

BGC Notes, LLC v Minutillo

2014 NY Slip Op 32614(U)

October 6, 2014

Sup Ct, New York County

Docket Number: 155017/2014

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

BGC NOTES, LLC,

INDEX NO. 155017/2014

Plaintiff,

MOTION DATE

- v -

MOTION SEQ. NO. 001

THOMAS S. MINUTILLO,

MOTION CAL. NO.

Defendant.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..	<u>1-2</u>
Answer — Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: X Yes No

Plaintiff, BGC Notes, LLC (“BGC Notes”), moves, pursuant to Section 3213 of the CPLR, for summary judgment in lieu of a complaint based upon an alleged loan provided to defendant, Thomas S. Minutillo (“Minutillo”), a former employee of BGC Financial, L.P. (“BGC Financial”), BGC Notes’ affiliate, pursuant to a promissory note. BGC Notes contends that after Minutillo was terminated for cause in November 2013, the loan immediately became due and payable without notice or demand. BGC Notes contends that to date, Minutiillo has only repaid \$26,161.55 in principal and \$10,556.76 in interest of the loan, and \$220,838.45 remains outstanding and owing to BGC Notes.

BGC Notes submits the affidavit of Andrew M. Kofsky, an authorized representative of BGC Notes. As averred to by the Affidavit, on or about July 27, 2011, Minutillo entered into an employment agreement (“Employment Agreement”) with BGC Financial, to work as a broker and manager on BGC Financial’s Capital Markets Desk in Garden City, New York. Minutillo commenced this position on August 1, 2011. The Employment Agreement provided for an initial term of four years. BGC Financial had the right to terminate the contract at any time for “Cause” under Section 4 of the Employment Agreement. A copy of the Employment Agreement is annexed to Kofsky’s affidavit as an exhibit.

Kofsky further avers that on the same date as Minutillo executed the Employment Agreement, Minutillo also signed and delivered to BGC Notes a Cash Advance Distribution Agreement and Promissory Note (the "Note"). A copy of the Note is executed to Kofsky's affidavit as an exhibit. The Note contemplated that Minutillo would eventually own limited partnership interests in BGC Holdings, L.P., another affiliate of BGC Financial, and BGC Notes agreed to loan Minutillo the principal amount of \$247,500 within 30 days of the execution of the Note provided that he was "already a partner" in BGC Holdings.

Kofsky further avers that, as of August 26, 2011, 30 days after Minutillo signed the Note, Minutillo was not yet a limited partner in BGC Holdings. Nevertheless, on August 31, 2011, BGC Notes advanced Minutillo \$247,000 subject to the terms of the Note. Minutillo agreed to make quarterly interest payments at a rate of 1.89% – the Applicable Federal Rate current as of August 31, 2011.

Section 1 of the Note required Minutillo to apply distributions he expected to receive from his prospective limited partnership interests in BGC Holdings until the Note was fully paid. Minutillo assigned his interest in all such distributions to BGC Notes in order to secure his obligations. More specifically, Section 1, "Repayment of the Loan," provides:

Maker agrees that Maker will repay the Loan (principal and interest) from the net Partnership distributions . . . (the "Partnership Distributions"). Except as otherwise provided below, these repayments will continue for as long as Maker is a Partner until the Loan is repaid in full. In the event that any portion of the Loan remains unpaid on such date as Maker ceases to be a Partner, the Lender will not seek to recover the remaining unpaid portion of the Loan (and any tax and other withholdings liabilities due in respect of the Loan) if Maker remained a current partner in the Partnership and did not breach any of his or her obligations owed to the Partnership or any Affiliate through: (a) if Maker was subject to an employment agreement for a defined period with Lender or any Affiliate thereof (and as further mutually extended, renewed, modified, replaced, or superseded, as applicable) (the "Employment Agreement") immediately prior to Maker ceasing to be a Partner, the Employment Agreement (expiration date; or (b) if Maker was not subject to an Employment Agreement immediately prior to Maker ceasing to be a Partner, the latest of (i) the three-year anniversary of the date the Loan is made and (ii) the most recent date Maker was no longer party to any Employment Agreement (l(a), (b)(i), and (b)(ii), as applicable, shall be

the "Reference Date"); *provided that* the Reference Date shall further be extended: (y) by one year if the last Redemption occurred within one year before the Reference Date; and (z) to two years after the last Redemption if such Redemption occurred between one and two years before the Reference Date. For purposes herein, a "Redemption" shall occur each time at least the sum of the percentages of Maker's Partnership units (excluding any Partnership units already exchangeable, redeemed, and/or purchased prior to the date the Loan is made) that are granted exchangeability into shares of common stock, redeemed, purchased, or otherwise monetized over an eighteen-month consecutive period is at least twenty percent (20%).

Section 2 of the Note, "Circumstances causing the Loan to become immediately payable in its entirety to the Lender," provided:

Notwithstanding anything set out above, any remaining unpaid portion of the Loan shall become immediately due and payable to the Lender, without notice or demand, upon the occurrence of any of the following events: (a) if at any time prior to the Reference Date, Maker ceases to be a Partner; (b) at any time an impairment of Maker's creditworthiness occurs, such as Maker becoming insolvent, that customarily permits lenders to accelerate repayment; (c) at any time a default in payment or performance of this Agreement or of any of the obligations of this Agreement or of any other payment obligation of Maker to Lender or to any of Lender's Affiliates occurs; (d) on or before the employment commencement date as stated in Maker's employment agreement with BGC Financial, L.P. (the "Company") (as applicable) (the "Commencement Date"), Maker changes his or her intention to commence employment with the Company; (e) Maker fails to commence employment with the Company by the Commencement Date; or (f) Maker fails to become a partner in the Partnership within 90 days of Maker's Commencement Date.

Section 5 of the Note, "General Provisions, provided:

Maker hereby promises to pay Lender its costs of collection of all amounts due hereunder, including reasonable attorneys' fees.

In addition to any rights and remedies of the Lender provided by law, the Lender shall have the right, without prior notice to Maker, to set-off and

apply against any indebtedness, including, without limitation, any amounts Maker owes to the Lender or any Affiliate, any amount the Lender or any Affiliate owes to Maker under any agreement or otherwise. The aforesaid right of set-off may be exercised by the Lender against Maker or against any trustee in bankruptcy, debtor in possession or assignee for the benefit of anyone claiming through or against Maker or such trustee in bankruptcy, debtor in possession or assignee.

THE PARTIES TO THIS AGREEMENT CONTEMPLATE THAT THERE MAY BE OTHER AGREEMENTS ENTERED INTO BETWEEN MAKER [MINUTILLO] AND LENDER [BGC NOTES] This Agreement is independent of and not integrated with any such other agreement.

Maker agrees that any and all disputes arising under this Agreement are subject to litigation in the courts of the State of New York and acknowledges that this Note is an agreement for the payment of money only subject to enforcement pursuant to NY CPLR §3213. With regard to any and all disputes arising under this Agreement, Maker hereby irrevocably submits to (a) the exclusive jurisdiction of the New York state courts, and (b) service of process by mail. Maker hereby waives all of Maker's rights to personal service of process.

As Kofsky further avers, on or around October 1, 2011, Minutillo became a limited partner in BGC Holdings. While Minutillo worked at BGC Financial, BGC Notes applied his partnership distributions against the Note. Kofsky avers that on November 21, 2013, BGC Financial terminated Minutillo for cause under the Employment Agreement, Minutillo immediately ceased to be a limited partner in BGC Holdings. Kofsky avers that as such, Minutillo's obligations under the Note accelerated without notice or demand and BGC Notes retained its right to collect all outstanding principal and interest under the Note because Minutillo was terminated prior to the Reference Date (i.e., August 1, 2015). Kofsky states that BGC Notes' records show that Minutillo has paid only \$26,161.55 in principal and \$10,556.76 in interest to date and that to the extent BGC Notes or its affiliates owe any debt to Minutillo, BGC Notes has not exercised its discretion to offset such amount against Minutillo's indebtedness on the Note. Accordingly, as of April 30, 2014, Minutillo's outstanding balance under the Note was \$220,838.45.

Minutillo cross moves, pursuant to an Order, pursuant to CPLR 7503, staying this action pending the arbitration of Minutillo's claim that he was

improperly terminated in breach of his agreement with BGC Financial, an affiliate of Plaintiff, and is therefore not liable to Plaintiff, and denying Plaintiff's motion in its entirety. Minutillo submits an affidavit.

In his affidavit, Minutillo avers that in addition to the other compensation and terms of the Employment Agreement, Section 3(e) of the Employment Agreement provides:

In consideration for services performed after the Start Date and as consideration for Employee's consent to enter into this Agreement, BGC shall provide Employee with an award in the gross amount of four hundred fifty thousand dollars (\$450,000). The award will be in the form of a Cash AD issued by BGC Notes, LLC, in the amount of two hundred forty seven thousand five hundred dollars (\$247,500), which represents the estimated net cash Employee would receive if the Cash AD amount had been paid in wages and subject to withholding on account of federal and New York state income tax responsibilities and which shall be payable within thirty (30) days after the Employee's execution of a promissory note for the amount of the Loan ...

Minutillo avers, "It was explained that I would not have to make any out of pocket payments and that after the four-year term of my employment, any balance remaining would be forgive ... Plaintiff acknowledges that it agreed not to seek repayment of principal or interest on the Note if I remained a limited partner of BGC Holdings for the entire four year term of the Employment Agreement."

Minutillo further avers, "If BGC Financial had not improperly terminated me, I would have completed the four year term of my Employment Agreement and would not have been required to repay any outstanding balance." Minutillo avers that he was not terminated for Cause, as defined in the parties' employment agreement. Minutillo avers BGC Financial's claim that he failed to follow a new corporate policy regarding obtaining approval of a post-trade correction, "the purported basis" for his termination "was a pretense." Minutillo states, "I am entitled to arbitrate the termination of my Employment Agreement, which also triggered the claim that I owe the sum of \$220,838.45 of my signing bonus. Not only do I not owe anything on the Note, but BCG Financial owes me almost \$1,400,000 for the balance due on my Employment Agreement."

CPLR § 3213 provides, in relevant part, "When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may

serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” “[A] document comes within CPLR § 3213 ‘if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.’ The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.” (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [citations omitted]). “A defendant can defeat a § 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact.” *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 384 [2004].

Here, Minutillo has raised issues of fact relating to if and when the Note became payable which preclude Plaintiff’s motion for summary judgment in lieu of complaint.

Wherefore it is hereby,

ORDERED that Plaintiff’s motion for summary judgment in lieu of the complaint is denied; and it is further

ORDERED that the plaintiff’s moving papers, consisting of the affidavit of Andrew M. Kofsky and exhibits thereto, are hereby deemed the complaint in this action and the defendant’s answering papers, consisting of the affidavit of Thomas S. Minutillo, are hereby deemed the answer; and it is further

ORDERED that Defendant’s cross motion to stay the action is denied; and it is further

ORDERED that all parties are directed to appear for a preliminary on January 20, 2015 at 9:30 a.m. at 80 Centre Street, Room 327.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: OCTOBER 6, 2014


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE