Arena Invs., LP v Ault

2025 NY Slip Op 33000(U)

July 25, 2025

Supreme Court, New York County

Docket Number: Index No. 655857/2024

Judge: Margaret A. Chan

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

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ARENA INVESTORS, LP,

Plaintiff,

- v -

MILTON C. AULT and KRISTINE L. AULT

Defendants.

INDEX NO. 655857/2024

MOTION DATE 03/04/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42
were read on this motion to/for DISMISSAL.

In this action to enforce a guaranty issued in connection with a $6.875 million loan, defendants Milton C. Ault (Milton) and Kristine L. Ault (Kristine, and together with Milton, defendants) move, pursuant to CPLR 3211(a)(1) and (a)(7) for an order dismissing the complaint's first and second causes of action insomuch as they are based on a purportedly unenforceable penalty provision (NYSCEF # 13). Plaintiff Arena Investors, LP (plaintiff) opposes defendants' motion and cross-moves, pursuant to CPLR 602(a), for an order consolidating this action with a related action captioned *Arena Investors, LP v Ault Alliance Inc. and RiskOn International, Inc.*, Index No. 652792/2024 (the Ault Alliance Action). Defendants, in turn, oppose plaintiff's cross motion. For the following reasons, defendants' motion is granted,[1] and plaintiff's cross-motion is granted.

Background

The following facts are drawn from the Complaint, its exhibits, and the materials accompanying to the parties' submissions. The Complaint's allegations are assumed true solely for purposes of resolving defendants' motion. The court also assumes familiarity with the background of this case, which was more thoroughly detailed in its Decision and Order, dated January 21, 2025, issued in the Ault Alliance Action (*see* Ault Alliance Action, NYSCEF # 46).

[1] By Stipulation, dated February 6, 2025, defendants agreed to withdraw that portion of their motion to dismiss seeking dismissal on the grounds that certain notes upon which plaintiff sues are criminally usurious (NYSCEF # 25). Accordingly, this portion of defendants' motion to dismiss is deemed withdrawn.

On April 27, 2023, RiskOn International (RiskOn) and six investors (the Investors) entered into a Securities Purchase Agreement, dated as of April 27, 2023 (the Purchase Agreement), and designated plaintiff as the Investors' collateral agent (*see* NYSCEF # 2 – compl ¶¶ 2, 21, 23). In connection with the Purchase Agreement, RiskOn authorized the issuance of a series of six senior secured convertible notes in the aggregate original principal amount of $6,875,000 (the Notes)[2] (*id.* ¶¶ 22, 26-32; NYSCEF # 4-8). At the same time as RiskOn and the Investors entered into the Purchase Agreement, Milton, Kristine, and Ault Alliance, Inc. (Ault) also executed a Guaranty in favor of Arena of, *inter alia*, the payment obligations set forth in the Purchase Agreement (compl ¶¶ 39-49; NYSCEF # 3 – Guaranty).[3]

The maturity date for each of the Notes was April 27, 2024, and each Note made clear that no interest would accrue (compl ¶¶ 33-34). That, however, would change upon the occurrence of an event of default (*id.* ¶ 35; NYSCEF # 4 § 4[a]). As relevant here, one such event of default included "suspension from trading or the failure of the Common Stock to be trading or listed (as applicable) on an Eligible Market for a period of seven (7) consecutive Trading Days (*see* compl ¶ 50; NYSCEF # 4 § 4[a][iii]). Upon the occurrence of an event of default, interest would begin to accrue at a default rate of 18% per annum (compl ¶ 35).

Furthermore, pursuant to Section 4(b) of the Notes, Arena, upon becoming aware of an Event of Default, had the right to require RiskOn to redeem all or any portion of the Notes at an Event of Default Redemption Price by delivering written notice (*see id.* ¶ 36). Specifically, the Notes provided that

> [u]pon the occurrence of an Event of Default with respect to this Note or any Other Note, the Company shall within one (1) Business Day of its discovery of such Event of Default deliver written notice . . . to the Holder. At any time after the earlier of the Holder's receipt of an Event of Default Notice and the Holder becoming aware of an Event of Default, the Holder may require the Company to redeem (regardless of whether such Event of Default has been cured) all or any portion of this Note by delivering written notice thereof . . . to the Company, which [written notice] shall indicate the portion of this Note the Holder is electing to redeem. Each portion of this Note subject to redemption by the Company pursuant to this Section 4(b) shall be redeemed by the Company at a price equal to the greater of (i) the product of (A) the Conversion Amount to be redeemed multiplied by (B) the Redemption Premium and (ii) the product of (X) the Conversion Rate with respect to the Conversion Amount in effect at such time as the Holder delivers

[2] All questions concerning the construction, validity, enforcement, interpretation, and performance of the Notes are governed by Nevada law (*see e.g.* NYSCEF # 4 § 29).

[3] All questions concerning the construction, validity, enforcement, and interpretation of the Guaranty are governed by Nevada law (Guaranty § 5[k]).

> a[] [written notice] multiplied by (Y) the product of (1) the Redemption Premium multiplied by (2) the greatest Closing Sale Price of the Common Stock on any Trading Day during the period commencing on the date immediately preceding such Event of Default and ending on the date the Company makes the entire payment required to be made under this Section 4(b) (the 'Event of Default Redemption Price')

(NYSCEF # 4 § 4[b]).[4] The parties further agreed that

> [i]n the event of the Company's redemption of any portion of this Note under this Section 4(b), the Holder's damages would be uncertain and difficult to estimate because of the parties' inability to predict future interest rates and the uncertainty of the availability of a suitable substitute investment opportunity for the Holder. Accordingly, any redemption premium due under this Section 4(b) is intended by the parties to be, and shall be deemed, a reasonable estimate of the Holder's actual loss of its investment opportunity and not as a penalty.

(*id.*) RiskOn was required to deliver the applicable Event of Default Redemption Price within five business days after the receipt of "written notice" of an event of default of default redemption notice (*id.* § 13 [a]; *see also id.* § 4 [b] ["Redemptions required by this Section 4(b) shall be made in accordance with the provisions of Section 13"]).

On October 30, 2023, RiskOn received conversion notices from the Arena-related Investors (the Arena Investors) converting an aggregate of $62,000 of the Notes, and it subsequently issued shares of common stock to the Arena Investors (compl ¶ 37). Then, on January 5, 2024, RiskOn received another set of conversion notices from the Arena Investors converting an aggregate of $101,209 of the Notes and subsequently issued common stock (*id.* ¶ 38).

The next month, on February 28, 2024, RiskOn's common stock was suspended from trading on the Nasdaq Capital Market (compl ¶ 51). Thereafter, on April 12, 2024, RiskOn received written notice that the Nasdaq Hearings Panel had determined to delist RiskOn's common stock from the Nasdaq (*id.* ¶ 53). To date, RiskOn's common stock has not been re-listed on the Nasdaq or any other qualifying exchange (*id.* ¶ 52).

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[4] The "Redemption Premium" was set at 125%, while the "Conversion Amount" equaled "the sum of (A) the portion of the Principal of this Note to be converted, redeemed or otherwise with respect to which this determination is being made, (B) accrued and unpaid Interest with respect to such Principal of this Note, (D) accrued and unpaid Late Charges with respect to such Principal of this Note and Interest, and (E) any other unpaid amounts pursuant to the Transaction Documents, if any" (*see* NYSCEF # 4 §§ 3[b][i], 33[oo]).

On April 27, 2024, the Notes matured (compl ¶ 54). At that time, under the Notes, RiskOn was required to pay "all outstanding Principal, accrued and unpaid Interest and accrued and unpaid Late Charges . . . on such Principal and Interest" (*id.* ¶ 55). RiskOn, however, failed to do so, and thus, on May 1, 2024, defendants, Ault, and RiskOn received a notice of events of default identifying two events of default (the Event of Default Notice) (*id.* ¶¶ 56-59). Later, on November 5, 2024, Arena sent defendants, Ault, and RiskOn an event of default redemption notice identifying a third event of default (the Redemption Notice) (*id.* ¶ 65; NYSCEF # 9 – Redemption Notice at 1).

On the same day that it issued the Redemption Notice, Arena commenced this action against defendants, asserting claims for breach of the Guaranty against Milton and Kristine, respectively (compl at 11 & ¶¶ 73-82). In its Complaint, Arena alleges that the outstanding principal amount of the Notes held by Investors as of November 1, 2024 is $4,030,571.43 (*id.* ¶ 69). This number is comprised of the original principal amount of $3,750,000, less the amounts of principal converted to common stock in October 2023 and January 2024 by the Arena Investors (i.e., $163,209), and capitalized default interest through April 30, 2024 of $443,779.43 (*id.* ¶ 70). Arena also asserts that the Arena Investors are due a redemption premium of $1,007,642.86 as of November 1, 2024 (the Redemption Price) (*id.* ¶ 71).

Discussion

Before the court are defendants' (now partial) motion to dismiss the Complaint insofar as plaintiff's claims are premised on defendants' failure to deliver the Redemption Price, and plaintiff's cross motion to consolidate this action with the Ault Alliance Action. The court first addresses defendants' motion to dismiss and then turns to plaintiff's cross-motion.

I. Defendants' Motion to Dismiss

A. Legal Standard

CPLR 3211(a)(7) provides for dismissal when a pleading "fails to state a cause of action." When deciding such a motion, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs 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]). Whether a plaintiff can ultimately establish its allegations is not considered when determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). But the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" (*Wilson v Tully*, 243 AD2d 229, 234 [1st Dept 1998]).

Meanwhile, dismissal based on documentary evidence under CPLR 3211(a)(1) is warranted "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]). It is only in "those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence" that a court will not presume them "to be true or accord[] every favorable inference" (*see Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]).

B. Analysis

Defendants seek to dismiss the Complaint insofar as it asserts claims related to plaintiff's failure to deliver the Redemption Price under the Notes (NYSCEF # 20 – MOL at 14-18; NYSCEF # 41 – Reply at 4-10). *First*, defendants argue that the Redemption Price constitutes an unenforceable penalty (MOL at 14-17; Reply at 4-9). *Second*, defendants assert that this action was prematurely initiated without giving RiskOn the requisite five days to comply with the Redemption Notice (MOL at 17-18; Reply 9-10).

In opposition, plaintiff offers two responses. Initially, plaintiff contends that defendants' challenge to the Redemption Price is speculative and, in any event, nothing in the Notes characterizes it as liquidated damages or a penalty (NYSCEF # 31 – Opp at 6-7). Second, plaintiff maintains that this action was not filed prematurely because on May 1, 2024, defendants received the Event of Default Notice, and thus it was immaterial that the Redemption Notice was sent on November 5, 2024 (NYSCEF # 31).

Under Nevada law, which governs the Notes and Guaranty, "liquidated damages provisions are generally prima facie valid, and the party challenging the provision must establish that the provision amounts to a penalty" (*Mason v Fakhimi*, 865 P2d 333, 335 [Nev 1993]). That said, "[l]iquidated damages are customarily unenforceable as penalties when they are in excess of actual damage caused by a contractual breach" (*In re Late Fee and Over-Limit Fee Litig.*, 741 F3d 1022, 1026 [9th Cir 2014]). Thus, "[i]n order to prove that a liquidated damages clause constitutes a penalty, the challenging party must persuade the court that the liquidated damages are disproportionate to the actual damages sustained by the injured party" (*Loomis v Lange Fin. Corp.*, 865 P2d 1161, 1164 [Nev 1993]). Although the question of whether a liquidated damages provision is enforceable is a matter of law for the court to decide, this is nevertheless a fact-intensive, evidence-driven inquiry (*see id.* at 1163-1164 [enforcing liquidated damages provision where defendant failed to meet its burden of showing that "the amount of actual damages is disproportionate to the amount of damages recovered under the liquidated damages clause"]; *see also e.g. ProDox, LLC v Professional Document Servs., Inc.*, 2022 WL 4379190, at *6-7 [D Nev, Sept. 22, 2022, No. 2:20-cv-02035-JAD-NJK] [concluding that defendant failed to meet burden of proving disproportionality and

thus the court could not "conclude on this record that the liquidated-damages provision in this contract is an unenforceable penalty"]).

Here, Section 4(b) of the Notes are clear that the Redemption Price is "a reasonable estimate of the Holder's actual loss of its investment opportunity and not as a penalty" (NYSCEF # 4 § 4[b]). And under Nevada law, to the extent this provision even references liquidated damages, it must be deemed as prima facie valid (*Fakhimi*, 865 P2d at 335). Defendants nevertheless maintain that the Arena Notes already had "standard safeguards addressing actual loss" and thus the Redemption Price does nothing more than essentially tack on an extra amounts that are not proportionate to plaintiff's actual damages (Reply at 5-6). But much of this reasoning is based on taking the provisions of Section 4(b) to their "logical extreme" and other speculation as to the damages suffered by plaintiff as a result of defendants' defaults. Stated succinctly, defendants have merely raised questions of fact as to whether the Redemption Price is, in fact, disproportionate to plaintiff's actual damages, which is not properly assessed on a motion to dismiss (*see generally Gerrish v 56 Leonard LLC*, 147 AD3d 511, 514 [1st Dept 2017] [observing that questions of fact "cannot be determined on [a] prediscovery motion to dismiss]).[5]

Nevertheless, dismissal of plaintiff's claims—insofar as premised on the failure to deliver the Redemption Price—is warranted at this juncture because the documentary evidence plainly establishes that plaintiff failed to satisfy a condition precedent to bringing this action. As the Notes make clear, any "[r]edemptions required by this Section 4(b) shall be made in accordance with the provisions of Section 13" (NYSCEF # 4 § 4[b]). Section 13, in turn, provides that RiskOn has "five (5) Business Days after [its] receipt of" the Redemption Notice to "deliver the applicable Event of Default Redemption Price" (*id.* § 13[a]). That Redemption Notice was delivered by plaintiff to defendants and RiskOn on November 5, 2025, yet plaintiff then chose to commence this lawsuit on the same day. Therefore, RiskOn was never given the full five business days available to it under the Notes to comply with its obligations to deliver the Redemption Price. This "failure to comply with a condition precedent to commencing suit render[s]" plaintiff's

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[5] None of the cases cited by defendants warrant a different outcome, as each was decided outside of the motion to dismiss context (*see e.g. Motichka v Cody*, 5 AD3d 185 [1st Dept 2004] [motion to hold defendant in default of judgment]; *Manhattan Syndicate, Inc. v Ryan*, 14 AD2d 323 [1st Dept 1967] [motion for summary judgment]; *Clean Air Options, LLC v Humanscale Corp.*, 142 AD3d 923 [1st Dept 2016] [motion for summary judgment]; *Board of Mgrs. of the Park Ave. v Sandler*, 48 Misc3d 1230[A] [Sup Ct, NY County, 2015] [motion for summary judgment]; *Pisane v Feig*, 2015 WL 2378981 [Sup Ct, Kings County, May 19, 2015] [motion for summary judgment in lieu of complaint]; *Sorenson v Radel-Sorenson*, 2018 WL 3913252 [Ct App Nev, July 27, 2019] [special order after final judgment]; *Adar Bays, LLC v 5Barz Intl., Inc.*, 2018 WL 3962831 [SD NY, Aug. 16, 2018, No. 16 Civ. 6231 (NRB)] [motion for summary judgment]; *Parallax Health Sci., Inc. v Ema Fin., LLC*, 2022 WL 2442338 [SD NY, June 13, 2022, No. 20-CV-2375 (LGS) (RWL)] [R&R setting forth amount of damages following entry of default]; *Joseph F. Sanson Inv. Co. v 268, Ltd.*, 795 P2d 493 [Nev. 1990] [motion to recover attorney's fees]).

Redemption Price claims a "nullity" (*ACE Secs. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 523 [1st Dept 2013]).

To avoid this outcome, plaintiff avers that its May 1, 2024 notice of event of default, as well as its commencement of the Ault Alliance Action, somehow satisfied its contractual obligations under the Notes (Opp at 7-8). This assertion, however, blatantly ignores that defendants' obligations under Section 13 were triggered by the specifically defined "Event of Default Redemption Notice" rather than the also-defined "Event of Default Notice" (*see* NYSCEF # 4 §§ 4[b], 13[a]). Accordingly, any such reliance on the Event of Default Notice or the filing of the Ault Alliance Action is wholly without merit.

In sum, to the extent that plaintiff's two causes of action are predicated on a failure to deliver the Redemption Price, that claim is dismissed, without prejudice. The remaining portion of defendants' motion to dismiss is therefore granted.

II. Plaintiff's Cross-Motion to Consolidate

In its cross-motion, plaintiff seeks to consolidate this action with the Ault Alliance Action (Opp at 8-10). Plaintiff avers that this action and the Ault Alliance Action concern the same loan transaction, involve the same plaintiff and related defendants, and will rely on the same key documents (*id.* at 9). Defendants oppose on the grounds that (1) plaintiff failed to comply with this court's Part Rules or submit an affidavit of service demonstrating that the cross-motion was served on Ault, and (2) this action seeks significantly different measures of damages than the Ault Alliance Action and, in any event, the two actions are at markedly different stages (Reply at 11-12).

A court may exercise its discretion granting a motion to consolidate in the interest of judicial economy where there are common questions of law or fact in the absence of any showing that consolidation would result in substantial prejudice to the party opposing such relief (*see Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.)*, 10 AD3d 518, 519 [1st Dept 2004]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts" (*Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984]). A motion to consolidate "is one directed to the sound discretion of the trial court" (*Ventures Intl. v Uppstrom*, 166 AD2d 321, 321 [1st Dept 1990]).

Here, both this action and the Ault Alliance Action arise out of the same transaction, largely involve the same parties, and will ultimately involve assessing the breach of similar contractual obligations arising under the same set of agreements (*compare* compl ¶¶ 1-7 *with* Ault Alliance Action, NYSCEF # 2 ¶¶ 1-7). The only apparent difference between the two actions is that this action involves

breaches of the Guaranty by Milton and Kristine, while the Ault Alliance Action involves a breach of the Guaranty by Ault (*compare* compl ¶¶ 73-83 *with* Ault Alliance Action, NYSCEF # 2 ¶¶ 68-72). Accordingly, consolidation of these two actions is appropriate.

None of defendants' arguments against consolidation are availing. To start, the fact that discovery is underway in the Ault Alliance Action but not in this action is not a basis to conclude that defendants in this action would be prejudiced, particularly where note of issue has not yet been filed in the Ault Alliance Action and there is no indication that consolidation would unduly delay the remaining discovery in that action (*see Rosewood Realty Rochester LLC v Gateway Prop. Solutions Ltd.*, 2025 WL 574322, at *2 [Sup Ct, NY County, Feb. 21, 2025] [granting consolidation motion where consolidation "is unlikely to delay discovery in either action and may well expedite discovery in this matter, should discovery prove necessary"]; *cf. Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1st Dept 2003] [affirming denial of consolidation motion where one action sought to be consolidated "had been placed on the trial calendar" whereas the other action "ha[d] barely advanced to the discovery phase"]). Meanwhile, to the extent plaintiff failed to file an affidavit of service on Ault of its notice of cross-motion on Ault, defendants has failed to establish the existence of any undue prejudice given that defendants in the Ault Alliance Action have been fully aware of this consolidation cross-motion as reflected in the parties' correspondence to the court referencing the cross-motion (*see Fugazy v Fugazy*, 44 AD3d 613, 614 [2d Dept 2007] ["Since the plaintiff was aware of the cross motion, submitted opposition to it, and was not unduly prejudiced by the lack of service of a notice of cross motion, the court providently exercised its discretion in entertaining the defendant's cross motion"]; *see e.g.* Ault Alliance Action, NYSCEF #s 52, 61). Finally, to the extent plaintiff failed to comply with this court's Part Rules, the court exercises its discretion to overlook that technical defect.

In short, plaintiff's cross-motion is granted and this action will be consolidated with the Ault Alliance Action.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss (MS001) is granted insofar as the complaint asserts claims arising out of defendants' failure to pay a redemption premium as set forth in the Event of Default Redemption Notice, dated November 5, 2024, and otherwise deemed withdrawn pursuant to the Stipulation for Withdrawal of Part of Defendants' Motion to Dismiss, dated February 6, 2025 (NYSCEF # 25); and it is further

ORDERED that plaintiffs' cross-motion to consolidate is granted, and the above-captioned action is consolidated in this court with the action captioned *Ault Alliance Inc. and RiskOn International, Inc.*, Index No. 652792/2024, and it is further

ORDERED that the consolidation shall take place under Index No. 652792/2024 and the consolidated action shall bear the following caption:

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ARENA INVESTORS, LP,

Plaintiff,

-against-

AULT ALLIANCE, INC., RISKON INTERNATIONAL, INC., MILTON C. AULT, III, and KRISTINE L. AULT, Index No. 652792/2024

Defendants.

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and it is further

ORDERED that, within 20 days of this order, counsel for plaintiff is directed to serve a copy of this order, together with notice of entry, upon defendants as well as the Clerk of the Court and the Clerk of the General Clerk's Office, who shall consolidate the documents in the actions hereby consolidated and mark their records to reflect consolidation.

7/25/2025
DATE

MARGARET A. CHAN, J.S.C.

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