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

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GEM HOLDCO, LLC, CWT CANADA II LIMITED PARTNERSHIP, and RESOURCE RECOVERY CORPORATION,

Index No.: 653694/2015

DECISION & ORDER

Plaintiffs,

-against-

RDX TECHNOLOGIES CORPORATION and DENNIS DANZIK,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

This is an action originally brought under CPLR 3213 to enforce a settlement agreement in a prior action before this court, styled *GEM Holdco, LLC v Changing World Techs., L.P.*, Index No. 650841/2013 (the Prior Action). Familiarity with the extensive history of the Prior Action and the court's numerous decisions is presumed.[1]

On November 6, 2015, the instant action was commenced by plaintiff GEM Holdco, LLC (GEM) by the filing of a summons and motion for summary judgment in lieu of complaint seeking the enforcement a settlement agreement (the Settlement Agreement) (Dkt. 34 at 2) and $9.5 million promissory note (the Note) (*see id.* at 13), each dated September 22, 2014, against defendants RDX Technologies Corporation (RDX) and Dennis Danzik (defendants or the RDX

[1] The Prior Action was marked disposed after the court decided the 27th motion (concerning attorneys' fees) by order dated February 6, 2017. *See* Prior Action, Dkt. 739. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system. Documents filed on NYSCEF in the Prior Action are cited to as "Prior Action, Dkt. __."

Parties). By order dated October 27, 2016, the motion was denied on the ground that the relief sought is more properly pursued by way of a plenary action. *See* Dkt. 28. The court, therefore, deemed the parties' papers a complaint and answer and directed GEM to move for summary judgment under CPLR 3212. *See id.*

On November 16, 2016, GEM filed the instant motion (Seq. 003) for summary judgment against defendants to hold them jointly and severally liable for $7,520,833.33, the remaining amount due under the Settlement Agreement. On December 21, 2016, defendants opposed the motion and cross-moved to disqualify GEM's counsel, Schlam Stone & Dolan LLP (Schlam Stone), based on its representation of defendants in the Prior Action. On January 18, 2017, GEM filed its reply and opposed the cross-motion. GEM also separately moved (Seq. 004) to add CWT Canada II Limited Partnership and Resource Recovery Corporation (collectively, the CWT Parties) as plaintiffs in this action. Defendants do not oppose the CWT Parties being added as plaintiffs. For the reasons that follow, plaintiffs' motions are granted and defendants' cross-motion is denied.

As an initial matter, defendants' cross-motion to disqualify Schlam Stone is entirely without merit. In the Prior Action, Schlam Stone originally represented all of the defendants, including the RDX Parties. When Schlam Stone withdrew as the RDX Parties' counsel and filed cross-claims against them on behalf of the CWT Parties, the RDX Parties moved to disqualify Schlam Stone from representing the CWT Parties. The court denied that motion, and the Appellate Division affirmed, because a conflict waiver signed by the RDX Parties precluded them from seeking to disqualify Schlam Stone. *See GEM Holdco, LLC v Changing World Techs., L.P.*, 46 Misc3d 1207(A) (Sup Ct, NY County 2015), *aff'd* 130 AD3d 506 (1st Dept 2015). Essentially ignoring both that decision and the fact that Schlam Stone was not involved

in drafting the Settlement Agreement (it was a settlement between GEM, who was represented by Arnold & Porter LLP, and the RDX Parties, who were represented by Greenberg Traurig LLP) (*see* Dkt. 34 at 9), the RDX Parties now claim that Schlam Stone's representation of the RDX Parties in the Prior Action precludes its ability to represent GEM in this action.

The question of whether the Settlement Agreement was breached does not concern the merits of the Prior Action or the confidential attorney client information the RDX Parties provided to Schlam Stone.[2] Schlam Stone's representation of GEM in this action, therefore, does not fall within the meaning of "substantially related matter" under Rule 1.9(a) of the Rules of Professional Conduct,[3] nor are the RDX Parties substantially prejudiced by Schlam Stone's representation of GEM in this action. *See Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 7 (1st Dept 2015) ("the conveyed information **did not have the potential to be significantly harmful to [the former client]** in the matter from which he seeks to disqualify counsel.") (emphasis added). In any event, now that the CWT Parties have been added as plaintiffs, their rights under their own settlement agreement with GEM (*see* Dkt. 66) gives them standing to prosecute this action.[4] The conflict waiver precludes the RDX Parties from seeking

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[2] As discussed further herein, the three breaches were non-payment, delisting of RDX's shares, and the RDX Parties' bankruptcy filings.

[3] Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person **in the same or a substantially related matter** in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

See 22 NYCRR 1200 (emphasis added).

[4] The RDX Parties' failure to oppose the addition of the CWT Parties as plaintiffs essentially concedes this point.

disqualification of Schlam Stone as counsel for the CWT Parties. Regardless, Rule 1.9(a)'s clear inapplicability defeats the disqualification motion. Simply put, the RDX Parties' disqualification motion is nothing more than a thinly veiled attempt to forestall judgment. This sort of cynical litigation tactic will not be countenanced.[5] *See Solow v W.R. Grace & Co.*, 83 NY2d 303, 310 (1994).

Turning now to the merits, summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a

[5] While plaintiffs also persuasively contend that the RDX Parties' failure to seek Schlam Stone's disqualification on the prior motion constitutes a waiver of their right to do so, the court need not reach this issue given the cross-motion's clear lack of merit. The court also will not opine on whether sanctions should be issued against the RDX Parties (who were sanctioned and held in contempt for their severe misconduct in the Prior Action) for filing a patently meritless disqualification motion because plaintiffs did not file a motion seeking such relief.

summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

There is no question of fact that the Settlement Agreement was breached. In the Prior Action, on the November 4, 2015 record [*see* Prior Action, Dkt. 597 (11/4/15 Tr. at 33-37)], the court found that the RDX Parties breached multiple provisions of the Settlement Agreement. The court reiterated these holdings on the October 27, 2016 record in this action. *See* Dkt. 30 (10/27/16 Tr. at 16). In its moving brief, GEM explains:

> Section 1(b) of the Settlement Agreement states that "RDX agrees to pay GEM or its assigns a total of U.S. $9.5 million in the form of cash or additional RDX shares, at RDX's option, to be paid in twenty-four (24) equal monthly installments over a two-year period ... provided that any shares delivered after the four-month hold period [i.e. more than four months after the execution of the Settlement Agreement] be free trading." Section 1(b) states, moreover, that "[i]n the event that trading in the shares is halted, or they are no longer listed, payment under this paragraph may only be in cash." The Settlement Agreement contains, as Exhibit A thereto, a Promissory Note for the full amount of $9.5 million.
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> **There is no dispute that, as of March, 2015, RDX was delisted from the Toronto Stock Exchange and was no longer publicly traded. As a result, GEM promptly demanded that RDX pay it in cash rather than stock. In fact, RDX did neither. More to the point, as of this writing GEM has not received any payments since February 2015**. The RDX Parties made five (5) installment payments, in RDX stock, pursuant to Section 1(b) of the Settlement Agreement and the Promissory Note: for October 2014, November 2014, December 2014, January 2015 and February 2015. However, since then, the RDX Parties have not made any payments pursuant to Section 1(b) of the Settlement Agreement and the Promissory Note. Accordingly, the outstanding obligations are for nineteen (19) payments that have not been made, for the period from March 2015 through September 2016, which is the end of the 24-month payment period provided for in the Settlement Agreement and Promissory Note. Because each installment payment was supposed to be for a value of $395,833.33 ($9.5 million divided by 24 installments), a total of $7,520,833.33 in principal ($395,833.33 x 19 unpaid installments) is long past due, plus accrued interest and the applicable costs and fees.
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> Separate and apart from the undisputed failure to pay, Section 2.2 of the Promissory Note makes it an event of default requiring acceleration of the outstanding debt, if RDX files a petition for bankruptcy or any proceeding

> seeking liquidation or reorganization. It is undisputed that RDX filed an application to the Court of Queen's Bench of Alberta, Canada in bankruptcy and insolvency in August 2015 (Eilender Aff. Ex. 4 hereto) and subsequently filed a separate petition for bankruptcy in the United States Bankruptcy Court for the District of Arizona on December 24, 2015 (Eilender Aff. Ex. 5), which was dismissed in June 2016 (Eilender Aff. Ex. 6).

See Dkt. 32 at 2-3 (emphasis added).

In opposition, the RDX Parties do not dispute any of these contentions, or even take the position that they did not breach the Settlement Agreement. Instead, they proffer the following three arguments: (1) the preconditions in section 1(b)(iii) of the Settlement Agreement were not satisfied; (2) the court's prior findings of breach are not res judicata; and (3) Danzik is not personally liable under the Settlement Agreement. The second argument does not merit serious consideration because, even if the court's prior breach findings are not res judicata, the RDX Parties did not rebut GEM's prima facie showing of breach. *See Brandy B. v Eden Cent. Sch. Dist.*, 15 NY3d 297, 302 (2010) ("Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing."), quoting *Alvarez*, 68 NY2d at 324. There are no questions of fact about any of the RDX Parties' breaches (they did not pay, RDX's shares were delisted, and the RDX Parties filed for bankruptcy).

With respect to the RDX Parties' first argument, section 1(b)(iii) of the Settlement Agreement provides:

> The terms of this Agreement are subject to and expressly conditioned upon final approval by the Toronto Venture Exchange (the "Exchange") within three business days of the full execution of this Agreement. RDX represents that the Exchange has given preliminary approval but that it requires a fully executed copy of this Agreement before giving final approval, RDX will submit a fully executed copy of this Agreement to the Exchange within twenty-four (24) hours

> of the execution of this Agreement. If such approval from the Exchange is not received by RDX and communicated to GEM within three business days of the execution of this Agreement, the Agreement shall be null and void.

See Dkt. 34 at 4.

It is undisputed that the Toronto Venture Exchange did not grant final approval of the Settlement Agreement. In reply, GEM takes the position that this does not matter:

> **It is indisputable that all parties have treated the Settlement Agreement as valid and enforceable for over two years. Defendants have made several partial payments under it: indeed, they admit that "RDX provided shares to plaintiff" for several months in partial performance of the Agreement**. That they did so "in hopes that the [Toronto Stock] Exchange would approve its contents" is pure fantasy: under the literal reading of the Settlement Agreement that Defendants now advocate, the Agreement would have been "null and void" unless it had been approved by the Exchange "within three business days of [its] execution," and a subsequent approval by the Exchange would not have automatically revived it. Not surprisingly, Defendants fail to attach to their papers copies of any alleged communications with the Toronto Stock Exchange in which they supposedly "worked on attempting to convince the Exchange to approve" the Settlement Agreement, or a copy of any alleged "final word" from the Exchange in September 2016 on its refusal to approve the Agreement. In fact, as discussed in the parties' prior motion papers, RDX was delisted from the Toronto Stock Exchange as of March 2015 and was no longer publicly traded. In short, Defendants' latest story about the Toronto Stock Exchange is nothing but fiction, designed to distract the Court's attention from their indisputable breaches of the Settlement Agreement.

See Dkt. 64 at 9-10 (emphasis added; citations omitted). GEM avers that the RDX Parties have waived a defense based on section 1(b)(iii) because they ratified the Settlement Agreement by partially performing thereunder and accepting its benefits despite knowing that final approval from the Toronto Venture Exchange was not procured.

The Settlement Agreement was executed in September 2014, and was adjudicated to have been breached in November 2015. The RDX Parties did not raise the Toronto Venture Exchange approval issue at the November 2015 hearing, nor did they raise the issue in their brief on the CPLR 3213 motion in this action. The issue was raised for the first time by the RDX Parties'

new counsel at the October 27, 2016 oral argument. *See* Dkt. 30 (10/27/16 Tr. at 25). The court rejected the argument on the ground that the parties acted as if the Settlement Agreement was valid. *See id.* at 26. The court adheres to that ruling because, under these circumstances, no reasonable finder of fact could conclude that the RDX Parties did not ratify the Settlement Agreement despite non-compliance with section 1(b)(iii). *See Allen v Riese Org., Inc.*, 106 AD3d 514, 517 (1st Dept 2013) ("Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it."), citing *Dinhofer v Med. Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 (1st Dept 2012) ("These claims are also barred by the doctrine of ratification, since plaintiff failed to act promptly to seek rescission of the consent, and indeed accepted and retained the benefits of the settlement.") (internal citation omitted). For more than two years, the RDX Parties accepted the benefits of GEM ceasing its litigation of the claims it asserted in the Prior Action. After accepting the benefits of the Settlement Agreement for that long, the RDX Parties have no right to now repudiate it. As a matter of law, the RDX Parties "implicitly ratified" the Settlement Agreement by accepting it benefits for more than two years. *See Hawkins v City of New York*, 40 AD3d 327 (1st Dept 2007); *Friedman v Garey*, 8 AD3d 129 (1st Dept 2004); *Benjamin Goldstein Prods., Ltd. v Fish*, 198 AD2d 137, 138 (1st Dept 1993).[6]

Finally, there is no merit in Danzik's contention that he is not personally liable under the Settlement Agreement. Under New York law, which governs the Settlement Agreement [*see*

[6] This conclusion is somewhat academic because, even in the absence of the Settlement Agreement, the RDX Parties' default in the Main Action would have resulted in judgment being entered against it. *See* Prior Action, Dkt. 664. Indeed, had a default judgment been entered in GEM's favor in the Prior Action, GEM might have procured a judgment in excess of the amount due under the Settlement Agreement.

Dkt. 34 at 7],[7] contracts must be construed based upon the parties' intent, which is to be determined from the language of the contract itself. *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002); *see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007) ("a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'"), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003).

The Settlement Agreement, at the outset, makes clear that both RDX and Danzik are each parties thereto; both are included in the definition of Settling Parties. *See* Dkt. 34 at 2. Section 8, titled "Remedy for Nonperformance", reinforces the notion that both RDX and Danzik have liability, as it begins by stating that "[i]f RDX **or Danzik** fails to perform." *See id.* at 6 (emphasis added). While this section permits the filing of a confession of judgment signed by Danzik [*see id.* at 23], that confession of judgment was held to be unenforceable in the Prior Action. *See* Prior Action, Dkt. 561. The Settlement Agreement does not, however, state that the filing of a confession of judgment is GEM's *sole* remedy against Danzik. On the contrary, section 8 merely states that GEM "may" file the confession of judgment in the event of breach. No other portion of the Settlement Agreement otherwise precludes GEM from simply suing for damages.

The First Department has consistently held that if a contract does not provide that a delineated remedy is the "sole remedy" against a particular breaching party, that breaching party may be held liable for the usual damages recoverable on a breach of contract claim, regardless of

[7] It is well settled that a settlement agreement is a contract subject to the usual rules of interpretation. *See IDT Corp. v Tyco Grp., S.A.R.L.*, 13 NY3d 209, 214 (2009), citing *Hallock v State*, 64 NY2d 224, 230 (1984).

whether a specific remedy is provided for in the contract itself. *Ambac Assur. Corp. v EMC Mort. LLC*, 121 AD3d 514, 519 (1st Dept 2014), citing *Assured Guar. Mun. Corp. v DLJ Mort. Capital, Inc.*, 117 AD3d 450, 451 (1st Dept 2014); *see also Morgan Stanley Mortg. Loan Trust 2006-13ARX v Morgan Stanley Mortg. Capital Holdings LLC*, 143 AD3d 1, 3 (1st Dept 2016), citing *Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 108 (1st Dept 2015). In fact, "while a provision providing for equitable relief as the 'sole remedy' will generally foreclose alternative relief, 'where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy.'" *Nomura*, 133 AD3d at 106 (citation omitted).[8]

In this case, Danzik executed the Settlement Agreement both in his corporate capacity on behalf of RDX and also in his individual capacity. *See* Dkt. 34 at 8. He did not execute the Note in his individual capacity since only RDX, and not Danzik, is liable under the Note. *See* Dkt. 34 at 13-15. That Danzik is not a party to the Note does not mean that he is not personally liable under the Settlement Agreement. The fact that Danzik signed (in both his corporate and individual capacity) a confession of judgment in the amount of $27 million [*see* Dkt. 34 at 23] is definitive evidence of the parties' intent that Danzik be held personally liable for breach of the Settlement Agreement. This intent is confirmed by section 8 of the Settlement Agreement, which specifically memorializes the fact that "RDX and Danzik are jointly and severally liable for [the] $27 million." To wit, Danzik's liability under the confession of judgment is almost three times more than RDX's liability under the Note. If the parties did not intend for Danzik to have personal liability for breach of the Settlement Agreement, Danzik would not have agreed to

[8] This rule would arguably be applicable here if section 8 was construed as a sole remedy clause given GEM's inability to enter the confession of judgment.

sign a $27 million confession of judgment. That he did so is incompatible with the notion that he did not agree to bear personal liability for RDX's breach of the Settlement Agreement. While the confession of judgment is not enforceable,[9] that fact does not preclude Danzik from being held personally liable because the Settlement Agreement does not contain a sole remedy clause. Danzik, thus, is personally liable.

In sum, since there is no question of fact that the Settlement Agreement was breached and that both RDX and Danzik are jointly and severally liable for such breach, summary judgment is granted to GEM for the outstanding amount due under the Settlement Agreement ($7,520,833.33) plus statutory pre-judgment interest under CPLR 5001 & 5004 from the earliest date of breach (March 15, 2015).[10] Accordingly, it is

ORDERED that the motion by plaintiff GEM Holdco, LLC to add CWT Canada II Limited Partnership and Resource Recovery Corporation as plaintiffs in this action is granted without opposition, and this action shall bear the following caption:

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GEM HOLDCO, LLC, CWT CANADA II LIMITED PARTNERSHIP, and RESOURCE RECOVERY CORPORATION,

Index No.: 653694/2015

Plaintiffs,

-against-

RDX TECHNOLOGIES CORPORATION and DENNIS DANZIK,

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[9] To be sure, there is a real consequence to Danzik not having liability under the confession of judgment, namely that the judgment entered against him in this action is for approximately $7.5 million, instead of the $27 million amount.

[10] Section 1(b) of the Settlement Agreement [*see* Dkt. 34 at 3] requires monthly payments on the 15th of each month. GEM claims, and defendants do not dispute, that the March 2015 payment was not made. *See* Dkt. 33 at 2.

Defendants.
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And it is further

ORDERED that the motion by plaintiff GEM Holdco, LLC for summary judgment against defendants RDX Technologies Corporation and Dennis Danzik is granted, and the cross-motion by defendants to disqualify Schlam Stone & Dolan LLP is denied; and it is further

ORDERED that and the Clerk is directed to enter judgment in favor of plaintiff GEM Holdco, LLC and against defendants RDX Technologies Corporation and Dennis Danzik, jointly and severally, in the amount of $7,520,833.33 plus 9% pre-judgment interest from March 15, 2015 to the date judgment is entered.

Dated: April 6, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.