Radium2 Capital, LLC v Platinum Rapid Funding Group Ltd.
2022 NY Slip Op 31170(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 652120/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

RADIUM2 CAPITAL, LLC (F/K/A RADIUM2 CAPITAL INC.),

Plaintiff,

- v -

PLATINUM RAPID FUNDING GROUP LTD., PRFG SPV #1 LLC, PLATINUM ASSET FUNDING, LLC, ARENA PRFG, LLC, PRIME MERIDIAN SPECIAL OPPORTUNITIES FUND, LP, ARENA INVESTORS, LP, ALI MAYAR, VINCENT BARDONG, MICHAEL PERAGINE, CFG MERCHANT SOLUTIONS, LLC, and CETERIS PORTFOLIO SERVICES, LLC,

Defendants.

INDEX NO. 652120/2020

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 82, 151, 152, 170, 171, 172, 173, 174, 175, 176, 177, 180, 181, 182, 183, 184, 185, 186

were read on this motion to/for DISMISS.

In motion sequence number 003, defendants Platinum Asset Funding, LLC (PAF), Arena PRFG, LLC (Arena PRFG), Prime Meridian Special Opportunities Fund, LP (Prime), Arena Investors, LP (AILP), and Ceteris Portfolio Services, LLC (Ceteris) move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of plaintiff Radium2 Capital LLC (Radium).

For background, see the court's decisions in *Platinum Asset Funding LLC Platinum Rapid Funding Group Ltd.*, Index No 652167/2020 and *Chatham Capital Management IV LLC et al v Platinum Asset Funding LLC*, Index No. 157977/2020.

In November 2018 and March 2019, Radium loaned $3 million to PAF across three promissory notes (Notes") for PAF to use "to fund other merchants and

syndications." (NYSCEF 12, Complaint ¶¶ 119, 126, 135, 144.) Plaintiff alleges, upon information and belief, that Arena PRFG "strong-armed" Platinum to raise such funds to "be used as additional Collateral under the Credit Agreements" to prevent being in breach of their terms. (*Id.*, ¶¶ 124-25). Plaintiff states that it was unaware that the funds would be used as collateral under the credit agreements between PAF and Arena and that, if they had known this, they would not have issued the funds to Platinum. (*Id.*, ¶¶ 125, 158). To date, Radium has yet to receive any principal or interest payments from PAF under the terms of the three promissory notes. (*Id.*, ¶¶ 132, 141, 149). Plaintiff alleges, upon information and belief, that the Arena Parties "knew that Platinum was required to make regular payments under the Notes," but that the Arena parties "had no interest in Platinum honoring its payment obligations." (*Id.*, ¶¶ 155-57). Plaintiff alleges that the Arena parties have thus "improperly tak[en] possession" of "the Note Receivables" and have "misappropriate[ed] and convert[ed]" these assets at the UCC-9 sale. (*Id.*, ¶¶ 163-64).

Finally, plaintiff alleges, upon information and belief, that the Arena Parties (AILP, Arena PRFG, and PAF) are alter-egos of one another such that "their separate personalities no longer exist." (*Id.*, ¶¶ 178-193).

Declaratory Judgment (Claim I)

In the first cause of action, plaintiff seeks a declaratory judgment against all defendants stating that plaintiff "has absolute ownership and an unconditional right of possession to its participation interest in and its *pro rata* share of the participation payments from the collection of the Syndication Receivables" and claims damages in excess of $8,484,517. (*Id.* ¶ 200).

Here, plaintiff asserts that, under the MPA, they have "outright" ownership of the receivables "as a co-investor" with Platinum. (*Id.* ¶ 27; NYSCEF 13, MPA ¶ 1.21). Plaintiff argues that its ownership interest is further acknowledged by §§ 2.6(a) and 2.6(b) of the Credit Agreements, each of which provides that the proceeds to be paid under the agreements are "exclusive of any amounts required to be paid as Receivables Participation Payments to a Receivables Participant" (here, Radium). (NYSCEF 12 Complaint ¶ 196; NYSCEF 14, 15, 2018, 2019 Credit Agreements §§ 2.6(a)-(b).)

Defendants dispute that plaintiffs had an ownership interest in the receivables under the MPA at all, but rather a security interest. Accordingly, defendants assert that plaintiff's failure to perfect that interest via a UCC-1 filing "renders its interest in the Receivables junior" to that of the defendants. However, under the language of the MPA, it is not clear that PRFG, and thus defendants, ever had an interest in plaintiff's share of the receivables. As stated on the record in the related Chatham Action, it does not appear that "the UCC-1 that was filed by Arena is conclusive at this point." (*Chatham Capital Management IV LLC et al v Platinum Asset Funding LLCl*, Index No. 157977/2020, Transcript of Proceedings at 40). Moreover, §§ 3.1.10-11 of the MPA, which state that PRFG as lead is the sole party able to take legal recourse against the client under the MPA, do not "utterly refute" the notion that plaintiff obtained an ownership interest in the receivables, as defendants contend. As such, there remains ambiguity as to the status of ownership of plaintiff's portion of the receivables under the MPA.

Defendants' motion to dismiss plaintiff's claim for declaratory relief relating to the ownership of the *pro-rata* shares of syndication receivables is denied.

Declaratory Judgment (Claim II)

In Radium's second cause of action, plaintiff seeks a declaratory judgment stating that (1) the Arena Defendants "acted in a commercially unreasonable manner . . . and in violation of UCC §§ 9-610 and 9-615(f)" in conducting the UCC-9 Sale, (2) the UCC-9 sale is null and void, (3) plaintiff "has absolute ownership and an unconditional right of possession to its participation interest in and its *pro rata* share of the participation payments from the collection of the Syndication Receivables," and (4) Radium is entitled to damages "believed to be in excess of $8,484,517. (NYSCEF 12, Complaint ¶ 217).

UCC § 9-610(b) requires that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." (UCC § 9-610 [b]). Plaintiff alleges that the UCC-9 sale was commercially unreasonable due to Arena PRFG providing only 15 days' notice amidst the COVID-19 global pandemic, Arena PRFG allegedly taking measures to exclude plaintiff from bidding at the public auction to ensure that platinum remain the only "qualified bidder," and PAF acquiring the collateral, allegedly worth $40,000,000, for $1,000,000. (NYSCEF 12, Complaint ¶ 69-99, 210.)

As plaintiff rightly points out, "[w]hether a sale was commercially reasonable is, like other questions about 'reasonableness', a fact-intensive inquiry; no magic set of procedures will immunize a sale from scrutiny." (*D2 Mark LLC . OREI VI Invs.,* No. 652259/2020, 2020 N.Y. Misc. LEXIS 2978, at *12). Therefore, defendants' compliance

with the 10-day safe harbor clause is not conclusive on the question. Similarly, a sale price is not outcome determinative as to the reasonableness of sale. As defendants assert, “Article 9 requires process, not outcomes.” (Defendant’s Mem. of Law at 7). Plaintiff’s allegations are sufficient to raise an issue of fact with the sale. For example, plaintiff alleges that defendants prevented plaintiff from participating in the public auction. Therefore, defendants’ motion to dismiss plaintiff’s claim for declaratory relief relating to the reasonableness of the UCC-9 Sale is denied.

Tortious Interference with the MPA (Claim III)

“A claim of tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages.” (*American Preferred Prescription, Inc. v Health Mgmt.*, 252 AD2d 414, 417 [1st Dept 1998]).

In their third cause of action, plaintiff alleges that “the Arena Parties and Ceteris intentionally and tortiously interfered with and improperly caused and procured Platinum's breach of the MPA by, inter alia, misappropriating Radium's participation interest and its rights to weekly participation payments from the collection of the Syndication Receivables.” (NYSCEF 12, Complaint ¶ 223).

The MPA constitutes a valid contract between plaintiff and PAF to which the Arena Parties and Ceteris are third parties. Plaintiff alleges that defendants had knowledge of the MPA. Defendants’ knowledge is demonstrated by sections 2.6(a) and 2.6(b) of the Credit Agreement and by the continued servicing of participation payments to plaintiff under the MPA following Arena PRFG’s seizure of PAF’s PFRG’s CRM

software. As for defendant's intent, plaintiff alleges that, in view of Arena PRFG's awareness of the existence of the MPA and their subsequent failure to continue servicing plaintiff's participation payments, that defendants intentionally and "improperly caused and procured Platinum's breach of the MPA." (*Id.* at ¶ 223). Finally, plaintiff alleges damages. Therefore, plaintiff has sufficiently alleged tortious interference of contract.

Tortious Interference with the Notes (Claim V)

In the fifth cause of action, plaintiff alleges that AILP and Arena PRFG intentionally "interfere[d] with Radium's rights to repayment under the Notes" by "improperly taking possession and control of . . . the Note Receivables and the proceeds thereof" and by "direct[ing] Platinum . . . to divert the proceeds from the Note Receivables that should have gone back to pay the Notes, to Arena and Arena PRFG." (*Id.* at ¶¶ 248, 255).

Here, the notes clearly constitute valid contracts between plaintiff and PAF to which the Arena Parties are third parties. Defendants challenge plaintiff's allegation that defendants had knowledge of the notes because "Platinum provided copies of the Notes to Arena and/or Arena PRFG, and thus, Arena and/or Arena PRFG knew that Platinum was required to make regular installments payments under the Notes," on information and belief. (*Id.* at ¶ 155). The court finds that this assertion is sufficient to allege defendants' knowledge. The court rejects defendants' argument that this claim is based on activity that occurred before the notes were executed as the claim has to do with repayment of the notes. Equally confounding is defendants' argument that this claim is duplicative of the breach of contract claim; breach of contract is one of the elements of

this cause of action. Therefore, defendant's motion to dismiss plaintiff's claim for tortious interference of contract under the Notes is denied.

Conversion (Claim VI)

In their sixth cause of action, plaintiff alleges that "Arena PRFG improperly exercised dominion and control of Radium's participation interest in the Syndication Receivables and interfered with Radium's absolute and superior right to such participation interest by improperly transferring same [sic] to Platinum Asset" in the UCC-9 Sale. (NYSCEF 12, Complaint ¶ 266). Plaintiff alleges damages in excess of $8,484,517 plus punitive damages. (*Id.* at ¶ 270). For the reasons stated in the Platinum decision on motions 03, defendants' motion is denied as to conversion.

Fraud (Claim IX)

Defendant's motion to dismiss plaintiff's claim for fraud is granted for the reasons stated on the record. (NYSCEF 218, tr at 58:7-18.)

Aiding and Abetting Fraud / Conspiracy to Defraud (Claim X)

Defendant's motion to dismiss plaintiff's claim for fraud is granted for the reasons stated on the record. (*Id.*)

Alter Ego

Defendant's motion to dismiss plaintiff's claim for alter ego is granted for the reason stated on the record. (*Id.*)

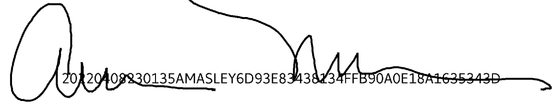
The court has considered the parties' remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that defendants' motion is denied; and it is further

ORDERED that defendants shall file an answer within 20 days of the date of this decision; and it is further

ORDERED that within 30 days of this order, the parties shall stipulate to a PC Order. If the parties cannot agree, they may submit competing orders.



4/8/2022				
DATE				ANDREA MASLEY, J.S.C.

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