NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

EK DEVELOPMENT LLC, JAMIL EZRA, and JASMINE DHANADA,

Plaintiffs,

-against-

ZAKI RAKIB AND VIVIEN RAKIB,

Defendants.

Index No: 655778/2017
DECISION/ORDER
Motion sequence 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion to dismiss complaint.

Papers	**NYSCEF Documents Numbered**
Defendants' Notice of Motion	10
Defendants' Affirmation in Support of Motion	11
Defendants' Memorandum of Law in Support	12
Plaintiffs' Memorandum of Law in Opposition	15
Defendants' Memorandum of Law in Reply	16

Akabas & Sproule, New York (David E. Bamberger of counsel), for plaintiffs.
Gregory Zimmer, Esq., New York (Gregory Zimmer of counsel), for defendants.

Gerald Lebovits, J.:

Background

Plaintiffs and defendants entered into a loan agreement. Under this agreement, plaintiffs agreed to lend defendants $1,000,000 and made the loan with the understanding that defendants would use the loan to finance a larger loan to a company called BioHarvest Ltd. Plaintiffs advanced the $1,000,000 to Ms. Rakib in September 2014. The loan was documented in a promissory note that defendants executed on October 20, 2014.

Loan agreement § 2.6 granted plaintiffs the right to call the loan on deamnd earlier than the maturity date, which was originally defined in the agreement as July 16, 2016. Further, the agreement entitles Ms. Rakib to convert all or part of the BioHarvest Loan Amount into freely tradeable stock on United States public stock exchange and registered common shares of BioHarvest. (Loan Agreement, Exhibit A to Complaint, at 1.) No initial public offering (IPO) of shares of BioHarvest has occurred.

After the agreement, plaintiffs and defendants amended the loan agreement to extend the maturity date to the earlier of July 31, 2017 or the occurrence of a "BioHarvest Event of Default"; "BioHarvest Event of Default" means that the company would become bankrupted, wound up, or dissolved. No BioHarvest Event of Default occurred. The amendment contains a

provision related to interest. Whether this provision amends the interest provisions in the loan agreement or adds a new type of interest to the loan agreement is unclear.

Other than the amendment, there has been no additional definitive agreement between the two parties. On May 2017, plaintiffs asked defendants to repay the loan before the extended maturity date. (Demand Letter, Exhibit D to Complaint, at 1.) On June7, 2017 and June 22, 2017, respectively, defendants made two proposals regarding the repayment, but plaintiffs rejected both. (Complaint ¶¶ 9-13.)

Plaintiffs emailed a settlement proposal, which requested defendants to transfer $200,000 on July 3, 2017 to continue settlement discussions. Defendants transferred $200,000 on July 10 and $800,000 on July 14, 2017, amounting to the initial advancement. (Complaint ¶¶ 14-19.) Plaintiffs sent another email notifying defendants that the $800,000 repayment will be applied to repaying interest and other expenses and that the remaining amount will be applied to the repaying principal. That left $247,702.79 in outstanding principal. Defendants did not repay the alleged interest.

Plaintiffs sued defendants, arguing that defendants breached the loan agreement by failing to repay interest on the loan. Under CPLR 3211 (a) (1) and (7), defendants move to dismiss the complaint, arguing that defendants are not required to pay interest on the loan under the set of written agreements.

Defendants' Motion to Dismiss

The issue in this case is whether the loan accrued any interest under the provisions of the loan agreement and the amendment. This court concludes that the loan accrued interest and therefore denies defendants' motion to dismiss.

On a motion to dismiss under CPLR 3211 (a) (1), "the interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint." (*Taussig v Clipper Group, L.P.*. 13 AD3d 166, 167 [1st Dept 2004].) However, the court's "options are limited where the contractual provisions at issue are drafted in a manner that fails to eliminate significant ambiguities." (*NFL Enters, LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008].)

The loan agreement is unambiguous. Under the loan agreement, the loan can accrue two forms of interests: interest under § 2.1 of the loan agreement and interest under § 2.5. First, § 2.1 of the agreement provides that the loan "shall accrue interest . . . solely in the event Borrower receives (i) proceeds from the sale or other disposition of the BioHarvest Shares ('Exit Event'), or (ii) distributions in respect of the BioHarvest Shares (not as result of disposition of BioHarvest Shares) ('Distribution Event')." Both parties agree that no Exit Event or Distribution Event occurred. Thus, no interest is accrued under § 2.1.

Section 2.5 of the loan agreement provides the second form of interest. § 2.5 provides that "[l]ender shall not be entitled to any interest on the loan, except, however, that the outstanding [l]oan [a]mount shall bear interest at a rate of eight percent (8%) per amount . . . . [This interest] shall accrue commencing from the date of disbursement of the Loan Amount from

Lender to Borrower and until the conversion or repayment thereof . . . ." (Loan Agreement at § 2.5.)

Any accrued interest under § 2.5 of the agreement shall be repaid to lender "only if and to the extent the [l]oan [a]mount is repaid upon the [m]aturity [d]ate . . . and shall not be converted into equity (i.e., the accrued [a]lternative [i]nterest shall not be repaid or converted in case of conversion of the [l]oan [a]mount)." (*Id.*) In other words, under § 2.5, if the loan amount is repaid before the maturity date or if the loan amount shall be converted into equity, the alternative interest need not be repaid.

However, the amendment is ambiguous. The amendment contains a provision regarding interest and it is unclear from the language of the amendment whether this provision amends § 2.5 of the loan agreement or adds a new form of interest to the loan agreement. Specifically, § 3(B) of the amendment provides that "notwithstanding anything in the [l]oan [a]greement or [n]ote to the contrary, (a) in addition to the [i]nterest [under § 2.5 of the loan agreement], interest shall also accrue on the [l]oan [a]greement and the [n]ote at the rate of eight percent (8%) per annum (compounded annually) commencing as of October 20, 2014, through and including the date on which the [l]oan [a]mount is converted or repaid as provided in the [l]oan [a]greement (such interest shall be repaid to [l]ender regardless of whether or not the [l]oan [a]mount is repaid upon the [m]aturity [d]ate or converted into equity)." This provision do not show whether it amends § 2.5 of the loan agreement.

Finally, § 4 of the amendment provides that mutual agreement in writing of the parties is required to amend, modify, or otherwise change the amendment.

Under the above provisions from the loan agreement and the amendment, defendants owe interest under the amendment, whether § 3 (B) of the amendment adds a new interest or amends § 2.5 of the agreement. First, if § 3 (B) of the amendment adds a new interest in addition to the interest under § 2.5, defendants must pay the new interest. Specifically, it is undisputed that plaintiffs called the loan earlier than the maturity date, which was July 31, 2017. Because plaintiffs called the loan early, interest does not accrue under § 2.5. However, under the amendment, the loan accrues interest because it is immaterial under § 3 (B) of the amendment whether the loan amount is repaid on the maturity date or not.

Second, if § 3 (B) of the amendment amends § 2.5 of the agreement, the loan accrues interest under § 3 (B) and defendants must repay it for the reason mentioned above. Accordingly, in either situation, the loan accrued some interest under § 3 (B) of the amendment, and defendants must repay it, if no mutual agreement in writing amends, modifies, or otherwise changes the amendment.

No mutual agreement in writing that amends, modifies, or otherwise changes the amendment: plaintiff rejected defendants' two proposals; and defendants rejected plaintiff's subsequent proposal by refusing to repay accrued interest.

Therefore, despite the ambiguity of the amendment, the loan accrued interest under § 3(B) of the amendment, and defendants' motion to dismiss plaintiffs' complaint is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied.

Dated: August 10, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.