SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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GMAC COMMERCIAL FINANCE LLC,

Plaintiff,

-against-

Index No. 600673-2009

PETER AHN,

Defendant.

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APPEARANCES:

For Plaintiff:

Erik B. Weinick, Esq.
Otterbourg, Steindler,
Houston & Rosen, P.C.
230 Park Avenue
New York, NY 10169

For Defendant:

Eric P. Heichel, Esq.
Eric Aschkenasy, Esq.
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FRIED, J:

Pending before the Court are two motions that are consolidated for decision. In motion sequence no. 002, defendant Peter Ahn moves for partial summary judgment on a breach of contract claim asserted by plaintiff GMAC Commercial Finance LLC. Besides opposing the motion, plaintiff separately moves, in motion sequence no. 003, for summary judgment on its claim, in the principal amount of $7 million.[1]

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[1] In its verified complaint, plaintiff asserted a first cause of action for breach of contract and a second cause of action for specific performance. Defendant moved to dismiss the complaint. By decision dated September 1, 2009, I denied the motion as to the breach of contract claim and granted the motion as to the claim for specific performance on the ground that money damages would be an adequate remedy.

The contract at issue is the Amended and Restated Capital Call Agreement, dated February 8, 2006 (Capital Call Agreement). Defendant was the majority shareholder of Block Corporation (Block), which obtained its working capital financing (a $50 million revolving credit facility) from plaintiff under a Revolving Credit, Term Loan and Security Agreement, dated March 17, 2000 (and with subsequent amendments, the Loan Agreement). The Capital Call Agreement was a separate agreement whereby defendant agreed to cover a specific layer of Block's debt to plaintiff, up to a maximum aggregate limit of $7 million.

More specifically, the Loan Agreement provides that if the amount of advances to Block exceeds a preset amount, an "Overadvance" will have occurred. Certain Overadvances are permitted (Permitted Overadvances) in excess of the amounts otherwise available. The maximum amount of Permitted Overadvances varies from month to month in accordance with a schedule set forth in the Loan Agreement. Under the Capital Call Agreement, defendant agreed to assume personal liability (capped at $7 million) for payment of any Overadvance above the Permitted Overadvance (Excess Overadvance), if certain conditions are met. Plaintiff's breach of contract claim is based on defendant's purported failure to pay the Excess Overadvance despite written demands for payment in December 2008 and January 2009.

A more complete factual background is to be found in my September 1, 2009 decision. The parties are assumed to be familiar with that decision.

The motions raise the same issues: (i) should two wire payments totaling $3 million made by defendant directly to plaintiff be credited against defendant's maximum liability under the Capital Call Agreement, thereby reducing defendant's potential liability under the

Capital Call Agreement to $4 million; and (ii) whether plaintiff is entitled to recover from defendant the legal fees it has incurred in connection with this lawsuit. For the reasons discussed more fully below, defendant's motion is denied and plaintiff's motion is granted.

It is undisputed that defendant's maximum aggregate liability under the Capital Call Agreement is $7 million and that defendant wired $3 million in two separate payments directly to plaintiff - $1 million in October 2008 and $2 million in November 2008 (Fall 2008 Payments). Thus, the only issue relating to this branch of the parties' opposing motions, as limited in oral argument, is whether the Fall 2008 Payments constitute payment under the Capital Call Agreement, such that defendant should receive a dollar for dollar reduction to his maximum aggregate liability of $7 million.

It is defendant's contention that, notwithstanding the lack of a written notice and demand for payment by plaintiff, as contemplated in Paragraph 2 of the Capital Call Agreement (Capital Call Notice), the Fall 2008 Payments were understood by the parties to be payments under the Capital Call Agreement. In opposition, plaintiff argues that any claim by defendant of an entitlement to a $3 million credit against his maximum liability, is refuted by the express terms of the Capital Call Agreement, which, as plaintiff contends, provides that no payment is to be made until plaintiff exercises its right to make a written demand for payment.

In support of his motion (and in opposition to plaintiff's motion), defendant makes the observation that the Fall 2008 Payments differed in fundamental ways from prior funding that defendant provided at plaintiff's behest. Specifically, plaintiff required that the Fall 2008 Payments be made directly to its own account and provided defendant with specific

wiring instructions. By contrast, all previous infusions of capital by defendant, in excess of $10 million between 2005 and 2008, were made to Block directly or as a letter of credit. As well, plaintiff credited the Fall 2008 Payments to Block's loan obligations to plaintiff - again, something that plaintiff had never done with any of defendant's prior funding to Block. In defendant's view, these facts demonstrate that the parties understood that the Fall 2008 Payments would count toward reducing defendant's personal liability under the Capital Call Agreement.

Going further, defendant claims that the Fall 2008 Payments were made pursuant to and satisfied Paragraph 3 of the Capital Call Agreement. Paragraph 3 provides, in pertinent part:

> "[Block] and [Ahn] each agrees that the proceeds of any and all capital contributions made pursuant hereto *or other payments by [Ahn]* to or for the benefit of [Block] (including, without limitation, the proceeds of a Letter of Credit) *shall be made to [GMAC] for [Block]'s benefit and shall be applied to the Obligations constituting the Overadvance*. [Block] hereby irrevocably authorizes and directs [Ahn], and [Ahn] hereby agrees, to make all payments in respect of the equity capital contributions provided for hereunder in immediately available *funds by wire transfer directly to [GMAC], for application to the Obligations constituting the Overadvance in accordance with the following wire instructions* ..."

(*see* affirmation of Eric P. Heichel, dated November 12, 2010 [Heichel Aff.], Ex. D [Capital Call Agreement] [emphasis supplied]). Noting the absence of any reference to the Capital Call Notice requirements in Paragraph 3, defendant argues that the criteria set forth in this paragraph were met, because: (1) payments were made by wire transfer directly to plaintiff, (2) in the manner directed by plaintiff, (3) for the benefit of Block, and (4) plaintiff internally

accounted for the payment by applying them to the "Obligations."

In other words, defendant is arguing that Paragraph 3 of the Capital Call Agreement covers two distinct categories of payments, one constituting "all capital contributions made pursuant hereto" for which a Capital Call Notice is required, and a second category constituting "other payments by [Ahn] to or for the benefit of [Block]," for which no Capital Call Notice is allegedly required if, like the payments at issue, the funds are wired directly to plaintiff and reduce the Overadvance.

"It has long been the rule that a contract must be read as a whole in order to determine its purpose and intent, and . . . single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph, and the latter from the whole document" (*Bijan Designer For Men v Fireman's Fund Ins. Co.*, 264 AD2d 48, 51-52 [1st Dept 2000] [internal quotation marks and citations omitted]).

Applying these principles, it is evident that defendant's interpretation of "other payments" is based on an overly narrow and isolated analysis of Paragraph 3 that makes little sense when read in its contextual setting. Defendant ignores the fact that no reference is made to the Capital Call Notice in Paragraph 3 because this paragraph is merely dealing with how payments are to be made and applied in response to the sending of a Capital Call Notice, as provided for in Paragraph 2, regardless of the form the payments may take. In this regard, the Capital Call Agreement expressly provides that payment can be made in the form of a capital contribution, a loan or a letter of credit. Under Paragraph 2 (b) of the Capital Call

Agreement (with respect to payments made by capital contributions and loans) and Paragraph 2 (c) (with respect to letters of credit), all three methods of payment expressly require the sending of a Capital Call Notice.

Paragraph 2 (b) provides:

> "Upon the occurrence of a Capital Call Event . . ., *[GMAC] shall send to [Ahn] a Capital Call Notice* . . . The Capital Call Notice shall include a demand by [GMAC] for [Ahn] to make an equity capital contribution to Borrower through payment to [GMAC] (which at [Ahn's] option, may be in the form of a subordinated loan ....) ..."

(Capital Call Agreement). Similarly, Paragraph 2 (c) provides:

> "Within five (5) Business Days after the delivery by [GMAC] of a Capital Call Notice to [Ahn], [Ahn] shall (i) pay to [GMAC] , for the benefit of [GMAC], in cash or other immediately available funds, the amount demanded by [GMAC] *as set forth in the Capital Call Notice*, or (ii) upon approval by [GMAC], in its sole and absolute discretion, provide [GMAC] with a Letter of Credit . . . in an amount equal to the amount demanded by [GMAC] as set forth in the Capital Call Notice"

(*id.*). Thus, the words "other payments" in Paragraph 3 refers to other forms of payment defendant could use after a Capital Call Notice was sent, such as making a loan to Block or opening a letter of credit, if defendant did not want to structure the payments as an equity capital contribution. Contrary to defendant's forced interpretation, Paragraph 3 does not create new methods of payment, and plainly, does not supersede (and render superfluous) the Capital Call Notice requirements of Paragraph 2.[2]

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[2] Though not dispositive, it is worth noting that defendant's current interpretation is at odds with the position he took in support of his motion to dismiss the complaint, that "[o]nly the sending of a proper 'Capital Call Notice' in the manner prescribed by the contract

In making his argument, defendant also ignores that he acknowledged in the September 29, 2008 Letter Agreement between defendant and plaintiff (September Letter Agreement), which was executed contemporaneously with the first wire payment of $1 million, that both parties understood that the sending of a Capital Call Notice remained the requisite trigger event by providing that "[plaintiff] may, in its sole discretion, send to [defendant] a Capital Call Notice" (*see* affidavit of Erik B. Weinick, dated November 12, 2010 [Weinick Aff.], Ex. 22). Significantly, as part of that agreement, plaintiff agreed to refrain from immediately exercising its rights to issue a Capital Call Notice, which would have required defendant to pay the Excess Overadvance at that time, and to continue to make advances to Block in excess of the Permitted Overadvances. As such, defendant is estopped from arguing that he is entitled to a credit for the Fall 2008 Payments without a prior Capital Call Notice (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

Indeed, none of the communications exchanged between the parties at the time reference any reduction to defendant's liability resulting from the Fall 2008 Payments. Rather, as late as February 2009, the parties' communications continued to refer to defendant's outstanding liability for the entire $7 million (*see* Weinick Aff., Exs. 12 and 13). Equally important, those communications also demonstrate that defendant knew how to negotiate for and receive *written* assurance that a payment would be credited to him and proportionately reduce his liability under the Capital Call Agreement.[3] For example, a draft

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triggers an obligation."

[3] That defendant is a sophisticated businessman cannot seriously be in dispute.

letter of understanding, "incorporating the changes we discussed," provides that, in exchange for an additional $1 million payment by defendant, plaintiff would rescind several Capital Call Notices issued in December 2008 and January 2009 (sent *after* the Fall 2008 Payments), and states: "The $1,000,000 will be credited to your maximum liability of $7,000,000 under the Capital Call Agreement" (*see* Weinick Aff., Ex. 13 [e-mail from John Hendrickson (Senior Vice-President of GMAC) to defendant and Michael Turcich (CEO of Block), dated February 19, 2009]). By comparison, Amendment 19 to the Loan Agreement, dated September 29, 2008 (Amendment 19) (pursuant to which the September Letter Agreement was executed), is completely silent as to whether the October 2008 payment of $1 million would be applied against defendant's liability (*see* Weinick Aff., Ex. 1C).

In short, plaintiff has sufficiently demonstrated that, without a prior Capital Call Notice - and it is undisputed that none was sent - the Fall 2008 Payments were not made pursuant to the Capital Call Agreement, and do not serve to reduce plaintiff's personal liability under that agreement. Accordingly, this branch of defendant's motion is denied and plaintiff's motion for summary judgment on its breach of contract claim is granted.

Also, plaintiff is awarded summary judgment with respect to the affirmative defenses raised in defendant's Answer. Defendant's affirmative defenses based on plaintiff's failure to dispose of collateral prior to seeking payment from defendant is expressly barred by Paragraphs 5 and 7 (b) of the Capital Call Agreement. Defendant also waived any defenses based on plaintiff's alleged breach of the Loan Agreement (*see* Capital Call Agreement, ¶¶

Defendant had obtained a Masters in Business Administration from the University of Chicago and was formerly chairman and owner of Wilshire Bank for approximately seven years.

4 [a], 6 [a] and 8). Further, defendant lacks standing to assert such claims (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009] [holding that a guarantor may not asset breach of the loan agreement because such defenses belong to the primary obligor]). Additionally, plaintiff has established that the amount of the Excess Overadvance as of December 26, 2008 was $7,079,799 (*see* affidavit of Robert Higgins, dated November 12, 2010 [Higgins Aff.], ¶¶ 24, 42). Thus, any defense based on plaintiff's failure to satisfy a condition precedent, fails as a matter of law. Defendant's claim that plaintiff acted in bad faith by "managing" the account to maximize his liability (*see* defendant's memorandum of law in support, dated December 13, 2010, at 12-14), must likewise be rejected. The Capital Call Agreement permits plaintiff to send defendant "multiple" Capital Call Notices "in its sole and absolute discretion" each time a Capital Call Event existed (*see* Capital Call Agreement, ¶ 2 [d]).

Plaintiff asserts that it is entitled to recover its legal fees and other expenses incurred in this action because they are included in the amount that comprises the Excess Overadvance due from defendant under the Capital Call Agreement (*see* Heichel Aff., Ex. DD [plaintiff's objections and responses to defendant's interrogatories] nos. 7 and 8). Specifically, plaintiff has added approximately $574,963 to the Obligations owed under the Loan Agreement that it claims is chargeable to defendant as a result of legal costs (through May 2010) associated with the instant case (*id.*, Ex. EE). Defendant disputes plaintiff's right to add these charges to the Obligations and thereby increase his liability under the Capital Call Agreement.

Defendant's principal argument is that the Capital Call Agreement - as opposed to plaintiff's standard form of personal guaranty (which defendant refused to execute) - contains no provision for the recovery of attorneys' fees if plaintiff had to sue to collect pursuant to it. And while defendant concedes that the Loan Agreement does provide for attorneys' fees, he maintains that such expenses are limited to those incurred "in defending or prosecuting any actions or proceedings arising out of or relating to [plaintiff's] transactions with [Block] ..." (*see* Heichel Aff., Ex. E [Loan Agreement], ¶ 15.9 [d]). Defendant claims that, in the instant case, it is his transactions with plaintiff, not Block's, that are at issue. Further, defendant asserts that the Capital Call Agreement is not a related agreement covered by Paragraph 15.9 (b) of the Loan Agreement. That subparagraph provides that plaintiff is entitled to "[a]ll costs and expenses including, without limitation, reasonable attorneys' fees and disbursements incurred by [plaintiff] . . . (b) in connection with the entering into, modification, amendment, administration and *enforcement* of this Agreement or any consents or waivers hereunder and all *related agreements*, documents and instruments ..." (*see* Loan Agreement, ¶ 15.9 [b] [emphasis supplied]). Defendant contends that the agreements cannot be termed "related" because the Capital Call Agreement was not in existence at the time the Loan Agreement was executed.

This argument has no merit. First, as a factual matter, both agreements relate to the funding of Block. Indeed, the entire purpose of the Capital Call Agreement was to increase the amount of borrowing available to Block under the Loan Agreement (*see* plaintiff's Rule 19-a statement of uncontested material facts, dated November 12, 2010, ¶¶ 14 and 17 and defendant's response to plaintiff's Rule 19-a statement, dated December 13, 2010, ¶¶ 14 and

17). In addition, Amendment 19 to the Loan Agreement expressly refers to the Capital Call Agreement (*see* Weinick Aff., Ex. 1C, ¶ 3 [b]). Given their interdependence, the agreements are clearly related. Accordingly, the collection costs incurred by plaintiff in this suit against defendant are obligations of Block under the Loan Agreement, and plaintiff is entitled to its expenses, including attorneys' fees, incurred in the prosecution of this action (*see Kensington House Co. v Oram*, 293 AD2d 304, 304-05 [1st Dept 2002]). Therefore, this branch of defendant's motion is denied.

In addition, plaintiff has come forward with uncontroverted evidence that, as of October 2010, the amount owing under the Loan Agreement and included in the Overadvance was $7,648,975.88 (*see* Higgins Aff., ¶ 43; Weinick Aff., Ex. 21 [October 2010 Monthly Statement]). Consequently, defendant has reached (and exceeded) the $7 million limit on his liability, and pursuant to the Capital Call Agreement, is obligated to plaintiff for this amount.

Based on the foregoing, it is:

ORDERED that defendant's motion for partial summary judgment in his favor is denied; and it is further

ORDERED that plaintiff's motion for summary judgment in its favor is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the

amount of $7,000,000.00 together with interest at the contract rate, as provided in the Loan Agreement, from the date of the decision on this motion, and thereafter, as calculated by the Clerk.

Dated: 6/15/2011

ENTER:

J.S.C.

HON. BERNARD J. FRIED