Ahead Co. Ltd. v Oceanwide Holdings Intl. Dev. III Co., Ltd
2023 NY Slip Op 31896(U)
June 5, 2023
Supreme Court, New York County
Docket Number: Index No. 653753/2022
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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INDEX NO. 653753/2022

MOTION DATE 05/31/2023

MOTION SEQ. NO. 002

AHEAD COMPANY LIMITED, ASIAN RESOURCES (HK) LIMITED, CHAN LIK SHUEN, CHAN LIK SHUEN, CHEUNG SHUN SHING, CHU NIN YIU STEPHEN, CHU NIN YIU STEPHEN, CHU NIN YIU STEPHEN, CHU SHENG HSIEN, CHUNG HANS HAN HIN, COCOBEAR INVESTMENTS LTD., JOEY CHAN KWOK JING, KA LUN CHIU, LI CHAN LAI SEUNG ALICE, LI MAN SHUN, LI MAN SHUN, LI MAN TAK, LI MEI LIN, LIN PING CHING KENNETH, LIN PING CHING KENNETH, SANGGYUN AHN, WONG SZE MAN ALICE, YING WAH LIN, YIP MEI CHUN, FU SING YAM WILLIAM

Plaintiff,

- v -

AMENDED DECISION + ORDER ON MOTION

OCEANWIDE HOLDINGS INTERNATIONAL DEVELOPMENT III CO., LTD, OCEANWIDE HOLDINGS CO., LTD., CHINA OCEANWIDE GROUP LIMITED, OCEANWIDE REAL ESTATE INTERNATIONAL COMPANY LIMITED,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is adjudged that the motion to dismiss is granted in its entirety.

Facts

Plaintiffs are a group of investors owning book-entry interests of the Senior Guaranteed Notes issued by defendant OCEANWIDE HOLDINGS INTERNATIONAL DEVELOPMENT III CO., LTD. The rest of the defendants are guarantors of the notes. The note defaulted on its maturity date by failing to pay the last semiannual interest and the principal. Plaintiffs brought the suit against the issuer and the guarantors based on breach of the indenture and the underlying notes.

Defendants filed the motion to dismiss under CPLR § 3211(a)(1), (a)(3) & (a)(7), claiming plaintiffs do not have the capacity to sue because they are not the trustee or holders of the notes. Plaintiffs object, claiming owners of book-entry interests have the status to bring the suit according to various clauses in the indenture.

Motion to dismiss general standard

On a motion to dismiss the court "merely examines the adequacy of the pleadings", the court "accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boeheim*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted *conclusively* establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (emphasis added). "[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable". *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

CPLR § 3211(a)(3)

"The concept of capacity is often confused with the concept of standing, but the two legal doctrines are *not interchangeable*." *Community Bd. 7 v Schaffer*, 84 NY2d 148, 152 [1994] (emphasis added). "'Standing' is an element of the larger question of 'justiciability', … designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome, …, the standing analysis is, at its foundation, aimed at advancing the judiciary's self-imposed policy of

restraint, which precludes the issuance of advisory opinions." *Id.* "'Capacity' concerns a litigant's power to appear and bring its grievance before the court. The concept of a lack of capacity, …, does *not admit of* precise or comprehensive definition. Capacity, or the lack thereof, sometimes depends purely upon *a litigant's status*. A natural person's status as an infant, an adjudicated incompetent or, formerly, a felony prisoner, for example, could disqualify that individual from seeking relief in court. Additionally, the capacity question has often arisen in connection with controversies involving trustees." *Id.* (emphasis added). "Capacity to sue is *a threshold question* involving the authority of a litigant to present a grievance for judicial review." *Town of Riverhead v NY State Bd. of Real Prop. Servs.*, 5 NY3d 36, 38 [2005] (emphasis added).

CPLR § 3211(a)(7)

"In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" *Leon v. Martinez*, 84 N.Y.2d 83, 88. "What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading "will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that plaintiff has no cause of action". *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept 2014].

Plaintiff's Capacity to Sue The Issuer and Guarantors for Breach of Contract Based On The Indenture and The Underlying Notes (The First, Second and Third Causes of Action)

Defendant filed the motion to dismiss pursuant to CPLR § 3211(a)(1), (a)(3) & (a)(7). CPLR § 3211(a)(3) permits defendant to move for judgment dismissing all causes of action on the

ground that plaintiff has no legal capacity to sue. Since capacity is a threshold issue, the court will entertain the question first.

First and foremost, capacity and standing are two different doctrines although they are often used interchangeably, like here. Standing is about justiciability and the most important element to consider is whether the party that brings the suit has suffered an "injury in fact", i.e., the injury is concrete and particularized, and it is actual or imminent. Pursuant to this standard, plaintiffs do have standing to sue here because the financial injury, the unpaid principal and interest on the note that is past due, is concrete, particularized, and actual.

What plaintiffs may lack here, is the legal capacity to sue. The Court of Appeals has artfully articulated the issue: "'Capacity' concerns a litigant's power to appear and bring its grievance before the court. The concept of a lack of capacity, …, does not admit of precise or comprehensive definition. Capacity, or the lack thereof, sometimes depends purely upon *a litigant's status*. A natural person's status as an infant, an adjudicated incompetent or, formerly, a felony prisoner, for example, could disqualify that individual from seeking relief in court. Additionally, the capacity question has often arisen in connection with controversies involving trustees." *Community Bd. 7 v Schaffer*, 84 NY2d 148, 152 [1994].

At issue here is whether plaintiffs, a group of investors as holders of beneficial interest of the underlying note, have the *legal status* to sue the issuer and the guarantors pursuant to the indenture or the note for the unpaid principal and interest.

Article 6 of the indenture governs default and remedies. The court looks to the article since the issuer has defaulted on the note by failing to pay the final interest and principal on the maturity date, May 23, 2021. NYSCEF Doc. No. 1, ¶ 19. The failure to pay off the debt constitutes "Events of Default" defined in § 6.01(a) & (b). NYSCEF Doc. No. 3, page 87.

In the event of default, § 6.03, the general "Other Remedies" section kicks in and bestows the Trustee with the discretion to take legal or equitable action against the issuer or guarantors to collect the unpaid principal and interest of the note. § 6.03 states in pertinent part that: "If an Event of Default occurs and is continuing, the Trustee *may pursue* … or instruct the Collateral Agent to pursue, …, any available remedy by proceeding at law or in equity to collect the payment of principal of and interest on the Notes or to *enforce* the performance of any provision of the *Notes* or this Indenture. The Trustee may maintain a proceeding even if it does not possess any of the Notes or does not produce any of them in the proceeding." *Id*. at pages 89-90. The indenture also reserves a provision, § 6.09, for default specified in § 6.01(a) & (b). In § 6.09, the trustee is empowered to recover the unpaid principal and interest in its own name or as trustee of the express trust for the entire unpaid debt. *Id*. at page 91.

Under either section, the power to sue is reserved to the trustee or the collateral agent. Here both roles are played by Citicorp International Limited. NYSCEF Doc. No. 3, the cover page and page 7. The indenture also contains a no-action clause, i.e., § 6.06, which states in pertinent part: "A Holder of Notes may not institute any proceeding, judicial or otherwise, with respect to this Indenture or the Notes, …, or for any other remedy under this Indenture or the Notes, unless:" *Id*. at page 90. Words after "unless" contain an exception to the no-action clause, setting forth the five preconditions that must be satisfied before the exception kicks in and permits Holders of Notes to sue. *Id*. at page 91.

The no-action clause is prevalent in trust indentures, as explained by the Court of Appeals: "Generally a no-action clause, such as in a trust indenture, prevents minority securityholders from pursuing litigation against the issuer, in favor of a single action initiated by a trustee upon request of a majority of the securityholders. Limitations on individual securityholder suits serve the

primary purpose of a no-action clause, which is to protect issuers from the expense involved in defending individual lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors." *Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 552 [2014].

Here, both parties agree that plaintiffs are not the trustee or the collateral agent, and thus neither § 6.03 nor § 6.09 will apply to plaintiffs. However, plaintiffs contend they should be allowed to pursue the present suit against defendants because of the right to receive payment of principal and interest granted by § 6.07. NYSCEF Doc. No. 3, page 91. This argument can only succeed if plaintiffs can establish their stats as Holders of the notes. Accordingly, the court now turns to the issue of whether plaintiffs are Holders of the notes.

If the Notes are Held in the Form of Global Notes

As plaintiffs did not specify in the complaint the Guaranteed Senior Notes in dispute were held in which form, the court will consider all relevant sections in the indenture governing registration, transfer, and exchange of notes to see if plaintiffs could be deemed as Holders of notes. NYSCEF Doc. No. 1, page 1.

Article 1 of the indenture defines "Holders" as "the Person in whose name a Note is registered in the Register" while a person could be "any individual, corporation, partnership, limited liability company, joint venture, trust, unincorporated organization or government or any agency or political subdivision thereof." NYSCEF Doc. No. 3, pages 15 & 31.

The same article directs the court to § 2.04 of the indenture to look for the meaning of "Global Notes". *Id*. at page 16 ("Global Notes" has the meaning assigned to such term in Section 2.04.). §§ 2.04(c) & (d) are the subsections that handle the Global Notes and the pertinent parts state: "On the Original Issue Date, an Authorized Officer of the Issuer will execute and deliver to

the Trustee one global note representing the Notes (together with any other global notes issued after the Original Issue Date, the "Global Notes"), …, in definitive, fully registered form without interest coupons,…, substantially in the form of Exhibit B hereto which shall be deposited with, and registered in name of the nominee of the common depositary for Euroclear and Clearstream (the "Common Depositary"), which shall initially be *Citivic Nominees Limited*. *Id*. at page 42-43. "Each Global Note (i) shall be… registered in the name of, the Common Depositary, or its nominee for the accounts of Euroclear and Clearstream, …" *Id*. at 43.

Both sections reveal important features about the Global Notes and its Holders: 1) a Global Note could be the one issued on the original issue date or afterward; 2) there is *only one physical* global note representing all the issued Global Notes; 3) the one physical note is registered in the name of the common depositary's nominee, which should be Citivic Nominees Limited initially; 4) each Global Note should be registered in the name of either the Common Depositary or its nominee.

The Common Depositary is Citibank Europe PLC. *Id*. at page 154. Therefore, if the Notes are held in the form of Global Notes, then only Citibank Europe PLC or its nominee could be the Notes' holder. This interpretation is consistent with § 2.06, which declares that "so long as the Notes are held in global form, the Common Depositary (or its nominee) will be considered the *sole* holder of the Global Notes for all purposes under this Indenture." *Id*. at page 47. Since plaintiffs are not holders of the Notes, § 6.07 will not enable plaintiffs to bring the present suit against defendants because that clause only applies to Holders of the notes. NYSCEF Doc. No. 81, pages 14-21. Additionally, the "Defaults and Remedies" clause contained in the Form of Reverse of Global Note will not empower plaintiffs to commence the action either because that clause only applies to the Trustee or the Holders of the notes, neither capacity is taken by plaintiffs. NYSCEF

Doc. No. 3, pages 167-168. Accordingly, the second and third claims must be dismissed pursuant to CPLR § 3211(a)(1), (a)(3) & (a)(7).

The court is also unpersuaded by plaintiffs' interpretation of the mechanism through which owners of book-entry interests, like plaintiffs, can exercise the Holder's rights in § 2.06. The relevant part states that "participants must rely on the procedures of Euroclear and Clearstream and indirect participants must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the Notes or to exercise any rights of Holders under this Indenture." NYSCEF Doc. No. 3, page 47.

Here, plaintiffs are owners of book-entry interests, a fact that is evidenced by the bank letters presented by plaintiffs. NYSCEF Doc. No. 89. Under § 2.06, they are indirect participants who can only rely on participants' procedures to exercise the Holder's rights. They have no right to rely on either clearinghouse's procedures to exercise Holder's rights because they are not participants. Plaintiffs' efforts to obscure the line between the two entities and the procedures that can be used to exercise relevant rights are unsuccessful here. NYSCEF Doc. No. 81, page 12. Therefore, the argument about using the authorization from the clearinghouse to sue defendants is not considered by the court. *Id*. pages 13-14.

If The Notes Are Held in The Form of Certificated Notes

According to § 2.06, the book-entry interests could be held in the form of Certificated Notes, and thus possibly expand the owner's right to remedy the default if § 2.04(e)(3) is triggered. NYSCEF Doc. No. 3, page 46. To trigger § 2.04(e)(3), an "Event of Defaults" defined by § 6.01 must happen, a declaration of acceleration defined by § 6.02 must have been made, and a written request from a Holder should have been received by the issuer. NYSCEF Doc. No. 3, page 44. Here, nothing in the record reveals that the trustee or Holders of the Global Notes have made such

a declaration of acceleration. Nor has the issuer received any written request from Holders of the Global Notes to exchange for the Certificated Notes. Since the preconditions to trigger § 2.04(e)(3) have not occurred, the Notes cannot be held in the form of Certificated Notes, hence the remedies contained in the Form of Reverse of Certificated Notes would not take effect and plaintiffs have no right to sue defendants thereunder. NYSCEF Doc. No. 3, pages 149-150.

In sum, plaintiffs at bar are not the trustee or the collateral agent of the Notes, nor do they prove to be the Holders of either Global Notes or Certificated Notes. Therefore, they do not have the legal capacity to sue defendants pursuant to the indenture or the underlying notes. The court need not analyze the substance of the claims since plaintiffs fail the threshold issue of capacity to bring action. Based on the foregoing, it is hereby

ADJUDGED that defendant' motion to dismiss pursuant to CPLR § 3211(a)(1), (a)(3) & (a)(7) is granted in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

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6/5/2023
DATE

LYLE E. FRANK, J.S.C.

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