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

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KOLCRAFT ENTERPRISES, INC., Index No.: 655226/2018

Plaintiff, **DECISION & ORDER**

-against-

ETG CAPITAL LLC and MAGLAN DISTRESSED MASTER FUND LP,

Defendants.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211, defendants ETG Capital LLC (ETG) and Maglan Distressed Master Fund LP (Maglan) move to dismiss the complaint. Plaintiff Kolcraft Enterprises, Inc. (Kolcraft) opposes the motion. The motion is denied.

Background

The facts are drawn from the complaint (Dkt. 1) and are assumed to be true unless conclusory or refuted by documentary evidence.[1]

[1] On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). A motion to dismiss based on documentary evidence will only be granted if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Kolcraft manufactures and distributes baby products. It continued to sell products to Toys "R" Us, Inc. (TRU) even after TRU filed for bankruptcy in September 2017. To hedge its risk that it would not be able to recover from TRU in the bankruptcy proceedings, pursuant to a Master Purchase Agreement dated as of December 11, 2017 (Dkt. 2 [the Master Agreement]), Kolcraft purchased put options from ETG, a hedge fund, that entitled Kolcraft to put certain of its post-petition TRU accounts receivable to ETG upon the occurrence of certain conditions.

At issue is a put option memorialized in a confirmation dated December 11, 2017, which provides that, for a fee of $186,895.16, Kolcraft obtained a put on a $1.25 million TRU account receivable with an Expiration Date of June 30, 2018 (Dkt. 3 [the Confirmation]). The Specified Event triggering the put, as relevant here, is a "Bankruptcy Event" (*see id.* at 3), which is defined in the Master Agreement as entry of a final order by the Bankruptcy Court "authorizing the commencement of an orderly liquidation of substantially all of [TRU's] assets" (Dkt. 2 at 2). In the Confirmation, Maglan guaranteed ETG's payment obligations (Dkt. 3 at 4).

To exercise a put, section 4(a) of the Master Agreement provides that:

> Seller [Kolcraft] must notify Purchaser [ETG] of its intention to sell, transfer and assign Account Claims, by irrevocable written notice (the "Assignment Notice"), to Purchaser if a Specified Event occurs prior to the Expiration Date. The Assignment Notice shall specify [among other things] in reasonable detail, Seller's Claims with respect to such Accounts Receivable that are Eligible Accounts (the "Account Claims") being sold, transferred and assigned to Purchaser (Dkt. 2 at 5).

Section 5(a) further sets forth that:

> If an Assignment Notice is properly issued, and the conditions set forth in Section 8 are satisfied on or prior to the thirty-fifth (35th) day after ... the Account Claims are allowed by a final order of the Bankruptcy Court (including an approved settlement) as administrative expense claims against [TRU] within the meaning of Section 503(b)(1)(A) of the Bankruptcy Code, then the closing of the sale and purchase of the Account Claims (the "Closing") shall take place ... on a date which must be a Business Day and which shall be at least five (5) days but no more than twenty (20) days subsequent to the satisfaction by Seller of the conditions set forth in Section 8. The time and date of the Closing are herein referred to as the "Closing Date." (*id.*).

In "the event Seller does not satisfy the conditions . . . in Section 8 prior to the expiration of the thirty-five (35) day period," the agreement dictates that "the Put shall be automatically canceled, discharged and terminated and will not be reinstated or rewritten, and Purchaser shall have no further obligation to Seller in respect of that Put" (*id.* § 5[b]).

Section 8 ("Conditions Precedent to Purchase of Account Claims") of the Master Agreement requires that "Seller shall have executed the Assignment of Claim Agreement, substantially in the form of Exhibit B hereto, selling, transferring and assigning the Account Claims to Purchaser (the 'Assignment Agreement') in an amount equal to the Net Account Value of the Accounts Receivable that are Eligible Accounts being sold, transferred and conveyed to Purchaser" (*id.* at 6 § 8[a]). It further mandates that "Seller shall have delivered the Proof of Claim as defined in the Assignment Agreement, in the form and with the content reasonably required by Purchaser, to Purchaser and a true and complete copy of the Proof of Claim, including all attachments, exhibits, schedules, modifications and amendments thereto, shall have been attached as an exhibit to the Assignment Agreement (*id.* § 8[b] and at 13 [Form of Assignment of Claim Agreement]).

On March 9, 2018, TRU failed to pay a Kolcraft invoice. Kolcraft notified ETG and the bankruptcy court. On March 15, 2018, TRU filed a motion in the bankruptcy court to wind down its operations in the United States. On March 22, 2018, the bankruptcy court granted the motion to the extent that it entered an order permitting TRU to cease operations and begin a store-closing process (the Wind Down Order). Kolcraft contends, and defendants do not dispute on this motion, that the Wind Down Order constitutes a Bankruptcy Event that is a Specified Event under the Confirmation. Approximately two weeks after the Wind Down Order was entered, on April 6, 2018, Kolcraft delivered an Assignment Notice to defendants pursuant to section 4(a) of the Master Agreement, purportedly exercising the put governed by the Confirmation (*see* Dkt. 4 [the Assignment Notice]).

On August 15, 2018, Kolcraft executed and delivered an Assignment of Claim Agreement to defendants pursuant to section 5(a) of the Master Agreement (Dkt. 5 [the ACA]). The ACA contained proof of the Creditor's Committee's August 10, 2018 approval of Kolcraft's bankruptcy claim in the amount of $1,250,987.02. ETG did not execute the ACA and, along with Maglan, refused to pay the claim. Kolcraft subsequently commenced this action by filing a complaint that asserts breach of contract claims. ETG is sued as the primary obligor and Maglan is sued as the guarantor.

Defendants move to dismiss. They argue that the ACA, delivered on August 15, 2018, was invalid and that the put option terminated. Specifically, they maintain that Kolcraft served the ACA too early in breach of the agreement. Defendants contend that

under section 5(a), the 35-day clock to serve the ACA did not begin until a "Final Order" was issued, which they assert occurred on September 7, 2018 when TRU filed a Notice of Allowed Administrative Claims in the bankruptcy proceeding announcing that Kolcraft's $1,250,987.02 claim was allowed (Dkt. 11 [the September 2018 Notice]). Their argument is rejected.

Analysis

Defendants failed to establish that Kolcraft violated the terms of the Master Agreement. The documentary evidence demonstrates that Kolcraft's claim for $1,250,987.02 was allowed without the need for an official bankruptcy court order (Dkt 11 [explaining that the May 2018 bankruptcy court order authorized allowance of claims without the need for a further order]). The September 2018 Notice, moreover, does not even satisfy defendants' proposed definition of a "Final Order"--taken from the form ACA attached to the Master Agreement--because it is not an order or judgment of the bankruptcy court. Even if the September 2018 Notice was deemed a "final order" within the meaning of section 5(a), as defendants urge, the existence of a final order is not a condition imposed on Kolcraft by section 8 and defendants did not show that Kolcraft did not comply with its section-8 requirements by submitting a properly executed ACA "on or **prior to**" the 35th day after the claims were allowed. Finally, and to be absolutely sure, defendants do not dispute that on September 25, 2018--within 35 days of September 7th, the date they assert a "final order" was issued--Kolcraft resubmitted the ACA (Dkt. 1 ¶ 35; Dkt. 16 at 17). Defendants have not shown that resubmission would not satisfy

section 5's timeliness requirements; therefore, there is no basis for dismissal of the complaint.

Accordingly, it is ORDERED that defendants' motion to dismiss the complaint is denied; and it is further

ORDERED that a preliminary conference will be held on August 16, 2019 at 11:30 a.m., and the parties shall file their joint letter at least one week beforehand.[2]

Dated: July 5, 2019

ENTER:

Jennifer G. Schecter, J.S.C.

[2] The parties' joint letter shall address whether discovery is necessary or if this case will be ripe for summary judgment after issue is joined.