BAE Sys. Southeast Shipyards AMHC Inc. v Epic Mar. Asset Holdings, LLC
2021 NY Slip Op 30416(U)
February 10, 2021
Supreme Court, New York County
Docket Number: 653828/2020
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BAE SYSTEMS SOUTHEAST SHIPYARDS AMHC INC., Plaintiff,	INDEX NO.	653828/2020
- v -	MOTION DATE	10/27/2020
EPIC MARITIME ASSET HOLDINGS, LLC, Defendant.	MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46
were read on this motion for SUMMARY JUDGMENT.

This is an action to enforce a Promissory Note. Plaintiff BAE Systems Southeast Shipyards AMHC Inc. ("BAE") is the holder of the Note, which was executed by Defendant Epic Maritime Asset Holdings, LLC ("Epic") to partially finance Epic's acquisition of a shipyard from BAE.

BAE seeks summary judgment on the ground that the undisputed facts show that Epic defaulted on its obligation to repay the Note. Epic cross-moves for summary judgment on the ground that BAE cannot seek to enforce the Note at this time because doing so is prohibited by a Subordination Agreement to which both parties are bound.

For the reasons that follow, the Court agrees with Epic. The Subordination Agreement provides that once the senior lenders took certain actions to enforce their rights under the senior loans (which they did), BAE was prohibited from bringing suit to enforce the Note until the senior loans were fully satisfied (which they have not been). Accordingly, based on the

undisputed factual record and the unambiguous language of the Subordination Agreement, BAE's motion for summary judgment is denied and Epic's cross-motion for summary judgment dismissing the Complaint is granted.[1]

SUMMARY JUDGMENT STANDARD

Summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). To prevail on a motion for summary judgment, the movant must make a prima facie showing that it is entitled to judgment as a matter of law and offer evidence demonstrating that there is no genuine issue of material fact (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). If the movant makes its prima facie showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

DECISION & ANALYSIS

1. *Introduction*

As will be described below, the Subordination Agreement (NYSCEF Doc No. 21) is not ambiguous. It uses language that "has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562,

[1] To the extent Epic's cross-motion also seeks summary judgment on its counterclaim for breach of the Subordination Agreement, that branch of the cross-motion is denied because it is unsupported by any specific argument in Epic's brief.

569-70 [2002] [internal quotation marks omitted]). "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]; *see also Analisa Salon, Ltd. v Elide Props., LLC*, 30 AD3d 448, 448-49 [2d Dept 2006] ["A contract must be read as a whole in order to determine its purpose and intent, and single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part"] [internal quotation marks and alterations omitted]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Greenfield*, 98 NY2d at 569 [internal quotation marks omitted]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.*). Accordingly, "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (*id.*).

Additionally, the material facts are not in dispute. Of particular importance, it is undisputed that:

- Epic's obligations under the Promissory Note (NYSCEF Doc No. 3) constitute "Subordinated Debt" under the Subordination Agreement (*see* NYSCEF Doc No. 45, Pl.'s Resp. to Def.'s SOF ¶ 10);
- In July of 2019, the "Senior Lenders" exercised secured creditor remedies by foreclosing on certain equity interests that collateralize the "Senior Debt" (as those terms are defined in the Subordination Agreement) (*see* Pl.'s Resp. to Def.'s SOF ¶¶ 13-16);

- As part of the July 2019 foreclosure action, the Senior Lenders reallocated a portion of the Senior Debt to Epic, with a related entity as guarantor (*see id.* ¶ 16); and
- The Senior Debt has not been paid in full (*id.* ¶ 17).

2. *Analysis*

Section 6 of the Subordination Agreement provides, in pertinent part:

> [BAE] will not foreclose or otherwise exercise any rights or remedies in respect of the Subordinated Debt if the Senior Lenders shall have instituted judicial proceedings, initiated foreclosure action, or otherwise have commenced the exercise of its secured creditor remedies with respect to the collateral securing such Senior Debt until the Senior Debt has been paid in full.

"Senior Debt" includes the amounts the Senior Lenders loaned to Epic (and related companies) under a Loan and Security Agreement dated July 20, 2018 (the "July 2018 LSA").[2] Importantly, "Senior Debt" encompasses: (i) "all indebtedness" under any of the "Senior Loan Documents," including Epic's debt under the July 2018 LSA, and (ii) "restructurings" of (or "modifications" to) such debt.[3] Thus, the "Senior Debt"—even if restructured—is still "Senior Debt" within the meaning of the Subordination Agreement.

"Subordinated Debt" means, in relevant part, "all indebtedness" under the Note, including principal and interest and other liabilities.[4] There is no dispute that Epic's obligations under the Note constitute "Subordinated Debt" within the meaning of the Subordination Agreement (*see* Pl.'s Resp. to Def.'s SOF ¶ 10).

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[2] *See* Subordination Agreement § 1 (defining "Senior Debt," "Senior Loan Documents," "Epic Obligations," "Epic Loan Documents," "Senior Credit Agreements," and "Epic Senior Credit Agreement"). *See also* Pl.'s Resp. to Def.'s SOF ¶ 6.

[3] Subordination Agreement § 1 (definition of "Senior Debt").

[4] *See id.* (defining "Subordinated Debt" and "Subordinated Note"). *See also* Note at 1 (providing that the Note is subject to the restrictions contained in the Subordination Agreement).

Essentially, Section 6 of the Subordination Agreement provides that once the Senior Lenders have commenced the exercise of secured creditor remedies with respect to the collateral securing the Senior Debt, BAE cannot pursue a claim against Epic to enforce the Note until the Senior Debt has been paid in full. The critical language in Section 6—"until the Senior Debt has been paid in full"—establishes a condition precedent to BAE's recovery on the Note, as the contract employs "the unmistakable language of condition ('if,' [and] ' . . . until')" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691-92 [1995]).

As noted, there is no dispute that the Senior Lenders exercised secured creditor remedies under the July 2018 LSA with respect to the collateral securing the Senior Debt (*see* Pl.'s Resp. to Def.'s SOF ¶ 14). The remedial actions of the Senior Lenders thus barred BAE's pursuit of any claim against Epic to enforce the Note absent full payment of the Senior Debt. Full payment of the Senior Debt is an express condition precedent that must be "literally performed" before BAE can recover for breach of the Note (*see Oppenheimer*, 86 NY2d at 690-91). At least a portion of the Senior Debt remains outstanding—again, there is no dispute about that (*see* Pl.'s Resp. to Def.'s SOF ¶ 17). Thus, Section 6 prohibits this action and BAE's Complaint must be dismissed. There is "no doubt of the parties' intent" and no reason for interpreting the language of Section 6 "other than as written" (*Oppenheimer* at 691-92).

Any doubt as to the impact of Section 6 on BAE's ability to maintain this action is removed by Section 7 of the Subordination Agreement. That section provides, in relevant part, that "[s]ubject to Section 6, no Subordinated Holder [BAE] will . . . commence any action or proceeding at law or equity against Maker [Epic] to recover all or any part of the Subordinated Debt [Note] not paid when due . . . ." Accordingly, the Subordination Agreement expressly

prohibits BAE from suing to recover amounts due from Epic under the Note until the Senior Debt has been paid in full.

Against the backdrop of the clear and unambiguous terms of Sections 6 and 7 of the Subordination Agreement, BAE's reliance on Section 3 of that agreement is unavailing. Section 3 provides: "So long as no Senior Event of Default has occurred and is continuing or would result therefrom after giving effect thereto, [Epic] may pay and [BAE] may accept the outstanding principal balance [owed under the Note] and all accrued interest thereon" on the Note's October 12, 2019 maturity date (*see also* Subordination Agreement § 1 [defining a "Senior Event of Default" to include an "Event of Default" under, and as defined in, the July 2018 LSA]). This section thus provides a general rule permitting payment on the Note when it does not create or exacerbate a Senior Event of Default.

Section 3 does not, in words or substance, supplant the directly applicable terms of Section 6, which are triggered when the Senior Lenders exercise remedies with respect to the collateral securing the Senior Debt. In those circumstances, as discussed above, Sections 6 and 7 expressly prohibit BAE from bringing an action to enforce the Note unless and until the Senior Debt is fully repaid.

Section 6 contains no limiting language with respect to "continuing" defaults. In essence, BAE asks the Court to limit Section 6's payment prohibition to ongoing foreclosure actions or other remedies commenced by the Senior Lenders. To do so, however, would require judicial re-drafting of Section 6's clear and unambiguous terms. "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Beinstein v Navani*, 131 AD3d 401, 405 [1st Dept 2015] [internal quotation marks omitted]; *see also Rowe v Great Atl. & Pac. Tea Co.*, 46

NY2d 62, 72-73 [1978] ["[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]). On its face, Section 6 does not limit the prohibition against payment to ongoing foreclosures. To the contrary, Section 6 speaks only to initiation and commencement of creditor remedies—that is, taking action, not ending it.

Additionally, whether the Senior Debt was restructured in no way relaxes Section 6's restrictions on BAE's current collection effort. As already noted, the definition of Senior Debt expressly includes a scenario where the Senior Debt is restructured—that is, the Senior Debt remains "Senior Debt" within the meaning of and is accorded the same priority protection under Section 6, notwithstanding any restructuring of the Senior Debt. If the parties wanted Section 6 to apply only to *ongoing* foreclosures, they could have written it that way. The Court cannot now do it for them.

This reading of the Subordination Agreement does not, as BAE suggests, render Section 3 "meaningless" or "without force or effect" (*cf. Valle v Rosen*, 138 AD3d 1107, 1109 [2d Dept 2016] ["Courts should rule against any construction which would render a contractual provision meaningless or without force or effect"] [internal quotation marks omitted]). Section 3 applies under circumstances different from those at play here—namely, where the Senior Lenders have not commenced remedial action with respect to the collateral securing the Senior Debt. In other words, Sections 3 and 6 apply under different factual scenarios. On the facts here, Section 6 is the operative provision.

BAE's contention during oral argument that the above interpretation of the Subordination Agreement leaves BAE in limbo until the Senior Debt is repaid is unavailing. While true, that is

what "subordination" means and, more importantly, what the parties agreed to in the Subordination Agreement.

The Court has considered BAE's remaining arguments and finds them to be unavailing.

* * * *

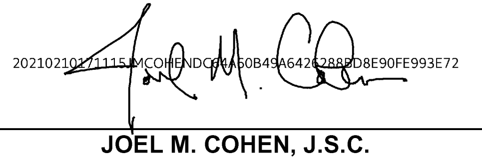
Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is **DENIED**; it is further

ORDERED that the branch of Defendant's cross-motion for summary judgment seeking dismissal of the Complaint is **GRANTED**, and the **Complaint is dismissed**; and it is further

ORDERED that the branch of Defendant's cross-motion seeking summary judgment on its counterclaim is **DENIED**.

The clerk is directed to enter judgment accordingly.



2/10/2021
DATE

JOEL M. COHEN, J.S.C.

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