SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LEON WAGNER,

Plaintiff,

against-

DECISION & ORDER
Index No. 654613/2019

Mot. Seq. Nos.: 001-002

PEGASUS CAPITAL ADVISORS, L.P.; PEGASUS CAPITAL, LLC; PEGASUS INVESTORS V SUSTAINABLE LUXURY LIMITED; SUSTAINABLE LUXURY (BVI) LIMITED PARTNERSHIP; PEGASUS HOSPITALITY HOLDINGS, LLC; CRAIG COGUT,

Defendants.

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O. PETER SHERWOOD, J.:

On these motions, the essential facts are undisputed. The parties have sharply different views of the applicable law.

In February 2011, Plaintiff Leon Wagner paid $1,000,000 for a membership interest in Pegasus Six Senses Holdings, LLC, a newly created entity (together with affiliated entities "Six Senses"). Those funds, along with contributions of other investors, were used to acquire and operate Six Senses Hotels Resorts Spas, an international owner and operator of luxury hotels, resorts and spas (*see* Verified Compliant ¶ 21, Doc. 28) ("Compl"). [1] In May 2012, Wagner invested $2,000,000 in another deal called Lighting Sciences Group ("LSG"). This sum was in addition to $9.5 million Wagner had already invested in LSG (*see* Aff'd of Leon Wagner, ¶ 25, Doc. 16). Both deals were organized by defendant Pegasus Capital, LLC ("Pegasus") which is wholly owned by Wagner's close friend of over 20 years, Craig Cogut ("Cogut") and his family.[2] Wagner obtained the additional $2 million to invest in LSG through a short-term loan from Pegasusand signed a promissory note evidencing the debt due in seven months, on December 2, 2012 ("Note") (*see* Reply to Counterclaim ¶ 63, Doc. 9 ["Reply cc"]; Wagner Br. in Support, p.

[1] "Doc" followed by a number refers to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) System.

[2] Over that two decade long period, Wagner was able to invest in various Pegasus deals (Compl. ¶ 11, Doc.17).

12 Doc. 24). The Note included a setoff clause which provided that if Wagner failed to repay the loan, Pegasus could recoup any outstanding amounts from sums due to Wagner from any Pegasus affiliate (the "Set-off Clause"). The Set-off Clause states:

> **Set-off.** If any amount owing to the Lender under this Note is not paid when due, the Lender is hereby authorized by the Borrower, at any time and from time to time thereafter, without notice, to set-off against, and to appropriate and apply to the payment of, the liabilities of the Borrower under this Note and any and all liabilities owing by the lender or any of its affiliates to the Borrower (whether matured or unmatured).

(Doc. 30, §4.9). Wagner failed to repay the loan when it became due or at anytime thereafter despite oral and written demands for payment (Verified Answer to Complaint, ¶ 153, Doc. 29) ("Answer").

The Six Senses deal became ripe for distribution in February 2019, more than six years after the LSG loan became due. It is undisputed that Wagner's investment yielded proceeds of $2,667,298.65 ("Proceeds") (Doc. 31). In a letter dated February 20, 2019, Pegasus advised Wagner that "accrued and unpaid principal and interest [due] on the Note [was] $2,937,803.36," that his minority interest in Six Senses entitled him to net sales proceeds of $2,667,298.65 and that "[p]ursuant to Section 4.9 of the Note, Pegasus is exercising its right to offset the full amount of [Wagner's] distribution…against the unpaid amount of the Note" (*id.*). Upon application of this amount to the debt, Wagner still owed $270,504.71 on the Note as of February 20, 2019 (*id.*).

Wagner responded to the letter with this litigation. The Complaint alleges twelve causes of action but Wagner has emphasized only three on his motion for summary judgment (Motion Seq. 002). They are breach of contract in connection with the Six Senses investment (First Cause of Action), conversation (Sixth Cause of Action) and declaratory judgment declaring that the Promissory Note is unenforceable as a setoff (Tenth Cause of Action) (*see* Doc. 24). In their answer, Defendants have denied the allegations in complaint in all material respects, interposed nine affirmative defenses and alleged counterclaims for breach of the terms of the Note, unjust enrichment, promissory estoppel and declaratory judgment (Doc. 29). In Motion Seq. 001, Defendants seek summary judgement dismissing all causes of action asserted by Plaintiff and in the alternative, summary judgment on their counterclaims (*see* Doc. 34). Essentially, these motions concern whether under the terms of the Set-off Clause, Pegasus was entitled to apply the Proceeds due Wagner to his outstanding debt obligation as evidenced by the Note.

Wagner views the Set-off Clause as an agreement to extend the six- year statute of limitations applicable to breach of contract claims (*see* Pl. Br. at 15, Doc. 24). He argues that under New York law, for an agreement that extends the statute of limitations to be valid (General Obligations Law § 17-103[1]), requires that the agreement be made after accrual of the cause of action to which the statute of limitation is being interposed (*see Xerox State & Local Solutions, Inc. v Xchanging Solutions (USA) Inc.*, 216F Supp 3d 355, 361 [SDNY 2016]). "[A]n extension agreement prior to the accrual of the cause of action continue to have no effect. Therefore, if the agreement to waive or extend the statute of limitations is made at the inception of liability, it is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative" (*id.*). Applying this law, he argues that "since the agreement to permit Pegasus Capital to enforce the Promissory Note through the set-off was made in the Promissory Note itself, well prior to the accrual of any cause of action thereunder, it is of no effect...*Xerox State and Local Solutions, Inc.*" (Pl. Br. at 16, Doc. 24).

The argument fails because, as defendants observe, the contractual Set-off Clause has nothing to do with any statute of limitations. Unlike *Xerox State and Local Solutions* and the other cases Wagner cites, the Set-off Clause does not purport to modify any limitations period. Nor does it contemplate the accrual of any cause of action. Rather, it establishes a means of debt payment which was bargained for in the parties' agreement and continues until the debt is satisfied. Under the terms of the Set-off Clause, the lender has a substantive right to collect payment by applying "any and all liabilities owing by [Pegasus] or its affiliates to [Wager]" (Promissory Note § 4.9, Doc. 30). That is precisely what occurred here. Because no statute of limitations is implicated, CPLR203 (d) which addresses when certain defenses or counterclaims may be asserted despite a statute of limitations bar, does not apply.

Assuming that an affirmative suit to enforce the Note was time barred, that fact would not extinguish Pegasus' underlying right to repayment but merely would bar a court remedy (*see Hahn Auto Warehouse, Inc. v Am Zurich Insurance Co.*, 81 AD 3d 1331 [4th Dept. 2011]; *Bank of N.Y. Mellon v WMC Mortgage, LLC*, 151 AD 3d 72, 78 [1st Dept 2017] ["law is now well-settled that the expiration of a time period set forth in a statute of limitations does not extinguish the underlying right, but merely bars the remedy"]).

Under the terms of the Note, Pegasus' rights include both an entitlement to payment of the debt and an ability to exercise self-help as provided for in the Set-off Clause. The set-off section authorizes Pegasus "at any time and from time to time thereafter… to set-off against…and apply to the payment of the liabilities of [Wagner] under this Note" liabilities owing to him by any Pegasus affiliate (Note § 4.9, Doc. 30). For this reason, Wagner's claim that the Proceeds cannot be applied to reduce the amount owed under the terms of the Note because the Note involved a separate financial investment (Pl. Br. at 12, Doc. 24), lacks merit.

Accordingly, Wagner's motion for summary judgment on its first cause of action for breach of contract against defendant Pegasus Investors V must be denied and defendant's motion for summary judgment to dismiss the first cause of action granted. Declaratory judgment shall be denied because the Set-off Clause applies. =Wagner's second cause of action against Sustainable Luxury Partnership ("SLP") must be denied. It is undisputed that Wagner had no interest in SLP. Pegasus Investors V in which Wagner held a limited partnership interest had a limited interest in SLP Holding. SLP Holding owned SLP which in turn owned and operated Six Senses (*see* Compl ¶¶ 16-21, Doc. 28). SLP's obligation was to Pegasus Investors V, not Wagner.

Given the court's finding that Wagner was paid, the court need not address his alternative theories of liability. In any event, the court finds that the remaining nine causes of action must also be dismissed as duplicative of the first cause of action for breach of contract, as barred by the existence of that contract or because it rests on the same asserted entitlement to the Proceeds which the court has determined were properly credited in accordance with the terms of the Set-off Clause.

The court has considered Plaintiff's other arguments and Defendants' counterclaims and finds them to be unavailing in light of the above.

It is hereby,

ORDERED that the motion for summary judgment of defendants (motion sequence 002) is GRANTED to the extent that the complaint is dismissed in its entirely; and it is further

ORDERED that the motion for summary judgment of plaintiff Leon Wagner (motion sequence 001) is denied; and it is further

ORDERED that the complaint is hereby DISMISSED in its entirety and Clerk of the Court is directed to enter judgment against plaintiff Leon Wagner and in favor of defendants PEGASUS CAPITAL ADVISORS, L.P., PEGASUS CAPITAL, LLC, PEGASUS INVESTORS

V SUSTAINABLE LUXURY LIMITED, SUSTAINABLE LUXURY (BVI) LIMITED PARTNERSHIP, PEGASUS HOSPITALITY HOLDINGS, LLC, and CRAIG COGUT, together with costs to be taxed in an amount fixed by the Clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: October 16, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.