

**War Chest Capital Multi-Strategy Fund, LLC v
Optimized Transp. Mgmt., Inc.**

2011 NY Slip Op 32924(U)

October 19, 2011

Sup Ct, NY County

Docket Number: 100527/11

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. M. Eder

PART 11

Index Number : 100527/2011
WAR CHEST CAPITAL MULTI-
 vs.
OPTIMIZED TRANSPORTATION
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

FILED
 PAPERS NUMBERED _____
 NOV 07 2011

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the unreviewed Memorandum Decision + Order.

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

Dated: October 19, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
WAR CHEST CAPITAL MULTI-STRATEGY FUND, LLC,

Index No. 100527/11

Plaintiff,

-against-

OPTIMIZED TRANSPORTATION MANAGEMENT, INC.,
and KEVIN BRENNAN, individually,

FILED

Defendants.

NOV 07 2011

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff War Chest Capital Multi-Strategy Fund, LLC ("War Chest") moves pursuant to CPLR 3213 for an order granting summary judgment in lieu of complaint against defendants Optimized Transportation Management, Inc. ("OTM") and Kevin Brennan ("Brennan"), individually. Defendants oppose the motion on the grounds that the defendants engaged in an illegal and fraudulent scheme which provides a defense to payment of the instruments at issue.

War Chest is a Delaware limited liability company. OTM is a public company whose stock trades on the Naddaq Bulletin Board, under the symbol OPTZ. OTM is in the business of providing supply chain logistics, including the software to manage the supply chain in an efficient manner. Brennan is the Chief Executive Officer of OTM.

On or about May 27, 2010, War Chest and OTM executed an Amended and Restated Secured Convertible Promissory Note (the Note) under which, for value received, OTM promised to pay War Chest the principal sum of \$25,000, with interest accruing at a rate of 21% per annum. The Note matured and became due and payable on November 27, 2010, or on demand of War Chest. The Note provided for repayment either in the form of money repayments

or conversion of shares of OTM stock. Specifically, under paragraph 2 of the Note, War Chest had the option, at any time, to convert the outstanding principal of the Note into shares of OTM's common stock at "50% discount of the 'Fair Market Value' but not to exceed Twenty Cents (\$0.20 per share)....."

On or about May 27, 2010, Brennan signed a "Continuing Personal Guaranty (unlimited)" (hereinafter "the Guaranty"), under which in exchange for inducing War Chest to continue to provide or to extend credit, he promised to pay "absolutely and unconditionally" any and all of OTM's obligations to War Chest.

Subsequent to the execution of the Note, War Chest and OTM executed two promissory notes (hereinafter "Subsequent Notes") in which OTM promised to repay loans in the aggregate sum of \$20,000. The Subsequent Notes, like the Note, gave War Chest the option of obtaining repayment in the form of monetary repayment or the conversion of shares. Paragraph 6(a) of the Subsequent Notes, provided that OTM was in default under the Subsequent Notes in the event of its nonpayment of any other obligation to War Chest.¹

War Chest now moves for summary judgment in lieu of complaint in its favor and against defendants based on the Note and Subsequent Notes and Guaranty in the amount of \$45,000, plus unpaid interest, and on its claims for costs, expenses and attorneys' fees. In support of its motion, War Chest submits copies of the Note, the Subsequent Notes and the Guaranty. War Chest also submits an affidavit of nonpayment from its managing member Howard Blum ("Blum") in which he states that OTM did not make repayment on the Note when it came due

¹The Subsequent Notes had not matured at the time that War Chest made the instant motion and War Chest seeks payment under the Subsequent Note based solely on defendants' default under the Note.

and payable on November 27, 2010, and that Brennan did not make payment under the Guaranty upon OTM's default. War Chest also asserts that since OTM is in default of its obligations under the Note it is in default of its payment obligations under the Subsequent Notes.

Defendants oppose the motion, asserting that the Note is not an instrument for payment of money only as it provides for the repayment either in the form of money or conversion of shares of OTM stock. Defendants also argue that there are triable issues of fact concerning whether War Chest already received compensation above what was due under the notes, and whether War Chest's fraudulent and/or illegal actions caused defendants to suffer damages and constitute a breach of the agreements in issue.

In support of their position, defendants submit the affidavit of its managing member, Brennan. According to Brennan, OTM was introduced to Blum in May 2010 to assist OTM to raise debt and equity financing to help OTM grow (Brennan Aff. ¶15). Blum then offered to invest in OTP through his three companies, War Chest, EP and Barclay (Id., ¶16). In exchange for these funds, OTM agreed to issue Blum and his partners, including War Chest, shares of OTM common stock at a price of 50% of the current bid price per share, and executed the Note (Id., ¶ 16).

According to Brennan, Blum and his companies, including War Chest, engaged in illegal trading practices, including the short sale of up to millions of shares of OTM stock, which resulted in a rapid increase in the trading volume of OTM stock and a resultant drop in the price of OTM stock from .30 per share at the time the Note was issued to .0004 a share despite no significant economic deterioration in the company (Id., ¶77-79). Specifically, Brennan asserts

that Blum and his agents or co-conspirators engaged in illegal short selling of OTM shares,² in a scheme to drive down the price of such shares “so that a greater number of shares could be obtained under the conversion feature of the convertible notes in question in the instant action and ... to evade the registration requirements of the securities laws” (*Id.*, ¶ 81) . Brennan further states that, to avoid further losses to the company and its shareholders resulting from the above described fraudulent and illegal conduct, OTM refused to permit War Chest to exercise its option under the Note to convert the shares of OTM stock, and that this action was commenced as a result of such refusal (*Id.*, ¶ 67).

In reply, War Chest asserts that the extrinsic evidence relied on by defendants is inadmissible to vary its obligations under the notes and guaranty.

“A plaintiff makes out a prima facie case for summary judgment in lieu of complaint by proof of an instrument and the defendant’s failure to make payment according to its terms.” Seaman-Andwall Corp. v. Wright Mach. Corp., 31 AD2d 136 (1st Dept 1968), aff’d, 29 NY2d 617 (1971). The device of summary judgment in lieu of a complaint is unavailable “where there are other issues and considerations presented by the writing.” Kerin v. Kaufman, 296 A.D.2d 336, 337 (1st Dept. 2002). See also, Weisman v. Sinorm Deli. Inc., 88 N.Y.2d 437 (1996).

Here, even assuming *arguendo* that the notes and guaranty at issue are instruments for payment of money only, defendants have raised issues as whether fraud or illegality were involved in the underlying transaction evidenced by these instruments. In particular, issues exist

²The short seller borrows the security from another market participant and delivers the borrowed security to a short-sale purchaser, thereby completing the trade, the sort seller is then obligated to return the securities to the lender—called covering the short—by repurchasing equivalent securities in the marketplace and delivering them to the lender. The short seller profits if the stock price falls between the time of the sort sell trade and the time the trade is covered. (Brennan Aff. at 11, fn. 2).

[* 6]
as to whether the conversion option in the notes was part of an illegal scheme by War Chest to devalue OTM's stock through short sales of OTM stock in order to obtain large numbers of OTM shares.

Under these circumstances, War Chest is not entitled to an accelerated judgment under CPLR 3213, and its motion for summary judgment in lieu of complaint must be denied. See Abrams v. Xenon Industries, Inc., 145 AD2d 362 (1st Dept 1988)(trial court properly denied motion for summary judgment in lieu of complaint where there was an "unresolved question of whether fraud and misrepresentation attended the transaction" resulting in the promissory notes at issue); Greenwald v. LeMon, 277 AD2d 202 (1st Dept 2000)(where notes were part of a transaction to avoid taxes, summary judgment in lieu of complaint was not appropriately granted).


Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that War Chest shall serve a formal complaint upon defendants' attorney within 30 days of the date of this order, a copy of which is being provided by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, on December 15, 2011 at 9:30 am.

Dated: October 19, 2011


FILED
J.S.C.
NOV 07 2011
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