

Alpha Capital Anstalt v Moocho, Inc.

2020 NY Slip Op 30743(U)

March 6, 2020

Supreme Court, New York County

Docket Number: 652947/2019

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

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ALPHA CAPITAL ANSTALT

Plaintiff,

- v -

MOOCHO, INC.,

Defendant.

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INDEX NO. 652947/2019

MOTION DATE 07/24/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to SUMMARY JUDGMENT IN LIEU OF COMPLAINT

Upon the foregoing documents:

Plaintiff Alpha Capital Anstalt seeks Summary Judgment in Lieu of Complaint against Defendant Moocho, Inc. pursuant to CPLR 3213. Defendant Moocho, Inc. opposes. For the following reasons, Plaintiff's motion is granted.

On or about July 16, 2015, Alpha Capital made a loan to Moocho in the principal amount of \$500,000 (the "Loan"). The Loan is evidenced and secured by a Convertible Promissory Note, dated July 16, 2015 ("the Note") (NYSCEF 4). The Note required Moocho to repay the principal of the Note "on or before January 16, 2017 (the "Maturity Date"), subject to acceleration and conversion as described therein." Rabinowitz Affidavit., ¶5. The parties entered into two extension agreements; the first on February 15, 2017 which extended the Maturity Date to October 15, 2017 (first extension agreement) and a second on February 15, 2019 which extended the Maturity Date to July 15, 2019 (second extension agreement). The second extension agreement required Defendant to make installment payments of \$200,000 on March 15, 2019 and May 15, 2019.

In the Second Extension, Moocho acknowledged that it had made “no payments” on the Note, that the Note is the “valid and binding obligation” of Moocho, and that Moocho’s obligations to Alpha Capital pursuant to the Note are not subject to any set-offs, defenses or counterclaims. Rabinowitz Aff., ¶11, Ex. C, Section 2. Moocho failed to make the first \$200,000 Installment Payment on March 15, 2019 or within 10 days following this due date. Rabinowitz Affid., ¶11-13.

The Note provided for five enumerated “Events of Default,” including “[i]f the payment of the Principal Amount or the Default Interest on th[e] Note is not paid when due (as set forth in Sections 2 and 7 of th[e] Note), which non-payment continues for a period of 10 days.” (NYSCEF 4). The Note further provides that it “shall be deemed an unconditional obligation of [Moocho] for the payment of money and, without limitation to any other remedies of [Alpha Capital], may be enforced against [Moocho] by summary proceeding pursuant to CPLR 3213 or any similar rule or statute in the jurisdiction where enforcement is sought.” NYSCEF 4, §19(i).

CPLR §3213 provides, in pertinent part, that “[w]hen an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” CPLR §3213. A plaintiff establishes its prima facie entitlement to an immediate judgment pursuant to CPLR §3213 upon showing that the defendant executed the instrument for the payment of money upon which the claim is based and failed to make the required payments due under the instrument. *Warburg, Pincus Equity Partners, L.P. v. O’Neill*, 11 A.D.3d 327, 327 (1st Dep’t 2004) (“[P]laintiff establishes a prima facie case by virtue of a note and a failure to make payments called for therein[.]”)

In opposition, Defendant contends that because the Note is a convertible one, payable in *either* equity interest or cash, that it does not qualify as an “instrument for the payment of money only”, and therefore falls outside ambit of CPLR §3213. This argument conflicts with prevailing caselaw which holds that convertible notes can be subject CPLR §3213. *Simon v. Industry City Distillery, Inc.*, 159 A.D. 3d 505, 505-506 (1st Dept 2008) (“the conversion option contained in the notes does not alter the fact that the note is ‘an instrument for the payment of money only’ and a proper subject of a motion pursuant to CPLR 3213”).

Moreover, the parties clearly and unambiguously agreed that the Note would be considered a payment for money as defined under CPLR §3213. NYSCEF 4, §19(i).

While Defendant does not dispute that the Note remains unpaid and that the time to pay has since lapsed, it argues the amount cannot be determined on the face of the Note. Defendant points to an April 10, 2019 demand for payment made by Plaintiff as evidence. (NYSCEF 10) The April 2019 demand reads in relevant part: “Demand is hereby made that the Company [Defendant] immediately issue to Alpha Six Hundred Thousand (600,000) shares of the Corporation’s Series A Preferred Stock and pay all sums due on the Note...”. It is settled, however, that the “mere presence of additional provisions” in an instrument does “not constitute a bar to CPLR 3213 relief” if such provisions do not “require additional performance as a condition precedent to repayment, or otherwise alter the defendant’s promise of payment”. *Juste v. Niewdach*, 26 A.D.3d 416, 417 (2nd Dept 2006); see also *First Interstate Credit Alliance, Inc. v. Sokol*, 179 A.D.2d 583, 584 (1st Dept 1992) (“The existence of various clauses contained in a contractual agreement in addition to the unconditional promise to pay money does not necessarily disqualify the agreement as an instrument for the payment of money only”).

Additionally, the Court notes again that the parties specifically contracted that the Note would be considered an instrument for the payment of money under CPLR 3213.

The record on this motion contains an unchallenged, sworn statement from Plaintiff's principal, Arie Rabinowitz, confirming the Note remains unpaid. Moreover, Defendant's principal, Matthew Levenson sent an e-mail to Mr. Rabinowitz, confirming that Defendant owes all monies under the Note, attributes the "untenable" situation to "the failure on [Mr. Levenson's] side of [Mr. Levenson's] doing to make [Plaintiff] whole" and apologizes that the monies had not yet been paid. (NYSCEF 25). Armed with a clear, unambiguous concession that Defendant owes at least \$600,000 (\$500,000 principal plus 10% interest over two years), it is difficult to understand how it argues to the contrary at this juncture.

The Court does not find that Defendant raises credible issues of fact or viable affirmative defenses which would preclude awarding Summary Judgment on liability.

Therefore, it is:

ORDERED that Plaintiff's Motion for Summary Judgment in Lieu of a Complaint is Granted and Plaintiff is entitled to \$600,000 payable by Defendant; it is further

ORDERED that Plaintiff is entitled to reasonable attorneys' fees by virtue of the terms of the subject Promissory Note. As such, parties are directed to appear before a Judicial Hearing Officer (J.H.O.) for a determination of the reasonable attorneys' fees Plaintiff is entitled to receive from Defendant; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon

the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

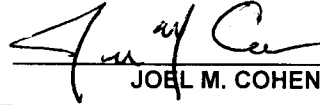
ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry on Defendant within five days and that counsel for Defendant, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the hearing on Plaintiff's attorneys' fees shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

3/6/2020
DATE



JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input checked="" type="checkbox"/> REFERENCE