IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

UNIVERSAL MUSIC INVESTMENTS, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No.: N13C-10-300 FSS
EXIGEN, LTD., et al.	)	
Defendants.	)	

Submitted: May 19, 2014
Decided: August 25, 2014

ORDER

***Upon Plaintiff's Motion for Judgment on the Pleadings* – GRANTED**

Plaintiff belongs to a group of related companies developing, marketing, and distributing recorded music. Plaintiff contracted with Exigen USA to develop software. Under a guaranty, Defendant guarantors jointly and severally promised to cover all Exigen USA's liabilities arising from the software contract. After a default judgment against Exigen USA,[1] Plaintiff sued to enforce the guaranty. Now, Plaintiff moves for judgment on the pleadings, arguing Defendants' defenses to the underlying debt and the resulting judgment are barred under *res judicata*. Defendants argue the default is void because it was entered moments after Exigen USA filed bankruptcy.

[1] *Universal Music Investments, Inc., v. Exigen (USA), Inc.*, Del. Super., C.A. No.: 10C-02-044 FSS, Silverman, J. (October 17, 2013) (ORDER).

I.

In 2010, Plaintiff sued Exigen USA for breach of their software development contract. Exigen USA began defending the case in depth, arguing the agreement and underlying project had not been validly terminated, and counterclaiming for breach of contract. After nearly three years of involved litigation, including extensive discovery and motion practice, Exigen USA's counsel withdrew. It took Exigen USA over three months, and Plaintiff's filing for default judgment, to secure a second set of counsel. This second set of counsel withdrew less than six months later. Then, the court gave Exigen USA time to secure a third set of counsel. But it again cautioned, "if new counsel has not appeared within 30 days, Plaintiff may file a motion for default, which the court will hear forthwith." When the deadline expired, Plaintiff re-noticed a default judgment. Exigen USA never responded. On October 17, 2013, as a last resort and after fair warning, the court granted default judgment and dismissed the counterclaims. In no way can it be said that it was a snap judgment.

On October 18, 2013, the court corrected a typo in the previous day's order. It substituted "UMI" for "Exigen" in the last numbered paragraph, to make it read "UMI is entitled to pre-judgment and post-judgment interest." Obviously, UMI, the plaintiff, not Exigen, the defaulter, was entitled to the interest awarded when the

judgment was entered, and the correction made it so. Concurrently, however, on October 17, 2013, Exigen USA filed for chapter 11 bankruptcy. The court believes the bankruptcy preceded the corrected order by hours, hence the core issue whether the corrected order violated the automatic bankruptcy stay.

With its default judgment in hand, Plaintiff filed suit here to enforce the guaranty on October 25, 2013. In the two months between the default and answering this action, Defendants did not challenge the judgment in the federal bankruptcy court, nor did they seek to intervene in order to have the default vacated or to appeal its entry. Instead, Defendants waited until Plaintiff acted.

On December 20, 2013, Defendants answered the complaint. The answer contends that the guaranty is unenforceable for lack of consideration and the default judgment violates the automatic bankruptcy stay. Further, as the guaranty allows Defendants to assert any underlying objections and defenses Exigen USA could assert,[2] Defendants asserted them along with essentially the identical counterclaims Exigen USA asserted in the initial litigation.

On February 11, 2014, Plaintiff filed this Motion for Judgment on the Pleadings. After initial briefing, the court held oral argument April 4, 2014. The

[2] "[E]ach of the Guarantors hereby further waives all other rights and defenses …, but not including those underlying objections and defenses that Exigen USA can or could assert under the Development Agreement."

court requested supplemental briefing on the relationship between the judgment order and Exigen USA's bankruptcy. The record closed May 19, 2014.

II.

Plaintiff argues the pleadings clearly establish Defendants are responsible for its judgment against Exigen USA. First, the guaranty is enforceable because, by its terms, it forbids revocation[3] and is supported by sufficient consideration.[4] More importantly, Plaintiff argues the October 17, 2013 order, entered before the bankruptcy stay, is final and binding because the correction was merely ministerial. Accordingly, under the guaranty's terms, all "objections and defenses" are waived except those available to Exigen USA. (As discussed below, however, they are no longer available because *res judicata* bars them all.) Counterclaims are not contemplated at all by the agreement. Accordingly, the judgment, in effect, decided all underlying claims, defenses, and counterclaims against Exigen USA, and guarantors are not entitled to relitigate them, hoping to do better than Exigen USA with a second go-round.

Defendants primarily argue *res judicata* does not apply. First, the default judgment is allegedly void because it was entered after the bankruptcy stay was in

[3] "Each of the Guarantors hereby waives any right to revoke this Guaranty...."

[4] "[I]n consideration of the premises and the covenants, agreements and conditions contained herein, and in order to induce the Beneficiaries to enter into and perform their obligations under the Development Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged...."

effect. Second, *res judicata* only applies to final judgments on the merits and where the parties to the two actions are in privity, neither of which Plaintiff has proven. And, here, the default judgment was not on the merits, nor are Defendants and Exigen USA in privity.

Defendants further respond that disputes of material fact proscribe judgment on the pleadings. For example, "If Guarantors[] prove at trial that UMI materially breached the Development Agreement, or that it was not validly terminated, that excuses the Guarantors from performance under the Guaranty." That, however, simply begs the question whether Guarantors may litigate material breech, and other excuses from performance. Similarly, Defendants assert, "If there was no consideration to support the Guarantors' promise, none of the terms in the Guaranty are enforceable, including the waiver in section 3(c) of the Guaranty.[5] This is a factual inquiry that should not be considered without discovery being taken." Lastly, in their supplemental brief, Defendants, again begging the question, add that because the dismissal of Exigen USA's claims by the default judgment is an avoidable transfer under bankruptcy law, the default cannot be considered final.

[5] "Each of the Guarantors acknowledges that it will receive substantial indirect benefits from the arrangements contemplated by the Development Agreement and that the waivers set forth in this Section 3 are knowingly made in contemplation of such benefits."

III.

The standards for a motion for judgment on the pleadings are set: 1) all well-pleaded facts are accepted as true, 2) the court draws all reasonable inferences in the non-moving party's favor, 3) there are no material facts in dispute, and 4) dismissal is only appropriate if the moving party is entitled to judgment as a matter of law.[6] "[J]udgment on the pleadings may be granted only where the non-moving party would not be entitled to judgment under any possible set of facts arising out of the [pleadings]."[7]

IV.

As mentioned above, there are essentially two issues presented: 1) whether the default judgment violates the bankruptcy stay, and 2) if not, whether *res judicata* precludes Defendants' affirmative defenses and counterclaims. If the stay does not apply and *res judicata* does, there are no factual disputes left to resolve.

The court appreciates that granting a plaintiff judgment on the pleadings is unusual. But, this guaranty situation lends itself to it. Defendants have not suggested a factual dispute about the default's entry, the order's correction, the parties' relationship, and the agreement's terms. Defendants are just looking for an

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[6] *Brooks-McCollum v. Emerald Ridge Bd. of Directors*, 29 A.3d 245, *2 (Del. 2011) (TABLE).

[7] *Highlands Ins. Grp., Inc. v. Halliburton Co.*, 2001 WL 287485 (Del. Ch. 2001) *aff'd*, 801 A.2d 10 (Del. 2002).

opening to pick-up Exigen USA's defense, or even restart the litigation from scratch. Defendants, *qua* guarantors, however, have not offered a principled justification for that.

A.

As discussed above, after years of costly, time-consuming litigation, the court granted default judgment just before Exigen USA filed for bankruptcy. Then, the next day, the court corrected an obvious mistake. While asserting the corrected order is void *ab initio* due to the automatic stay, Defendants acknowledge there is a ministerial acts exception to the stay.[8] The ministerial acts exception "stems from the common-sense principle that a judicial 'proceeding' ... ends once a decision on the merits has been rendered."[9]

The original October 17, 2014 order is the decision on the merits, not the next day's corrected order. The original order decided and ended the case. It declared who had won and it awarded specific damages plus interest. Accordingly, despite Defendants' assumption that the corrected order is material because it awarded pre- and post-judgment interest, the correction falls squarely within the

[8] "Defendants dispute any contention by UMI that entry by this Court of the Corrected Order post-petition was a 'ministerial act.'"

[9] *In re Pettit*, 217 F.3d 1072, 1080 (9th Cir. 2000). *See also Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 528 (2nd Cir. 1994) ("The judicial proceedings were concluded at the moment the judge directed entry of judgment").

ministerial acts exception.[10] Based on the pleadings, it is indisputable that the original judgment order specifically provided for pre- and post-judgment interest. It is also indisputable that as to the interest award, the corrected order merely transposed the parties, correcting an obvious mistake. Even flawed and uncorrected, the pre-bankruptcy order was an enforceable final judgment. And, again, none of this concerns disputed facts.

The court notes that while it has jurisdiction to decide whether its action violates a bankruptcy stay,[11] it is not the ultimate authority. If Defendants object to the corrected order, the federal bankruptcy court could address their claim. And, if the bankruptcy court disagrees, the bankruptcy court's resolution is determinative.[12] But, Defendants have not sought relief from the bankruptcy court, and this court holds, based on there being no disputed facts and as a matter of law, the corrected default judgment does not violate the bankruptcy stay.

Similarly, Defendants' characterizing the dismissal as an avoidable transfer is unpersuasive. While a judgment may constitute a transfer under the bankruptcy code, only a transfer for less than "reasonably equivalent value" is

[10] *E.g. Cusano v. Klein*, 485 Fed.Appx. 175, 179 (9th Cir. 2012) (The district court's February 2008 order amending the September 2003 judgment to incorporate the attorney's fees awarded by the Ninth Circuit was a ministerial act).

[11] *In re Singleton*, 230 B.R. 533, 539 (B.A.P. 6th Cir. 1999).

[12] *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 384 (6th Cir. 2001).

avoidable.[13] A dismissal of claims with prejudice constitutes a transfer for reasonably equivalent value as a matter of law.[14] And, a dismissal for failure to prosecute is a dismissal with prejudice.[15] The thinking behind the avoidable transfer notion is preventing some creditors benefitting at others creditors' expense. This court does not see that here. And again, the federal bankruptcy court presumably could have addressed this had it been asked.

B.

As the default judgment is valid, the next issue is whether *res judicata* bars Defendants' affirmative defenses and counterclaims. *Res judicata* applies if:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action [were] decided adversely to the [party to be bound] ... and (5) the decree in the prior action was a final decree.[16]

There is no question that the court had jurisdiction over the original action, which involved the same issues and was resolved with a final decree adverse to Exigen USA.

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[13] *Matter of Besing*, 981 F.2d 1488, 1493 (5th Cir. 1993).

[14] *Matter of Besing* at 1496.

[15] *Nyce v. Stella*, 1996 WL 944887 (Del. Super. 1996) *aff'd*, 687 A.2d 196 (Del. 1996).

[16] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009) citing *Dover Hist'l Soc., Inc. v. City of Dover Planning Comm'n,* 902 A.2d 1084, 1092 (Del. 2006).

Defendants, however, deny they are in privity with Exigen USA. Parties are in privity when "there is a close or significant relationship" between them.[17] Thus, courts have found guarantors[18] and major shareholders[19] are in privity. It is undisputed Defendants are guarantors. Moreover, Defendant Exigen Ltd. is the parent of all other Defendants and Exigen USA, and they all share senior management who signed the Guaranty on behalf of all Defendants. And, of course, even if they were not family, which they are, Defendants are undeniably Exigen USA's guarantors. As a matter of law, entities positioned like Exigen USA and Defendant guarantors are in privity for *res judicata's* purposes.

Furthermore, a critical element of privity is whether the parties' interests are aligned.[20] Where the new parties' claims are derivative, as here,[21] their interests are closely aligned. Defendants never suggested that before their legal offspring gave up on it, they were unaware of the full-blown litigation that ended in default judgment. As guarantors, Defendants could have provided a third set of counsel or otherwise intervened and stopped the default in its tracks, thus sparing themselves

[17] *Grunstein v. Silva*, 2012 WL 3870529 (Del. Ch. 2012).

[18] *VIII-Hotel II P Loan Portfolio Holdings, LLC v. Zimmerman*, 2013 WL 5785290, *3 (Del. Super. 2013).

[19] *Towle v. Boeing Airline Co.*, 364 F.2d 590 (8th Cir. 1966).

[20] *Levinhar v. MDG Med., Inc.*, 2009 WL 4263211 (Del. Ch. 2009).

[21] *In re CD Liquidation Co., LLC*, 2012 WL 6737478 (Bankr. D. Del. 2012)(guarantor's claims are always derivative of principal's).

from their current predicament. That brings into sharp focus why Defendants may not deny privity and why *res judicata* bars their affirmative defenses and counterclaims.

V.

For the foregoing reasons, Plaintiff's Motion for Judgment on the Pleadings is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Richard L. Horwitz, Esquire
John A. Sensing, Esquire
Frederick B. Rosner, Esquire