Kay Inves. Series A, LLC v Nordica Invests. LLC
2013 NY Slip Op 32834(U)
November 1, 2013
Supreme Court, New York County
Docket Number: 653138/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 653138/2013
KAY INVESTMENTS SERIES A, LLC
vs.
NORDICA INVESTMENTS LLC
SEQUENCE NUMBER : 001
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. _____
MOTION DATE 10/8/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 12-19
Answering Affidavits — Exhibits _____ No(s). 21-26
Replying Affidavits _____ No(s). 27

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/1/13

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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KAY INVESTMENTS SERIES A, LLC, IL CAVALLO INVESTMENTS CORPORATION, and ROBERT CARRILLO HERRERA, on behalf of themselves as members of NORDICA SOHO LLC and in the right of NORDICA SOHO LLC, and on behalf of all other members of NORDICA SOHO similarly situated,

Plaintiffs,

-against-

NORDICA INVESTMENTS LLC, a Delaware limited liability COMPANY, NORDICA MANAGEMENT COMPANY LLC, STEPHANE BOIVIN, STEPHANE BIBEAU, and FACUNDO DE AURTENECHE RAWSON,

Defendants.

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Index No.: 653138/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Plaintiffs Kay Investments Series A, LLC, Il Cavallo Investments Corporation, and Robert Carrillo Herrera (collectively, the Preferred Members) move by order to show cause for a preliminary injunction, pursuant to CPLR 6301, removing defendant Nordica Investments LLC (the Sponsor Member) as managing member of Nordica Soho LLC (the Company). Plaintiffs' motion is denied for the reasons that follow.

I. Factual Background & Procedural History

This is the second action arising from defendants' alleged fraud related to their management of the Company.

A. The First Action

On May 3, 2013, the Preferred Members commenced an action in this court under Index No. 651628/2013 (the First Action), alleging that defendants committed myriad breaches of

contract and fraud by, *inter alia*: (1) failing to make contractually mandated capital contributions of over $6 million in accordance with the Company's operating agreement; and (2) failing to provide the Preferred Members with a contractually mandated accounting of the Company's finances. On May 6, 2013, the Preferred Members moved by order to show cause to compel the Sponsor Member to produce the Company's financial records. In an order dated May 14, 2013, this court granted the motion and ordered such records to be produced.

After the Preferred Members received some of the records, they filed an Amended Complaint (the AC) on May 17, 2013. The AC alleged that the Company's financial records show that the Sponsor Member: (1) never made its capital contributions; (2) stole money from the Company; and (3) engaged in fraud and other willful misconduct on a massive scale, including intentionally writing checks for over $200,000 on behalf of the Company, when the Company's bank account was overdrawn by almost $30,000. Additionally, the Sponsor Member failed to give the Preferred Members the complete set of financial records, in violation of this court's May 14, 2013 order. Thus, on May 21, 2013, the Preferred Members filed a motion by order to show cause for: (1) complete production of the Company's financial records; and (2) removal of the Sponsor Member as the Company's managing member based on the wrongdoing alleged in the AC. That motion was never decided because the parties settled the First Action and filed a stipulation of discontinuance on June 13, 2013.

B. The Instant Action

On September 10, 2013, the Preferred Members commenced the instant action. The complaint in this action is based on the same operative facts alleged in the AC. On September 12, 2013, the Preferred Members filed the instant motion, which seeks substantially the same

relief as their May 21, 2013 motion, which was resolved when the case settled. To date, defendants still control the company.

The instant motion, originally scheduled for October 1, 2013, has been adjourned a number of times. First, off the record, defendants asked for and were granted an extension of time to file their opposition and an adjournment of the hearing due to a supposed pending loan which would have resolved the parties' dispute. Then, after a telephone conference was held on September 30, 2013, during which defendants made further representations about the allegedly pending loan, the court issued an order, again extending defendants' time to file opposition and adjourned the hearing to October 8, 2013. On that date, a hearing was held, at which the court admonished defendants for what it believed were bad faith representations about pending construction loans, dating back to May 2013, that would have resolved the case. In addition, the court strongly implied that it was prepared to rule in plaintiffs' favor on the injunction application.

However, the court did not issue a ruling at the hearing because defendants produced a copy of the parties' settlement agreement from the first action (the Settlement Agreement), which, on its face, appears to preclude the Preferred Members from maintaining this action. Counsel for the Preferred Members, on the record, stated that the Settlement Agreement was merely "in escrow" pending certain conditions precedent, which supposedly did not occur. The Preferred Members claimed they possessed documentary proof supporting this contention and argued that they had not released their claims against defendants. The court reserved decision to further study the Settlement Agreement and any relevant documentary evidence and permitted briefing on this issue.

C. The Settlement Agreement

The Settlement Agreement was executed on June 13, 2013.[1] It is governed by New York law. Section V.8, an integration clause, states that the Settlement Agreement "sets forth the entire agreement between the parties with respect to the subject matter [i.e. the settlement and release of all claims from the first action, as set forth in Section II(i)]". The integration clause also disclaims and waives any prior agreements, collateral agreements, and representations not contained in the Settlement Agreement. In other words, the parties' rights are governed only by the express terms of the Settlement Agreement and not (as discussed below), by the emails sent by their counsel shortly before they executed it.

The terms of the Settlement Agreement provide the following. In exchange for releasing the claims in the first action, defendants agreed to pay the Preferred Members $4.25 million, the collective amount of their investment in the Company (the First Payment), plus the 20% per annum return originally agreed to in the Company's operating agreement (the Preferred Return). Settlement Agreement, Section I.1(i) & (i)(a). The Settlement Agreement does not state a definitive due date for the First Payment. Nor does it say that the closing of financing is a condition precedent to mutual releases or any other piece of the Settlement.

Section I.1(i) of the Settlement Agreement, however, merely provides that the First Payment must be made at the closing of the "the Madison Loan" (discussed below), which was "estimated to take place on June 14, 2013." At that time, upon receipt of the First Payment, the Preferred Members are supposed to transfer title to their equity in the Company to the Sponsor Member. As for payment of the Preferred Return (approximately $1.3 million), the first

[1] Though the Settlement Agreement has a confidentiality provision, it is material to this action because, as discussed herein, its terms will (upon further application by defendants) likely require dismissal of this case. Therefore, the Settlement Agreement will not be sealed.

$100,000 is due within 30 days of the Madison Loan's closing. The remainder of the money, which accrues at a 7% annual interest rate, is due by June 30, 2015. The Preferred Return is secured by a Note, personally guaranteed by defendant Stephane Boivin.

"The Madison Loan" was one of the "imminent" transactions that defendants' counsel claimed would resolve this case. It was supposed to be a construction loan from non-party Mason Realty Capital, which would be used to renovate the subject property (the Company's main asset). Section IV.1 (in the section titled "Representations and Warranty of Buyers [the Sponsor Member]") of the Settlement Agreement provides:

> [The Sponsor Member] represents and warrants as a necessary and material term of this Agreement that it has the right to utilize the funds borrowed from Madison Realty Capital, according to Madison's May 21, 2013 Confidential Commitment, and any extension of that offer from Madison on identical terms, for the purpose of the purchasing of [the Preferred Members'] ownership interest in [the Company].

The Preferred Members' argue that this Section creates a condition precedent, making settlement dependent upon the closing of the Madison Loan. Further, the Preferred Members contend that emails exchanged by the parties demonstrate that the Settlement Agreement was meant to be held "in escrow" pending the closing of the Madison Loan. The court rejects both arguments.

Obviously, such a contemporaneous agreement, even in writing, is precluded by the Settlement Agreement's integration clause. However, for the reasons discussed in Part II, even if such an agreement were valid, the emails merely evidence a narrower escrow agreement than the Preferred Members aver, and does not include holding the Settlement Agreement in escrow pending the Madison Loan's closing.

II. Discussion

To succeed on a motion for a preliminary injunction, the movant must demonstrate a likelihood of ultimate success on the merits, that irreparable injury would result in the absence of injunctive relief, and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of this extraordinary relief. CPLR 6301; *Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 (2d Dept 1995); *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 (1st Dept 1982), *app dismissed*, 58 NY2d 1113 (1983). Additionally, the movant "must demonstrate a clear right to relief which is plain from the undisputed facts," to establish its likelihood of success. *Blueberries Gourmet Inc. v Aris Realty Corp.*, 255 AD2d 348, 349-50 (2d Dept 1998). Where questions of fact exist which would substantially subvert the movant's likelihood of ultimate success, an injunction should not be granted. *Adv. Digital Sec. Solutions, Inc. v Samsung Techwin Co.*, 53 AD3d 612, 613 (2d Dept 2008). Furthermore, "economic loss, which is compensable by money damages, does not constitute irreparable harm" and so does not justify injunctive relief. *DiFabio v Omnipoint Comm's Inc.*, 66 AD3d 635, 637 (2d Dept 2009), *quoting Walsh v Design Concepts*, 221 AD2d 454, 455 (2d Dept 1995).

The Preferred Members have failed to show a likelihood of success on the merits. Indeed, this action is precluded by the Settlement Agreement. Ergo, as the Preferred Members are likely barred from maintaining this case, the court need not assess the merits of their underlying claims.

A. Sections I.1(I), (i)(a), & IV.1

Settlement agreements "are favored by the courts and not lightly cast aside.", *Hallock v State*, 64 NY2d 224, 230 (1984). Moreover, "[a] settlement agreement is a contract between the

parties, it must be construed according to ordinary contract law." *Lyons v Whitehead*, 291 AD2d 497, 499 (2d Dept 2002).

It is well established that contracts "are construed in accord with the parties' intent." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). "The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* (citations omitted). Furthermore, "provisions in a contract are not ambiguous merely because the parties interpret them differently." *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 362 (1996). "The ultimate aim is to realize the parties' 'reasonable expectations' through a practical interpretation of the contract language." *Gessin Elec. Contrs., Inc. v 95 Wall Assocs., LLC*, 74 AD3d 516, 518 (1st Dept 2010), quoting *Sutton v E. River Savings Bank*, 55 NY2d 550, 555 (1982).

The Preferred Members contend that the Settlement Agreement, and, specifically the language of Sections I.1(I), (i)(a), & IV.1 (which discuss the Madison Loan), provides that the closing of the Madison Loan is a condition precedent to the release of their claims in the first action. "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.'" *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 (1995), quoting Calamari & Perillo, Contracts § 11-2, at 438 (3d ed). When a contract contains a condition precedent to "the formation or existence of the contract itself ... no contract arises 'unless and until the condition occurs.'" *Id.* (internal citation omitted). "In determining whether a particular agreement makes an event a condition courts will interpret doubtful language as embodying a

promise or constructive condition rather than an express condition. This interpretive preference is especially strong when a finding of express condition would increase the risk of forfeiture by the obligee." *Id.* at 691, citing Restatement [Second] of Contracts § 227(1); *see also DirecTV Latin America, LLC v RCTV Int'l. Corp.*, 38 Misc3d 1212(A), at *5 (Sup Ct, NY County 2013) (finding no condition precedent where the contract's description of the alleged condition lacked prefacing language, such as "if" or "unless and until").

The express language of the Settlement Agreement does not condition its enforcement on the closing of the Madison Loan. Had the parties, who were all represented by counsel, wished to agree to such a condition precedent, they could have explicitly provided for one in the Settlement Agreement. Instead, the relevance of the Madison Loan in the Settlement Agreement is limited to the timing of the payments to the Preferred Members and the stock transfer to the Sponsor Member. The representation contained in Section IV.1 addresses the Sponsor Member's right to access the funds, a right not challenged by the Preferred Members . The court cannot change the terms of the parties' negotiated agreement, nor can the court give weight to the parties' supposed contemporaneous side agreements, which are disclaimed by the integration clause. That being said, given that the Madison Loan did not close in June, and has not yet closed, it is unclear when the payments are due. However, this issue is not before the court, as this motion does not seek to compel the Sponsor Member to make the First Payment or the Preferred Members to transfer their shares. That is a matter for another day, and, in any event, there may not be a dispute if the Madison Loan closes or some other source of funding (such as sale of the subject property) takes place.

B. The "Escrow Agreement"

On June 12, 2013, the day before the Settlement Agreement was executed, the parties exchanged the following emails. At 3:29 pm, counsel for the Preferred Members sent counsel for the Sponsor Member the following email:

> Pursuant to our conversation, detailing the agreement to hold the attached documents in escrow:
>
> Please find enclosed the signed stipulation of discontinuance that we agreed you will hold in escrow and not file until I receive the following agreements signed by your client: settlement agreement, promissory note, and personal guaranty.
>
> Please find enclosed the signed Settlement Agreements (in counterparts) that we agreed you will hold in escrow and not file until I receive the following agreements signed by your client: settlement agreement, promissory note, and personal guaranty.
>
> Please reply to acknowledge that you will hold said documents in escrow.

Counsel for the Sponsor Member replied at 3:49 pm:

> There is nothing attached.
>
> And we did not agree that the stipulation of discontinuance would be held in escrow – we said that the Note, Guarantee, and [Transfer Certificates] would be held in escrow until the Madison Loan was closed.
>
> I'm not sure if there is an issue here or something, but I have told you over the last few days that I am here and available to talk to you by phone to work through any processes or misunderstandings.
>
> Please call me if there is something you need to discuss for clarity. And please send me the Settlement Agreement in signed counterparts and then we will sign the Discontinuance Stipulation.

Counsel for the Preferred Members replied at 4:37 pm:

> Please find enclosed the signed Settlement Agreements (in counterparts) that we agreed you will hold in escrow and not file until I receive, review and approve the following agreements signed by your client: settlement agreement, promissory note, and personal guaranty. The Discontinuance

> will not be filed until the promissory note and personal guaranty are produced, we consider the promissory note and personal guarantee to be part of the Settlement Agreement.

At 4:45 pm, counsel for the Sponsor Member replied:

> I do not know what you mean by holding the Settlement Agreement "in escrow" - this is an agreement that is entered into by the parties.
>
> As far as the other agreements and documents necessary to transfer the Sellers' NS Percentage Interest, the executed Promissory Note, Guaranty, Transfer Certificates, and Stipulation of Discontinuance, we agree that they shall be held in escrow by the attorneys (plaintiffs' attorney shall hold the Note and Guaranty – defendants' attorney shall hold Transfers and Stipulation) to be released or filed, upon the closing of the Madison Loan, and the First Payment being distributed to the Sellers' counsel.
>
> If you agree to this, please confirm by email and I will forward you the scanned executed Note and Guaranty.

At 5:07 pm, counsel for the Sponsor Member followed up:

> Are we in agreement here? Should I send you the documents for you to hold in escrow, and visa versa?

At 7:20 pm, counsel for the Preferred Members responded:

> Yes, I will hold in escrow, you are to continue to hold our documents in escrow as well until we have a chance to review.

At 8:51 pm, counsel for the Sponsor Member replied:

> Attached are the executed promissory note and guarantee, as discussed, to be held by [Preferred Members'] counsel in escrow until transfer of the [stock].
>
> Also as discussed, [Preferred Members'] counsel will execute the stipulation of discontinuance, which will be held in escrow by my office until transfer of title of [the stock].
>
> [The Preferred Members] will also provide executed certificates of transfer, which I will hold in escrow until transfer of title.

The following day, the Settlement Agreement was executed, including all of the incorporated documents (e.g. the note and personal guarantee).

This pre-execution back-and-forth is legally irrelevant, since the Settlement Agreement's integration clause disclaims reliance on terms not incorporated into the written contract. Again, had the parties wished to hold the Settlement Agreement in escrow, they could have included such language in the Settlement Agreement itself.

That being said, the emails do not contain a meeting of the minds to hold the Settlement Agreement in escrow. Rather, the purpose of the parties' "escrow" arrangement was to ensure the documents related the Settlement Agreement would be acted on in the proper manner. For instance, the parties wanted to ensure that the stock transfer documents would not cause title to pass to the Sponsor Member until the Preferred Members received the First Payment. Likewise, the Sponsor Member wanted to ensure that it would not be bound by the note and Boivin would not be bound by the personal guarantee until the parties all signed the Settlement Agreement. Contrary to the argument now made by the Preferred Members, these emails do not premise the effect of the Settlement Agreement, or the mutual release of claims asserted in the First Action, on the closing of the Madison Loan.

Over the months following the Settlement Agreement's execution, particularly in late June and throughout the rest of the summer, the parties' counsel exchanged numerous emails that the court will not reproduce given their length. Suffice it to say, these post-execution emails evidence great regret on the part of the Preferred Members. It appears that the Preferred Members wish they had not signed the Settlement Agreement. They consistently tried to reframe the scope of the parties' "escrow" arrangement to claim that the entire Settlement Agreement was not to be effective until the Madison Loan closed. The Preferred Members may

have wished they had agreed to such a condition precedent, but the documents do not evidence such an arrangement.

At this juncture, the court need not definitively rule out the Preferred Members' version of history. This is a preliminary injunction motion, and the ultimate adjudication of the merits is not at stake. Nevertheless, assessing whether the movants, the Preferred Members, have established a likelihood of success on the merits, the court cannot find in their favor.

The court reached this conclusion after the supplemental briefing was submitted. However, the court did not issue this decision at that time because defendants, once more, informed the court that an imminent transaction would moot this case. Specifically, defendants represented that they had contracted for the sale of subject property. To wit, defendants represented that there were already millions of dollars in escrow from the buyer's down payment. The parties agreed to have this motion held in abeyance pending their attempt to reach a new settlement, whereby the Preferred Members would be paid immediately, in cash, the full amount that they previously settled for. This, of course, was an attractive prospect for the Preferred Members, because they would not have had to wait until 2015 to receive all of their money. Unfortunately, the parties did not settle.

Finally, the court notes that, even though the Settlement Agreement is binding, the Preferred Members still have their equity in the Company because the transfer of such equity to the Sponsor Member has not occurred since the First Payment has yet to be made. Given the details of the proposed sale, the court reminds the parties that such sale must comply with the Company's operating agreement. Until the First Payment (of $4.25 million) is made, the Preferred Members retain their equity and all attendant rights. Hence, even though the Sponsor Member remains in charge of the Company, the proposed sale cannot violate the Preferred

Members' rights under the operating agreement. The parties are strongly urged to settle this matter (and promptly make the First Payment). If they do not, the court will surely be faced with a motion to dismiss the action, a motion to enjoin the sale, and a motion to compel payment under the Settlement Agreement. Efficiency and common sense militate against such further litigation, though it is the parties, not the court, who must choose which path forward is in their best interest. Accordingly, it is

ORDERED that the motion by plaintiffs Kay Investments Series A, LLC, Il Cavallo Investments Corporation, and Robert Carrillo Herrera for a for a preliminary injunction to remove defendant Nordica Investments LLC as managing member of Nordica Soho LLC is denied.

Dated: November 1, 2013

ENTER:

J.S.C.