

Handl N.Y. LLC v Identity Group LLC

2024 NY Slip Op 31839(U)

May 24, 2024

Supreme Court, New York County

Docket Number: Index No. 655018/2023

Judge: Andrew Borrok

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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 53

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HANDL NEW YORK LLC, ALLEN HIRSCH,	INDEX NO. <u>655018/2023</u>
Plaintiff,	MOTION DATE <u>10/12/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>
THE IDENTITY GROUP LLC, NICK VARANO, PETER GIZZI, BRAD SATZ	
Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 5.24.24), the motion for summary judgment in lieu of complaint (Mtn. Seq. No. 001) is denied. Such relief is not appropriate in this case because the motion is not based on a sum certain that can be determined within the four corners of the instrument (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017]). As discussed, below the motion is converted into a complaint and the defendant is directed to final an answer within 20 days.

Reference is made to a certain Agreement of Handl New York, LLC (**Handl**), dated as of October 31, 2018 (the **Operating Agreement**; NYSCEF Doc. No. 19), whereby Mr. Allen Hirsch and The Identity Group LLC (**TIC**) undertook to manage Handl. TIC was granted an initial 1% equity in Handl, which percentage would rise and vest according to a certain Schedule B (NYSCEF Doc. No. 19, at 44). As part of the consideration to induce Mr. Hirsch to enter into the Operating Agreement, Mr. Brad Satz, Nicola Varano, Peter Gizzi (the principals of TIC), and

TIC executed a certain Guaranty (the **Guaranty**; NYSCEF Doc. No. 5 [second whereas clause]).

The Guaranty is attached to the Operating Agreement as Schedule G. The Guaranty is one guaranteeing both performance and payment, broadly providing among other things that it is absolute, irrevocable, and unconditional:

1. Guaranty. Guarantors hereby absolutely, irrevocably and unconditionally guaranty the **due and punctual performance when due of all agreements and obligations of the Company (including, without limitation, any obligation for the payment of money)** in connection with the operation of the Business, including, but not limited to, obligations of the Company under any of its contracts (**including manufacturing, distribution, warehousing and sales agreements**) and the other obligations of the Company that are the responsibility of TIG under the Agreement and/or the Agreed Terms and Conditions (collectively referred to as the “Guaranteed Obligations”).

2. Guaranty of Payment and Not of Collection. This Guaranty is a guaranty of **performance and payment**, and not of collection, and an obligation and debt of Guarantors for their own account. The Company shall not be obligated or required before enforcing this Guaranty against Guarantors to pursue any right or remedy the Company or Hirsch may have against third parties or commence any suit or other proceeding against such third parties in any court or other tribunal.

(*id.*, §§ 1-2 [emphasis added]). The Guaranty includes a broad waiver provision, whereby the guarantors waived, among other things, notice of acceptance or presentment, demand, protest or notice of any kind and otherwise waived their right to dispute amounts due or owing:

4. Waivers. The Guarantors, to the fullest extent permitted by applicable law, hereby waive notice of acceptance hereof or any presentment, demand, protest or notice of any kind, and any other act or thing, or omission or delay to do any other act or thing, which in any manner or to any extent might increase the risk of Guarantors or which otherwise might operate to discharge Guarantors from their obligations hereunder and hereby waive all rights the Guarantors may now or in the future have under any statute relating to sureties or otherwise related to the foregoing waiver. Any right which at any time the Guarantors have under existing or future laws to require that recourse be had to the assets of any other Person before any claim is enforced against the Guarantors in respect of the Guaranteed Obligations hereby assumed by the Guarantors are hereby abandoned and waived. Guarantors agree that if at any time Hirsch or the Company sues Guarantors in respect of this Guaranty and the Company is not sued also, the Guarantors shall not claim that the Company must be made a party to the proceedings. Guarantors agree to be bound by this Guaranty whether or not it is made a party to legal proceedings for the recovery of any amount due or owing to the Company or Hirsch and whether the formalities required

by any law whether existing now or in the future in regard to the rights or obligations of sureties shall or shall not have been observed.

(*id.*, § 4). The guarantors agreed to guaranty personally all obligations of Handl until the date on which a certain “TIG Interim Performance Test Satisfaction” occurs, *i.e.*, when purchase orders net of returns for which TIG is responsible reach \$15 million (*id.*, § 8; NYSCEF Doc. No. 19, §§ 1.89 & 1.91). Thus, this is not a springing guaranty or one that terminates in its entirety when the TIG Interim Performance Test Satisfaction occurs. It terminates only as to future obligations that accrue after that date occurs. In any event, Mr. Hirsch states in his affidavit that this requirement was never satisfied:

20. Paragraph 8 of the Guaranty provides that it remains in effect until the date of “TIG Performance Test Satisfaction.”

Term of Guaranty. This Guaranty shall be and remain in effect as to all Guaranteed Obligations arising or accruing or becoming owing at any time or times prior to, but not after, the date of TIG Interim Performance Test Satisfaction.....

21. Section 1.89 of the HANDL Operating Agreement provides that the date of “TIG Interim Performance Test Satisfaction” is the date “[w]hen TIG Sales are \$15 million in the aggregate.”

22. Those sales and that date have not yet been achieved

(NYSCEF Doc. No. 3, ¶¶ 20-22).

As relevant to this case, Handl filed for bankruptcy on June 31, 2021, under Chapter 11 of the Bankruptcy Code and submitted a Voluntary Petition for Non-Individuals Filing for Bankruptcy in the United States Bankruptcy Court for the District of Delaware (the **Petition**; NYSCEF Doc. No. 22, at 2). The Petition listed the at-issue Operating Agreement as an executory contract under Schedule G (*id.*). In the Debtor’s Third Amended Plan of Reorganization (the **Plan**),

however, the Debtor's rights to enforce the Guaranties were explicitly preserved, despite rejection of the Operating Agreement:

1. The Debtor's Operating Agreement, to which it was a party with Mr. Hirsch and TIG. This agreement shall be deemed rejected by confirmation of the Plan, effective as of the Effective Date; provided, however, ***that the rejection shall not affect (i) the Debtor's rights to enforce the Guaranties (as defined below), and (ii) the rights between and among any non-debtor parties under the agreement.*** Notwithstanding the foregoing, the Debtor may assume the Operating Agreement instead of rejecting it, by motion filed on or before the Confirmation Date.

(NYSCEF Doc. No. 24, at 26 [emphasis added]). The Plan also provides for a retention of jurisdiction by the bankruptcy court for issues arising from the assumption or rejection of executory contracts (*i.e.*, the Operating Agreement):

6.4 Retention of Jurisdiction by the Bankruptcy Court.

The Bankruptcy Court shall retain jurisdiction of this case with regard to the following matters: (i) to make such orders as are necessary or appropriate to implement the provisions of this Plan and to resolve any disputes arising from implementation of the Plan; (ii) to rule on any modification of the Plan proposed under Bankruptcy Code section 1193; (iii) to hear and allow all applications for compensation to professionals and other Administrative Expenses; (iv) to resolve all issues regarding Claims objections, and issues arising from the assumption/rejection of executory contracts or unexpired leases, and (v) to adjudicate any cause of action which may exist in favor of the Debtor, including preference and fraudulent transfer causes of action.

(NYSCEF Doc. No. 24, § 6.4). Section 2.5(j) "Net Guaranty Recoveries" of the Plan, however, explicitly carves out and preserves Handl's ability to pursue recovery under the Guaranty:

(i) **The Debtor shall be permitted, but not required, to pursue recoveries against TIG and its members on account of certain personal guaranties (each a "Guaranty," and collectively, the "Guaranties")** they executed "in connection with the operation of the Business, including, but no limited to, obligations of the Company under any of its contracts (including manufacturing, distribution, warehousing and sales agreements) and the other obligations of the Company that are the responsibility of TIG under the Agreement, and/or the Agreed Terms and Conditions (collectively referred to as the "Guaranteed Obligations")."

(ii) Nothing in this Plan shall limit or otherwise affect the right of the Debtor and/or Mr. Hirsch to enforce and recover upon any Guaranteed Obligations. Any amounts recovered

upon any Guaranteed Obligations, less any actual expenses (including but not limited to actual attorneys' fees and costs) and less a 15% collection charge (which shall be retained by the Debtor), shall constitute "Net Guaranty Recoveries" under this Plan.

(*id.*, § 2.5[j][i - ii] [emphasis added]). Lastly, and in contrast to the broad jurisdictional provision in Section 6.4, Section 2.5 of the Plan notes specifically that the bankruptcy court would retain "non-exclusive jurisdiction to enforce the Guaranty" (*id.*, § [j][v]).

The Plan was confirmed by the bankruptcy court on June 2, 2022 (the **Bankruptcy Order**; NYSCEF Doc. No. 7), with the bankruptcy court specifically confirming the carve-out and preservation of Guaranty-related claims:

9. Preservation of Certain Litigation and Causes of Action. Except as otherwise expressly provided in the Plan or herein, all claims, rights, defenses, offsets, recoupments, causes of action, actions in equity, or otherwise, whether arising under the Bankruptcy Code or federal, state, or common law, that constitute property of the Estate within the meaning of § 541 of the Bankruptcy Code, as well as all claims, rights, defenses, offsets, recoupments, and causes of action arising under Chapter 5 of the Bankruptcy Code (including without limitation the Litigation Claims) with respect to the Debtor or its Estate, shall be and hereby are preserved for the benefit of the Debtor and the Estate, as set forth in the Plan. **Nothing in the Plan, including but not limited to the rejection of any executory contract, shall limit the enforceability by the Debtor or any third party of the Guaranties** (as defined in the Plan). None of the facts or terms stated in the Plan shall constitute an admission.

(*id.* [emphasis added]). The Bankruptcy Order provided for the retention of jurisdiction "in accordance with the terms of the Plan and §§ 1141 and 1142 of the Bankruptcy Code" (NYSCEF Doc. No. 7, ¶ 22), thus incorporating the jurisdictional provision of the Plan in Section 2.5(j).

The plaintiffs bring this motion pursuant to CPLR 3213 for summary judgment in lieu of complaint to enforce the Guaranty and collect on various debts arising from or related to the bankruptcy proceeding, to wit (i) "Post-Petition Administrative Expenses" in the amount of

\$234,594.67, (ii) “Secured Claims” in the amount of \$442,113.00, and (iii) “General Unsecured Claims” in the amount of \$1,782,505.58 (NYSCEF Doc. No. 3, ¶ 26).

Summary judgment in lieu of complaint is an accelerated procedure for the adjudication of actions based on instruments for the payment of money only (CPLR 3213; *see also Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 491 [2015]). To make out a *prima facie* case, a plaintiff must demonstrate there was a suitable instrument and failure to make payments under that instrument (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). A document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make a more than *de minimis* deviation from the face of the document (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017]; *cf. CBRE, Inc. v. Four-C Realty Company, et al.* Index 656477/2019, NYSCEF Doc. No. 6 [commission agreement explicitly provided the exact amount due]).

The Guaranty at issue in this case falls squarely under the rule in *PDL Biopharma*. The amounts allegedly due here can not be computed within the four corners of the Guaranty, and this court would certainly have to make more than a *de minimis* deviation from the face of the document to ascertain those amounts (indeed, at oral argument the plaintiffs directed the court to NYSCEF Doc. No. 9 when discussing amounts due) (*PDL Biopharma*, 147 AD3d at 495).

The defendants raise numerous arguments in favor of dismissal. They are all unavailing. On the record before the court, the Plan was confirmed in June of 2022 (NYSCEF Doc. No. 7). As an

independent matter, the bankruptcy court does not have exclusive subject matter jurisdiction over this case. To the contrary, the Bankruptcy Order acknowledged that the bankruptcy court “shall retain jurisdiction in accordance with the terms of the Plan” (NYSCEF Doc. No. 7, ¶ 22). The Plan, in turn, specifically states that the bankruptcy court would have *only non-exclusive jurisdiction* over enforcement of the Guaranty (NYSCEF Doc. No. 24, § 2.5[j]). The defendants’ argument based on Section 6.4(iv) of the Plan’s general jurisdictional clause is thus unavailing. Lastly, dismissal based on their arguments (i) that the Guaranty is substantively unconscionable (it is not) or (ii) that Mr. Hirsch breached the Operating Agreement by virtue of the Termination Letter (NYSCEF Doc. No. 20) also fail.

The court has considered the parties’ remaining arguments and finds them unavailing.

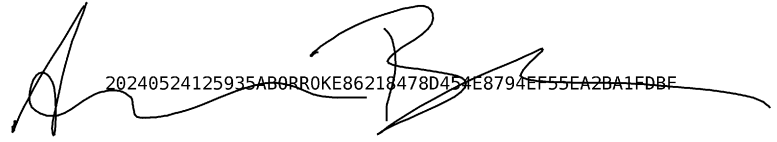
Accordingly, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint is denied and the matter converted to a plenary action; and it is further

ORDERED that the cross-motion to dismiss is denied; and it is further

ORDERED that the plaintiffs’ moving papers are hereby deemed the complaint in this action and the defendants are directed to file an Answer within 20 days of this decision and order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference via the Microsoft Teams platform on July 5, 2024, at 11:30 AM.


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5/24/2024
DATE

ANDREW BORROK, 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