

**Nimble Ventures, LLC v Liquid Digital Capital Mkts.
Holdings, LLC**

2020 NY Slip Op 32878(U)

September 1, 2020

Supreme Court, New York County

Docket Number: 651762/2020

Judge: Barry Ostrager

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER. PART IAS MOTION 61EFM

Justice

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Nimble Ventures, LLC, Plaintiff,	INDEX NO. <u>651762/2020</u> MOTION NO. <u>004, 005, 006</u>
- v -	
Liquid Digital Capital Markets Holdings, LLC, Liquid Digital Holdings LLC, and Michael Graves, Defendants	DECISION & ORDER ON MOTION

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OSTRAGER, J.

This action was previously before the Court on prior motions which are the subject of a written decision dated June 26, 2020. *See* NYSCEF Doc. No. 79. Presently before the Court are three motions: Motion 004 by Plaintiff Nimble Ventures LLC (“Nimble”) for summary judgment on Count One of the Complaint; Motion 005 by defendant Michael Graves (“Graves”) to renew his previous motion to compel arbitration; and Motion 006 by defendants Liquid Digital Capital Markets Holdings, LLC and Liquid Digital Holdings, LLC (together, the “LDH defendants”) to compel arbitration. Only one of these motions —Nimble’s motion for summary judgment— (motion 004) raises entirely new issues.

Turning first to motion 004, the Court finds that plaintiff Nimble is entitled to summary judgment on Count One of the Complaint—breach of a Loan Agreement against the LDH defendants. The Court previously determined (NYSCEF Doc. No. 79) that Count One of the Complaint is properly before this Court because the Amended and Restated Loan and Security Agreement (“Loan Agreement”) contains a New York forum selection clause. No party disputes the validity of the Loan Agreement, which was entered on August 30, 2019, by Nimble (as

lender), Liquid Digital Capital Markets (as borrower), and Liquid Digital Holdings (as parent guarantor). *See* NYSCEF Doc. No. 143. Pursuant to the Loan Agreement, Nimble lent the LDH defendants \$8 million. Upon default, the entire amount under the Loan Agreement is due. Nimble is seeking a \$8 million judgment and is expressly waiving its right to collect interest, attorney fees and other sums under the Loan Agreement. *See* NYSCEF Doc. No. 141 Affirmation of Joanne Poile at ¶ 27.

Nimble has demonstrated, and the LDH defendants have failed to refute, that there were multiple events of default under the Loan Agreement. Specifically, Liquid Digital breached the Loan Agreement by failing to provide accurate financial statements (Loan Agreement § 3.6, § 3.10 and § 5.7); by failing to use loan proceeds “not in contravention of any Law” and only for certain purposes. (Id. § 5.8); by “directly or indirectly enter[ing] into any transaction of any kind with or for the benefit of a Related Person, whether or not in the ordinary course of business” (Id. § 6.7); and, by the resignation of former-CEO Patrick Whalen (Id. § 7.1(p)).

Various provisions in the Loan Agreement require the LDH defendants to provide Nimble with accurate financial statements. Nimble argues that Liquid Digital's financial statements were not accurate because, *inter alia*, they did not reflect payments and transfers to Mr. Graves and companies he owns and controls and cash withdrawals by Mr. Graves. The LDH defendants do not dispute that these transactions took place and were not reflected properly. Instead, the LDH defendants, with a supporting affirmation from Mr. Graves, argue that the money in the LDH account rightfully belonged to Mr. Graves. In short, the defendants state that Mr. Graves performed work for an unrelated entity that had nothing to do with LDH and that instead of paying the sums due for that work to Mr. Graves and/ or the his company that he performed the work through, Mr. Graves made an agreement to have his money paid into the

LDH account due to concerns that his other company had “attracted the interest of law enforcement.” *See* NYSCEF Doc. No. 224 at p. 6 Affirmation of Michael Graves.

Taking as true that the funds transferred to and withdrawn by Mr. Graves rightfully belonged to him, those transactions still violate provisions of the Loan Agreement. Specifically, the LDH defendants do not dispute that the statements were inaccurate, and further this conduct violated the prohibition on transactions with related persons (Loan Agreement § 6.7). Under the Loan Agreement, a “related person” means “any Affiliate of Borrower, or any officer, employee, director or equity security holder of Borrower or any Affiliate.” As an officer of LDH, Mr. Graves is a related person and thus, the LDH defendants were prohibited from entering a transaction with him, allowing him to funnel personal funds through LDH accounts.

Finally, it is indisputably an event of default under the Loan Agreement if the “Engagement of [CEO] Patrick Whalen is terminated at any time by Borrower or any other Person for any or no reason (including without limitation by reason of death or disability) without the consent of Lender.” On June 28, 2020 Mr. Whalen resigned from LDH. Mr. Whalen affirmed that his resignation was not procured by either plaintiff or defendants. *See* NYSCEF Doc. No. 249.

While Nimble alleges several other instances of default, any one of the confirmed events of default detailed above is sufficient for a finding that the LDH defendants have breached the Loan Agreement. In sum, Nimble has presented undisputed facts and documentary evidence entitling Nimble to summary judgment and the LDH defendants have failed to advance any evidence to raise a triable issue of fact that would preclude summary judgment.

Turning next to motion 005, defendant Graves’ motion to renew his motion to compel arbitration is denied. The basis for Mr. Graves’ motion to renew is a new “Consent to Arbitrate”

proffered by the LDH defendants since Mr. Whalen's resignation. However, this is not a new fact impacting Mr. Graves' ability to compel arbitration of the claims against him in this case.

The Court previously held (on motion 002) that Mr. Graves was not permitted to compel arbitration on the claims against him as an individual because he is not a party to any agreement containing an arbitration clause and he is subject to jurisdiction in New York. *See* NYSCEF Doc. No. 79. The Court held that, if anything, the LDH defendants had the option to elect to arbitrate claims that arose under the LLC Agreement, which contains a permissive arbitration clause, as opposed to the Loan Agreement which contains a New York forum selection clause. The LDH defendants' election to arbitrate (discussed more fully below) does not change the fact that Mr. Graves is not a signatory to the LLC Agreement and that he is being sued in this action as an individual for conduct arising under the Loan Agreement. Nimble alleges that Mr. Graves committed improper and manipulative acts under the Loan Agreement, and these claims will be adjudicated by this Court.

Finally, turning to the LDH defendants' motion to compel arbitration, this motion is denied. The LDH defendants did not appear in this first motion to compel arbitration, and now argue that the LDH defendants have consented to arbitration. *See* NYSCEF Doc. No. 182. Nimble argues in opposition that Mr. Graves personally secured a majority of votes on the LDH board by improperly installing a new member following the resignation of former-CEO Mr. Whalen, resulting in this new consent to arbitrate. The Court need not reach the specific issue of whether the consent to arbitrate is valid, because it is irrelevant here. As discussed above, the remaining claims against the LDH defendants arise out of the Loan Agreement, which contains a New York forum selection clause, not the LLC Agreement, which contains a permissive forum selection clause. Consequently, the LDH defendants' motion to compel arbitration is denied.

Finally, the Court notes that the pending action among the parties in the Delaware Chancery Court has been resolved. On May 21, 2020, Nimble filed an action in Delaware against Mr. Graves and his personal trust, FTL Systems Trust (“FTL”) seeking to enjoin the JAMS Arbitration that Mr. Graves had commenced (the “Delaware Action”). The Delaware Court issued a decision on the record of August 21, 2020 and sent the claims in that action to arbitration. *See* NYSCEF Doc. No. 246. The Delaware Court found that “the Arbitration Provision of the LLC Agreement evinced the parties’ clear and unmistakable intent to arbitrate.” (emphasis added). The Delaware Court analyzed only the LLC Agreement and not the Loan Agreement. Once again, because this case arises under the Loan Agreement — not the LLC Agreement — the meaning of the arbitration clause in the LLC Agreement has no bearing on this Court’s decision denying arbitration.

Accordingly, it is hereby,

ORDERED that plaintiff Nimble Ventures LLC’s motion (004) for summary judgment on Count One of the Complaint for breach of contract against defendants Liquid Digital Capital Markets Holdings, LLC and Liquid Digital Holdings, LLC is granted in the sum of \$8,000,000.00 The Clerk is directed to enter judgment in favor of plaintiff Nimble Ventures LLC and against defendants Digital Capital Markets Holdings, LLC and Liquid Digital Holdings, LLC jointly and severally for \$8,000,000; and it is further

ORDERED that defendant Michael Graves’ motion (005) to renew his motion to compel arbitration is denied; and it is further

ORDERED that defendants Liquid Digital Capital Markets Holdings, LLC and Liquid Digital Holdings, LLC’s motion (006) to compel arbitration is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference before this Court on September 2, 2020 at 2:00 pm for a preliminary conference. The parties should meet and confer to the best of their ability to prepare a preliminary conference order prior to the conference, setting a Note of Issue deadline within 18 months of the date of this decision and order.

Dated: September 1, 2020

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: