

**SQN Asset Servicing, LLC v Shunfeng Intl. Clean
Energy Ltd.**

2019 NY Slip Op 32714(U)

September 11, 2019

Supreme Court, New York County

Docket Number: 652604/2017

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM
Justice
INDEX NO. 652604/2017
SQN ASSET SERVICING, LLC, MOTION DATE 05/31/2019, 06/07/2019
Plaintiff, MOTION SEQ. NO. 006 007
- v -
SHUNFENG INTERNATIONAL CLEAN ENERGY LTD, DECISION + ORDER ON MOTION
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 103, 104, 105, 106, 107, 108, 109 were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 96, 97, 98, 99, 100, 101, 110, 111, 112, 113, 114, 115 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Motion sequence nos. 006 and 007 are consolidated for disposition. Upon the foregoing documents and for the reasons set forth on the record (9/10/2019), Shunfeng International Clean Energy Ltd. (SFCE)'s motion for (i) leave to reargue (Mtn. Seq. 007) and (ii) to amend (Mtn. Seq. 006) are denied.

Reference is made to a credit agreement (the Credit Agreement), dated November 17, 2015, by and between Suniva, Inc. (Suniva) as borrower, in favor of certain lenders, and SQN Asset Servicing LLC (SQN) as administrative agent (NYSCEF Doc. No. 50). In late 2015, SFCE agreed to purchase a majority interest in Suniva and SFCE subsequently executed a parent guaranty (the Guaranty), dated November 17, 2015, by and between SFCE, as guarantor, in favor of SQN as administrative agent, pursuant to which SFCE guaranteed a portion of SQN's

obligations including their obligations set forth in the Credit Agreement (NYSCEF Doc. No. 51). In April 2017, Suniva filed a voluntary petition for bankruptcy in the United States Bankruptcy Court in the District of Delaware (the **Bankruptcy Court**). On April 9, 2019, Suniva's Third Amended Chapter 11 Plan of Reorganization (the **Plan**) was confirmed by the Bankruptcy Court (NYSCEF Doc. Nos. 88-89).

In a decision and order, dated April 29, 2019, the court denied SFCE's motion to compel settlement documents that were sealed in the United States Bankruptcy Court for the District of Delaware because the documentary evidence unequivocally established that the settlement agreement is not relevant to any of SFCE's obligations under the Guaranty and the Credit Agreement (NYSCEF Doc. No. 81; the **Prior Decision**).

Motion Sequence 007 (SFCE's Motion for Leave to Reargue its Prior Motion to Compel)

To succeed on a motion for reargument, a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not intended "to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). A motion for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but which were unknown to the party seeking leave to renew, and therefore, not made known to the court (*Foley*, 68 AD2d at 568).

SFCE argues that the court erred in its Prior Decision because (i) the court did not consider that SQN waived its objections by failing to respond to SFCE's discovery demands in accordance with the CPLR and that the court applied the incorrect standard in deciding this motion, (ii) the court resolved an issue of law during a discovery motion, and (iii) that the settlement agreement remains material and necessary to issues in this lawsuit. SFCE is incorrect. The court did not misunderstand SFCE's prior arguments. SQN did not waive its objections to SFCE's document demands by failing to respond within the time limit set forth in CPLR § 3122 because SFCE's demand for the settlement documents was palpably improper (*see Lea v NY City Tr. Auth.*, 57 AD3d 269, 269 [1st Dept 2008] [refusing to compel the production of documents despite the defendant's failure to timely object under CPLR § 3122 because the demands at issue were palpably improper]).

Significantly, at oral argument, SFCE remained unable to identify any provision in the Credit Agreement or Guaranty pursuant to which SQN could apply an additional offset to SFCE's guaranteed obligations to the \$25 million of credit bidding that was previously extended (*see* NYSCEF Doc. No. 50, § 9.08). Simply put, SFCE cannot compel disclosure of the settlement documents when the express provisions of the relevant contracts do not provide any basis for the theory that SFCE seeks to test – *i.e.* SFCE's purported reduction of its principal obligation under the Guaranty. SFCE's interpretation of the Agreement would require the court to read into the Agreement provisions that do not exist. This, the court refuses to do. Consequently, the settlement documents are not in any manner relevant to the resolution of the guaranty of the equipment lease that is at issue in this case. Accordingly, SFCE's motion to reargue is denied.

To the extent that SFCE construes this motion as a motion to renew (NYSCEF Doc. No. 97, fn 7), SFCE has not adduced any additional material facts that would alter the court's decision. The documentary evidence cited by SFCE in its motion to amend (Mtn. Seq. 006) in fact confirms that there is no release or variation of SFCE's obligations as it relates to the Agreement at issue in this case. The Plan in the bankruptcy action states that:

5.1 Prior Compromise and Settlement of Disputes

The Plan reflects the outcome of a Settlement Agreement approved by the Court on November 20, 2018 [D.I. 941]. *For the avoidance of doubt, the Settlement Agreement and Equipment Lease and License Agreement shall remain in effect pursuant to their terms and are binding on the Reorganized Debtor and the parties thereto*, and, for avoidance of doubt, are not subject to rejection under article 8 of the Plan and are therefore not rejected hereunder. *The Settlement Agreement and the Equipment Lease and IP License Agreement are attached to the Plan Supplement and incorporated herein as a part of the Plan as if fully set forth in the Plan, and nothing in the Plan shall alter any party's rights under the Settlement Agreement or the Equipment Lease and IP License Agreement* [emphasis added] (NYSCEF Doc. No. 88, § 5.1).

The above referenced settlement agreement also contains a provision that "SQN shall retain any and all interests it may have in [] that certain lawsuit, captioned *SQN Asset Servicing, LLC v. Shunfeng Int'l Clean Energy Ltd.*, No. 652604/2017, currently pending before the Supreme Court of the State of New York in the County of New York, State of New York" (NYSCEF Doc. No. 72, 6). Thus, SFCE's obligations remain unaltered under the original Agreement and Guaranty. Accordingly, SFCE's motion to renew is also denied.

Motion Sequence 006 (SFCE's Motion to Amend)

Pursuant to CPLR § 3025 (b), leave to amend is committed to the sound discretion of the trial court (*Colon v Citicorp Inv. Servs.*, 283 AD2d 193, 193 [1st Dept 2001], citing *Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983]). Leave to amend the pleadings should be freely

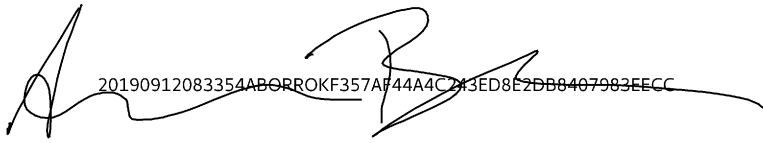
given unless there is prejudice or surprise resulting from the delay to the opposing party, or if the proposed amendment is “palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]).

SFCE argues that it should be granted leave to amend its Answer to add an affirmative defense of release because the Plan allegedly contemplates the release of SQN’s claims against SFCE under the Guaranty. In opposition, SQN argues that the proposed amendment should be denied because it is palpably improper and patently devoid of merit. To the extent that SQN asserts that the Plan and settlement agreement did not grant SFCE a release as to claims in this litigation, the court agrees. For the foregoing reasons, the express terms of the Plan and the settlement agreement specifically exclude any release of SFCE’s obligations at issue in this lawsuit. It would be palpably improper for SFCE to add an affirmative defense of release under the bankruptcy action when the record reveals the contrary. Accordingly, SFCE’s motion for leave to amend is denied.

For the avoidance of doubt, SQN’s request for costs and fees regarding its response to motion sequences 006 and 007 is denied.

Finally, as indicated on the record, the court denied SFCE’s request for a stay of proceedings pursuant to CPLR § 5519.

9/11/2019
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE