

**Kaplan v U.S. Coal Corp.**

2012 NY Slip Op 30166(U)

January 23, 2012

Supreme Court, New York County

Docket Number: 112252/10

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

LAWRENCE KAPLAN,  
Plaintiff,

Index No.: 112252/10

Motion Date: 10/18/11

- v -

Motion Seq. No.: 01

U.S. COAL CORPORATION,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 9 were read on this motion for summary judgment in lieu of complaint.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

PAPERS NUMBERED

1 - 4

Answering Affidavits - Exhibits \_\_\_\_\_

5, 6

Replying Affidavits - Exhibits \_\_\_\_\_

7 - 9

**FILED**

Cross-Motion:  Yes  No

JAN 25 2012

Upon the foregoing papers,

Motion sequence numbers 001 and 002 are consolidated for disposition.  
NEW YORK COUNTY CLERK'S OFFICE

In motion sequence number 001, plaintiff moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint. Defendant cross-moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint.

In motion sequence number 002, East Coast Miner LLC (East Coast) moves, pursuant to CPLR 1013, to: (1) be allowed to intervene in the primary action; (2) be added as a party

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

defendant; (3) have the caption amended by adding East Coast as a party defendant; (4) allow East Coast to submit opposition papers to plaintiff's motion; (5) deny plaintiff's motion; and (6) dismiss the complaint.

On or about April 15, 2008, plaintiff, defendant, and nonparties Camofi Master LDC (Camofi), Camhzn Master LDC (Camhzn), Futurtec L.P. (Futurtec) and Michael Miller (Miller) entered into an agreement, entitled "Rights Agreement," whereby, pursuant to a "Securities Purchase Agreement" (SPA), defendant, as the parent company for a group of borrowers, issued to plaintiff, Camofi, Camhzn, Futurtec and Miller (collectively, investors) certain promissory notes (Notes) in the aggregate principal amount of \$5 million.

Pursuant to the SPA, the Notes were secured by certain assets of defendant and the borrowers, subject to a Security Agreement.

Under the terms of the SPA, the investors received an aggregate of 500,000 shares of defendant's common stock at \$.001 par as additional consideration for their purchase of the Notes, with certain put rights attached to such shares. The time for electing the put option, pursuant to section 1 of the Rights Agreement, was to be triggered if defendant failed to consummate one of the following: (1) an underwritten public offering of its common stock; or (2) a reverse merger. If the put right was

triggered, under section 2 of the Rights Agreement, each investor could exercise the put for a purchase price of \$5.40 per share, with certain adjustments not here relevant.

Section 5 of the Rights Agreement states:

Security Interest. The obligation of [defendant] to make payment of the Purchase Price pursuant to Section 2 hereof shall be secured by a security interest in certain assets of [defendant] and the Borrowers pursuant to the Security Agreement; provided, however, such security interest shall not become fully granted, attached or effective and Investors shall take no action to perfect or enforce such security interest unless and until all the obligations of [defendant] and the Borrowers to the Credit Agreement Lenders under the Credit Agreement (as such terms are defined in the Notes) and all other Loan Documents (as such term is defined in the aforementioned Credit Agreement) have been paid in full.  
(emphasis in original)

Plaintiff alleges that, pursuant to the Rights Agreement, defendant failed to consummate the conditions enunciated therein so as to trigger his right to exercise the put option. By letter dated April 2, 2010, plaintiff notified defendant of his intention to exercise his put option right. Plaintiff held 25,000 put shares, and seeks \$135,000.00 for their redemption, which defendant has allegedly failed to pay. Plaintiff has provided a second letter, dated May 18, 2010, in which he reiterates his intention to exercise the put option.

Plaintiff contends that this action is one for the payment of money only based on the aforementioned Rights Agreement.

In opposition to plaintiff's motion, and in support of its cross-motion, defendant states that, pursuant to the SPA,

plaintiff appointed and authorized Camofi to act as his agent to acquire, among other things, a security interest on plaintiff's behalf in certain assets of defendant's and defendant's subsidiaries. Camofi entered into the Security Agreement on plaintiff's behalf on April 15, 2008.

On the same date that the Security Agreement was executed, defendant and the borrowers entered into two inter-creditor and subordination agreements, one relating to the borrowers' stock held by defendant, and the other relating to assets of the borrowers. These agreements were subsequently amended the following year. Camofi, on plaintiff's behalf, signed these agreements, pursuant to which plaintiff was deemed a "Junior Creditor." According to these agreements, senior creditors are to be paid before junior creditors are paid, and until the senior creditors are paid no junior creditor, without the prior written consent of the senior creditors, may exercise any remedy with respect to a default.

Based on the foregoing documents, defendant asserts that plaintiff may not maintain the present action because the senior creditors have not been paid. Further, in its memorandum of law, defendant argues that plaintiff's loan bears a criminally usurious rate of interest, which mandates dismissal of this action. Defendant alleges the true interest rate is the 20% interest rate stated in the agreement, enhanced by the amount

that he would receive in the exercise of the put options, exercisable in 17.5 months, bringing the alleged interest to approximately 57% per annum.

In opposition to defendant's cross motion and in reply to defendant's opposition, plaintiff avers that the provisions of General Obligations Law (GOL) § 5-501 (6) (b) expressly bars defendant's usury defense, where the amount of the loan exceeds \$2.5 million. Further, plaintiff maintains that the prohibition against junior creditors seeking remedies only applies to remedies against the borrowers, not defendant.

In reply to plaintiff's opposition to its cross motion, defendant states that GOL § 5-501 (6) (b) is inapplicable because plaintiff's loan was only \$250,000.00, and plaintiff is attempting to aggregate the total amount of the loans made to reach the statutory minimum. In addition, defendant states that the inter-creditor and subordination agreements state that a junior creditor may not seek any remedy, and those provisions are not in conflict with the provision prohibiting lawsuits against the borrowers. Specifically, defendant points to the provision in question, which states:

"Remedy" shall mean, with respect to a Default, the acceleration of any Junior Creditor Debt, or the exercise of any remedies in respect of such Default (including, without limitation, the right to sue the Borrowers), to exercise any right of set off, and to file or participate in any bankruptcy proceeding against the Borrowers, and explicitly including the imposition of default interest rate).

In motion sequence number 002, East Coast states that it is a junior creditor along with plaintiff, pursuant to the subordination agreement noted above, and seeks to intervene based on the assertion that the subordination agreement prohibits plaintiff's action without the written consent of the senior creditors, which plaintiff does not have. East Coast maintains that, if plaintiff were to be granted the relief he seeks, such relief would have the effect of breaching the agreement and adversely effect East Coast's security interest.

East Coast states that defendant is not a party to the subordination agreement and, therefore, does not have standing to defend East Coast's interests in the main action. Otherwise, East Coast basically agrees with defendant's position with respect to the main action, as presented above.

In opposition to East Coast's motion, plaintiff asserts that the Rights Agreement contains a merger clause that bars extrinsic evidence and is the only agreement that forms the basis of plaintiff's motion. The clause in question states:

Entire Agreement. This Agreement (including Annexes I and II) constitutes the entire agreement among the parties with respect to the subject matter hereof and supercedes all other prior agreements and understandings, both written and oral, among the parties or any of them with respect to the subject matter hereof.

The court notes that the subordination agreement that forms the basis of the opposition was amended subsequent to the execution of the Rights Agreement.

The court shall deny Plaintiff's motion. CPLR 3213, states, in pertinent part that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint."

Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable. Put another way, a document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make payments called for by its terms.' The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the instrument.

Weissman v Sinorm Deli, Inc., 88 NY2d 437, 444 (1996) (internal citations omitted); Bloom v Luqli, 81 AD3d 579 (2d Dept 2011); Metal Management, Inc. v Esmark Incorporated, 49 AD3d 333 (1<sup>st</sup> Dept 2008).

In the case at bar, the Rights Agreement that forms the basis of plaintiff's motion specifies, as noted above, that defendant's obligation to pay for the put rights is subject to the security agreements and certain triggering events. Therefore, in order to determine whether defendant is obligated to pay plaintiff, the court must look at extrinsic evidence and



the ancillary agreements to determine whether their conditions have been met so as to trigger defendant's payment obligations.

"While CPLR 3213 could apply to an action on a promissory note where subordination agreements merely order the priority of plaintiff['s] rights as against other creditors and have no bearing on plaintiff's rights against defendant" (Lipsky v Ajax Electric Motor Corp., 225 AD2d 1055, 1056 [4<sup>th</sup> Dept 1996]), here, the subordination agreements, by the terms of the Rights Agreement, create a condition precedent to defendant's obligations and "and thus, plaintiff['s] prima facie case consisted of more than 'proof of the note and a failure to make the payments called for by its terms.'" Hence, plaintiff has failed to establish that the Rights Agreement is an instrument for the payment of money only entitling him to the accelerated provisions of CPLR 3213.

In denying plaintiff's motion, the court deems the moving and answering papers as the complaint and answer respectively and shall consider defendant's motion to dismiss this action. CPLR 3213; Lipsky v Ajax Electric Motor Corp., 225 AD2d at 1056, supra. In doing so, the court shall grant defendant's cross motion to dismiss the complaint. Defendant moves pursuant to CPLR 3211 (a) (1) & (7) on the grounds of a defense founded upon documentary evidence and that the complaint fails to state a cause of action.

As stated above, the documentary evidence provided with these motions contain a condition precedent that must occur before plaintiff can maintain this action. That is, under the inter-creditor and subordination agreements plaintiff as a junior creditor must at a minimum plead that "that the Senior Creditor Debt has been paid in full in cash." Plaintiff does not dispute that this condition has not been satisfied and as a consequence, defendant's cross-motion must granted and the action dismissed. In reaching this conclusion, the court need not address defendant's usury arguments.

Because of the dismissal of the action on defendant's motion, East Coast's motion shall be denied as moot.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint (motion sequence number 001) is DENIED; and it is further

ORDERED that defendant's cross-motion to dismiss the action is GRANTED and the action is DISMISSED with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that East Coast Miner LLC's motion (motion sequence number 002) is DENIED AS MOOT.

This is the decision and order of the court.

Dated: January 23, 2012

ENTER:

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.

**FILED**

**JAN 25 2012**

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