

Goldman Sachs Bank USA v Schreiber
2022 NY Slip Op 30291(U)
January 6, 2022
Supreme Court, New York County
Docket Number: Index No. 656597/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART 53

Justice

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GOLDMAN SACHS BANK USA,
Plaintiff,

- v -

JOEL SCHREIBER, WE MEMBER LLC, 2307 HOLDINGS
LLC, JETSON MEMBER LLC, RETAIL WORX MEMBER
LLC

Defendant.

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INDEX NO. 656597/2021
MOTION DATE
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Goldman Sachs Bank USA's (the Lender) motion for a preliminary injunction preventing Joel Schreiber (the Grantor) and We Member LLC (We Member) from selling, removing, altering, transferring, or disposing of the assets held by We Member, including shares of WeWork Inc. (WeWork), without prior written consent from the Lender must be granted. Sections 4.1 and 4.2 of the Pledge and Security Agreement (hereinafter defined) provide that the Grantor shall not permit or allow any modification or amendment to any of We Member's Governing Documents, which consist of the LLC Agreement and the Organizational Certificate, as may be amended. The Amendment to the Organizational Certificate prohibits the transfer of the assets of We Member without the Lender's prior written consent. The defendants do not dispute that the Grantor transferred assets (i.e., WeWork shares) of the We Member. The Lender has thus established a likelihood of success on the merits. Inasmuch as the assets of the We Member are the value of the collateral, the Lender has also established irreparable harm. The balance of the equities also weighs in favor of granting the injunction because there have been multiple defaults

under the loan, the injunction is limited in scope and protects the legitimate interest of the Lender in the value of the collateral and the defendants do not have any right to transfer the We Member's assets without the Lender's consent (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). Therefore, the injunction must be granted.

The Facts and Circumstances

Reference is made to (i) a certain Revolving Loans (Committed Loan) Loan Agreement (the **Loan Agreement**; NYSCEF Doc. No. 4), dated September 3, 2019 between Goldman Sachs Bank USA as Lender and Joel Schreiber and We Member LLC, collectively, as Borrower, for a revolving line of credit (the **Revolving Loans**) of \$20,000,000, (ii) a Pledge and Security Agreement (the **Pledge and Security Agreement**; NYSCEF Doc. No. 6) dated as of September 3, 2019 by Mr. Schreiber as Grantor in favor of the Lender as the Secured Party in connection with the Revolving Loans, (iii) an Amendment to Certificate of Formation of We Member LLC (the **Amendment**; NYSCEF Doc. No. 7) dated August 30, 2019 by Mr. Schreiber as the sole member and authorized signatory of We Member, (iv) and Amended and Restated Term (Committed Loan) Loan Agreement (the **Amended Loan Agreement**; NYSCEF Doc. No. 8), dated June 26, 2020 between the Lender as Lender and Mr. Schreiber, We Member LLC, 2307 Holdings LLC, Jetson Member LLC, and Retail Worx Member LLC as Borrower (collectively, the **Borrowers**), and (v) a Forbearance Agreement (the **Forbearance Agreement**; NYSCEF Doc. No. 12) dated April 1, 2021 by and between the Borrowers and the Lender.

Pursuant to Section 5.15 of the Loan Agreement, if the ratio of outstanding principal of the Revolving Loans to the value of the shares held in WeWork held by We Member (the **WeWork**

Shares) ever exceeded 25%, the Lender's commitment to make the Revolving Loans available would terminate and the Borrowers would, within three business days, pay down the principal amount on the Revolving Loans sufficient so that such ratio did not exceed 25%. Failure to sufficiently pay down the principal within three days would constitute an event of default. In order to induce the Lender to enter into the Loan Agreement, Mr. Schreiber executed the Pledge and Security Agreement (NYSCEF Doc. No. 6, at 1). Pursuant to the Pledge and Security Agreement, Mr. Schreiber pledged and granted a security interest in certain **Collateral**, consisting of (i) the Membership Interest (hereinafter defined) in We Member, (ii) the Collateral Proceeds (hereinafter defined), and the Collateral Account (hereinafter defined) (*id.*). The **Membership Interest** means, among other things, (i) all income, distributions, and rights to payments owing to Mr. Schreiber with respect to his interest as a member of We Member and (ii) all voting and management rights, rights of access, and all other rights, interests, property, and claims to which Mr. Schreiber is entitled as a member of We Member (*id.*, at 2). The **Collateral Proceeds** means all payments, dividends, interest, fees, and other payments of any kind derived from or relating to the Membership Interest (*id.*, at 1-2). The **Collateral Account** is the account into which all Collateral Proceeds and other payments by We Member on account of any of the Collateral is paid (*id.*, § 4.2). Prior to executing the Pledge and Security Agreement, Mr. Schreiber executed the Amendment. The Amendment stated that, so long as any loan from the Lender is outstanding, We Member will not transfer, pledge, mortgage, hypothecate, assign, or otherwise convey any of its assets without the Lender's prior written consent (NYSCEF Doc. No. 7). The Amended Loan Agreement and the Forbearance Agreement both preserved the Lender's security interest over the Collateral as set forth in the Pledge and Security Agreement (NYSCEF Doc. No. 8, § 3.1; NYSCEF Doc. No. 12, § 8[a]).

The Lender alleges that, shortly after the Loan Agreement was executed, WeWork cancelled a planned initial public offering, causing the valuation of its shares to drop and triggering Section 5.15 of the Loan Agreement (Complaint; NYSCEF Doc. No. 1, ¶¶ 16-17). The Grantor and We Member failed to pay down the outstanding principal on the Revolving Loans within three days, leading to an event of default (*id.*, ¶ 18). The Lender alleges that, to accommodate the Grantor, it entered into the Amended Loan Agreement, which provided for a loan principal of \$19,494,000 and required additional collateral, including a lien on the profits, distributions, and liquidity events of 2307 Holdings LLC and the Grantor's pledge of his equity interests in Jetson Member LLC and Retail Worx LLC (*id.*, ¶¶ 19-21). The Lender alleges that the Borrowers defaulted again (*id.*, ¶¶ 22-23). The Lender then entered into the Forbearance Agreement as additional accommodation, but alleges that the Borrowers further defaulted (*id.*, ¶¶ 27-28). In connection with discussions about an additional forbearance agreement, the Lender allegedly learned that Mr. Schreiber had caused We Member to sell several hundred thousand of its WeWork Shares in violation of the Pledge and Security Agreement and the Amendment (*id.*, ¶ 31). The Lender accordingly brought this action, claiming breach of the Amended Loan Agreement and breach of the Pledge and Security Agreement (*id.*, ¶¶ 34-42).

Discussion

A party seeking a preliminary injunction must establish a likelihood of success on the merits, the threat of irreparable harm in the absence of an injunction, and that the balance of the equities weighs in the movant's favor (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]).

The Lender has established a likelihood of success on the merits. The Lender claims that the WeWork Shares were sold in violation of the Pledge and Security Agreement and the Amended Loan Agreement. The Pledge and Security Agreement expressly provides that the Grantor would not approve or consent to any transfer of any assets held by We Member without prior written consent of the Lender (NYSCEF Doc. No. 6, § 4.1). Pursuant to the Amended Loan Agreement, the Borrowers represented that they would not violate any Constituent Instruments of any of the corporate Borrowers (NYSCEF Doc. No. 8, § 4.2). The Constituent Instruments of We Member includes the Amendment, which provides that We Member shall not convey any of its assets without the Lender's prior written consent (NYSCEF Doc. No. 7). The Lender has also established irreparable harm in the absence of an injunction. The parties expressly agreed that the Lender's consent was required prior to sale of any assets of the We Member. This agreement reflects the bargain that We Member would have sufficient value to support the loan. The sale of these assets in direct contravention of the governing documents irreparable harms the Lender by taking away the value of the collateral (*Suttongate Holdings Limited v Laconm Management N.V.*, 159 AD3d 514, 515 [1st Dept 2018], *see Robjudi Corp. v Quality Controlled Products, Ltd.*, 111 AD2d 156, 157 [2d Dept 1985]). Finally the balance of the equities also weighs in favor of the Lender, as it is not disputed that there have been multiple events of default by the Grantor and the Borrowers with respect to the Revolving Loans.

The Borrowers' argument that the Lender is an unsecured creditor of We Member falls flat.

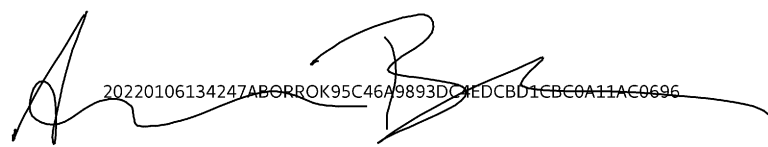
There is a security agreement, and according to the Lender's counsel (1.6.22) a UCC-1

Financing Statement filed against such pledged interest which Lender’s counsel is uploading to NYSCEF.

For completeness, *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 (2000) does not suggest a different result. Here, the Lender as a secured creditor seeks only to prevent a dissipation of the collateral. The Lender is not seeking to generally prevent a dissipation of assets that it would look to satisfy a judgment.

It is accordingly hereby ORDERED that the Lender’s motion for a preliminary injunction is granted; and it is further

ORDERED that the undertaking is fixed in the sum of \$250,000 conditioned that the Lender, if it is finally determined that it was not entitled to an injunction, shall pay to the Borrowers all damages and costs which may be sustained by reason of this injunction.


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1/6/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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