

**SQN Asset Servicing, LLC v Shunfeng Intl. Clean
Energy LTD**

2021 NY Slip Op 30511(U)

February 23, 2021

Supreme Court, New York County

Docket Number: 652604/2017

Judge: Andrew Borrok

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afforded a credit. Although Shunfeng's attorneys were allegedly notified of the upcoming UCC sale, even assuming that the notice was inadequate, SQN has rebutted the presumption that the sale was not commercially reasonable. Shunfeng is not entitled to additional offsets not otherwise provided for in the Credit Agreement or Guaranty (hereinafter defined). Thus, SQN's motion for summary judgment must be granted and Shunfeng's motion for summary judgment (Mtn. Seq. No. 013) must be denied. Shufeng's motion (Mtn. Seq. No. 014) to exclude the expert testimony of Christopher R. LeWand, on the basis that Mr. LeWand is "usurping the role of the trier of fact" by offering his analysis of the facts and underlying documents is also denied because Mr. LeWand is qualified to opine on damages and the commercial reasonableness of SQN's credit bid and the court can give it its proper weight in adjudicating the summary judgment motions at issue.

THE RELEVANT FACTS

Reference is made to (i) a Credit agreement (the **Credit Agreement**; NYSCEF Doc. No. 311) dated November 17, 2015, by and between nonparty Suniva, Inc. (**Suniva**) as borrower, in favor of certain lenders, and SQN as administrative agent, (ii) a Parent Guaranty (the **Guaranty**; NYSCEF Doc. No. 319), dated of even date therewith, by Shunfeng as guarantor in favor of SQN as administrative agent, pursuant to which Shunfeng guaranteed 63% of Suniva's obligations, including its obligations in the Credit Agreement, (iii) a Third Amended Chapter 11 Plan of Reorganization for Suniva, Inc. (the **Plan**; NYSCEF Doc. No. 609), dated April 5, 2019, which was confirmed by the Delaware Bankruptcy Court on April 9, 2019, and (iv) a Settlement Agreement (the **Settlement Agreement**; NYSCEF Doc. No. 483), dated November 20, 2018, by and among Suniva, SQN, and certain other lenders.

It is undisputed that Suniva defaulted in its obligations under the Credit Agreement by (i) breaching a liquidity provision set forth in section 7.15(a) of the Credit Agreement, (ii) defaulting on a similar liquidity provision set forth in a related credit agreement with Wells Fargo Bank, National Association, which constituted a cross default under section 8.01(e) of the Credit Agreement, (iii) filing for bankruptcy, which constitutes an independent default under section 8.01(f) of the Credit Agreement, and (iv) failing to comply with the minimum EBITDA covenant in section 7.15(b) of the Credit Agreement, thereby triggering Shunfeng's obligations under the Guaranty.

In April 2017, Suniva filed a voluntary petition for bankruptcy (the **Bankruptcy**) in the United States Bankruptcy Court for the District of Delaware. Thereafter, Suniva, SQN, and certain other lenders entered into a Settlement Agreement. Section 16 of the Settlement Agreement provides that:

SQN shall retain any and all interest it may have in [] that certain lawsuit captioned *SQN Asset Servicing, LLC v Shunfeng Int'l Clean Energy Ltd.*, No. 652604/2017, currently pending before the Supreme Court of the State of New York in the County of New York, State of New York (the "Guaranty Litigation").

(NYSCEF Doc. No. 483, § 16[a]).

The Settlement Agreement was expressly incorporated into the Plan, and although SQN did release certain claims pursuant to the Plan (NYSCEF Doc. No. 609, § 11.5.1), SQN did not release its rights under the Guaranty against Shunfeng. To wit, the Plan states:

The Plan reflects the outcome of a Settlement Agreement approved by the Court on November 20, 2018 [D.I. 941]. ***For the avoidance of doubt, the Settlement Agreement and Equipment Lease and License Agreement shall remain in effect pursuant to their***

terms and are binding on the Reorganized Debtor and the parties thereto, and, for avoidance of doubt, are not subject to rejection under article 8 of the Plan and are therefore not rejected hereunder. The Settlement Agreement and the Equipment Lease and IP License Agreement are attached to the Plan Supplement and incorporated herein as a part of the Plan as if fully set forth in the Plan, and ***nothing in the Plan shall alter any party's rights under the Settlement Agreement*** or the Equipment Lease and IP License Agreement.

(NYSCEF Doc. No. 487, § 5.1 [emphasis added]).

Section 13.7 of the Plan provides in boilerplate language that “in the event of any inconsistency among the Plan, the Disclosure Statement, the Plan Documents, any exhibit to the Plan or any other instrument or document created or executed pursuant to the Plan, the provisions of the Plan shall govern” (*id.*, § 13.7).

On May 24, 2018, SQN conducted a UCC Article 9 sale (*see* NYSCEF Doc. No. 377, Bates Nos. Sun-Bank000698-708). As part of this sale, some of Suniva’s collateral was auctioned off and, pursuant to Section 9.08 of the Credit Agreement, SQN successfully bid on two of the four lots (lot numbers 1 and 3). SQN’s credit bid totaled \$25.05 million, which amount SQN credited towards Suniva’s obligations under the Credit Agreement.

DISCUSSION

I. The Summary Judgment Motions

Summary judgment should be granted where the movant tenders evidence, in admissible form, to establish entitlement to judgment as a matter of law (CPLR § 3212; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once such burden is met, to defeat a motion for summary judgment, the opposing party must produce evidence “in admissible form sufficient to require a

trial of material questions of fact” (*id.*). The court’s function on a motion for summary judgment is issue finding, not issue determination (*Rowan v Brady*, 98 AD2d 638, 638 [1st Dept 1983]).

There are no genuine issues of material fact here. The underlying documents are not ambiguous and the parties do not dispute that a default by Suniva occurred under the Credit Agreement. Nor is there any dispute that Shunfeng was liable for payment under the Guaranty. Rather, Shunfeng argues that the court should deny SQN’s motion for summary judgment and grant its motion for summary judgment because (i) SQN released its claim against Shunfeng pursuant to the Plan, (ii) SQN failed to provide adequate notice of the sale of the collateral, and (iii) Shunfeng is entitled to additional offsets. The arguments fail.

As discussed above, Shunfeng was not released from its obligations under the Guaranty. The Settlement Agreement was expressly incorporated into the Plan and the Settlement Agreement unambiguously carves out the instant action from the Plan and any release contained in the Plan (NYSCEF Doc. No. 483, § 16[a]; NYSCEF Doc. No. 487, § 5.1 [*“SQN shall retain any and all interest it may have in”* the instant lawsuit]). Contrary to Shunfeng’s argument, this carve out is not inconsistent with the Plan. The boilerplate language in Section 13.7 of the Plan and the release set forth in the Plan do not suggest a different result. Indeed, as Shunfeng concedes in its summary judgment motion, the language of the Plan is “clear and unambiguous” (NYSCEF Doc. Nos. 459 at 1; 387 at 30) and the operative language of section 5.1 of the Plan makes clear that nothing therein alters any rights negotiated under the Settlement Agreement (NYSCEF Doc. No. 487, § 5.1). This includes SQN’s rights with respect to the instant lawsuit.

In addition, the plain language of the Guaranty makes clear that Shunfeng has waived its affirmative defenses to enforcement, which Guaranty is subject only to the limitations contained in paragraph 2 thereof, such as e.g., payment, and which limitations are not applicable here (NYSCEF Doc. No. 319, ¶¶ 1, 5-7, 8; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 [awarding summary judgment where defendant's defenses were "precluded by guaranty, which waived all defenses and counterclaims except actual payment and performance in full, which defendant has not alleged"])

Shunfeng's argument that summary judgment should be denied because notice of the UCC auction was inadequate also fails. Assuming arguendo Shunfeng's argument that notice was inadequate because it was sent less than ten days before the sale and because it was published only in the Atlanta Journal Constitution and not in any national or industry specific publication is correct, and/or because this notice did not contain any terms of sale (such as minimum bid amounts or required good faith deposits), under New York law, the failure to provide notice of the foreclosure sale to Shunfeng creates a rebuttable presumption that an auction would have generated an amount equal to the secured obligation, expenses and attorneys' fees (NY UCC § 9-626; *In re Winer*, 39 BR 504 [Bankr Ct SD NY 1984]).

Here, SQN has rebutted that presumption. SQN's expert, Rick Daubenspeck, a Managing Director of Tangible Asset Valuations at BDO USA, LLC and a certified appraiser with over a decade of relevant experience in the solar industry (*see* NYSCEF Doc. No. 382, ¶¶ 4-7) provides detailed calculations and cogent, fact specific analysis (including certain site visit inspections) in support of his fair market value appraisal for the collateral equipment as being

between \$5,659,000 and \$7,956,000 as of the auction date. Inasmuch as the credit bid was \$25 million -- i.e., somewhere between 500% and 300% of the appraised value (for which the obligations under the Credit Agreement and the Guaranty were credited), this is sufficient to rebut the presumption that the auction was not commercially reasonable.

In its opposition papers, Shunfeng does not raise a material issue of fact for trial or otherwise adduce admissible evidence that the equipment was sold for less than its fair market value or that the results of the auction would have been different had it received notice. Shunfeng's affiant, Michael Brandley, acknowledges in his affidavit that he has no actual experience with any solar equipment auctions. As such he may not be properly qualified as an "expert" (*see Frye v United States*, 293 F 1013 [1923]). Even if he were qualified as an expert, he does not refute the appraisal value or otherwise provide his own valuation (NYSCEF Doc. No. 570). Indeed, Mr. Brandley merely states that he has "reviewed the pleadings filed in this case, the transcripts of the depositions taken in connection with this case, and exhibits to the depositions, the transcript of the Auction, along with various news reports and certain filings from the bankruptcy proceedings" and summarily concludes that the auction "did not conform to commercially reasonable standards" (*id.*, ¶¶ 3-4). Such a vague and conclusory affidavit is not sufficient to raise a triable issue of fact with respect to the value of collateral auctioned. The mere fact that a better price could have been obtained by sale of collateral at a different time or in a different manner from that selected by the secured party is not by itself sufficient to establish that a sale was not made in a commercially reasonable manner (*In re Sackman Mtge. Corp.*, 158 BR 926 [Bankr Ct SD NY 1993]). For the avoidance of doubt, the fact that Jeremiah Silkowski may have valued SQN's collateral for more than Mr. Daubenspeck or that Mr. Silkowski testified that

at one point SQN considered a higher offer from another entity as “potentially credible” does not create an issue of fact, as Shunfeng argues (*see* NYSCEF Doc. No. 581 at 121:12-18; NYSCEF Doc. No. 591). For among reasons, Mr. Silkowski also testified that this and other offers all ultimately “couldn’t prove that [they] could meet the commitments that [they were] promising to make” (NYSCEF Doc. No. 581 at 127: 5-14; *see also* 203:11-13 [“We would have done a deal if that were the case, but that was not the way this was structured”]).

To the extent that Shunfeng argues that it is entitled to certain offsets, nothing in the Credit Agreement, Guaranty or the Plan entitle Shunfeng to additional offsets as to its guaranteed obligations beyond what has already been extended to it by SQN. A credit has already been extended pursuant to Section 9.08 of the Credit Agreement in the amount of \$25.05 million and there is no additional right of offset as it relates to the AD/CVD settlement or otherwise.

Shunfeng’s argument that it should be released from its obligations under the Guaranty because of what SQN might hypothetically receive by way of additional funds in connection with the Settlement Agreement or in respect of certain AD/CVD claims, also fails. SQN has demonstrated that no funds in connection with the Settlement Agreement have been distributed to anyone and SQN is not aware of when, if ever, any funds would be distributed. As such, SQN is not required to account for cash proceedings under UCC § 9-615(a) or for non-cash proceeds under UCC § 9-615(c), which is only required when the failure to so account would be commercially unreasonable. There is nothing to account for here. Nor is a different outcome required under UCC § 9-620 as to a purported right to the discharge of the entire amount owed

by Shunfeng as a result of an imaginary strict foreclosure and “acceptance” of the AD/CVD collateral by SQN in satisfaction of the obligations which did not occur.

On the record before the court, no AD/CVD Settlement funds have been distributed to anyone after almost eight years. The fact that SQN and Suniva entered into an equipment lease after executing the Settlement Agreement does not change the fact that Shunfeng guaranteed certain obligations that Suniva defaulted on and that Shunfeng remains liable for based on the terms of its Guaranty. As discussed above, the Plan and the Settlement Agreement expressly carved out the instant action.

Accordingly, SQN has met its burden of coming forward with sufficient evidence to establish its entitlement to summary judgment and Shunfeng has not come forward with any evidence to create a material issue of fact for trial. Thus, SQN is entitled to damages of \$26,113,159.91, comprised of \$15,151,554.47 in principal and \$10,961,605.44 in interest, and with additional interest at the rate of \$6,734.02/day from June 15, 2020 to the date of entry of judgment, as set forth in SQN’s moving papers and based on a conservative reading of the Credit Agreement, applying the credit bid against the principal. For the avoidance of doubt, the court has considered Shunfeng’s additional arguments and finds them unavailing.

II. Motion to Exclude

As the Court of Appeals has explained, “the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court” (*People v Lee*, 96 NY2d 157, 162 [2001]). Expert testimony is admissible where it would be helpful to “clarify an issue calling for

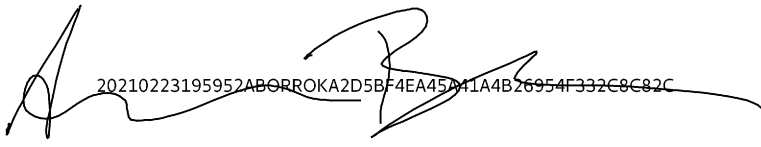
professional or technical knowledge,” which is “possessed by the expert” (*De Long v Erie County*, 60 NY2d 296, 307 [1983]). If the court finds that expert testimony is appropriate, it may admit such testimony only for a permissible purpose (*People v Brown*, 97 NY2d 500, 505-06 [2002]). Shunfeng does not dispute that expert testimony is appropriate and necessary in this action, but argues that Mr. LeWand’s expert testimony, contained in his report (NYSCEF Doc. No. 502), impermissibly opines on the background facts of this action, interprets the contractual documents at issue, and submits legal conclusions, thus usurping the role of the fact finder. The argument fails.

Although Mr. LeWand references certain facts and documents and offers his opinions, it is wholly in the context of providing his *opinion*, and, particularly as this opinion is provided to the court in support of the summary judgment motion, the court can afford it the appropriate weight to which it is entitled. Mr. LeWand is qualified to opine on damages and the commercial reasonableness of SQN’s credit bid and there is no basis to exclude his testimony.

Accordingly, it is

ORDERED that plaintiff SQN Asset Servicing, LLC’s motion for summary judgment (Mtn. Seq. No. 012) is granted, and the Clerk is directed to enter judgment in favor of the plaintiff in the amount of \$26,113,159.91, plus interest of \$6,734.02/day from June 15, 2020 to the date of entry of judgment, for a total of \$ _____, and with interest at the statutory rate thereafter, and it is further

ORDERED that defendant Shunfeng International Clean Energy Ltd.’s motion for summary judgment (Mtn. Seq. No. 013) and its motion to preclude (Mtn. Seq. No. 014) are both denied.


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ANDREW BORROK, J.S.C.

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		<input type="checkbox"/>	REFERENCE
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