

<b>DGL Group Ltd. v ETG Capial Advisors LLC</b>
2020 NY Slip Op 31863(U)
June 10, 2020
Supreme Court, New York County
Docket Number: 655266/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

DGL GROUP LTD and HAPPY THREADS LLC

Plaintiffs,

INDEX NO. 655266/2018

MOTION DATE 08/16/2019

MOTION SEQ. NO. 002

- v -

ETG CAPITAL ADVISORS LLC and ETG CAPITAL LLC,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 170, 171, 172, 173, 174, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that defendants' motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (7) is denied in its entirety; and it is further

ORDERED that the defendants' motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1) is denied in its entirety; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference to be held at the Supreme Court, 60

Centre Street, New York, New York, IAS Part 59, Room 331, by court approved video platform, or, to the extent court operations permit, in person, on the 4<sup>th</sup> day of August 2020 at 10:00 A.M.

#### DECISION

In this breach of contract action, defendants, ETG Capital Advisors LLC (Advisors), and ETG Capital LLC (Capital), move pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint. Plaintiffs, DGL Group Ltd. (DGL) and Happy Threads LLC (Happy Threads), oppose such motion, to which opposition, the defendants submit a reply.

#### Background

Plaintiffs are in the business of selling goods to retailers, including Toys "R" Us (TRU). On September 19, 2017, TRU commenced a Chapter 11 bankruptcy proceeding pursuant to Chapter 11 of Title 11 of the U.S. Code, under Case No. 17-34666-klp, in the Bankruptcy Court for the Eastern District of Virginia (the Bankruptcy Court). Plaintiffs agreed to continue to be suppliers during TRU's bankruptcy; however, to hedge the risk that they would not be able to recover from TRU in the bankruptcy proceeding, plaintiffs separately contracted with defendants, who were in the business of guaranteeing or insuring payment when a purchaser, such as TRU, is experiencing liquidity issues or is in bankruptcy.

Under to two separate Master Claims Purchase Agreements (the Master Agreement[s]) and Confirmation Agreement(s), by and between DGL and Advisors, and Happy Threads and Capital, the parties acknowledged that they anticipated entering into one or more "Puts" (Put[s]), which would entitle plaintiffs to Put certain of its post-petition TRU accounts receivable to defendants upon the occurrence of a Specified Event (NYSCEF Doc. No. 2). The Confirmation Agreements contained provisions setting forth specific terms and conditions relating to the sale of plaintiffs' administrative claim against TRU for sums owed on account of goods sold (Confirmation Agreement at 2-6). The Specified Event triggering a Put is defined as a Bankruptcy Event, which means the Bankruptcy Court has entered final orders: (1) converting the Company's Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code, (2) authorizing the Company to cease operating its business in the ordinary course, (3) confirming a liquidating plan of reorganization under Chapter 11 to commence an orderly liquidation of its assets, or (4) authorizing the Company to make distributions to administrative expense creditors that do not provide for payment in full of the Accounts Receivable (NYSCEF Doc. No. 2 at 1).

DGL/Advisors

The DGL/Advisors Purchase Agreement and Confirmation Agreement, dated February 8, 2018, provides that, upon satisfaction of certain conditions precedent, DGL would have the option (the Put Option) to require Advisors to purchase up to \$200,000.00 of DGL's administrative claims allowed by the Bankruptcy Court. The parties executed a Letter Agreement dated February 8, 2018, for \$200,000.00 of TRU accounts receivable, for the six-month coverage period beginning February 8, 2018 and ending August 7, 2018, at a Put rate of 3.45% per month, for total put fee of \$41,400.00.

Happy Threads/Capital

The Happy Threads/Capital Purchase Agreement and Confirmation Agreement, dated December 11, 2017, provided that, upon satisfaction of certain conditions precedent, Happy Threads would have the option (the Put Option) to require Advisors to purchase up to \$80,000.00 of Happy Threads' administrative claims allowed by the Bankruptcy Court. The parties executed a Letter Agreement dated December 11, 2017 for \$80,000.00 of TRU accounts receivable, for the six-month coverage period beginning December 11, 2017 and ending March 31, 2018, at a Put rate of 2.25% per month, for total put fee of \$6,561.29.

To exercise a Put, Section 4 of the Master Agreements require plaintiffs to notify defendants of their intention to sell, transfer and assign account claims (Account Claims), by irrevocable written notice (the Assignment Notice) (NYSCEF Doc. No. 2 at 4). If a Specified Event occurs prior to the expiration date set forth in Item 5 of the Letter Agreement, plaintiffs must deliver the Assignment Notice to defendants by 5 p.m. on the date that is within 20 days of the date of the Specified Event (*id.*). Additionally, Section 8 of the Master Agreements states that defendants' obligation to purchase Account Claims is subject to plaintiffs satisfying certain conditions precedent (*id.* at 5). Section 8 (a) specifically provides that plaintiffs must execute the Assignment of Claim Agreements (the Assignment Agreement) selling, transferring, and assigning the Account Claims to defendants in an amount equal to the net account value of the Accounts Receivable (*id.*). Section 8 (b) further mandates that plaintiffs deliver the proof of a claim to defendants and shall include a copy of the Proof of Claims with all necessary attachments as an exhibit to the Assignment Agreement (*id.*).

In the event that plaintiffs properly issue Assignment Notices and satisfy the conditions precedent, closing of the sale and purchase of the Account Claims is to occur at 9:00 a.m.

(New York time) at defendants' offices, by facsimile, or by other electronic transmission, at least 5 days and not more than 20 days after the satisfaction by plaintiffs of the conditions precedent (id. at 4). Account Claims are allowed by a final order of the Bankruptcy Court as administrative expense claims, pursuant to Section 5 (a) of the Master Agreement (id.). Pursuant to Section 5 (b), if plaintiffs fail to satisfy the conditions in Section 8 within the 25-day period, the Put shall be automatically canceled, discharged and terminated and will not be reinstated or rewritten, and defendants shall have no further obligation to plaintiffs with respect to that Put (id.).

On March 22, 2018, the Bankruptcy Court entered an order (Wind-Down Order) authorizing the debtors to wind-down its operations (NYSCEF Doc. No. 5). Plaintiffs argue that the Wind-Down Order, having been issued between the effective dates of the Letter Agreement, constituted a Specified Event. On March 29, 2018, DGL filed a proof of claim with the Bankruptcy Court in the sum of \$244,494.00 and Happy Threads filed a proof of claim for \$131,076.75 (NYSCEF Doc. No. 4).

On March 30, 2018, plaintiffs delivered the Assignment Notices to defendants (NYSCEF Doc. No. 173 at Exhibits E 1-3). Defendants acknowledged receipt in its email to plaintiffs dated

April 5, 2018. On May 25, 2018, the Bankruptcy Court entered an amended order (Procedure Order) establishing administrative claim procedures (NYSCEF Doc. No. 174). Plaintiffs argue that the Procedure Order dated May 25, 2018 allowed for the debtors to reconcile and allow administrative claims without further order of the Bankruptcy Court. On July 27, 2018 plaintiffs notified defendants, via email, that their claims would be allowed in the amount of \$316,453.49 and \$131,076.75 (NYSCEF Doc. No. 11-12). On July 27, 2018, defendants confirmed receipt of plaintiffs' email. Plaintiffs further argue that they satisfied their contractual prerequisites by timely making a demand on August 6, 2018. On September 6, defendants notified plaintiffs that it was rejecting both notices claiming it was not required to pay either of plaintiffs' insurance proceeds because the Wind-Down Order did not constitute a final order.

Plaintiffs filed the lawsuit at bar alleging one cause of action by DGL for breach of contract against Advisors and one cause of action by Happy Threads for breach of contract against Capital. Plaintiffs claim defendants breached the terms of the purchase agreement by accepting plaintiffs' money to insure against the credit risk, and then in bad faith refusing to honor their obligations to purchase insured receivables. DGL seeks a money judgment in the sum of approximately \$200,000.00, plus interest from August 16, 2018, and costs, expenses and

attorneys' fees. Happy Threads seeks a money judgment in the sum \$80,000.00, plus interest from August 15, 2018, and costs, expenses and attorneys' fees.

Defendants move for an order dismissing the amended complaint, pursuant to CPLR 3211 (a) (1), (7), based on documentary evidence and failure to state a cause of action<sup>1</sup>. Defendants argue that plaintiffs' notices of claims were not timely delivered because said notices were dated prior to the Bankruptcy Court issuing a Final Order allowing plaintiffs' claims.

#### DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a][7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (Morone v Morone, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any

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<sup>1</sup>Plaintiffs' original complaint was filed on October 23, 2018. In response to the defendants' first motion to dismiss (mot. Sequence number 001), plaintiffs filed their amended complaint on February 11, 2019 and defendants withdrew their prior motion to dismiss.

cognizable legal theory (id.). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR 3211 § (a) (1). A motion to dismiss pursuant to CPLR 3211 § (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]).

DGL's First Cause of Action for Breach of Contract & Happy Threads' Second Cause of Action for Breach of Contract

Plaintiffs each allege a cause of action based upon similar facts, terms and conditions, for breach of the express provisions of the Master Agreements.

To prevail on a breach of contract claim, a plaintiff must establish "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]).

The amended complaint alleges that (1) DGL and Advisors and Happy Threads and Capital are parties to the Master Agreements and Confirmation Agreements, which are valid, binding and enforceable contracts (amended compl. ¶¶ 11-14; 45-48); (2) a

Specified Event occurred (*id.* at ¶¶ 17; 52 [b]); (3) plaintiffs performed their obligations under the Master Agreements and Confirmation Agreements by remitting the premium payments to defendants, which payments were accepted, and by fulfilling the requirements for the notice of the occurrence of a specified event and their intention to exercise Put Options, as well as timely providing assignment of the TRU receivables to defendants (*id.* at ¶¶ 18-36; 52 [a]-66); (4) defendants breached their obligations under the Master Agreements and Confirmation Agreements and breached their implied duties of good faith and fair dealing by refusing to accept assignment of and failing to pay plaintiffs for their TRU receivables (*id.* at ¶¶ 43, 73); and (5) plaintiffs suffered monetary damages as a result of defendants' breaches (*id.* at ¶¶ 85,96).

Taking these allegations as true, the amended complaint adequately pleads a cause of action for breach of contract. On that basis, defendants' motion to dismiss plaintiffs' first and second causes of action, pursuant to CPLR 3211 (a) (7) must be denied.

Defendants move to dismiss plaintiffs' first and second causes of action based upon documentary evidence.

Defendants rely on the Master Agreements and Assignment of Claim Agreements to establish that plaintiffs did not timely (1) represent that a final order had been issued and (2) provide an

Assignment Agreement. The documentary evidence does not utterly refute the allegations in the amended complaint or establish a defense as a matter of law. To the extent that defendants argue that plaintiffs' breach of contract claim fails because their notice of claim was untimely, such argument is likewise unavailing. The amended complaint alleges that plaintiffs initially complied with their obligations under the Master Agreements by sending the Assignment Notices and Assignment of Claim Agreements to defendants on March 30, 2018, within 20 days of the date of the Bankruptcy Court's Wind-Down Order, which plaintiffs allege constituted a Specified Event and Bankruptcy Event and which plaintiffs' further allege constituted a Final Order pursuant to the Master Agreement. The amended complaint also asserts that plaintiffs made timely demands on August 6, 2018, after the July 26 notice that the claims were approved. Taken as true, these allegations are sufficient to support plaintiffs' claim that they complied with the notice of claim requirements. Therefore, the motion to dismiss based upon documentary evidence shall be denied.

<u>6/10/2020</u> DATE					<u>DEBRA A. JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE