

GS Capital Partners, LLC v FTE Networks, Inc.

2022 NY Slip Op 33965(U)

November 18, 2022

Supreme Court, New York County

Docket Number: Index No. 650626/2021

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

GS CAPITAL PARTNERS, LLC,

Plaintiff,

INDEX NO. 650626/2021

MOTION DATE 09/29/2022

- v -

FTE NETWORKS, INC., SCFTE SPV LLC

Defendants.

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 82, 84, 85, 86, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to AMEND COMPLAINT and for PRELIMINARY INJUNCTION.

Plaintiff GS Capital Partners, LLC’s (“Plaintiff”) motion to amend and for a preliminary injunction is GRANTED for the reasons stated on the record on October 20, 2022 (NYSCEF 86), as further specified below.

This is an action by Plaintiff to enforce a Note (NYSCEF 50) and Guaranty (NYSCEF 51) relating to a Stock Purchase Agreement (“SPA” [NYSCEF 49]). On August 18, 2022, the Court denied Plaintiff’s motion for summary judgment in lieu of a complaint because Defendants FTE Networks, Inc. and SCFTE SPV LLC (together “Defendants”) asserted a potentially meritorious usury defense (*GS Capital Partners, LLC v FTE Networks, Inc.*, 2022 NY Slip Op 22286 [Sup Ct New York County Aug. 18, 2022]). On September 20, 2022, the Court entered a Preliminary Conference Order (NYSCEF 43) and discovery commenced.

On September 29, 2022, Plaintiff moved (NYSCEF 45) for leave to file an amended complaint and for an order “directing Defendants FTE and SCFTE to immediately execute,

deliver and record a first priority mortgage in form and substance satisfactory to Plaintiff for properties that adequately secure FTE's \$1,800,000.00 obligation under the Convertible Redeemable Note dated March 10, 2020." During oral argument on October 20, 2022, the Court granted Plaintiff's motion for leave to file the proposed amended complaint (NYSCEF 48) as unopposed (Tr. 3:3-5, 86:9-13). The First Amended Verified Complaint was subsequently filed on October 20, 2022 (NYSCEF 79).

With respect to the motion for a preliminary injunction, Section 4(f) of the SPA provides:

f. Post-Closing Obligation. Post-Closing Obligation. As soon as reasonably practicable, but no later than March 13, 2020 (or such later date as may be agreed by the Buyer), the Company shall deliver or cause to be delivered to the Buyer:

(i) a Mortgage, Assignment of Leases, Security Agreement and Fixture Filing duly executed by SCFTE SPV LLC, a South Carolina limited liability company ("Property Owner"), an affiliate of the Company, in favor of the Buyer, in form and substance reasonably satisfactory to the Buyer, encumbering certain real properties located in Cook County, Illinois (as amended, restated or otherwise modified from time to time, the "Mortgage").

Section 15 of the Note provides, in relevant part, that in the event of a breach of the foregoing paragraph, "the Company shall cause Property Owner or another affiliate of the Company to grant a first priority mortgage on other real estate of comparable value and otherwise acceptable to Holder." Section 1 of the Post-Closing and Amending Agreement ("Post-Closing Agreement" [NYSCEF 52]) required that a mortgage or mortgages be delivered by March 17, 2020. There is no dispute that, despite the parties' efforts, no mortgages were delivered (Tr. 3:18-4:5; NYSCEF 57, 59-64).

Based on the foregoing, Plaintiff's motion for a preliminary injunction was granted (Tr. 32:14-20). The Court found that Plaintiff had demonstrated "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities"

Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]). Specifically, the mortgage or mortgages required by the SPA, Note and Post-Closing Agreement are “a unique, bargained-for contractual remedy” and Defendants’ potential usury defense is not sufficient to deny relief (*Suttongate Holdings Ltd. v Laconm Mgt. N.V.*, 159 AD3d 514, 515 [1st Dept 2018]).

It became clear at the hearing that Defendants “are not sure what mortgages still exist over what properties. . .there could be no mortgages to give at all” (Tr. 31:14-17). Accordingly, the injunction was “granted with the provision that details of it need to be worked out” (Tr. 37:14-16) because “the parties don’t really, at this point, have an understanding of what the properties can still be encumbered are” (Tr. 40:19-42:25). As “neither side knows whether there are any properties to which these mortgages could be attached” (Tr. 32:11-14), the Court directed that “a list of unencumbered properties” be provided and granted leave to serve “formal discovery” before submitting a proposed order in two-weeks’ time (Tr. 40:23-42:11). The Court noted that “the point is that what they are entitled to in the contract they should get” (Tr. 40:23-41:2).

On November 4, 2022, the Court granted the parties a one-week extension of time to confer on the language of the proposed order (NYSCEF 83). On November 10, 2022, counsel for Plaintiff advised that no agreement was reached and submitted a proposed order (NYSCEF 84-85). On November 14, 2022, counsel for Defendants submitted their own letter and proposed order (NYSCEF 89-94). Plaintiff submitted a reply letter (NYSCEF 95) on November 15, 2022. Defendants filed a sur-reply on November 16, 2022 (NYSCEF 96-97).

Having reviewed the parties’ submissions, it is

ORDERED that Plaintiff’s motion to amend is **GRANTED** and Defendants shall answer or otherwise respond to the First Amended Complaint on or by December 7, 2022; it is further

ORDERED that Plaintiff’s motion for a preliminary injunction is **GRANTED** and Defendants shall comply with Section 4(f) of the SPA as amended by the Note and Post-Closing Agreement by filing the necessary mortgage or mortgage(s); it is further

ORDERED that Defendants shall provide a sworn statement including “a list of unencumbered properties” for which mortgages can be filed in satisfaction of the SPA, Note and Post-Closing Agreement to Plaintiff within fourteen (14) days of the issuance of this Order or a sworn statement that no such properties exist; it is further

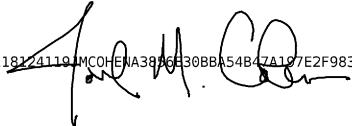
ORDERED that the parties meet-and-confer in good-faith to determine what properties are sufficient to comply with the terms of this order and may submit a stipulation to be “So Ordered” once the properties are agreed to; it is further

ORDERED that Plaintiff shall immediately post an undertaking of one thousand dollars (\$1,000) and increase the undertaking to fifty thousand dollars (\$50,000) within ten (10) days of the filing of the requisite mortgages or mortgages pursuant to CPLR 6312(b); it is further

ORDERED that this Order shall bind Defendants and their officers, principals, representatives, affiliates, subsidiaries, successors, assigns, agents, servants, employees, attorneys, or any persons acting in concert with or on behalf of them.

This constitutes the decision and order of the Court.

11/18/2022
DATE

202211181241110JMC0HEWA3896E330BBA54B47A197E2F983AD0A90

JOEL M. COHEN, 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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE