At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of October, 2023.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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GREEN CAPITAL FUNDING LLC,

Plaintiff,

-against-

Index No.: 504203/2022

GRAND INCENTIVES INC d/b/a GRAND INCENTIVES, GRAND GETAWAYS and JOSE LUIS MARTINEZ,

DECISION AND ORDER

Defendants.

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The following papers read herein:	Doc. Nos.:
Notice of Motion/Affirmation/Exhibits	6-10
Affirmation in Opposition	13
Reply Affirmation	15

Defendants Grand Incentives, Inc. d/b/a Grand Incentives, Grand Getaways and Jose Luis Martinez (collectively, "Defendants") move for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing Plaintiff Green Capital Funding LLC's ("Plaintiff") complaint (Mot. Seq. No. 1). Moving Defendants also request judicial notice of certain court records. Plaintiff opposes the motion, arguing that (1) it has alleged the elements of its breach of contract claims and (2) the bankruptcy of a party to an agreement does not excuse performance by a non-debtor party.

Plaintiff commenced this action asserting claims for breach of contract, breach of personal guarantee, and attorneys' fees. On or about May 7, 2021, Plaintiff and Defendant Grand Incentives, Inc. ("Grand Incentives") and non-party StaySaver Vacations LLC ("StaySaver") entered into a future receivables sales and purchase agreement (the "Agreement"). Under the Agreement, Grand Incentives and StaySaver are defined collectively as "Seller." Defendant Jose Luis Martinez ("Martinez") signed a Personal Guarantee of Performance. Pursuant to the Agreement, Plaintiff agreed to pay $350,000 and Seller agreed to pay 25% of Seller's future receipts. Plaintiff alleges that Grand Incentive ceased depositing its account-receivables into an

account accessible to Plaintiff on January 18, 2022, resulting in a default under the Agreement. A day prior, StaySaver filed for bankruptcy. It is undisputed that only StaySaver filed for bankruptcy[1] and Grand Incentive remains in business.

In their motion to dismiss, Defendants argue that StaySaver's bankruptcy qualifies as a "Valid Excuse" under the Agreement, thus excusing performance by Grand Incentive. Specifically, Section 16 (b) (iii) provides that "Seller shall be excused from performing its obligations under this Agreement in the event Seller's business ceases its operations exclusively due to the . . . bankruptcy of Seller." Defendants claim that Plaintiff has failed to allege facts sufficient to establish the element of "breach" because Defendants' documentary evidence (i.e., the Agreement and bankruptcy court records) resolves this factual issue as a matter of law in their favor. Defendants now seek to dismiss Plaintiff's complaint under CPLR 3211(a)(7) for failure to state a claim and under CPLR 3211(a)(1) based on documentary evidence. Defendants also request that the Court take judicial notice of the bankruptcy court records annexed as "Exhibit 3" to their motion.

In opposition to the motion, Plaintiff claims that it properly asserted the elements of its breach of contract claims by: (a) alleging the existence of the Agreement and personal guarantee (collectively, the "Contracts"); (b) alleging the material terms of the Contracts by annexing copies of the same; (c) alleging that it performed by paying the purchase price; (d) alleging that Defendants partially performed and then breached the Agreement; and (e) alleging that it has been injured in the amount of $348,000 by Defendants' breach. In addition, Plaintiff contends that the parties expressly agreed to construe the term "Seller" collectively. However, even if the term "Seller" is construed collectively or individually, Plaintiff argues that Grand Incentives would only be excused from performance if it filed for bankruptcy as well. Plaintiff argues that Defendants' mixed interpretation of the Agreement is not only inconsistent, but also lacks sense in the context of the Agreement as a whole. Plaintiff further contends that under basic principles of bankruptcy law, a bankruptcy filing does not extend any benefits to non-bankrupt co-obligors. Since the Defendants are not bankrupt, Plaintiff avers that they are not entitled to any benefit from StaySaver's bankruptcy filing.

In reply, Defendants assert that under the Agreement, if "Seller" consists of more than one entity, that term means "individually and collectively, all such entities." Thus, "bankruptcy of

[1] On January 17, 2022, StaySaver filed a Voluntary Petition for Bankruptcy under Chapter 11 (NY St Cts Elec Filing [NYSCEF] Doc. No. 10). The bankruptcy was later converted to a Chapter 7 liquidation (*id.*).

Seller" could mean the bankruptcy of Grand Incentive and/or StaySaver. Defendants aver that since "Seller" is used in the collective throughout the agreement, the bankruptcy of one of the Seller entities excuses the performance of all Seller entities. Where a term is ambiguous, Defendants argue that it should be construed against Plaintiff, the drafter of the Agreement.

As a preliminary matter, the Court addresses Defendants' request for the Court to take judicial notice of the court records related to StaySaver's bankruptcy. This request was not opposed by Plaintiff in its opposition, and it is also undisputed that StaySaver filed for bankruptcy. Therefore, the Court takes judicial notice (*see Khatibi v Weill*, 8 AD3d 485, 485 [2d Dept 2004] [the "court may take judicial notice of undisputed court records and files"]; *RGH Liquidating Tr. v Deloitte & Touche LLP*, 71 AD3d 198, 207 [1st Dept 2009], *revd on other grounds*, 17 NY3d 397 [2011] [taking judicial notice of "uncontroverted public records of bankruptcy proceedings"]).

On a motion to dismiss under CPLR 3211(a)(7), a complaint is afforded liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). That is, "the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Uzzle v Nunzie Ct. Homeowners Ass'n, Inc.*, 70 AD3d 928, 929–30 [2d Dept 2010]). Pursuant to CPLR 3211(a)(1), a complaint will only be dismissed if there is documentary evidence that "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

A written agreement will be enforced, according to the plain meaning of its terms, if it is complete, clear and unambiguous (*Greenfield v Philles Recs., Inc.*, 98 NY2d 562, 569 [2002] Ambiguity exists if the agreement's language lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion (*see id.* [internal citations omitted]). "A court's fundamental objective in interpreting a contract is to determine the parties' intent from the language employed and to fulfill their reasonable expectations" (*Harmony Rockaway, LLC v Gelwan*, 200 AD3d 863 [2d Dept 2021]).

Plaintiff and Defendants concede that "Seller" is used or should be used collectively. Plaintiff argues that the parties agreed that "Seller" would be construed collectively, and Defendant contends that "Seller" is used in the collective throughout the Agreement. The Cambridge Dictionary defines "collectively" as a "group" (Cambridge Dictionary, collectively [https://dictionary.cambridge.org/us/dictionary/english/collectively]). Accordingly, it logically follows that "Seller shall be excused from performing [in the event of] bankruptcy of Seller" means

"Grand Incentive and StaySaver shall be excused from performing [in the event of] bankruptcy of Grand Incentive and StaySaver." Assuming arguendo that "Seller" was to be construed individually, StaySaver alone was excused due to its bankruptcy filing.

The Court is doubtful that the parties intended or expected that the bankruptcy of one entity would excuse the performance of another entity who remains in business and can still fulfill its obligations under the Agreement. This is evidenced by certain provisions in the Agreement. For instance, Section 1 (iii) states that the "representations, warranties, covenants, obligations and liabilities of each Seller shall be joint and several." Under Section 1 (vi), Plaintiff "may pursue its rights and remedies . . . against any one or any number of entities that constitute Seller without obligation to assert, prosecute or exhaust any remedy or claim against any other Seller or any Guarantor." Moreover, Section 16 (b) (iii) excuses Seller's performance upon the condition that their business has ceased operations, which Grand Incentives has neither alleged nor proffered evidence to establish.

Defendants' motion stands or falls on their contention that Grand Incentive did not breach the Agreement because StaySaver filed for bankruptcy. Since the Court finds that StaySaver's bankruptcy did not relieve Grand Incentive of its obligations, Plaintiff has adequately pled causes of action that are unrefuted by Defendants' documentary evidence.

Accordingly, it is hereby

ORDERED, that Defendants' motion is DENIED in its entirety.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice