

U-Trend New York Inv. L.P. v US Suite LLC
2016 NY Slip Op 30706(U)
April 11, 2016
Supreme Court, New York County
Docket Number: 652082/2014
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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U-TREND NEW YORK INVESTMENT L.P.,
individually and Derivatively on Behalf
of Nominal Defendant Hospitality Suite
International, S.A. and its
wholly-owned subsidiary US Suite Corp.,

Plaintiff,

-against-

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652082/2014
Mo. Seq. No. 26

US SUITE LLC, AURA INVESTMENTS LTD.
and 440 WEST 41ST LLC,

Defendants,

and

HOSPITALITY SUITE INTERNATIONAL, S.A.
and US SUITE CORP.,

Nominal Defendants.

-----X
Hon. C.E. Ramos, J.S.C.

Plaintiff U-Trend New York Investments L.P. ("plaintiff")
has moved for an order:

a. Pursuant to Section 2701 of the New York Civil Practice
Law and Rules (the "CPLR"), directing Signature Bank N.A. (the
"Escrow Agent") to immediately release and turnover funds to
plaintiff's counsel from the escrow account established pursuant
to that certain Escrow Deposit Agreement dated as of March 20,
2015 among plaintiff, US Suite LLC ("Suite LLC"), 440 West 41st
LLC ("440 West 41"), Aura Investments Ltd. ("Aura") and their
respective counsel and the Escrow Agent (the "Signature Bank
Escrow Account");

b. Determining that \$8,182,823 was provided by plaintiff as a loan to defendant Suite LLC at an annual interest rate of 11% (as reflected in, among other things, the borrower's financial statements and other contemporaneous documents);

c. Determining that an additional \$2,000,000 was provided by plaintiff as a loan to nominal defendant Hospitality Suites International, S.A. ("HSI") at an annual interest rate of 9% (as reflected in, among other things, the borrower's financial statements and other contemporaneous documents), and further determining that HSI contributed the \$2,000,000 loan proceeds to its wholly-owned subsidiary and holding company Suite Corp., which contributed it as a capital contribution to Suite LLC as reflected in Suite LLC's books and records and other evidence;

d.

1. Granting summary judgment to plaintiff for accrued interest owed (net of certain interest payments already made by Suite LLC to plaintiff) on account of plaintiff's \$8,182,923 loan to Suite LLC, and

2. Pursuant to CPLR Section 2701, directing the Escrow Agent to immediately release and turnover to plaintiff's counsel funds from the Signature Bank Escrow Account sufficient to pay principal and interest owed on account of plaintiff's \$8,182,923 loan to Suite LLC; and

3. Determining that each day after January 15, 2016

that the \$8,182,823 loan remains unpaid, an additional \$2,466.06 (or a pro-rata amount thereof based on the percentage of the principal that remains unpaid) continues to accrue on that loan; and

e.

1. Granting summary judgment to plaintiff for accrued interest owed on account of plaintiff's \$2,000,000 loan to HSI to fund Suite Corp.'s \$2 million capital contribution, and

2. Pursuant to CPLR Section 2701, directing the Escrow Agent to immediately release and turnover to plaintiff's counsel funds from the Signature Bank Escrow Account sufficient to pay principal and interest owed on account of plaintiff's \$2,000,000 loan to HSI; and

3. Determining that each day after January 15, 2016 that the \$2,000,000 loan remains unpaid, an additional \$493.15 (or a pro-rata amount thereof based on the percentage of the principal that remains unpaid) continues to accrue on that loan.

Discussion

Defendant US Suite LLC ("Suite LLC"), a limited liability company formed under Delaware law, acquired title to the property located at 440 West 41st Street, New York, New York 10036 (the "Property") on or about March 10, 2010. The organizational structure of Suite LLC can be depicted (as set forth in the plaintiff's submissions) as follows:

Suite LLC has two members: US Suite Corp. ("Suite Corp."); and 440 West 41st LLC ("440 West 41"). Suite Corp. holds a 70% membership interest in Suite LLC and is the "Managing Member" of Suite LLC in accordance with the Operating Agreement. 440 West 41 holds a 30% membership interest in Suite LLC. Benzion Suky ("Suky") is the managing member of 440 West 41.

Suite Corp., a corporation formed under the laws of Delaware, is a holding company wholly owned by HSI, a company formed under the laws of Luxembourg.

HSI has two shareholders, each holding an equal 50% of the shares: plaintiff and Aura Investments Ltd. ("Aura"), through its wholly owned subsidiary Hospitality Resorts International, S.A. ("HRI").

The plaintiff is a partnership formed under the laws of the British Virgin Islands, comprised of approximately 200 Israeli limited partners.

Tomer Shohat ("Shohat") is a representative of Manhattan Building Project N.Y. Management Ltd., which is the plaintiff's General Partner (the "GP"). He is also a director of HSI and one of two directors and officers of Suite Corp.

Aura is a company formed under the laws of Israel whose shares are publicly traded on the Tel Aviv Stock Exchange. Tomer Saliah ("Saliah"), Boaz Misholi ("Misholi") and Joseph Saliah ("J. Saliah") were the senior executives at Aura who were

originally responsible for Aura's investment in the Property. Each was a director and officer of Aura, HSI and Suite Corp. at the time of the acquisition and thereafter, until around early 2012.

Saliah was involved in Aura's investment in the Property in 2009 and 2010 until at least part of 2012. On or about March 22, 2012, a group of investors led by Yaacov Atrakchi (the "Atrakchi Group") acquired Aura through a Creditor Arrangement under Israeli law. Atrakchi became the CEO and a director of Aura and currently holds approximately eighty percent of its shares. He is also a director of HSI.

Although the Atrakchi Group acquired the assets of Aura "free and clear" of liabilities, the Atrakchi Group also acquired the shares of HSI and Suite Corp., with all of their then-existing liabilities intact.

Yohai Abtan ("Abtan") became the CFO of Aura and a director and Officer of HSI and Suite Corp. and also claims to be the President of Suite Corp. Michael Kleiner is the Chairman of Aura's Board of Directors and a director of HSI.

Suite LLC's acquisition cost for the Property (including closing costs and renovation expenses) was approximately \$18.7 million. \$10 million was obtained through a mortgage loan from New York Community Bank (the "Mortgage") and plaintiff provided a loan of an additional \$8,182,823. The \$8,182,823 loan is not

evidenced by a note but is reflected in numerous documents, including the borrower's own books and records. None of the other defendants claim to be the source of the loan although they do not concede that plaintiff was the lender.

The business and financial activities of the Property were recorded and tracked, in the ordinary course of its business, through the use of the QuickBooks software ("QuickBooks"). Ms. Bruria Singer ("Singer") was the bookkeeper and the person with principal responsibility for maintaining the QuickBooks ledgers. Ms. Singer and Mr. Suky testified at their depositions, that the entries and balances reflected in QuickBooks are accurate to the best of their knowledge.

The books and records evidencing plaintiff's \$8,182,822.79 loan are as follows:

I) Suite LLC's Balance Sheet, generated from QuickBooks, reflects a "Long-Term Liability" in the amount of \$8,182,822.79 owed by Suite LLC, as borrower, to "U-Trend New York Investment, L.P.," as lender.

ii) The borrower's QuickBooks accounting ledgers contain a sub-account under the category of "Long Term Liabilities" entitled "U-Trend New York Investment, L.P." which, according to Suite LLC's bookkeeper Ms. Singer, constitutes the "register of the loan from U-Trend." This register reflects the dates and amounts of the funding of plaintiff's loan in the

aggregate amount of \$8,182,822.79.

iii). Section 3.1(a) of the Operating Agreement expressly refers to the \$8.5 million line of credit provided by plaintiff, of which \$8,182,823 was funded according to the borrower's own books and records.

Although the Operating Agreement refers to the \$8.5 million line of credit as the "Aura Loan," the Agreement defines the "Aura Loan" as an "unsecured cash flow loan to [Suite LLC] made not by Aura, but by "an affiliate" of Aura. Aura, in turn, is defined as US Suite Corporation (not Aura Investments Ltd.).

This Court finds that the plaintiff was the "affiliate" of US Suite Corp. who made the "Aura Loan." In an email dated February 7, 2010, Michael Lubin, Esq. (an attorney at Stroock & Stroock & Lavan LLP, counsel for the borrower) inquired "[W]hat is the name of the lender and jurisdiction of formation for the Aura promissory note?" By email on February 8, 2010, Aura executive Mr. Saliah responded: "U-Trend New York Investments LP."

In Note 9 to the Consolidated Financial Statements of HSI and its subsidiaries as of September 30, 2011, it is stated that during 2009, [Suite LLC] entered into an \$8,500,000 line of credit agreement with a shareholder of HSI and that as of September 30, 2011 and December 31, 2010, total advances under the line were approximately \$8,183,000.

In addition, the outside accountants who audited and signed off on HSI's consolidated financial statements during 2009, 2010 and the first three quarters of 2011 testified that plaintiff is the "shareholder of HSI" referred to in Note 9 of the Financial Statements as having loaned \$8,182,822.79 to Suite LLC. In addition, the December 31, 2013 Trial Balance provided by Suite LLC to the accountants who prepared Suite LLC's 2013 tax return (signed off on by Mr. Suky while this litigation was pending in September 2014) reflects \$8,182,822.79 in indebtedness to "U-Trend New York Investment, L.P."

On February 25, 2015, Mr. Saliah provided written responses, under oath and subject to the penalties of perjury, to questions posed by plaintiff in connection with litigation in Israel. In that sworn response, Mr. Saliah (in his capacity as a former director of Aura, HSI and Suite Corp.) confirmed that the U-Trend Partnership and its partners provided a line of credit in an amount up to \$8,500,000. Within this framework the U-Trend Partnership forwarded all the required amounts until the funds of the US Suite LLC Company received an accumulated amount of 8.2 million US \$, up to and including 2011.

The fact that the plaintiff loaned the \$8,182,823 and that the borrower was Suite LLC is confirmed by the books and records and is consistent with the admissions of the borrower. They are admissions that U-Trend was the lender, the affiliate of Aura.

There was and is no credible evidence that the loan came from any other source.

This Court also finds that \$5,088,834.92 of interest is owed to the plaintiff through January 15, 2016.

According to the QuickBooks Ledgers, \$1,900,943.46 of interest accrued through June 30, 2012. The borrower booked and accrued interest on the \$8,182,823 loan from its inception through June 30, 2012. Among other things, the Balance Sheet (as of November 16, 2015) that reflects the \$8,182,822.79 loan also reflects \$1,900,943.46 of "U-Trend Interest Payable."

The borrower's QuickBooks accounting ledgers contain a sub-account, under the category "Long Term Liabilities," entitled "U-Trend Interest Payable" reflecting the borrower's quarterly accrual of interest on plaintiff's \$8,182,822.79 loan totaling \$1,900,943.46 through June 30, 2012. The December 31, 2013 Trial Balance provided by the borrower to the accountants who prepared Suite LLC's 2013 tax return reflects \$1,900,943.46 of "U-Trend Interest Payable" through June 30, 2012 and was reflected in Suite LLC's 2013 corporate tax return.

Additional interest amounting to \$3,187,891.46 has accrued from July 1, 2012 through January 15, 2016. The \$8,182,823 loan bears interest at 11%.

The borrower and the lender reached agreement with respect to the rate of interest as shown by the borrower's booking and

accrual of interest in its QuickBooks ledgers, disclosure of the borrowing and the 11% interest rate in the notes to its financial statements and audit confirms, and identification of the debt and the interest in its tax returns.

The amount of interest owed for the period after July 1, 2012 (through December 31, 2015) is as follows:

11% interest on \$8,182,823 equates to \$900,110.53 per year (or \$75,009.21 per month), July 1, 2012 through December 31, 2012 represents 6 months of interest, totaling \$450,055.27. January 1, 2013 through December 31, 2015 represents three years of interest, totaling \$2,700,331.59. January 1, 2016 through January 15, 2016 represents one-half of a month of interest, totaling \$37,504.61.

In total, as of January 15, 2016, the borrower owes \$5,088,834.92 of interest on plaintiff's \$8,182,823 loan (i.e., \$1,900,943 + \$450,055.27 + \$2,700,331.59 + \$37,504.61.)

The borrower's books and records reflect, and plaintiff concedes, that the borrower made interest payments totaling \$120,500 on account of the loan. \$93,500 of those payments have been netted in the \$1.9 million accrued "interest payable" figure in the borrower's books and records.

After deducting the remaining \$27,000 in interest payments, the resulting interest accrued on account of the \$8,182,823 loan

(through December 31, 2015) is \$5,061,834.92 (i.e., \$5,088,834.92 - \$27,000).

Defendants now dispute that the \$120,500 payments were interest payments on account of plaintiff's loan. Instead, Defendants contend these were management fees paid to plaintiff's General Partner pursuant to an agreement dating from May 21, 2012. However, this is the contention of Teresa Daley, counsel, not a witness. And the Defendants have conceded that the payments were booked as interest payments on account of plaintiff's loan. This was confirmed by Ms. Singer at her deposition.

Each day after January 15, 2016 that the \$8,182,823 loan remains unpaid, an additional \$2,466.06 (or a pro rata amount at 11% depending on how much of the principal remains unpaid) continues to accrue on that loan.

Plaintiff also made a loan in the amount of \$2,000,000 to HSI for the purpose of enabling HSI's wholly-owned subsidiary, Suite Corp., to fund its \$2 million capital contribution for its 70% equity stake in Suite LLC.

The \$2 million loan (and the \$8,500,000 line of credit, of which \$8,182,823 was advanced by plaintiff) were both contemplated in a Founder's Agreement between Aura and plaintiff's former general partner ("U-Trend Ltd.") dated December 2009.

The Founder's Agreement states that the \$2 million loan "shall be placed as a loan by [plaintiff] to [HSI], who will invest it in [Suite LLC]."

Defendants note that the Founder's Agreement contemplated that plaintiff might not have been successful in raising the loans. However, the agreement provides that if plaintiff failed to raise the loans, its 50% equity share in HSI would be reduced accordingly. There is no dispute that plaintiff received, and holds to this day, 50% of the equity of HSI.

Plaintiff's \$2 million loan is reflected in other evidence as well. On February 16, 2010, HSI (through Mr. Saliah) requested confirmation from plaintiff with regard to the \$2 million loan. That confirmation demonstrates the amount of the borrowing that had been provided as of that date (i.e., \$2,000,000) as well as the interest rate (9%) and the date when interest began accruing (13 months after November 18, 2009; i.e., December 18, 2010). It bears a counter-signature of plaintiff's representative dated March 2, 2010.

The outside accountants who audited and signed off on HSI's consolidated financial statements during 2010 and the first three quarters of 2011 testified that plaintiff is the "same shareholder of HSI" who is referred to in Note 9 of the Financial Statements as having loaned \$2,000,000 to HSI in 2009.

To this day, Suite LLC's Balance Sheet reflects Suite

Corp.'s \$2,000,000 capital contribution (under the category "Equity"), which was made possible by plaintiff's \$2,000,000 loan to HSI. Note 9 to the Consolidated Financial Statements of HSI and its subsidiaries as of September 30, 2011 states, in pertinent part that during 2009, HSI entered into a loan agreement with the same shareholder [of HSI] for \$2,000,000 and that as of September 20, 2011 and December 31, 2010, \$1,957,000 was due under that loan agreement.

The spreadsheet provided by Ms. Singer to Mr. Shohat on July 27, 2012 (and copied to Mr. Suky) reflects a "Loan for Aura's Equity" in the amount of \$2,000,000 under the heading "U-Trend Loans" (listed under the category "Liabilities"). Mr. Saliah confirmed, under oath, that "The U-Trend Partnership and its partners transferred an accumulated sum of US\$2,000,000 to the Hospitality Suite International SA company as a loan bearing interest at the rate of 9%"

As reflected in HSI's audit confirmation, plaintiff's \$2,000,000 loan bears interest at 9% per annum, beginning on December 18, 2010. Interest on the \$2 million loan, as of January 15, 2016 is as follows: simple interest, at 9% per annum, on \$2,000,000 equates to \$180,000 per year (or \$493.15 per day).

December 18, 2010 through December 17, 2015 represents five years of interest, totaling \$900,000.

December 18, 2015 through January 15, 2016, represents

twenty-nine days of interest, totaling \$14,301.37.

In total, as of January 15, 2016, plaintiff is owed \$914,301.37 of interest on plaintiff's \$2,000,000 loan (i.e., \$900,000 + \$14,301.37.)

Each day that the \$2,000,000 loan remains unpaid, an additional \$493.15 (or a pro rata amount at 9% depending on how much of the principal remains unpaid) continues to accrue on that loan.

For its part, Aura contends that it, and not plaintiff, loaned the \$10,182,823 to Suite LLC and HSI. In addition (or in the alternative), Aura contends that it, and not Suite LLC or HSI, was the borrower to whom plaintiff made its loans. However, there is no evidence to support either theory. According to Aura, because plaintiff's funds had passed through Aura's bank accounts (which it claimed it did not previously know), that gave Aura the right to take the money and not pay it over to the plaintiff.

The record shows that Aura understood its involvement with plaintiff's loans was limited to functioning as a conduit between plaintiff, as lender, and HSI and Suite LLC, as borrowers.

On January 18, 2010, Mr. Saliah emailed plaintiff with a draft letter for plaintiff to deliver confirming Aura's role as a conduit for the routing of plaintiff's loans:

In accordance with the [Founder's Agreement] . . . , we [plaintiff] have transferred and/or will transfer into your

[Aura's] trusted hands funds in a total sum of up to 10.5 million U.S. dollars.... As agreed, we [plaintiff] ask you [Aura] to transfer the sum of 2 million U.S. dollars as a loan by the undersigned to the company [HSI] and any additional amount that we have transferred and/or will transfer to you as a loan by the undersigned to the company [Suite LLC].

Plaintiff's representative later signed the letter, as requested.

On May 6, 2012, Mr. Saliah delivered a letter addressed to plaintiff's then-Israeli counsel stating that pursuant to its undertaking, U-Trend provided a loan in an accumulative amount of approximately 10.2 million U.S. dollars (principal), of which, as agreed, the sum of 2 million U.S. dollars was a loan to HSI (which was also transferred to [Suite LLC] through [Suite Corp.]), that the balance was a loan directly to [Suite LLC], and that the loan was transferred, in part, by transfers to Aura at the special request of the late Mr. Naftali Mendelovits, in light of the fact that at the time of the transfer of the funds, the U-Trend partnership had not yet been actually set up.

In his Affidavit, Misholi stated under oath that "Aura did not invest money in the project." Mr. Suky stated in a letter dated January 23, 2014 that: "[i]t is a sad situation when a partner [Aura] who has not invested any money in the building announces to its public stockholders that it invested \$1,100,000 in the building, and misleads its stockholders and the Israeli regulators about an investment that it did not make."

In addition, the Trustee in Aura's Creditor Arrangement proceeding in Israel never identified any indebtedness owed by Suite LLC, Suite Corp. or HSI to Aura.

The public statements issued by Aura as a publicly-traded company also demonstrate that it did not make any loans to Suite LLC, Suite Corp. or HSI. There is no indication anywhere in Aura's publicly-filed financial statements (before or after its Creditors Arrangement proceeding in Israel) that Aura made any loans or "advances" to either HSI, Suite Corp. or Suite LLC.

There is no asset, or any other indication, in Aura's publicly filed financials that Aura has a right of payment directly from any of those subsidiaries in the amount of more than \$10 million.

Under applicable international accounting principles applicable to Aura's financial disclosures, an alleged \$10 million asset or right of payment owed to Aura from Suite LLC, Suite Corp. and/or HSI would have been material to Aura's overall financial condition.

In connection with its solicitation to repurchase certain of its publicly-traded bonds, in the summer of 2015 Aura was required to provide the bondholders with a third-party valuation of the collateral securing repayment of the bonds (including Aura's interest in the Property). That expert opinion valued Aura's interest in the Property - together with other non-Israeli

assets including assets in Petra and elsewhere - at approximately \$1.5 million (net of expenses). Based on the asset valuation, Aura successfully obtained bondholder consent to buy back the bonds at a discount to par. The publicly-disclosed expert valuation report cannot be reconciled with Aura's contention that it "loaned or advanced" more than \$10 million.

In a release publicly disseminated by the Aura trustee on March 18, 2012, days before the Atrakchi Group's offer was submitted, the trustee specifically disclosed the Property's material debts. The release identified plaintiff's loan in the amount of "about 10 million \$," but did not disclose any liability or debt owed by any of the Property entities to Aura. In its year-end 2009 financial statements, Aura conceded that (as of April 2010) plaintiff had already advanced the full amount of the \$2 million loan to HSI and had advanced "approximately 6.5 million US dollars . . . as a loan to [Suite LLC]."

On February 23, 2015, this Court signed an order (the "Sale and Distribution Order") authorizing and directing the sale of the Property.

The Sale and Distribution Order provides, among other things, that the proceeds from the sale of the Property shall be placed in escrow pending future distribution to the parties to this action in accordance with their respective rights and entitlements if any.

The Sale and Distribution Order directed the parties, within thirty days, to "present their positions and proposals for a process and timetable for the Court to adjudicate the parties' rights and entitlements with respect to the" proceeds from the sale." It also explicitly confers "jurisdiction [on the Court] to adjudicate any disputes relating to . . . the distribution of Net Sale Proceeds." (Id.)

No party appealed from the Sale and Distribution Order.

Under the terms of the written sale contract, the Buyer agreed to assume responsibility for "all liabilities, violations, liens and encumbrances affecting the Premises with the sole exceptions of the [Mortgage] and any indebtedness owed to U-Trend New York Investments, L.P."

The sale closed on April 1, 2015, yielding \$15,820,862 of net sale proceeds (after repayment of the Property's mortgage) for future distribution. The \$15.8 million has been held in an interest-bearing escrow account with Signature Bank since April 1, 2015 in accordance with the Sale and Distribution Order.

Subsequent to the closing of the Sale, this Court granted a judgment in the amount of \$316,032 against JSBarkats and directed that firm to reinstate to the Signature Bank Escrow the funds that it had withdrawn.

The parties were unable to reach agreement on a "process and timetable" for the "adjudication of [their] rights and

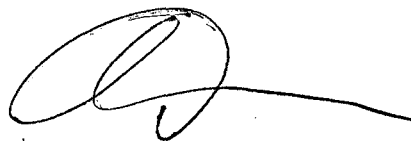
entitlements with respect to the" proceeds from the sale.

Accordingly, in May 2015, instead of requiring plaintiff to file an amended complaint, this Court directed each party to file a Statement/Counter-Statement of Claim setting forth how much of the sale proceeds it seeks to receive. No defendant sought reconsideration or lodged any appeal.

Plaintiff filed its Statement of Claim in June 2015.

This Court find that the net sales proceeds shall be distributed to the plaintiff in accordance with this decision and the balance, if any, to the respective interests of the defendants as they lie. Settle order on notice.

Dated: April 11, 2016



J.S.C.

CHARLES E. RAMO

4/11/16