SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **IAS MOTION 48EFM**

Justice

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HAWK MOUNTAIN LLC and MICHELLE MITCHELL

Plaintiffs,

- v -

RAM CAPITAL GROUP LLC,

Defendant.

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INDEX NO. 450359/2018

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 132, 133, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 210, 211, 212, 220

were read on this motion to/for DISMISS.

Masley, J:

In motion sequence number 001, Defendant Ram Capital Group (Ram) moves, pursuant to CPLR 3211(a) (1), (5), and (7), to dismiss the amended complaint. Plaintiffs Hawk Mountain, LLC (HM) and Michelle Mitchell cross-move for summary judgment pursuant to CPLR 3211(c) and 3212.

Background

The following factual allegations are alleged in the amended complaint, unless otherwise indicated, and for the purposes of this motion, are accepted as true.

Plaintiff HM is a Delaware limited liability company organized in 2002 with Gigi Jordan as its sole manager. (NYSCEF Doc. No. 96, amended complaint, ¶ 2). HM's ownership interest was transferred by Jordan to the trustees of nonparty Hawk Mountain Trust (HM Trust), a trust established by Jordan (*id.*). In 2011, Jordan, the sole

beneficiary of the Hawk Mountain Trust, assigned her rights and interests, including all ownership interests in HM and all of its assets, to the Intercession Trust which was also created in 2011 (*id.*, ¶ 4). Plaintiff Michelle Mitchell is the Trustee of the Intercession Trust, which is the ultimate beneficiary of Hawk Mountain Trust (*id.*). The Intercession Trust was created by the execution of a Trust Agreement in Bronx, New York on January 4, 2011 (*id.*). Defendant Ram is a Delaware limited liability company founded in 1997 (*id.*, ¶ 5). Ram is owned and operated by Raymond Mirra, the former business partner of HM Manger Gigi Jordan (*id.*).

On April 1, 2005, Ram borrowed $100,000 from HM by way of a written promissory note (Note) (*id.*, ¶¶ 7-10). The Note provided for an additional $6 million line of credit (*id.*, ¶ 10). The Note was payable on demand by lender (*id.*, ¶ 12). HM alleges that between April 13, 2005 and February 20, 2007, Ram drew on the line of credit in the amount of $5,344,000 without HM's knowledge or consent (*id.*, ¶ 18). On December 18, 2013, by written notice, HM formally demanded repayment of the entire principle of the note and accrued interest (*id.*, ¶ 23). HM alleges that Ram has not paid back the balanced owed on the Note (*id.*, ¶ 32). HM claims it is entitled to repayment of the principle loan as well as interest and fees pursuant to the Note (*id.*, ¶ 34).

Gigi Jordan and Raymond Mirra are ex-spouses and former business partners (NYSCEF Doc. No. 99, Raskopf aff, ex D, Second Amended Complaint Delaware Action, ¶¶ 46-47). On March 13, 2008, Mirra and Jordan entered into both a Separation Distribution Agreement (SDA) and a Mutual General Release Agreement (Release) to sever their business interests and finances. (NYSCEF 106, Troilo, Jr. aff, ex A, SDA; NYSCEF 107, Troilo Jr. aff, ex B, Release). The SDA identified their joint assets and

liabilities and set forth a schedule for how they would be allocated and distributed. (NYSCEF 106, SDA). The Release was a general release broadly discharging all claims between Jordan, Mirra, and their affiliates occurring before their separation. (NYSCEF 107, Release). However, the Release did not discharge claims arising under the SDA, reserving each party's right to enforce the SDA. (*id.*, ¶¶ 2, 3 ["Notwithstanding anything herein to the contrary, [Jordan/Mirra] is not releasing hereby [Mirra/Jordan] from Claims that arise under the express terms and conditions of, and specified in, the Distribution Agreement ... ."])

Discussion

Choice of Law

The parties agree that Delaware law governs the interpretation of the Release and the Note as both contain Delaware choice of law provisions (*id.*, ¶ 7; NYSCEF 97, Note, ¶17). However, procedural issues are governed by New York law (*Royal Park Invs. SA/NV v Morgan Stanley*, 165 AD3d 460, 461 [1st Dept 2018] [procedural matters are governed by the forum state's law]).

Statute of Limitations

Statute of limitations is typically a procedural issue, and thus, the court will apply New York law (*Tanges v Heidelberg N. Am., Inc.*, 93 NY2d 48, 54-55 [1999] ["In New York, Statutes of Limitation are generally considered procedural because they are viewed as pertaining to the remedy rather than the right."]). The statute of limitations for bringing an action based on a promissory note is six years (CPLR 213 [2]), which begins to run from the date of the payable on demand note's execution (*Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 143 [1993]).

Here, it is undisputed that the Note, which is payable on demand, was executed on April 1, 2005, and plaintiffs allege that Ram drew on the line of credit various times between April 13, 2005 and February 20, 2007. Thus, Ram argues that, at the very latest, the statute of limitations expired on February 20, 2013, more than three years prior to plaintiffs filing their complaint, making this action time-barred. In response, plaintiffs assert that General Obligations Law (GOL) § 17-101 and the tolling provision of 28 USC § 1367(d) apply, making their filing of this action timely. Plaintiffs do not dispute that, without these statutory provisions, an action on the Note should have been brought within six years from the date the Note was signed.

GOL § 17-101 resets the accrual date for a claim to recover on a note when the debtor acknowledges the debt in a signed writing. "This section restates the rule that a written acknowledgment or promise will toll the Statute of Limitations ...The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" (*Banco do Brasil S.A. v State of Antigua & Barbuda*, 268 AD2d 75, 77 [1st Dept 2000] [internal quotation marks and citations omitted]).

Plaintiffs argue that Ram's debt was revived on March 12, 2008, when Mirra entered into the SDA. Exhibit 3.1.1 (3) of the SDA provides,

> "Within a reasonable time period as mutually agreed to by the parties but in no event later than the Closing Date (or such later date as may be agreed to mutually by the parties in their sole discretion), the parties agree to the following:(1) Mirra shall contribute sufficient capital to RAM Capital Group, LLC to effectuate the satisfaction and payment in full all of the outstanding indebtedness plus accrued interest which RAM Capital Group, LLC owes to Conundrum LLC, (ii) Jordan shall contribute $7,863,000 to RAM Capital Group, LLC and RAM Capital Group LLC agrees to make full payment and satisfaction all of the outstanding indebtedness plus accrued interest which RAM Capital Group, LLC owes to Hawk Mountain LLC; and (iii) both Mirra and Jordan shall contribute all

> advances each has made to RAM Capital Group, LLC as a capital contribution upon execution of the Separation Agreement."

Even if the court finds that this provision constitutes a new or continuing contract under GOL § 17-101, to be timely, the deadline for filing this action was March 12, 2014; however, it was not filed until September 30, 2016.[1] Thus, in order to deem this action timely filed, the tolling provision of 28 USC § 1367 (d) must also apply.

28 USC § 1367 (d) provides,

> "[t]he period of limitations for any claim asserted under subsection (a)[2], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

This provision tolls the statute of limitations for certain pendent state law claims that are dismissed without prejudice by a federal district court. Plaintiffs assert that this statute is applicable because they filed this action within 30 days of the United States District Court for the District of Delaware's decision to decline to exercise supplemental jurisdiction over the New York State claims brought here.[3]

> "When a federal court declines to exercise supplemental jurisdiction over *a timely* state-law claim ... subsection 1367(d) allows such a claim to be re-filed within 30 days. But subsection 1367(d) plainly applies only to pendent state-law claims that are dismissed in this way (or voluntarily dismissed after a dismissal of predicate federal claims). Subsection 1367(d) cannot be read to revive claims that were

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[1] This action was originally commenced in Bronx County on September 30, 2016.

[2] 28 USC § 1367 (a) provides, in part, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

[3] Plaintiffs filed a RICO action in the Delaware federal court on December 23, 2013.

> never filed in the first case or claims that were withdrawn from the first case before a judicial dismissal of federal claims"

(*In re LIBOR-Based Financial Instruments Antitrust Litigation*, 2015 WL 6243526, *158 [SD NY 2015] [emphasis added]). Here, plaintiffs commenced the RICO Action in Delaware federal court on December 23, 2013 (NYSCEF Doc. No. 114, ¶ 24). It is undisputed that, on January 31, 2014, plaintiffs amended their complaint in the RICO action and added a cause of action against Ram for nonpayment of the Note. Thus, when plaintiffs brought the claim for nonpayment of the Note in the RICO Action, it was untimely and 28 USC § 1367(d) only applies when the state-law claim is filed timely in the federal court. Further, as far as the allegations raised for the first time in this complaint, they too are untimely and cannot be saved by 28 USC § 1367 (d) because § 1367(d) cannot be read to revive claims that were never filed in the federal court (*In re LIBOR-Based Financial Instruments Antitrust Litigation*, 2015 WL 6243526, *158). This action is untimely.

Nevertheless, even if plaintiffs' claims to recover on the Note were timely, they are barred by the valid Release. "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [a] release ... ." CPLR 3211(a) (5). "Delaware courts recognize the validity of general releases. A clear and unambiguous release will only be set aside where there is fraud, duress, coercion, or mutual mistake concerning the existence of a party's injuries" (*Deuley v Dyncorp Intl. Inc.*, 8 A3d 1156, 1163 [Del 2010] [internal quotation marks and citations omitted]).

Under Delaware Law, a release will encompass claims involving third parties where the terms of the agreement so specify (*see Chakov v Outboard Marine Corp.*,

429 A2d 984, 985 [Del 1981]). General releases are "intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise" (*Hob Tea Room v Miller*, 89 A2d 851, 856 [Del 1952]). When determining whether a release covers a claim, "the intent of the parties as to its scope and effect are controlling, and the court will attempt to ascertain their intent from the overall language of the document. If the language of the release is clear, it will be given effect. If it is ambiguous, however, it must be construed most strongly against the party who drafted it." (*Corporate Prop. Assocs. 6 v Hallwood Group Inc.*, 817 A2d 777, 779 [Del 2003] [internal quotation marks and citations omitted]).

Here, under the express terms of the Release "Jordan...[and] her affiliates...agrees to and hereby does irrevocably release and forever discharge Raymond A. Mirra ... [and] his affiliates ... from any and all manner of actions ... claims ... debts ...which occurred, arose or existed at any time on or before the date of this Release Agreement." (NYSCEF 107 at ¶ 3). There is no dispute that the Note was signed in 2005 and the last draw on the line of credit was in February 2007, so the alleged debt arose before the Release was signed in 2008. Further, there is no dispute that HM is an affiliate of Jordan and Ram is an affiliate of Mirra (*see also* NYSCEF Doc. No. 224, December 20, 2019 Decision by U.S. District Court Judge McHugh at 20-22[4])

[4] Plaintiffs object to Ram's post-argument submission. However, the submission of this court decision is proper under Commercial Division Rule 18, which provides that "[a]bsent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument." Express permission was not required to submit the federal court's decision relevant to this pending action. The court will disregard any arguments made in Ram's accompanying letter.

"Under the general law of contracts, a release is valid and binding where the minds of the parties have met; where the release is supported by consideration; and where there has been no fraud, misrepresentation, mistake, duress or undue influence" (*Egan & Sons Air Conditioning Co. v General Motors Corp.,* 1988 WL 47314 [Del Super 1988]).

Plaintiffs advance the argument that the Release does not bar this action because there was no consideration. Specifically, plaintiffs argue that the Release defines the parties' consideration for entering into the Release as the SDA and the monetary and proprietary exchanges promised, and since Ram never paid the Note, the Release cannot be enforced. Plaintiffs assert that the Release's carve-out provision spares the subject claim because it involves an explicit term of the SDA, the consideration upon which the Release was based. However, plaintiffs are collaterally estopped from re-litigating this issue.

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.,* 62 NY2d 494, 500 [1984]). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001] [citation omitted]). For purposes of preclusion, privity "includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose

interests are represented by a party to the action, and [those who are] coparties to a prior action" (id. at 304 [internal quotation marks and citation omitted]).

Collateral estoppel applies here because the same issue has been decided in the RICO Action and plaintiffs had a full and fair opportunity to contest that decision as they were parties in that action. The issue of the validity of the release is the same exact issue that was litigated and decided in the RICO Action (see *Jordan v. Mirra*, 2017 WL 4070646 [D Del 2017]; NYSCEF Doc. No. 224). Regarding the same Release that is at issue here, the United States District Court found "the Release is valid and bars Jordan's claims (*id.* at *10; NYSCEF Doc. No. 224 at 2 ["I have concluded that the Release Agreement is a valid and enforceable contract, in both parties covenanted not to sue each other."]). Further, the United States District Court held that claims predicated on facts that occurred on or before the date of the Release were covered by the Release (*id.* at 7; NYSCEF Doc. No. 224 at 22). The Court found that the state law claim for nonpayment of the Note arose prior to the Release (NYSCEF Doc. No. 224 at 22, n. 6).

Plaintiffs next argue that their claim falls under a carve out provision in the Release, and therefore, is not barred by the Release. Specifically, plaintiffs argue that their claim for breach of the Note is preserved by the following carve out provision from the Release: "[n]otwithstanding anything herein to the contrary, Jordan is not releasing hereby Mirra from Claims that arise under the express terms and conditions of, and specified in, the Distribution Agreement, the Indemnification Agreement and the Purchase Agreement" (NYSCEF Doc. No. 107 at ¶ 3).

Plaintiffs' claim does not fall under the carve out provision and is barred by the Release. The plain language of this carve out says that it applies to claims brought by Jordan against Mirra, arising under the express terms and conditions of the SDA. This claim is being brought by HM and Mitchell against Ram and arises out of a promissory note signed three years before the Release or SDA. The carve out does not apply to the claim in question here.

In *Seven Investments, LLC v. AD Capital*, LLC, 32 A3d 391 (Del. Ch. 2011), the Delaware Chancery Court interpreted a similar carve out provision in a general release. In deeming the plaintiff's claims barred by the release, the Delaware Court held that the carve out provision was a "customary exclusion preserv[ing] the parties' right to enforce the Termination Agreement as a contract" (*id.* at 398). The Termination Agreement in *Seven* is similar to the SDA here – a separation agreement entered into at the same time as the release (*id.* at 394-395). In both *Seven* and here, the carve out provision only preserves the party's right to enforce the underlying separation agreements, in *Seven* the Termination Agreement and here the SDA. Here, as plaintiffs' claims are for breach of the Note not the SDA, the carve out does not apply.

While the following clauses do appear in the SDA, plaintiffs do not allege that RAM breached these clauses or any clause in the SDA. The SDA provides, "RAM Capital Group LLC agrees to make full payment and satisfaction all of the outstanding indebtedness plus accrued interest which RAM Capital Group, LLC owes to Hawk Mountain LLC" (NYSCEF Doc. No. 106 at ¶ 3.1.1[3]). The SDA also shows loans of $7,078,772 and $1,043,252 made by HM to RAM (*id.* at ¶ 2.1.2). Plaintiffs attempt to use these clauses to argue their claim arises under the SDA. However, it is unclear if

the debts described in the SDA are derived from the Note; the amounts allegedly owed appear to be different. Regardless, plaintiffs' claim is for breach of the Note, not for breach of the SDA.

Plaintiffs also argue that collateral estoppel prevents RAM from re-interpreting the carve out provision. However, this argument is without merit. RAM is not arguing that the carve out is void, only that it does not apply here and the court agrees.

The court has considered all remaining arguments and finds them without merit and/or inapplicable. Plaintiffs' cross motion which seeks to convert Ram's motion to a motion for summary judgment and enter judgment is plaintiffs' favor is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted and the complaint is dismissed in its entirety with costs and disbursements to defendant upon a submission of a bill of costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that plaintiffs' cross motion is denied.

1/4/2020
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE