DCF Capital, LLC v US Shale Solutions, LLC
2017 NY Slip Op 30258(U)
January 24, 2017
Supreme Court, New York County
Docket Number: 654495/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 654495/2016
DCF CAPITAL, LLC
vs.
US SHALE SOLUTIONS, LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. ______
MOTION DATE 12/16/16
MOTION SEQ. NO. ______

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

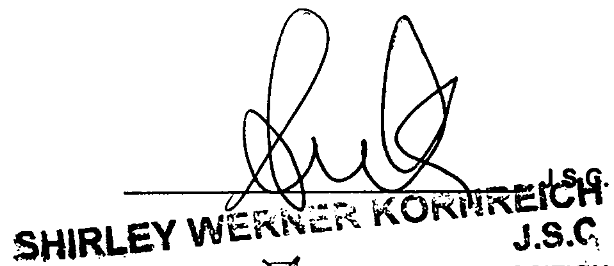
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). 2-5, 14
Answering Affidavits — Exhibits ______ | No(s). 9-12
Replying Affidavits ______ | No(s). 13

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: 1/24/17



SHIRLEY WERNER KORNREICH, 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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DCF CAPITAL, LLC,

Plaintiff,

-against-

US SHALE SOLUTIONS, LLC,

Defendant.

---X

Index No.: 654495/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendant US Shale Solutions, LLC moves, pursuant to CPLR 3211, to dismiss the complaint. Plaintiff DCF Capital, LLC opposes the motion. Defendant's motion is denied for the reasons that follow.

This case concerns defendant's failure to make timely interest payments to plaintiff on notes governed by an indenture. The only issue raised by defendant on this motion is plaintiff's failure to comply with the indenture's conditions precedent to suit. As the court explains herein, regardless of whether such conditions were complied with, federal law mandates that plaintiff be permitted to maintain this action.

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties. The court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the

elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

On September 1, 2015 and March 1, 2016, defendants failed to make interest payments due to plaintiff on notes (the Notes) governed by an indenture dated August 19, 2014 (the Indenture). *See* Dkt. 14.[1] The Indenture is governed by New York law.[2] *See id.* at 107. Section 6.01(1) provides that defendants' failure to make these interest payments is an Event of Default. *See id.* at 80. Section 6.02 further provides that, upon an Event of Default under section 6.01(8) or (9) [*see id.* at 81], which are not alleged to be applicable in this case, the "Notes will become due and payable immediately without further action or notice." *See id.* at 82. Section 6.02 then states that if there is any other type of Event of Default, such as a default under section 6.01(1)

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

[2] *See Quadrant Structured Prods. Co. v Vertin*, 23 NY3d 549, 559 (2014) ("A trust indenture is a contract, and under New York law," it must be interpreted in accordance with the usual interpretive principles, i.e., that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.") (citations and quotation marks omitted).

for failure to pay interest, the Notes will only be accelerated by declaration of either the trustee, non-party Wilmington Trust National Association (the Trustee), or holders of at least 25% of the aggregate principal amount of the outstanding Notes. *See id.*[3] Plaintiff claims to be the latter, i.e., a "holder of at least 25% in the aggregate principal amount of the outstanding Notes." *See* Complaint ¶ 25.

By letter dated March 4, 2016, plaintiff's manager wrote the following to the Trustee:

> We hold on behalf of our client [$1 million] in principal of the [Notes], making us holders of a majority of these outstanding Notes. Pursuant to the "Events of Default and Remedies" section on page 156 of the US Shales Solutions Offering Memorandum dated August 7, 2014 (attached): "If any other Event of Default occurs and is continuing the Trustee or the holders of at least 25% in aggregate principal amount of the then outstanding Notes may declare all the Notes to be due and payable immediately." We would like to instruct [the Trustee] to exercise its power to accelerate repayment of our Notes (including principal and interest) immediately."

See Dkt. 13 at 2.[4] The Trustee neither accelerated the Notes nor commenced suit against defendant. Nor have defendants paid the outstanding interest or the balance due on the Notes.

On August 25, 2016, plaintiff commenced the instant action by filing a complaint with a single cause of action for breach of the Indenture.[5] On September 26, 2016, defendant filed the

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[3] Absent acceleration, the Notes would not mature until September 1, 2017.

[4] It is unclear why plaintiff demanded that the Trustee declare the notes to be immediately payable since, under section 6.02, plaintiff had the right to do so. As explained herein, the parties' disputes over whether plaintiff's notice to the Trustee was sufficient is irrelevant by virtue of plaintiff's acceleration rights under section 6.02 and the federal law discussed below.

[5] This action was initially filed in federal district court, but was voluntarily discontinued without prejudice for lack of diversity jurisdiction because one of the members of defendant (a Delaware LLC) is a New York limited partnership. *See* Complaint ¶ 3.

instant motion to dismiss.[6] It argues that plaintiff failed to comply with the conditions precedent to suit in section 6.06 of the Indenture, which provides:

> No Holder of a Note may pursue **any remedy** with respect to this Indenture or the Notes unless:
>
> (1) such Holder has previously given the Trustee written notice that an Event of Default is continuing;
>
> (2) Holders of at least 25% in aggregate principal amount of the then outstanding Notes make a written request to the Trustee to pursue the remedy;[7]
>
> (3) such Holder or Holders offer and, if requested, **provide to the Trustee security or indemnity reasonably satisfactory to the Trustee against any loss, liability or expense**;
>
> (4) the Trustee does not comply with such request within 60 days after receipt of the request and the offer of security or indemnity; and
>
> (5) during such 60-day period, Holders of a majority in aggregate principal amount of the then outstanding Notes do not give the Trustee a written direction inconsistent with such request.
>
> A Holder of a Note may not use this Indenture to prejudice the rights of another Holder of a Note or to obtain a preference or priority over another Holder of a Note.

See Dkt. 14 at 83 (emphasis added).

In opposition, plaintiff complains about defendants' supposed "hyper-technical" reliance on section 6.06. *See* Dkt. 9 at 2. Plaintiff, however, does not rebut defendants' argument that plaintiff failed to comply with section 6.06(3) because it failed to make the requisite offer of indemnity. Rather, plaintiff contends that since it only demanded that the Trustee pursue the acceleration remedy in section 6.02 – as opposed to demanding that the Trustee commence suit –

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[6] The court reserved on the motion after oral argument. *See* Dkt. 15 (12/2/16 Tr.).

[7] As explained below, plaintiff has an absolute and unconditional right to sue for failure to pay interest. Thus, an indenture cannot prohibit a noteholder from suing unless the Trustee declines to do so. That sections 6.06(2) and (4) provide otherwise is, therefore, of no moment.

plaintiff was not required to make an offer of indemnity. Plaintiff, moreover, argues that its non-compliance with section 6.06 does not matter because, supposedly, section 6.07 excuses non-compliance in this instance. Section 6.07 provides:

> Notwithstanding any other provision of this Indenture, the right of any Holder of a Note to receive payment of principal of, premium on, if any, or interest, if any, on the Note, on or after the respective due dates expressed in the Note (including in connection with an offer to purchase), or to bring suit for the enforcement of any such payment on or after such respective dates, **shall not be impaired** of affected without the consent of such Holder ... [irrelevant exception regarding lien impairment omitted].

See Dkt. 14 at 83-84 (emphasis added).

Regardless of the parties' arguments and the agreement's provisions, compliance with section 6.06 and the relevance of section 6.07 applies are not apposite.[8] Clearly applicable federal law prohibits an indenture from barring a noteholder from suing for nonpayment of principal or interest by virtue of a no-action clause. Specifically, § 316 of the Trust Indenture Act (the TIA), 15 USC § 77ppp(b), provides that "a noteholder's right 'to receive payment of the principal of and interest on [the] indenture security, on or after the respective due dates expressed in such indenture security, **or to institute suit for the enforcement of any such payment on or after such respective dates**, shall not be impaired or affected without the consent of such holder[.]'" *MeehanCombs Global Credit Opportunities Funds, LP v Caesars Entm't Corp.*, 80 FSupp3d 507, 515 (SDNY 2015) (emphasis added). The meaning of § 316 is well settled. *See Marblegate Asset Mgmt., LLC v Educ. Mgmt. Corp.*, 2017 WL 164318, at *5 (2d Cir Jan. 17, 2017) ("under § 316, the right to sue [for non-payment of principal and interest] clearly bars so-

[8] To be sure, under New York law, where a plaintiff commences an action without satisfying an indenture's preconditions to suit, the action would ordinarily be dismissed. *See Emmet & Co. v Catholic Health E.*, 114 AD3d 605 (1st Dept 2014); *ACE Secs. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 112 AD3d 522, 523 (1st Dept 2013), *aff'd* 25 NY3d 581 (2015), citing *Walnut Place LLC v Countrywide Home Loans, Inc.*, 96 AD3d 684 (1st Dept 2012).

called 'no-action clauses,' which preclude individual bondholders from suing the issuer for breaches of the indenture, leaving the indenture trustee as the sole initiator of suit."), citing *Cruden v Bank of New York*, 957 F2d 961, 968 (2d Cir 1992) ("The '**absolute and unconditional**' right of a noteholder to pursue unpaid principal or interest is a requirement of § 316 of the [TIA].") (emphasis added); *RBC Capital Markets, LLC v Ed. Loan Trust IV*, 2011 WL 6152282, at *5 (Del Ch 2011) (Strine, C.); *see also RBC Capital Markets, LLC v Educ. Loan Trust IV*, 87 A3d 632, 641 n.35 (Del 2014). This court, in fact, has previously followed the dictate of § 316. *See Emmet & Co. v Catholic Health E.*, 37 Misc3d 854, 859 (Sup Ct, NY County 2012), *aff'd* 114 AD3d 605 (1st Dept 2014), citing *Great Plains Trust Co. v Union Pac. R. Co.*, 492 F.3d 986, 991 (8th Cir 2007) ("Section 316(b) of the [TIA] prohibits the purported restriction by an indenture of certain rights of security holders, including the right to sue for unpaid interest. ... We hold that Section 316 grants [plaintiff] **the absolute right to sue for unpaid interest without having to first comply with the no-action clause.**") (emphasis added). The Court of Appeals also has noted this rule. *See Quadrant*, 23 NY3d at 566.

Since § 316 makes the right to sue for non-payment unconditional, any mandatory preconditions to suit, such as those set forth in section 6.06 of the Indenture, are unenforceable in a non-payment action. Plaintiff, as alleged "holder of at least 25% in the aggregate principal amount of the outstanding Notes," has the right under section 6.02 of the Indenture to accelerate the amounts due on the Notes by virtue of defendant's missed interest payments. Having done so,[9] § 316 of the TIA permits plaintiff to sue defendant for nonpayment, regardless of any preconditions in the Indenture to the contrary. Accordingly, it is

[9] While, as noted earlier, plaintiff demanded that the Trustee do so, accepting the complaint's allegations to be true for the purposes of this motion, plaintiff has adequately provided defendant with notice that it holds the requisite 25% interest and demands acceleration. There is no reason

[* 8]

ORDERED that the motion by defendant US Shale Solutions, LLC to dismiss the complaint is denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on February 23, 2017, at 11:30 am, and the parties' pre-conference joint letter shall be e-filed and faxed to Chambers at least one week beforehand.

Dated: January 24, 2017

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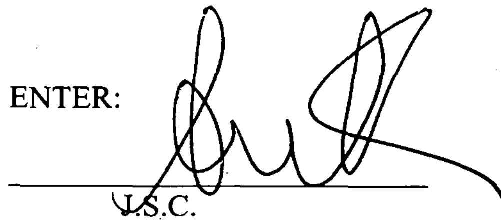

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

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to believe (at least none raised by the parties) that the complaint is an insufficient mechanism for providing defendant with its demand for acceleration (it does not appear that the Indenture requires a specific type of acceleration notice). *Cf. Panda Capital Corp. v Kopo Int'l*, 242 AD2d 690, 692 (2d Dept 1997) (with respect to notice required under the UCC, "the complaint and subsequent amended complaint in this action themselves constituted such notice, and that the plaintiff had repeatedly made its objections to [defendant's] pattern of deficient performance known prior to the shipments reflected in the invoices.").