

<b>Octagon Asset Mgt., LLC v Morgan</b>
2015 NY Slip Op 30095(U)
January 16, 2015
Supreme Court, New York County
Docket Number: 652000/13
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39

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OCTAGON ASSET MANAGEMENT, LLC,

Plaintiff,

Index No. 652000/13

-against-

PAUL C. MORGAN,

Defendant.

-----X  
HON. SALIANN SCARPULLA:

Plaintiff Octagon Asset Management, LLC (“Octagon”) moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint in connection with a promissory note for one million dollars.<sup>1</sup> For the reasons stated below, the motion is denied.

**Background**

In the early 2000s, defendant Paul Morgan (“Morgan”) was the principal of Deamar Pte, Ltd and certain affiliated companies (collectively “Deamar Entities”), which traded in commodities, including cotton. From 2002 through 2005, the Deamar Entities

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<sup>1</sup> Octagon is the successor-in-interest to the original plaintiff in this action, Octave-1 Fund, Ltd. (“Octave-1”), pursuant to a so-ordered stipulation dated March 10, 2014.

obtained financing through certain companies, including non party  
Commodityfinance.com and its affiliate, Octave-1.

On August 23, 2005, Commodityfinance.com commenced an action in this court, Index No. 603023/2005, against Morgan and the Deamar Entities, alleging an indebtedness of approximately \$10 million. On February 11, 2008, the parties entered into a settlement agreement (the "Settlement Agreement"). Among other things, the defendants consented to the entry of a judgment against them for \$5 million. On that same date, Morgan agreed to execute a promissory note ("Morgan Promissory Note" or "Note") for \$1 million, payable five years from the date of execution.

Relevant here, the Settlement Agreement contained a provision referring to certain shares originally held by Morgan in a company called Parque Industrial Agua Profunda, SA ("PIAPSA"), which was engaged in developing a shipping port in Argentina. Earlier, in November of 2005, Morgan had sold his shares in PIAPSA ("PIAPSA shares") to Octave-1 for \$652,026.

The Settlement Agreement provided that:

During the five year period while the Morgan Promissory Note remains outstanding, should Plaintiffs recover an amount exceeding \$3,000,000 (three million dollars) above Plaintiffs' capital disbursements relating to the PIAPSA investment, whether through a sale, redemption or otherwise, the obligations under the Morgan Promissory Note shall be extinguished, null and void.

On November 1, 2012, Octave-1 and Octagon executed an Assignment and Assumption Agreement (“Assignment”). Under this Assignment, Octave-1 assigned all of its interests and obligations in connection with the Morgan Promissory Note to Octagon, as well as its interests in “all other agreements, notes and documents related to, and executed in conjunction with, the [Morgan] Promissory Note and any other obligations of [Morgan] due to Commodityfinance.com.” The Assignment specifically set forth that Octagon agreed to assume all of Octave-1's obligations under both the Morgan Promissory Note and any related documents and agreements.

It is undisputed that Octave-1 sold the PIAPSA shares in 2012 for \$820,000. It is also undisputed that the Morgan Promissory Note matured in February of 2013 and that Morgan has not paid the \$1 million due under the Note.

Octagon now moves for summary judgment in lieu of complaint for payment under the Note. Morgan opposes the motion on the grounds that the payment of the Note was conditioned on whether, before the Note matured, plaintiffs recovered an amount exceeding \$3 million in connection with the PIAPSA shares.

Morgan concedes that the shares were sold for \$820,000, but contends that their actual value far exceeded \$3 million, and that they were sold at a lower price in bad faith and not in a commercially reasonable manner. Morgan contends that the \$820,000 represents possibly as little as 11% of the actual value of the shares at the time of sale.

Octagon disputes Morgan's allegations as to the value of the PIAPSA shares.

### Discussion

“To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms.” *Zyskind v FaceCake Marketing Technologies, Inc.*, 101 A.D.3d 550, 551 (1st Dept 2012).

“Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense.” *Id.* Summary judgment in lieu of complaint is not appropriate where extrinsic evidence is required to determine either the amount due or whether the defendant defaulted according to the terms of the underlying note. *Ian Woodner Family Collection, Inc. v Abaris Books*, 284 A.D.2d 163, 164 (1st Dept 2001).

Here, plaintiff has not demonstrated that the Morgan Promissory Note is an unconditional promise to pay. Moreover, questions of fact exist as to whether payment is due under the Note, which preclude the granting of summary judgment in lieu of complaint.

First, although it is undisputed that the Note itself states that it is unconditional, it is also undisputed that the Note was a byproduct of the Settlement Agreement and was

executed on the same day as the Settlement Agreement, subject to conditions set forth in the Settlement Agreement. Specifically, as set forth above, the Settlement Agreement stated that the Note would be “extinguished, null and void” if the plaintiffs in the underlying action recovered more than three million dollars in connection with the PIAPSA shares. Thus, while the Note described itself as unconditional, it was indisputably conditioned on the amount of plaintiffs’ recovery in connection with the PIAPSA shares. Such a condition undermines plaintiff’s assertion here that the Note’s promise to pay was unconditional or unequivocal.

Moreover, because the Note is intertwined with the terms of the Settlement Agreement, I am compelled to look beyond the terms of the Note itself to the terms of the Settlement Agreement to determine whether Morgan is required to make payment under the Note. A resort to such extrinsic evidence also weighs against granting summary judgment in lieu of complaint with regards to the Note.

Further, Morgan has raised issues of fact as to whether the PIAPSA shares were deliberately undervalued and sold in bad faith, which could affect whether, under the terms of the Settlement Agreement, Morgan was required to repay the Note. These questions of fact further weigh against a granting of summary judgment in lieu of complaint.

At oral argument, plaintiff raised the issue of whether it is a holder in due course as a result of the assignment from Octave-1. Plaintiff raises the possibility that if it was a holder in due course it would not be precluded by the terms of the Settlement Agreement from recovering under the Note.

At best, questions of fact exist as to this issue. As set forth above, the Assignment specifically stated that Octave-1 assigned its rights and interests in the Note to Octagon. However, Octagon also specifically agreed to assume Octave-1's obligations under any other agreements and documents related to, and executed in conjunction with, the Morgan Promissory Note, which would almost certainly include the Settlement Agreement, and the conditions on the Note contained therein. As such, plaintiff has not demonstrated, at this point, that it is a holder in due course such as would allow it to recover under CPLR 3213 in connection with the Note.

In accordance with the foregoing, it is

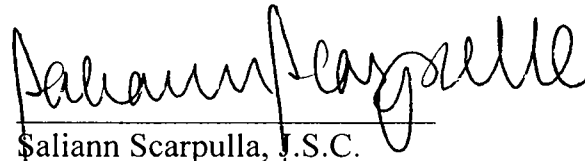
ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant's attorney within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service thereof.

This constitutes the decision and order of the Court.

Dated: New York, New York  
January 16, 2015

ENTER:

  
Saliann Scarpulla, J.S.C.