

Target Capital 2 LLC v Susglobal Energy Corp.

2024 NY Slip Op 31836(U)

May 23, 2024

Supreme Court, New York County

Docket Number: Index No. 654879/2023

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. MELISSA A. CRANE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>TARGET CAPITAL 2 LLC</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>SUSGLOBAL ENERGY CORP.,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART 60M</p> <p>INDEX NO. <u>654879/2023</u></p> <p>MOTION DATE <u>03/11/2024</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 17 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

Plaintiff's unopposed motion for summary judgment in lieu of complaint is granted as set forth in this decision and order.

Plaintiff has established that that the motion papers were properly served. In addition, plaintiff has established prima facie entitlement to judgment as a matter of law.

Service

The second amended notice of motion (Doc 14) seeks substantially identical relief as the original and first amended notices of motion. In the second amended NOM, plaintiff selected a return date of 2/9/24 (Doc 14). The second amended NOM, together with the original motion papers and the first amended NOM, were sent by overnight mail (FedEx) on 12/27/23 (Doc 15). In the underlying note, defendant "irrevocably waive[d] personal service of process and consent[ed] to process being served in any such suit, action or proceeding by mailing a copy thereof via registered or certified mail or overnight delivery (with evidence of delivery) . . . at the address in effect for notices to it under this Note" (Doc 5 [note], section 8 [d]). In section 8 (a),

the note states that “[a]ny notice . . . shall be deemed given and effective on the earliest of: . . . the second Business Day following the date of mailing, if sent by U.S. nationally recognized overnight courier service.”

Plaintiff’s prima facie case

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, “other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *see Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *affd* 2022 NY Slip Op. 00806 [1st Dept 2022]).

The same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. Movant must make a prima facie case by submitting the instrument and evidence of the defendant’s failure to make payments in accordance with the instrument’s terms (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]).

Here, the underlying debt arises from the parties’ note (Doc 5). Pursuant to the parties’ sale and purchase agreement (SPA), plaintiff tendered \$1.25 million to defendant (*see* Doc 4 [SPA], Doc 3 [Shapiro *aff.*]). In exchange, defendant tendered the note, with a value of \$1,471,000, to plaintiff (Doc 5). Defendant was required to repay the note amount by 7/29/22. The note matured on that date but was not repaid (Doc 3, para 17). Pursuant to the parties note amendment (Doc 6), the note’s principal amount was increased by 10% to \$1,618,000 in exchange for an extended maturity date of 11/15/22 (*id.*; *see also* Doc 3, para 21). On 11/15/22, defendant did not repay the amount owed under the note as amended. Thereafter, plaintiff

converted a portion of the note into SusGlobal stock. According to plaintiff's managing member, it converted \$318,000 of the note into stock, leaving a principal balance of \$1.3 million (Doc 5, para 29).

Thus, plaintiff has established that defendant defaulted under the note and the note amendment and owes plaintiff \$1.3 million in principal. In addition, plaintiff is entitled to default interest at the contractual rate of 24% per annum from 11/16/22 (Doc 5, section 7 [b] [i]) as well as its reasonable attorneys' fees (*id.* section 8 [d] ["(T)the prevailing party . . . shall be reimbursed by the other party for its attorney's fees and other costs and expenses."]). The court will hold an inquest to determine the amount of plaintiff's reasonable attorneys' fees and costs. The inquest will be scheduled for 7/8/24 and it will be conducted on papers unless the parties request that the inquest be held in person at 60 Centre Street at least 10 days before the scheduled proceeding.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted, absent opposition, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$1,300,000, together with interest at the contractual default rate of 24% from November 16, 2022 until the date of this decision and order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the inquest to assess the amount of plaintiff's reasonable attorneys' fees and costs will be held on 7/8/24 at 9:30 a.m. The inquest will be held on papers unless the parties request an in person proceeding at least 10 days prior to the

inquest date by email, cc'ing all sides, to SFC-Part60@nycourts.gov. All papers in support of the inquest must be e-filed and emailed to the court by 6/17/24, and any opposition papers must be e-filed and emailed to the court by 7/1/24; and it is further

ORDERED that the Clerk is directed to mark this case disposed.

5/23/2024
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE