Black Pearl Global Opportunity Fund v Summit Equities LLC
2019 NY Slip Op 30917(U)
March 25, 2019
Supreme Court, New York County
Docket Number: 655992/2016
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BLACK PEARL GLOBAL OPPORTUNITY FUND, Index No.: 655992/2016

Plaintiff, **DECISION & ORDER**

-against-

SUMMIT EQUTITES LLC, EVAN SEIDEN, and APOGEE INVESTMENTS, INC.,

Defendants.

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JENNIFER G. SCHECTER, J.:

Plaintiff Black Pearl Global Opportunity Fund (BPGOF) moves, pursuant to CPLR 3215, for a default judgment against defendants Summit Equities, LLC (Summit) and Apogee Investments, Inc. (Apogee). Only Summit opposes the motion. For the reasons that follow, the motion is granted.

Plaintiff commenced this action on November 16, 2016 by asserting, as relevant here, a claim against Summit for breach of contract for failure to repay a loan balance in excess of $16 million plus interest (*see* Dkt. 1 at 9). Summit filed an answer to plaintiff's original complaint on December 20, 2016 (Dkt. 14). By order dated July 12, 2017, the court permitted Summit's original counsel to withdraw (Dkt. 42). Ellenoff Grossman & Schole LLP (EGS) appeared as Summit's new counsel on August 10, 2017 (Dkt. 49). Plaintiff filed an amended complaint on December 8, 2017, in which it asserted additional claims for fraudulent conveyance and named Evan Seiden (Summit's managing member) and Apogee as defendants on that claim (Dkt. 57 [the AC]). On January 26, 2018, Seiden, also represented by EGS, moved to dismiss the fraudulent

conveyance claims (Dkt. 58). The court denied his motion by order dated March 23, 2018 (Dkt. 78). Seiden filed an answer to the AC on April 30, 2018 (Dkt. 81).

Neither Summit nor Apogee ever responded to the AC. This was particularly notable with respect to Summit, which had filed an answer to the original complaint, because it was represented by EGS, who was actively participating in the case on behalf of its other client, Seiden. The reason Summit did not file an answer to the AC was no secret. It was an admittedly defunct entity that did not want to provide discovery and thus no longer intended to contest liability on the breach of contract claim. Seiden, in contrast, was focused on defending the fraudulent conveyance claims brought against him (*see* Dkts. 122, 123). This was discussed with the court and in writings between counsel in March 2018 (*see id.*). EGS recognized at that time that Summit was in default and there was discussion about whether it would consent to a default judgment (*see id.*). When no such agreement was reached, Summit still declined to respond to the AC. Discovery proceeded only on the fraudulent conveyance claims against Seiden, with document production to be completed by December 6, 2018 (*see* Dkt. 89). That did not occur.

On November 30, 2018, days before the production deadline, EGS moved to be relieved as counsel for Summit and Seiden (*see* Dkt. 90). EGS refused to review and produce the final tranche of ESI because it was not being paid. On December 7, 2018, plaintiff made this motion for a default judgment against Summit and Apogee based on their failure to respond to the AC (Dkt. 93). Plaintiff only seeks judgment on the breach

of contract claim against Summit (since it recognizes the other claims are duplicative) and on the fraudulent conveyance claim against Apogee. Plaintiff *does not* seek a default judgment against Seiden. EGS' motion was resolved by a so-ordered stipulation dated December 19, 2018, which provided that new counsel would appear by January 24, 2019 and set new dates for replacement counsel to oppose the default judgment motion (*see* Dkt. 112 at 4).

On January 22, 2019, Hantman & Associates (H&A) appeared as counsel for Summit and Seiden (Dkt. 113). No one appeared for Apogee. On a January 24, 2019 call with the court, H&A requested additional time to respond to the motion and assured the court that opposition would only be filed if there was a valid basis for opposing a default judgment. The court granted the request based on these assurances (Dkt. 114).

On February 2, 2019, Summit and Seiden filed opposition to the default judgment motion that is rife with frivolous contentions (Dkt. 115). For example, they assert that defendants "had no knowledge of existence of the complaints" (*see id.* at 2), which is belied by the fact that Summit and Seiden were represented by the same counsel and multiple motions were made, including a motion by Seiden to dismiss the AC.[1] The opposition also baselessly objects to entry of judgment against Apogee, even though H&A does not represent Apogee (*see id.* at 7). Summit further opposes a default

[1] Seiden submitted an affidavit on January 26, 2018 in support of his motion to dismiss in which he explains that he is the founder and managing member of Summit and recites detailed facts regarding this case that leaves no doubt that he has actual knowledge of it (Dkt. 59). But even more fundamentally, by answering the complaint without asserting a defense based on lack of jurisdiction or improper service, Seiden waived any such objections (*see Montcalm Pub. Corp. v Pustorino*, 125 AD2d 188 [1st Dept 1986]). That said, Seiden and his counsel are strongly cautioned that proffering further clearly frivolous assertions may result in sanctions.

judgment on the claims other than breach of contract (*see id.* at 12), which are not even raised by the motion (*see* Dkt. 118 at 13).

The only legitimately contested issue presented on this motion is whether a default judgment should be entered against Summit on the breach of contract claim. The answer is yes. There is no question that Summit did not respond to the AC since its filing on December 8, 2017 and that plaintiff timely moved for a default judgment within one year (*see* CPLR 3215[c]). Where, as here, a defendant does not timely respond to the complaint and the plaintiff moves for a default judgment and proffers an affidavit of merit showing defendants' liability, the burden shifts to defendants to proffer a justifiable excuse for default and a meritorious defense (*ICBC Broad. Holdings-NY, Inc. v Prime Time Advert., Inc.*, 26 AD3d 239, 240 [1st Dept 2006]; *see Time Warner City Cable v Tri State Auto, Inc.*, 5 AD3d 153 [1st Dept 2004] ["(Defendant's) failure to set forth a reasonable excuse rendered it unnecessary for the court to consider whether there was a meritorious defense"]).

Summit does not proffer any excuse for failing to respond to the AC, let alone a reasonable one. Indeed, Summit's only attempt at addressing the reasonableness of its failure to respond to the AC is the purported lack of proper service on Seiden. That issue, while dubious, is a red herring. Even if Seiden was not served, that fact has no bearing on whether a default judgment should be issued against Summit. There is no question that Summit was served with the original complaint (*see* Dkt. 15), appeared in this action

by counsel and responded to the original complaint. It was properly served with the AC by e-filing at a time when it was represented by counsel.

Summit's failure to explain its failure to respond to the AC is unsurprising. As discussed, the record is clear that it willfully defaulted. It made the tactical decision that defending the breach of contract claim was not worth its time or money because it is judgment proof (*see Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d 418, 419-20 [1st Dept 2013] [no reasonable excuse for default where "the default judgment resulted from Helmsley's decision not to answer the complaint or otherwise appear in the action because it apparently believed itself to be judgment-proof and that plaintiff would be unable to satisfy the judgment against it".], *affd* 25 NY3d 1098 [2015]). The record is equally clear that Summit, from the outset, frustrated the discovery process and that it chose to default to forgo engaging in discovery on the claims against it, including the breach of contract cause of action (*see* Dkt. 52 [8/15/17 Tr. at 3] [EGS withdrawing baseless motion to quash filed by prior counsel]).[2] Excusing Summit's default, under the circumstances, would allow Summit to achieve maximum delay by requiring the parties to altogether reopen the ESI process when, had it not affirmatively chosen to default, all of the discovery would have efficiently proceeded in tandem from the outset.

Although in light of Summit's willful default there is no need to go further, Summit also did not demonstrate a meritorious defense. There is no question that

[2] The subpoena Summit sought to quash was only necessary due to Summit's failure to comply with plaintiff's clear contractual rights to its books and records. The court declines to recount the history of Summit's obstructionism, but notes, especially in light of the frivolity proffered by Summit on this motion (proffered by its third counsel in three years), further attempts to delay this case due to discovery violations will not be tolerated.

Summit did not repay the loan and that it owes more than $16 million to plaintiff in principal plus interest. Each of the proposed defenses raised in the opposition are either conclusory or patently without merit.

First, Summit again proffers a frivolous argument by contending that it "did not breach the terms of the parties' contract" when, in fact, it does not deny that it failed to repay the loan (*see* Dkt. 115 at 5). Then, it sets forth in a conclusory manner that "Plaintiff is the one who not only breached the terms of the parties' contract but also acted in bad faith time and time again and took part in conduct that amounts to constructive fraud" and that "Defendants relied upon Plaintiff's misrepresentation and lost millions of dollars as a result" (*id.*). It does not provide a cogent explanation for these assertions. Instead, Summit proffers the following narrative:

> [Summit] relied upon BPGOF's commitment to invest with [Summit] in order to conduct its business and make such investments. [Summit] successfully closed on several development projects from 2011-2014, both retail and residential, which resulted in over [$19 million] being paid in aggregate to BPGOF and Apogee.
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> In 2013 and 2014, BPGOF pressured [Summit] to sell of its cash flowing projects and exclusively pursue more lucrative development projects. [Summit] explained to BPGOF and Apogee that in order to achieve higher [sic], [Summit] would have to invest in riskier real estate development projects. BPGOF represented to [Summit] that it wanted [Summit] to pursue these development projects and that it fully understood more money and patience from BPGOF would be required to bring these development projects to fruition.
>
> [Summit] agreed to undertake such projects, investing millions of dollars itself in the operations of the company so it could pursue the projects and incurring further purported indebtedness to BPGOF. It was reasonable for [Summit] to rely upon BPGOF's representations, because BPGOF had consistently represented itself to [Summit] as a deep pocketed investor with

> numerous sources of funding interested in earning high returns, and because BPGOF had shown itself to be willing and able to fund disbursements to [Summit] with ease having funded more than nineteen million dollars since 2011 to Summit.
>
> BPGOF knew that without its equity commitment that [Summit] would not be able to complete [Summit's] Projects. BPGOF knew that terminating its equity financing to [Summit] would necessarily cause [Summit's] Projects to fail, and this is precisely what BPGOF did. In late September 2016, BPGOF reneged on its commitments to provide capital to [Summit].
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> As a result of BPGOF's unlawful conduct, [Summit] was unable to close on [Summit's] Projects, which resulted in [Summit] suffering millions of dollars in damages, including lost profits that [Summit's] Projects would have generated but for BPGOF's last minute refusal to fund [Summit's] Projects (*id.* at 5-6).

Even if these allegations are true, they do not support a meritorious defense to plaintiff's breach of contract claim. Pursuant to a Revolving Loan Agreement dated February 16, 2011 (Dkt. 104 [the RLA]), Summit executed a Revolving Note with a face value of $20 million (Dkt. 105). Plaintiff agreed to lend Summit up to $20 million to acquire and develop real estate. Interest was to accrue at various rates set forth in section 2.4 of the RLA (*see* Dkt. 104 at 6-7). It is undisputed that, in total, plaintiff loaned Summit $16,718,000 between October 2012 and September 2016. Summit does not dispute receipt of these funds or that its failure to make certain scheduled payments triggered an event of default under the RLA and accelerated the full outstanding loan amount (*see id.* at 32). Plaintiff alleges that, as of December 1, 2018, the unpaid principal totals $16,687,773.15 and, with interest, the total amount due is $23,703,997.54 (*see* Dkt. 94 at 8). Summit does not dispute these calculations.

Nor does Summit explain how plaintiff breached the agreement at issue, the RLA, let alone cite any particular provision that was breached. Summit merely states that plaintiff urged Summit to make risky investments and promised to provide more funding. Indeed, Summit does not even claim that any such alleged promises were reduced to a written agreement. It does not claim plaintiff made any misrepresentation of fact, but only that plaintiff allegedly lied about its future intention to lend more money. This does not support a claim of fraud (*N.Y. Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 318 [1995]; *TIAA Glob. Investments, LLC v One Astoria Square LLC*, 127 AD3d 75, 87 [1st Dept 2015]; *see GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.*, 168 AD3d 563, 564 [1st Dept 2019]).

The argument that the parties had a subsequent oral agreement to provide more funding is precluded by section 11.6 of the RLA, which prohibits oral modifications (*see* Dkt. 104 at 39-40). Summit's claim to lost profits, moreover, is expressly barred by the waiver of consequential damages in section 11.2.2, which applies to all claims relating to the RLA (*see id.* at 39).[3]

In sum, Summit provides neither a justifiable excuse for its intentional default nor a meritorious defense. The record establishes that Summit purposely decided not to file an answer to the AC (*Hudson City Sav. Bank v Bomba*, 149 AD3d 704, 705 [2d Dept 2017] [defendants' former attorney consciously decided not to respond to motion for summary judgment because defendants "had no defense to it"]; *see Bank of New York*

[3] Any possible exception to the rule that such provisions are enforceable is precluded by section 11.16, which disclaims any fiduciary relationship between the parties (*see id.* at 40).

Mellon v Colucci, 138 AD3d 1047, 1048 [2d Dept 2016] ["misguided strategy" of not answering based on advice of counsel is not law office failure and is not a reasonable excuse for defaulting], citing *OCE Bus. Sys., Inc. v J.I. Sopher & Co.*, 186 AD2d 464 [1st Dept 1992]). It has no excuse for the default. Moreover, the amount Summit owes plaintiff – $23,703,997.54 – is undisputed and Summit's baseless fraud claims are not a valid defense.[4]

As to Apogee, which does not oppose this motion, plaintiff has established the merit of its fraudulent conveyance claim based on its contention that, in 2014, while its own financial statements showed it to be insolvent, Summit distributed $915,750 to Apogee without any consideration. This is a classic example of a constructively fraudulent conveyance (DCL § 273; *see Wimbledon Financing Master Fund, Ltd. v The Wimbledon Fund, SPC*, 2016 WL 7440844, at *4-5 [Sup Ct, NY County Dec. 22, 2016], *affd* 162 AD3d 433 [1st Dept 2018]).[5] To be sure, while Summit itself lacks standing to oppose a default judgment against Apogee, its contention that this fraudulent conveyance

[4] Plaintiff's concern about losing the ability to obtain its contractual right to access Summit's books and records after judgment is entered is unfounded (*see* Dkt. 94 at 8). Since Seiden remains a party to this case, he can be compelled to provide access to Summit's records that are within his possession, custody or control. Moreover, any such records that are relevant to plaintiff's judgment enforcement efforts are certainly discoverable through an information subpoena. Simply put, if plaintiff needs access to Summit's records, it should raise the issue in a discovery conference.

[5] That Apogee was a member of Summit when this distribution was made means that a transfer to it while Summit was insolvent is legally considered to have been made in bad faith, and thus would still be a fraudulent conveyance even if consideration was provided (*see Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]).

claim lacks merit is belied by the earlier denial of the motion to dismiss. Plaintiff has made a sufficient showing of merit.

Accordingly, it is ORDERED that plaintiff's motion for a default judgment against Summit and Apogee is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against (1) Summit in the amount of $23,703,997.54 plus 9% pre-judgment interest from December 2, 2018 to the date judgment is entered; and (2) against Apogee in the amount of $915,750 plus 9% pre-judgment interest from December 31, 2014[6] to the date judgment is entered.

Dated: March 25, 2019

ENTER:

Jennifer G. Schecter, J.S.C.

[6] Since the exact date of the 2014 transfers is not alleged, the court directs that pre-judgment interest be computed from December 31, 2014.