SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

----------X

GUY KWOK-HUNG LAM,

Plaintiff,

- v -

TOR ASIA CREDIT MASTER FUND, L.P., and ANDREW OKSNER,

Defendants.

INDEX NO. 653542/2022

MOTION DATE 06/05/2023, 10/25/2023, 10/25/2023

MOTION SEQ. NO. 004 006 007

DECISION + ORDER ON MOTION

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 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, 70, 71, 72, 82, 84, 85, 88, 90, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 106, 112, 113
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 114, 115, 116, 148
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 149, 151, 152, 153, 154
were read on this motion to/for DISMISS.

In this action arising out of a loan agreement and personal guaranty, defendants Andrew Oksner and Tor Asia Credit Master Fund LP ("Tor") each move to dismiss plaintiff's Amended Complaint (MS 006 & MS 007, respectively). Tor separately moves for summary judgment in lieu of counter-claims (MS 004). Plaintiff Guy Kwok-Hung Lam, a solicitor in London proceeding *pro se* in this action, opposes all three motions.

For the reasons below, the court resolves the pending motions as follows: (1) Oksner's motion is granted; (2) Tor's motion to dismiss is granted in part; (3) the Amended Complaint is accordingly dismissed as to all claims except Count 5 for waiver; and (4) Tor's motion for summary judgment in lieu of counterclaims is denied.

BACKGROUND

This case relates to three agreements between plaintiff, Tor, and non-party CP Global Inc. (CP Global), some or all of which were negotiated by Oksner. Plaintiff is the sole shareholder and director[1] of CP Global, and at all relevant times owned or controlled many of CP Global's affiliates and subsidiaries, including CP Holdings, CP Homes Group, CP Assets, and more (together "CP entities") (NYCSEF # 105, Amended Complaint or AC ¶¶ 14-17). Since 2015, Oksner has been president of CP Global and CP Holdings and holds "management and board roles within the CP Homes Group of companies" (*id.* ¶¶ 18-19).

In 2017, Oksner introduced plaintiff to Tor as a potential financier to expand CP Global's business operations (*id.* ¶ 20). Negotiations with Tor culminated in the three aforementioned interlocking agreements ("the Loan Documents"), all executed on or about July 11, 2017: (a) a Credit & Guaranty Agreement between CP Global and Tor for a $29,500,000 loan ("CGA") (*id.* ¶ 22; CGA, CGA); (b) a Security & Pledge Agreement ("SPA") between several CP entities and Tor (AC¶ 28; NYSCEF # 123, SPA); and (c) an equitable mortgage between plaintiff and CP Global (Mortgage) (NYSCEF # 124, Mortgage; *see also* AC ¶ 73 ["value of the equitable mortgage provided by [p]laintiff . . .]). The CGA was amended three times, with the third amendment currently controlling ("Third Amendment") (AC ¶¶ 26-27; Third Amend., Third Amendment).

The CGA[2]

Pursuant to the CGA, Tor was to lend CP Global $29,500,000 (AC ¶¶ 29-30; CGA at Article 10). The CGA required CP Global to make payments on specific deadlines, with failure to do so constituting an "Event of Default" (AC ¶ 22; CGA §§ 2.01, 2.04 [a], 2.05 [b] – [c], 9.01 [a]). Upon an Event of Default, the CGA authorized Tor to accelerate the debt "without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived" (CGA § 9.02 [b]).

Plaintiff agreed to personally guaranty the CGA (AC ¶¶ 29-30; CGA § 10.01). As guarantor, plaintiff promised that "if any of the Obligations [were] not paid in full when due," he would "promptly pay the[m], without any demand or notice whatsoever" (CGA § 10.01). Plaintiff also waived "notices of default under any Loan Document" or other related agreements (*id.* §§ 10.02, 10.04). However, the CGA limited recovery against plaintiff to "an aggregate amount equal to the largest amount that would not render such obligations subject to avoidance under the Insolvency Laws" (*id.* § 10.01).

---

[1] It is unclear from the Amended Complaint if plaintiff is still a director.

[2] In their briefs, the parties refer to the CGA as "CPG Debenture," "the Agreement," "the Loan," "Credit Agreement," and more. For simplicity, CGA is used here.

Plaintiff alleges that during negotiations, he informed both Tor and Oksner that he would not agree to include his personal residence as part of the collateral to the CGA (AC ¶ 23). Plaintiff alleges both Oksner and Tor understood and agreed and that all parties intended to exclude his personal residence from any contemplated collateral (*id.* ¶ 24). However, unbeknownst to plaintiff, his personal residence was "mistakenly included" under the definition of "Personal Guarantor Real Property" without his permission or knowledge (*id.* ¶¶ 24-25; *see also* CGA § 7.19).

The CGA by its terms requires all amendments or waivers to be in writing—oral waivers are prohibited (CGA § 12.01 ["No amendment or waiver of any provision of any Loan Document . . . shall be effective unless in writing executed by (1) [sic] the Lender and the Borrower or the Loan Parties party to the applicable Loan Document"]). The parties followed this provision for all three amendments to the CGA, culminating with the Third Amendment (NYSCEF # 127, Third Amend.).

Finally, the parties to the CGA agreed to "submit[] to the exclusive jurisdiction" of New York's state and federal courts for "all legal proceedings arising out of or relating to" any of the three agreements ("Exclusive Jurisdiction Clause" or "EJC") (*id.* § 12.16 [b]). Lawsuits "seeking enforcement against any collateral or other property," however, can be brought in "courts of any jurisdiction where such property is located to the extent such courts have jurisdiction over the relevant loan party or over such collateral or other property" (*id.*).

The SPA[3]

The SPA "relates to the potential exchange of collateral under the" CGA, although the Amended Complaint includes very few allegations about it (*see, e.g.*, AC ¶¶ 28, 62). The collateral appears to consist of nearly all of the assets of each guarantor except for certain excluded property such as the property covered by the Equitable Mortgage (described below) (SPA § 2). Upon an Event of Default under the CGA, Tor may "apply for" receivers over the collateral and have those receivers "appointed under state or federal law by a court of competent jurisdiction" (AC ¶¶ 62, 88, 106; SPA § 8[i]).

Equitable Mortgage

The final agreement at issue is the Mortgage, dated the same day as the CGA and SPA. Per the Mortgage, plaintiff gave Tor "a first ranking equitable mortgage (the 'Security')" over all of his shares of CP Global—which, because he is sole shareholder of CP Global, consisted of *all the shares* of CP Global ("the Shares") (*see* NYSCEF # 120, Tor MTD MOL at 4; Mortgage § 4.3). Upon an Event of Default, plaintiff promised "to pay and discharge as principal obligor and not merely as

[3] The parties variously refer to this as the "Security Agreement" or "Pledge Agreement."

surety all of the Obligations" under the CGA (Mortgage § 2). The Mortgage also becomes "immediately enforceable" upon an Event of Default (*id.* § 7.1).

Tor gains several rights and remedies when the Mortgage becomes "enforceable." Most relevant here, Tor is authorized to "appoint any one or more persons to be a [r]eceiver of all or any part of the Security Assets [the Shares]" (*id.* § 9.1 [a]). Any such appointment must be made "by deed, under seal or in writing" (*id.* § 9.1 [b]). The receiver then takes "immediate possession of, get[s] in and collect[s] any Security Asset" (*id.* § 10.2). Additionally, upon an Event of Default, Tor "may exercise (in the name of [plaintiff] and without any further consent or authority on the part of [plaintiff]) any voting rights and any powers or rights which may be exercised by the legal or beneficial owner of [the Shares]" (*id.* § 6.6[c]).

July 2017 – July 2019: Breaches Resulting in the Third Amendment to CGA

Plaintiff alleges that between July 2017 and June 22, 2019, CP Global repeatedly defaulted on its loan obligations (AC ¶ 35). Plaintiff alleges that during this period, Tor would "provide notice to CP Global, and the guarantors" whenever Tor had "concerns relating to potential Events of Default . . . or otherwise had issues related to performance and the protection of its interests" (*id.* ¶ 32). Those notices led to discussions, which in turn led to "CP Global and guarantors . . . mak[ing] reasonable accommodations to address the concerns of Tor" (*id.* ¶ 33). Ultimately, these accommodations were recorded into "written or oral amendments," and the parties would "continue performance" (*id.* ¶¶ 33-34). Plaintiff alleges that these "good faith negotiations left no alleged Events of Default uncured through written or oral amendment or otherwise through waiver" (*id.* ¶ 34).

This process occurred at least three times, culminating with the Third Amendment on June 22, 2019 (AC¶ 38). As part of the Third Amendment, CP Global admitted to several Events of Default, and Tor agreed to conditionally waive these defaults if CP Global paid further fees (Third Amend. at Recitals & § 6.1). The parties also agreed to extend the Maturity Date to December 31, 2019 (*id.* §§ 6.1, 2.04 [b]; AC ¶ 38). The Maturity Date could be further extended to July 13, 2020 if CP Global met certain conditions, including paying a "Pay Down Amount" (AC ¶ 39; Third Amend. § 2.04 [b]).

November 2019–April 2020: Bank Leumi Refinancing Negotiations

At a meeting on November 8, 2019, roughly two months before the December 31, 2019, Maturity Date, plaintiff informed Tor that CP Global would not be able to repay the loan without refinancing (*see* AC ¶ 41; *see also* NYSCEF # 128, Letter from Tor to Plaintiff 11/13/2019, at 1). On November 13, 2019, Tor sent the following letter response:

> "In our meeting on November 8, 2019, you [plaintiff] indicated that the Company [CP Global] may not be able to repay the relevant amounts

> on December 31, 2019. Our position remains unchanged from that set forth in the Third Amendment, [sic] an extension past December 31, 2019 requires payment of the Pay Down Amount and satisfaction of the other conditions to the extension. We will not tolerate any failure to comply with the terms of the Third Amendment, particularly with respect to the timely payment of the amounts set forth therein, and will aggressively exercise our rights as lender."

(NYSCEF # 128 at 1).[4] The letter also states that waivers "will be effective only if given in writing," and that "[n]o failure to exercise, nor delay in exercising . . . any right or remedy . . . does, will, or is intended to operate as a waiver of any Event of Default" (*id.*).

Despite Tor's letter, plaintiff searched for refinancing opportunities by "sen[ding] Oksner to a financing conference in the United States where he met with several potential lenders" (AC ¶ 42). As alleged, the most attractive lending offer came from non-party Bank Leumi USA ("Bank Leumi") (*id.*).

Oksner proceeded to negotiate the refinancing from Bank Leumi while simultaneously negotiating for Tor's approval of this refinancing plan. Plaintiff alleges, and submits evidence indicating, that over the course of December 2019, Oksner repeatedly informed him that Tor "responded positively" to refinancing discussions (*see id.* ¶ 43). For example, on December 11, 2019, Oksner texted plaintiff that Bryant Stone, a high-ranking individual within Tor, asked for "further certainty that the Bank Leumi quote is real," and suggested that "perhaps [Tor was] considering an accommodation of some type" (NYSCEF # 96, Oksner Text 12/11/2019).[5] On December 21, 2019, Oksner texted plaintiff a "near final Bank Leumi term sheet" which would give funds at the end of February 2020 (NYSCEF # 97, Oksner Text 12/21/2019). Oksner further stated that "Tor is Ok with that [timeline]" (*id.*).

The Bank Leumi negotiations allegedly culminated in a signed term sheet,[6] pursuant to which (a) Bank Leumi would extend a $22,000,000 term loan facility to non-party Pacrim US LLC—a guarantor of the CGA and subsidiary to a CP entity;

---

[4] Under CPLR 3211(c), "[u]pon the hearing of a motion made under [3211] subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment." Thus, the court may consider this letter because it is integral to the complaint, in that plaintiff makes allegations about Tor's reaction to the news of refinancing, and this document directly shows that reaction

[5] While plaintiff originally filed this and other text and email exhibits in opposition to Tor's SJILC motion, he also cites to these texts and email in his opposition to the motions to dismiss (*see* NYSCEF # 148, Pltf's Opp to Oksner MTD, at 6 n. 2; NYSCEF # 149, Pltf's Opp. to Tor MTD, at 5 n. 1).

[6] It is unclear when the term sheet was signed, as the allegations and evidence give contradictory answers (*compare* Am.Compl. ¶ 46 [Term Sheet signed December 20, 2019] *with* NYSCEF # 97 [Oksner says on December 21 that Bank Leumi wanted them to sign by "next Monday (December 23), latest Tuesday (December 24)"]).

(b) Tor "would be required to subordinate part of its security to Bank Leumi;" (c) plaintiff would personally guarantee the Bank Leumi loan/financing; and (d) all parties would endeavor to close the deal by end of February 2020—after the Maturity Date in the CGA (AC ¶¶ 45-46).

Because the Bank Leumi refinancing was meant to close after the Maturity Date, plaintiff alleges that the parties went into 2020 with the knowledge and understanding that:

> "(i) Tor Asia would allow the refinancing with Bank Leumi to proceed; that "(ii) Tor Asia did not intend to make any claim that CP Global (or [p]laintiff) were in default of their obligations during that time period; and (iii) that it was not necessary for [p]laintiff to obtain a formal extension of the [CGA] through a fourth amendment of the same."

(AC ¶ 48). Plaintiff further alleges that he and Oksner met with unspecified "representatives of Tor Asia" on January 15, 2020, who "made it clear that refinancing was in their best interests" and that plaintiff would retain control of his companies (*id.* ¶ 49).[7] On January 19, 2020, Oksner texted plaintiff several conditions from Stone/Tor relating to granting permission for the Bank Leumi refinancing, including paying Tor $200,000 within two weeks and pledging certain shares in other companies owned or controlled by plaintiff (NYSCEF # 98, Oksner Texts 1/19/2020; *see also* AC ¶ 50). AC ¶ 97). On January 25, 2020, Oksner texted plaintiff an email from Stone as follows:

> "Without prejudice and subject to contract/cost"
>
> "Andy [Oksner],
>
> As you are aware CP Homes is in default and we reserve all our rights. We have considered internally and suggest some ways we may be willing to amend the terms of our agreement, subject to final investment committee approval and signing of definitive legal documentation."

(NYSCEF # 99, Oksner Text 1/25/2020, at 1-2; Am.Compl. ¶ 52). These conditions included plaintiff personally guaranteeing the Bank Leumi loan and closing the loan by February 28, 2020 (NYSCEF # 99 at 1).

The parties' negotiations continued through late February 2020. On February 22, 2020, Oksner sent an email to Stone and another Tor employee with the subject line "Loan Amendment Proposal/Non-Binding Privileged & Confidential" (NYSCEF # 100, Oksner Emails 2/22-26/2020, at *1-2). The email extended Tor a "proposal in regards to the overdue Tor loan" in which Tor would "agree[] that its loan with CP

[7] This is arguably the only time plaintiff alleges he personally spoke to anyone at Tor. All other instances are through Oksner.

Global is not in default and extend[] such loan to June 30, 2021" conditioned on close of the Bank Leumi loan (*id.*). Plaintiff, meanwhile, would "provide any personal guarantees necessary to realize the Bank Leumi loan" (*id.*). Stone replied on February 26:

> "Dear Andy,
>
> **Without prejudice save as to cost**
>
> Please see our updates attached, we look forward to reviewing the updated S&U and Ben [sic] Leumi loan documentation."

(*id.* at *5 [emphasis in original]). Oksner forwarded the initial email and Stone's reply to plaintiff, explaining that Tor had accepted the above terms and had rejected only one term not relevant to this case (*id.* at *6).

Despite these positive steps, the parties did not close the Bank Leumi loan by February 28, 2020, nor did plaintiff make any effort to meet the requirements to extend the Maturity Date under the Third Amendment. Instead, on April 3, 2020,[8] Oksner emailed plaintiff several updates and informed him that Stone "promised me a draft new Loan Amendment next week [on or about April 10, 2020]" (NYSCEF # 101, Oksner Email 4/3/2020; AC ¶ 54). Plaintiff alleges that he relied on Stone's promise by deciding not to extend the Maturity Date under the Third Amendment or sign the personal guarantee for the (still to-be-negotiated) Bank Leumi loan on April 7, 2020 (AC ¶ 55; *see also* NYSCEF # 102, Limited Guaranty of Bank Leumi loan). Ultimately, the parties ever executed Bank Leumi loan, nor are there any allegations that CP Global or any guarantor ever made payments towards the Tor loan.

Tor's Takeover of CP Global and Worldwide Litigation

Plaintiff alleges that unbeknownst to him, Oksner and Tor had secretly conspired to "force a default under the [CGA] so that Tor [] could exert control over [p]laintiff's valuable assets, and so that Oksner could increase his position of power and value within [p]laintiff's network of companies" (*id.* ¶ 56). As part of that conspiracy, plaintiff alleges that Oksner allowed a "Deposit Account Control Agreement" (DACA) to be terminated and replaced by one that "increase[ed] Tor[]'s control over certain [unspecified] accounts" (*id.* ¶ 57). He also alleges that Oksner wanted to use the new account to apply for a PPP loan at the start of the global pandemic (*id.* ¶ 58).

Ultimately, on April 15, 2020, just eight days after plaintiff signed the personal guaranty for the (still un-executed) Bank Leumi loan, Tor "ambushed"

[8] The parties do not provide any details about their negotiations between February 28, 2020 and April 3, 2020.

plaintiff by appointing receivers over plaintiff's shares in CP Global pursuant to the Mortgage, and then exercised the voting rights of those shares to replace managers and directors of various CP entities (NYSCEF # 46 ¶ 38; AC ¶ 59; *see also* NYSCEF # 51, Deed of Appointment of Receivers and Managers).[9] Tor did not send plaintiff any prior notice of default or give any warning that the Bank Leumi negotiations would be terminated in this way (AC ¶¶ 60–61). Plaintiff alleges that he only received a short letter stating that receivers had been appointed (*id.* ¶¶ 62-63). A Tor-appointed individual would go on to send letters purporting to assume control over the companies and took actions that allegedly harmed plaintiff monetarily (*id.* ¶¶ 64-67).

Plaintiff alleges that Tor never intended to allow plaintiff to refinance the loan or extend the Maturity Date (*id.* ¶ 68). Instead, Tor and Oksner worked together to "lull [p]laintiff into refraining from exercising his rights to extend the Maturity Date . . . in order to wrongfully assert control over the collateral" (*id.* ¶¶ 68-69). According to plaintiff, Oksner misrepresented or distorted his discussions with Tor to bring about this outcome (*id.* ¶ 69). As support, plaintiff alleges that around the time of Tor's takeover, Oksner "deleted all of the e-mails between him, [p]laintiff, and/or Tor [] (and upon information and belief, all other e-mails in existence)" (*id.* ¶ 70). Plaintiff learned of this deletion when, upon receiving notice of the takeover, he tried to access his company's system to review Oksner's emails with Tor but was informed by staff "that Oksner's e-mails had been willfully deleted" (*id.*).

Since Tor's takeover, the parties have engaged in litigation across the world. Tor almost immediately commenced a bankruptcy action against plaintiff in Hong Kong to recover under plaintiff's personal guarantee (*id.* ¶¶ 72-74). While Tor was victorious at the trial level (*see* NYSCEF # 137, Hong Kong Bankruptcy Court Decision), the decision was reversed at both the appellate level and by the Hong Kong High Court, with costs awarded to plaintiff (AC ¶ 74). Both appeals courts determined that the CGA's Exclusive Jurisdiction Clause required Tor to bring suit in New York (*see* NYSCEF # 141, Hong Kong Appellate Court Decision; NYSCEF # 142, Hong Kong Highest Court Decision).

Tor also used its voting power to cause certain CP entities to declare voluntary bankruptcy in the Federal District of Delaware and commence an adversary proceeding against plaintiff (*see* NYSCEF # 136, Hearing Tr in Delaware Bk. Ct). The federal bankruptcy court ultimately approved the sale of "substantially all CP Holdings' and Pacrim U.S. LLC assets to Tor" (NYSCEF # 120, Tor MTD, at 6; *see also* NYSCEF # 138, Order of District of Delaware).[10] Plaintiff alleges that the

---

[9] While the Deed was submitted only in support of the briefing on Tor's motion for summary judgment in lieu of complaint on its counterclaims, the court is permitted to search the docket and consider documents.

[10] The court also dismissed the case without prejudice that same day on a motion by Lam (*see* NYSCEF # 67, Delaware Bk. Dismissal).

various takeovers and sales resulted in at least $736 million in damages (Am.Compl. ¶ 76).

Meanwhile, plaintiff initially brought an injunction against Tor in the Cayman Islands per the Mortgage, but ultimately withdrew that case (*see* NYSCEF # 58, Originating Summons in Cayman Action; NYSCEF # 59, Order Discontinuing Cayman Action). Plaintiff also brought actions both here in New York and in Texas, but discontinued both via stipulations (NYSCEF # 68, Stipulation of Discontinuance in Original NY Case; NYSCEF # 69, Joint Notice of Non-Suit Without Prejudice in Texas Action).

Current Case and Procedural History

Plaintiff commenced this action against Oksner and Tor on September 27, 2022 (NYSCEF # 1, Original Complaint).[11] Tor responded and moved for Summary Judgment in Lieu of Counterclaim pursuant to CPLR 3213 ("SJILC") (NYSCEF # 44, Notice of SJILC [MS 004]). Tor contends that plaintiff breached the CGA by failing to repay Tor under his personal guaranty (NYSCEF # 45, Tor SJILC MOL at 2).

Plaintiff filed an Amended Complaint on September 14, 2023, which asserted 14 claims against Tor and Oksner (AC ¶¶ 86-210). Tor and Oksner now each separately move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1), (a)(3), (a)(7), and CPLR 3016(b) (NYSCEF # 114, Oksner Notice of MTD [MS 006]; NYSCEF # 119, Tor Notice of MTD [MS007]).

Motions to Dismiss by Oksner & Tor (MS 006 & 007)

Legal Standard

CPLR 3211(a) provides for various grounds under which a party may move for judgment dismissing one or more causes of action. Pursuant to CPLR 3211(a)(7) a party may move to dismiss when a pleading "fails to state a cause of action" (CPLR 3211 [a] [7]). On such a motion, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the non-movant] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation omitted]; *accord Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]). The court will not, however, accept "conclusory allegations of fact or law not supported by allegations of specific fact" (*Wilson v Tully*, 243 AD2d 229, 234 [1st Dept 1998]). This pleading standard is heightened for

[11] Plaintiff is now proceeding *pro se*. He was previously represented in all of the above actions, but his attorneys were granted leave to withdraw early in this case (*see* NYSCEF # 13, Order Granting Withdrawal).

claims of misrepresentation, fraud, mistake, and breach of trust (CPLR 3016[b]). Such claims must be pled with particularity, meaning they are supported with "specific facts with respect to the time, place, or manner" of the misrepresentations or omissions (*CMB Export Infrastructure Inv. Group 48, LP v Motcomb Estates, Ltd.*, 223 AD3d 513, 514 [1st Dept 2024], citing *Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487, 488 [1st Dept 2014]). Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). But where evidence is submitted in support of a CPLR 3211(a)(7) motion, the inquiry "changes . . . from whether the pleader has *stated* a cause of action to whether the pleader *has* a cause of action amenable to relief" (*Holder v Jacob*, 216 NYS3d 134, 141 [1st Dept 2024] [emphasis in original]).

Similarly, CPLR 3211(a)(1) allows for dismissal if a "defense is founded upon documentary evidence" (CPLR 3211 [a] [1]). Dismissal based on documentary evidence under 3211(a)(1) is warranted "only where 'it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it' " (*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [alterations omitted], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In those circumstances "where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal quotations omitted]).

Finally, under CPLR 3211(a)(3), a party may move to dismiss on the ground that the party asserting the cause of action lacks "legal capacity to sue" (*see* CPLR 3211 [a] [3]). Capacity "concerns a litigant's power to appear and bring its grievance before the court" (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). Capacity, or lack thereof, "often depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or . . . a business corporation" (*Sec. Pac. Natl Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]).

Threshold Issue: Standing

As a threshold matter, Tor argues that plaintiff does not have standing to bring several of his claims. According to Tor, plaintiff is merely a guarantor to the CGA, and thus "may not assert [the] principal obligor's claims or defenses" (NYSCEF # 120 at 8). This argument would affect Counts 1, 3,[12] 5, and 6 (*id.*).

[12] Tor mistakenly refers to Count 2, which Tor describes as a claim for "Breach of Contract—Wrongful Appointment of Receivers and Wrongful Assumption of Collateral" (NYSCEF # 120 at 8-9). However, Count 2 is actually a claim for "Declaratory Judgment—Limitation of Damages" (*see* Am.Compl. ¶¶ 94-103). Count 3 is the relevant Breach of Contract claim (*see id.* ¶¶ 104-110).

Tor would ordinarily be correct, because generally, a guarantor may not assert a principal's claims or defenses to a guaranty agreement except in certain limited circumstances (*see Walcutt v Clevite Corp.*, 13 NY2d 48, 56 [1963]). Where Tor errs is in the initial premise that plaintiff is merely a guarantor to the CGA. Per the Mortgage—a different but related contract submitted by Tor in support of this motion—plaintiff promised "to pay and discharge **as principal obligor and not merely as surety** all of the Obligations [as defined in the CGA]" (Mortgage at *5, § 2 [emphasis added]; *see also id.* § 1.2 [a] [capitalized terms like "Obligations" have same meaning as CGA unless expressly defined in the Mortgage]). Thus, the parties agreed that plaintiff is a principal to the CGA. Plaintiff therefore may assert these claims.

Counts 1 & 3: Declaratory Judgment and Breach of Contract—Wrongful Appointment of Receivers and Wrongful Assumption of Collateral (Tor)

Count 1 seeks a declaration that "the appointment of the receivers, and any and all actions taken by the receivers thereafter, are null and void" because Tor did not properly "apply for" their appointment per § 8(i) of the SPA (AC ¶¶ 88-91). These allegations are nearly identical to Count 3, which pleads breach of contract for the same reason (*id.* ¶¶ 104-110), and so the claims will be considered together.[13]

Tor argues that plaintiff relies on the wrong contract—Tor was enforcing its rights under the Mortgage, not the SPA (NYSCEF # 120 at 9-10). Tor argues that per the agreement, it immediately appointed receivers over plaintiff's shares of CP Global by deed, and then voted those shares to install new management across the CP entities (NYSCEF # 120 at 9-10, quoting Mortgage § 9.1[a]–[b]).

Tor is correct: the Mortgage controls here and undermines plaintiff's allegations. Immediately upon an Event of Default, the Mortgage allows Tor to "appoint any one or more persons to be a Receiver of" plaintiff's shares in CP Global by "deed, under seal, or in writing" (*see* Mortgage § 9.1[a] – [b]; *see also id.* § 7.1 ["[t]his Security will become immediately enforceable if an Event of Default occurs"]). Tor filed as an exhibit a "Deed of Appointment of Receivers and Managers" which purports to do just that (NYSCEF # 51, at 1 [paragraph B(a)]). The Mortgage also permitted Tor to "exercise . . . any voting rights and any powers or rights which may be exercised by the legal or beneficial owner of [the Shares]" (Mortgage § 6.6[c]). Thus, Tor appears to have been *following*, not breaching, the relevant agreements when it took over plaintiff's companies.

Plaintiff responds that even if the Mortgage controls, Tor nonetheless breached that agreement because the relevant Event of Default—failing to make

[13] The declaratory judgment claim cannot be dismissed as duplicative because it requests different relief: Count 3 asks for monetary damages, while Count 1 asks the court to declare everything the receivers did void, effectively reversing the various bankruptcies and sales that have taken place over the course of these events.

payments by the December 31, 2019 Maturity Date—came about solely due to Tor's misconduct (NYSCEF # 149 at 12-13). Specifically, plaintiff argues that Tor lured him and CP Global into pursuing the Bank Leumi refinancing instead of paying to extend the Third Amendment's Maturity Date, thereby manufacturing CP Global's default (*id.*).

Through this argument, plaintiff essentially concedes that Tor did not breach any of the agreements, but instead took actions that caused *him* to breach. Count 3 for breach of the SPA is accordingly dismissed. As for Count 1 declaratory judgment, the theory of liability is incorrect given that, as just explained, Tor took actions consistent with the Mortgage and SPA. Thus, Count 1 for declaratory judgment for breach of the SPA and voiding receivers is dismissed.

Counts 2 & 4: Declaratory Judgment and Breach of Contract – Limitation of Damages (Tor)

Counts 2 and 4 seek, respectively, declaratory judgment and breach of contract for limitation of damages are also dismissed. Plaintiff alleges that § 10.01 of the CGA limits his obligations as a guarantor to sums "that would [not] render him insolvent" (Am.Compl. ¶ 117). Hence, plaintiff avers, Tor violated this provision by initiating the Hong Kong bankruptcy and obtaining an initial bankruptcy order against plaintiff (*id.* ¶ 118). Tor responds that plaintiff misreads the language of § 10.01, which is meant to protect *Tor*, not plaintiff (NYSCEF # 120 at 10-11). Tor is correct. Section 10.01 states

> "Notwithstanding any provision to the contrary contained herein or in any other of the Loan Documents, the Guaranteed Obligations of each Guarantor under this Agreement and the other Loan Documents shall be limited to an aggregate amount equal to the largest amount that would not render such obligations subject to avoidance under the Insolvency Laws."

(Third Amend. § 10.01).

Nothing in this language says that recovery is limited to an amount that would not render a guarantor insolvent. It merely says that recovery is limited to the largest amount that would not be avoided under Insolvency Laws. Plaintiff's obligations have not been challenged or avoided under any relevant insolvency laws, and so this hypothetical situation has not been triggered (*see ACP Master, Ltd. v Vitro S.A.B. de C.V.*, 34 Misc 3d 1201(A) [Sup Ct, NY County 2011] [denying defense based on similar limitations provision because guarantee is meant to protect plaintiff "in the event that the Guaranties are challenged as a fraudulent conveyance by other creditors or a bankruptcy trustee, a hypothetical situation that has not occurred in any proceeding"). Plaintiff's claims under Counts 2 and 4 therefore fail and are therefore dismissed.

Count 5: Waiver & Estoppel (Tor)

Plaintiff alleges that in his normal course of dealing with Tor, whenever CP Global was unlikely to make payment, the parties would discuss, make accommodations, and then amend the agreement orally or in writing (AC ¶¶ 122-123). Tor purportedly violated this normal course of dealing by repeatedly causing plaintiff to detrimentally rely on its representation that it would permit plaintiff to obtain refinancing from Bank Leumi rather than relying on any remedies that would be available as a result of a purported Event of Default (*id.* ¶¶ 127-128, 130). Plaintiff claims that either (1) Tor's representations were "knowingly false," thereby estopping it from asserting the remedies, or (2) it waived its right to enforce remedies against plaintiff (*id.* ¶¶ 129-132).

Tor responds that there is no estoppel because (i) plaintiff failed to plead any actual or specific misrepresentations per CPLR 3016(b), and (ii) the parties' entire relationship is governed by contract (NYSCEF # 120 at 14-15). Tor similarly asserts that there is no waiver because the parties' contracts and written communications, including Tor's November 2019 letter, all state that waiver will only be valid if made in writing (*id.*, citing CGA § 12.01, and NYSCEF # 128 at 1).

Plaintiff first responds that, as to estoppel, he has given particularized descriptions of the time, place, and content of Tor's wrongful statements (NYSCEF # 149 at 16-17). Plaintiff does not meaningfully respond to the argument that the existence of a contract defeats estoppel claims. He does, however, respond that a contract may be orally modified if "the oral modification is fully executed or there has been a partial performance 'unequivocally referable' to the oral modification" (*id.* at 18, citing *F. Garogalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000]).

Tor reiterates that there are no misrepresentations pled and that the CGA prohibits any oral waivers or modifications (NYSCEF # 151 at 9-10). Tor also argues that this court should give deference to the Hong Kong bankruptcy court's decision, which found that plaintiff's theories were contradicted by the clear terms of the agreements, inconsistent with the parties' previous conduct of entering the three amendments, and "inherently improbable" (*id.* at 10).

Plaintiff seems to confuse a claim of oral modification—which would arguably be a claim for breach of contract—with his actually-asserted claims for estoppel and waiver. The Court of Appeals has explained the differences between the three:

> Modification of the terms of a mortgage requires consideration except when a statute . . . dispenses with the need for consideration when a writing exists. Neither waiver nor estoppel rests upon consideration or agreement. A modification, because it is an agreement based upon consideration, is binding according to its terms and may only be withdrawn by agreement. An estoppel 'rests upon the word or deed of

> one party upon which another rightfully relies and so relying changes his position to his injury.' It is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought. While estoppel requires detriment to the party claiming to have been misled, waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable. A waiver, to the extent that it has been executed, cannot be expunged or recalled, but, not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform.

(*Nassau Tr. Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 183-184 [1982] [internal citations omitted]).

With the above context in place, even if he had claimed oral modification, plaintiff's claim would fail because there are no allegations of consideration for the mere chance to negotiate refinancing with Bank Leumi (*see id.*; *see also Bank Leumi Tr. Co. of New York v Block 3102 Corp.*, 180 AD2d 588, 590 [1st Dept 1992] ["Without consideration, no modification is established."]). At best, the allegations and documents show that the parties agreed to discuss a potential *written* modification, and even settled on certain terms they might include (*see, e.g.*, NYSCEF # 100), but no consideration was ever given nor was a final agreement ever signed (*see* AC ¶¶ 54-55, 59).

Plaintiff's citation to *F. Garofalo Electric Company, Inc. v New York University* is unavailing. The court there ruled that "[w]hen a written contract, as here, provides that it can be modified only by a signed writing, an oral modification of that agreement is not enforceable unless the oral modification is fully executed or there has been a partial performance 'unequivocally referable' to the oral modification" (*F. Garofalo Elec. Co., Inc. v New York Univ.*, 270 AD2d 76, 80 [1st Dept 2000], quoting General Obligations Law § 15-301 [1] and others; *see also Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013]). Here, plaintiff's default and his failure to extend or cure that default are not "unequivocally referable" to any potential or executed oral modification. The parties had already thrice amended and extended the Maturity Date due to CP Global's prior Events of Default, and the parties needed to refinance the loan (*id.* ¶¶ 26, 38, 40, 41). There is thus no oral modification.

There also is no equitable estoppel. "The elements of equitable estoppel are: (1) conduct amounting to false representation or concealment of material facts, (2) intention or expectation that the other party will act upon such conduct, and (3)

actual or constructive knowledge of the true facts" (*Forman v Guardian Life Ins. Co. of Am.*, 25 Misc 3d 1224(A) [Sup Ct 2009], *affd,* 76 AD3d 886 [1st Dept 2010], citing *BWA Corp. v. Alltrans Express U.S.A.,* 112 AD2d 850, 853 [1st Dept 1985]). The party asserting estoppel must show with respect to themselves: "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (*id.*, quoting *BWA*, 112 AD2d at 853).

In essence, plaintiff argues that Tor is estopped from invoking its available contractual remedies because it falsely represented that it would permit plaintiff to obtain the Bank Leumi refinancing instead of invoking any contractual remedies for an Event of Default, which, in turn, lured plaintiff into defaulting rather than extending the Maturity Date under the Third Amendment (*see* AC ¶¶ 128, 130, 131). But plaintiff does not provide particularized facts that give rise to an inference that Tor never intended to allow refinancing to go forward.

The sole exception is plaintiff's contention that on April 3, 2020, Stone promised to send a "draft new Loan Amendment next week," only for Tor to utilize its remedies two weeks later (AC ¶¶ 54, 59; NYSCEF # 101). The timing strongly implies Tor was being less than truthful and never intended to send a new draft. However, there is no plausibly alleged detrimental reliance on this representation because plaintiff/CP Global had already been in default for several months by that point. Plaintiff also cannot point to his personal guaranty of the Bank Leumi loan for detrimental reliance because the Bank Leumi loan was never executed and plaintiff therefore was not guarantying anything (*see* AC ¶ 56).

Plaintiff's reliance on defendant's oral representations is also not reasonable under the circumstances given that the various contracts prohibited oral modification (*see Aris Indus., Inc. v 1411 Trizechahn-Swig, LLC*, 294 AD2d 107, 107 [1st Dept 2002] [dismissing estoppel claim where a clause prohibiting oral modification existed because "under the circumstances alleged, there could have been no reasonable reliance on the alleged oral promise"]). Plaintiff likewise cannot rely on any written modifications, considering that none were ever executed. Accordingly, for the foregoing reasons, plaintiff fails to allege equitable estoppel.

Plaintiff has, however, sufficiently maintained a claim for waiver notwithstanding the contractual provisions and communications prohibiting such waivers. "[A] contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement" (*Bank Leumi*, 180 AD2d at 590). But "[w]aiver is unilateral and, 'not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform'" (*id.*; *see also Baker v Norman*, 226 AD2d 301, 303 [1st Dept 1996] ["Having waived the provision, defendant cannot hold plaintiffs to its terms without adequate notice that strict compliance will be required"]). This is rule of "simple fairness" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc.*

LLC, 30 AD3d 1, 7 [1st Dept 2006], *affd,* 8 NY3d 59 [2006]).Here, Tor sent plaintiff a letter on November 13, 2019 warning that Tor will demand strict compliance with the Third Amendment's extension provision and will "aggressively enforce [its] rights as lender" (NYSCEF # 128 at 1). But *after* Tor sent itsletter, Tor spent the next five months actively negotiating the Bank Leumi refinancing instead of asserting its rights (*see Korpacz v 120 Middleton Realty Corp.*, 217 NYS2d 779, 780 [Sup Ct 1961] [six-month delay in commencing foreclosure action "lends some credence to the defendants' allegation regarding estoppel and waiver"]; *see also* NYSCEF # 100 at *3, *5, *6 [Oksner's email to Stone proposing extension to loan conditioned on Bank Leumi closing]; NYSCEF # 101 at 1 [Stone promised Oksner "a draft new Loan Amendment" in early April 2020]; Am.Compl. ¶¶ 41-43, 48-54). While Tor noted that it was reserving its rights in some of those communications (NYSCEF # 99 [Stone to Oksner: "As you are aware CP Homes is in default and we reserve all our rights"]), Tor nevertheless did not enforce its remedies during this time. Even two weeks before Tor's takeover, Tor was still promising CP Global drafts of a new amendment to the CGA (NYSCEF # 101 at 1). All of this came about *after* the Maturity Date passed. These allegations and documents together support a reasonable inference that Tor orally waived its remedies only to withdraw that waiver without notice or reasonable time to perform (*cf. Bank Leumi*, 180 AD2d at 590). Thus, plaintiff has stated a claim for waiver.[14]

Count 6: Breach of Covenant of Good Faith & Fair Dealing (Tor)

Plaintiff alleges the covenant was breached because "the parties' good faith negotiations left no alleged events of default uncured through written or oral amendment or otherwise through waiver," and yet Tor then "ambushed" plaintiff by taking over his companies without any "prior notice" (AC ¶¶ 137-139). Plaintiff further alleges that "Tor Asia was colluding and conspiring with CP Global to bring about and force the alleged Event of Default that occurred" (*id.* ¶ 140).

"Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party 'acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'" (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept 2007] quoting *Jaffe v Paramount Communications,* 222 AD2d 17, 22–23 [1st Dept 1996]).

Here, the above allegations do not suggest that Tor in any way deprived plaintiff of the right to the benefits under the agreements (*see O'Neill*, 39 AD3d at 282). The allegations suggest only that Tor was utilizing *its* rights. This claim therefore fails.

---

[14] This is not inconsistent with the ruling denying equitable estoppel. Tor is not estopped from utilizing its remedies based on a misrepresentation—rather, Tor was and is free to withdraw its waiver upon adequate notice, but such notice was not given.

Counts 7, 8, 9: Actual Fraud, Constructive Fraud, Conspiracy to Commit Fraud (Tor & Oksner)

Plaintiff brings interlocking claims of actual fraud, constructive fraud, and civil conspiracy to commit fraud. "In order to establish [actual] fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]). "General allegations of lack of intent to perform are insufficient; rather, facts must be alleged establishing that the adverse party, at the time of making the promissory representation, never intended to honor the promise" (*King Penguin Opportunity Fund III, LLC v Spectrum Group Mgt. LLC*, 187 AD3d 688, 690 [1st Dept 2020]). Meanwhile, constructive fraud requires the same elements as actual fraud except that it "does not require an assertion that the defendant had actual knowledge of the falsity of the representation" (*Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 168 [1st Dept 1995]). Finally, a claim for civil conspiracy lives or dies on the existence of an underlying tort or fraud claim (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] ["[T]o establish a claim of civil conspiracy, the plaintiff 'must demonstrate the primary tort' . . . "]).

Here, plaintiff alleges that Tor never intended to allow plaintiff to refinance the loan. However, plaintiff alleges no facts from which it can be reasonably inferred that this is true. The allegations arguably show the opposite: Tor gave plaintiff nearly four months to negotiate the Bank Leumi loan before pulling back (AC¶¶ 46-53, 59).

Plaintiff also fails to allege facts from which one could infer that Oksner misrepresented Tor's position or otherwise misled plaintiff. For example, plaintiff does not allege that any of the information conveyed by Oksner was wrong. And while Oksner's email deletion may raise concerns, it allegedly happened after Stone's April 3, 2020 promise to send a "draft new Loan Amendment," a promsie upon which, as discussed above, plaintiff did not detrimentally rely. As a result, both the actual fraud and constructive fraud claims against Oksner fail. Consequently, the conspiracy claim must be dismissed with the fraud claims. Counts 7, 8, and 9 fail against both defendants.

Count 10: Breach of Fiduciary Duty (Oksner)

The breach of fiduciary duty claim similarly fails, because the amended complaint contains no allegations of misconduct. To state a claim for breach of fiduciary duty, plaintiff must allege that "'(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct'" (*New York Mar. & Gen. Ins. Co. v Wesco Ins. Co.*, 213 AD3d 461, 462 [1st Dept 2023]).Here, all that is alleged in the Amended Complaint is that Oksner assured plaintiff that no extensions were needed, and conclusory allegations that

Oksner allowed a DACA to expire only to enter a new one that somehow gave Tor more control in order to use PPP loans to repay the Tor loan. These conclusory allegations do not plausibly allege misconduct. This claim is dismissed.

Count 11: Reformation (Tor)

Plaintiff also argues for reformation of contract based on mutual mistake or alternatively unilateral mistake. "A claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Aventine Inv. Mgt., Inc. v Can. Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]).Here, the Amended Complaint asserts, in conclusory fashion, that "it was the intention of all relevant parties not to include [p]laintiff's residence" in the CGA, but that his residence was included by mistake and without *his* knowledge (AC ¶¶ 23-25). Here, there are no factual allegations that anyone other than plaintiff wanted to exclude his personal residence or mistakenly failed to exclude it, only conclusory assertions. This claim for mutual mistake must be dismissed.

As for unilateral mistake, such claims require particularized allegations that plaintiff's mistake was due to fraud (*see Barclay Arms, Inc. v Barclay Arms Assoc.*, 74 NY2d 644, 647 [1989]). The claims of fraud must "satisfy the specificity and particularity requirements of CPLR 3013 and 3016 (b)" (*id.*). Here, plaintiff did allege that defendant in some way defrauded him during the original CGA negotiations or otherwise hid the fact that his personal residence was included as collateral. The claim for reformation is likewise dismissed.

Count 12: Conversion (Tor)

Plaintiff alleges that Tor converted the CP entities when it took over "without first commencing a proceeding to do so" (AC ¶¶ 191-195). But as explained in the discussion of Counts 1 and 3, no such proceeding was necessary, because the Mortgage allowed Tor to immediately appoint receivers over the shares of CP Global and then vote those shares to take over the remaining companies. As plaintiff fails to allege possessory rights or interest over which defendant improperly exercised control the conversion claim is dismissed (*see Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009] ["Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights"]).

Count 13: Malicious Prosecution (Tor)

The elements of a cause of action for malicious prosecution arising from a prior civil action are "[1] 'commencement or continuation' of a proceeding 'by the defendant' that [2] terminated in the plaintiff's favor, [3] 'the absence of probable cause for the ... proceeding[,] [4] ... actual malice," and [5] "special damages" (*Cold*

Spring Advisory Group, LLC v Natl. Sec. Corp., 226 AD3d 612, 613 [1st Dept 2024], quoting *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015]). Here, plaintiff offers no legal basis for his claim that there was no probable cause to support Tor's Hong Kong bankruptcy action. He first argues that Tor knew it could not seek "insolvency-inducing damages" in bankruptcy pursuant to § 10.01 of the CGA, but this argument fails because it is based on the same misreading of the contract that defeats Counts 2 and 4. Plaintiff next argues that Tor knew the bankruptcy was commenced in the wrong jurisdiction, but this argument also fails. As Tor explains, it initiated the bankruptcy in Hong Kong because that is plaintiff's home residence, and the goal was to protect Tor's collateral, as it was arguably allowed to do pursuant to the CGA's exception to the jurisdiction clause (*see* CGA § 12.16 ["any suit seeking enforcement against any collateral or other property may be brought . . . in the courts of any jurisdiction where such property is located to the extent such courts have jurisdiction over the relevant loan party or over such collateral or other property"]).

At no point did the courts of Hong Kong rule that there was no merit to defendant's adversary bankruptcy action. Instead, intervention of Hong Kong's High Court was necessary to determine whether the jurisdiction clause required the claims to go first to New York. Accordingly, these alleged facts do not suggest a "patent" lack of probable cause (*see Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015] [plaintiff "must allege that the underlying action was filed with 'a purpose other than the adjudication of a claim' and that there was 'an entire lack of probable cause in the prior proceeding'"]). Count 13 is dismissed.

Count 14: Tortious Interference with Contract (Oksner)

"The elements of tortious interference are a valid contract between plaintiff and another, the defendant's knowledge of the contract and intentional procurement of its breach without justification, and damages resulting therefrom" (*Nostalgic Partners, LLC v New York Yankees Partnership*, 205 AD3d 426, 428 [1st Dept 2022]). This claim fails because it is speculative and conclusory. There are no allegations of what steps Oksner took to convince Tor to breach the contract. Indeed, as shown above, there is no indication that Tor breached the contract at all—just allegations that Tor made plaintiff breach the contract.

Motion for Summary Judgment in Lieu of Counter-Claims (MS 004)

For the same reasons that plaintiff's claim for waiver survives, Tor's motion for Summary Judgment in Lieu of Counterclaim must fail. Even if all of Tor's evidence and allegations are correct, there is an issue of material fact as to whether Tor orally waived its default remedies, and whether Tor gave plaintiff notice that it was withdrawing that waiver. Tor's motion is denied.

CONCLUSION

Pursuant to the above, it is hereby

ORDERED that defendant Andrew Oksner's Motion to Dismiss (MS 006) is granted in its entirety, and the Amended Complaint is dismissed as it relates to Oksner (Counts 7, 8, 9, 10, & 14); and it is further

ORDERED that defendant Tor Asia Master Credit Fund L.P.'s Motion to Dismiss (MS 007) is denied in part as to Count 5 for waiver only and granted as to all remaining claims against Tor; and it is further

ORDERED that Tor's Motion for Summary Judgment in Lieu of Complaint (MS 004) is denied; and it is further

ORDERED that Tor shall e-file its answer and counterclaims within 20 days of entry of this order; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing accordingly in favor of Andrew Oksner and remove him from the caption; and it is further

ORDERED that defendants shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address www.nycourts.gov/supctmanh).

10/18/2024
DATE

MARGARET A. CHAN, J.S.C.

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