SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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SPARTA COMMERCIAL SERVICES INC.,

Plaintiff,

DECISION/ORDER
Index No. 653870/2015

-against-

VIS VIRES GROUP INC, KBM WORLDWIDE INC., ASHER ENTERPRISES INC., SETH KRAMER, KURT KRAMER, JERSEY STOCK TRANSFER LLC, JOHN DOES ONE THROUGH TEN

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Sparta Commercial Services Inc. ("Sparta" or "plaintiff") moves by order to show cause to preliminarily enjoin defendants from converting shares of Sparta common stock, selling shares of Sparta common stock that they received in accordance with certain agreements, and enjoining Jersey Stock Transfer LLC ("JST") from transferring to the other defendants any more shares of Sparta common stock. Sparta also seeks an order requiring the defendants to return to plaintiff residual shares of Sparta common stock that they received in accordance with certain agreements.

Unless otherwise noted, the following facts are taken from the amended complaint. Sparta is a public company pursuant to the Securities and Exchange Act of 1933, as amended. Sparta also alleges that it is "listed over the counter," its stock is traded on a national exchange, and that JST serves as its stock transfer agent. Plaintiff alleges that defendants Vis Vires Group, Inc. ("VVG"), KBM Worldwide, Inc. ("KBM"),

and Asher Enterprise, Inc. ("Asher") "[are] . . . entit[ies] that make[] Toxic Debt Loans around the country." Defendant Seth Kramer is President of KBM, and defendant Curt Kramer is President of Asher and VVG.

Sparta alleges that it executed loan agreements ("Agreements") with KBM, Asher, and VVG. The Agreements are comprised of a Securities Purchase Agreement and a Convertible Promissory Note ("Note").[1]

The Notes, five of which were attached to the verified complaint,[2] state that approximately nine months after issuance Sparta would be obligated to pay the principal amount of the loan with 8% interest per annum, running from the date of issuance. Additionally, the Notes specify Sparta's right to prepay the principal and interest, which right expires after 180 days following the Note's issuance.

Relevant here, pursuant to Article 1.1 of the Notes, commencing 180 days after the issuance, the holder of the Note has the right

> to convert all or any part of the outstanding and unpaid principal amount of this Note into fully paid and non-assessable shares of Common Stock, as such Common Stock exists on the Issue Date, or any shares of capital stock or other securities of the Borrower into which such Common Stock shall hereafter be changed or reclassified at the conversion price . . . determined as provided herein.

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[1] In its memorandum of law in opposition to the motion, defendants explain why the loans were structured in this particular way. According to the defendants, allowing for the conversion of stock at a discounted rate "is not untoward in any way but instead is quite typical of such transactions in the securities industry."

[2] When Sparta filed its amended complaint it did not properly file the exhibits to the complaint. However, these exhibits were properly filed with the verified complaint, and I refer to those exhibits within this decision and order. *See* CPLR § 2001.

The aforementioned right, however, is modified by a provision which limits the amount of common stock that a holder may beneficially own to 4.99% of outstanding shares of Sparta common stock.

Sparta alleges that the Notes give Asher, KBM, and/or VVG the right to demand Sparta common stock at a discount from the market rate instead of repayment under the loans. Plaintiff alleges that the right to "demand [stock at a discounted rate instead of repayment] constitutes the right to obtain interest at a rate far in excess of the amount indicated in the promissory note," and that "the loans made by ASHER, KBM and VVG to SPARTA were and are high interest rate loans that are governed by New York General Obligations Laws Sections 5-501, et seq., and the New York Banking Law Section 14-a."

Plaintiff further alleges that Asher, KBM, and/or VVG have converted Sparta common stock that was received under the Agreements "at a rate and in such quantity that the market cannot absorb them," and, as a result have and will cause an artificially deflated market rate for Sparta common stock. It further alleges that the defendants threatened to convert shares "on or after November 23, 2015," and if they do so then "[plaintiff] as a company will be destroyed and will have to cease operations as a going concern." Sparta's amended complaint alleges six causes of action for, *inter alia*, injunctive and declaratory relief and rescission, or, alternatively to void, surrender, or cancel the Agreements.

On November 27, 2015 Sparta filed its order to show cause, which was signed by the Honorable Peter H. Moulton. In the order to show cause, Judge Moulton also temporary restrained defendants from converting Sparta common stock and/or selling

shares of Sparta common stock they received in accordance with the Agreements; and also temporarily restrained JST from transferring any more shares of Sparta common stock to the other defendants. Pursuant to the order to show cause, the TRO ran until the hearing on the order to show cause, and, at oral argument, I extended the TRO through the determination on this motion.

While the amended complaint is aimed at a number of loans between Sparta and Asher, KBM, and/or VVG, the order to show cause is specifically directed toward a $33,000 loan between Sparta and VVG ("Loan 3").[3] The Note connected to Loan 3 was issued on May 19, 2015, and gave VVG the right to convert part of the Note to shares of Sparta common stock beginning 180 days from issuance. Accordingly, on November 23, 2015, VVG served a notice of conversion on Sparta in order to convert $12,200 on the principal to 4,357,143 shares of Sparta common stock, leaving a $20,800 principal balance on the loan. In an affidavit, Anthony Havens, CEO of Sparta, claims that if the threatened conversion occurs "SPARTA as a company, will have to cease operations as a going concern as the value of the stock will plummet rendering the corporation worthless."

In support of its order to show cause, Sparta argues that it has satisfied all of the requirements to receive a preliminary injunction. First, it argues that it is likely to

[3] As defendants' counsel noted during oral argument, the Securities Purchase Agreement submitted with Loan 3 does not pertain to the Note at issue in this motion. The first page of the Securities Purchase Agreement submitted with Loan 3 is dated as of July 14, 2015 and states that the principal amount of the loan is $38,000. The Note submitted with Loan 3 is dated May 19, 2015 and states that the principal amount of the loan is $33,000.

succeed on the merits for a number of reasons, including that defendants were not legally able to enter into the Agreements with Sparta because they do not have a New York lending license. Sparta also argues that "[t]he subject loan agreements are in violation of New York State's usury laws which are clearly way above either NY civil usury limit of 16% or its criminal usury limit of 25%." Second, it claims that it will be irreparably harmed if the injunction is not issued because the conversion of more than four million shares of stock will cause the stock's value to sink and it will be forced to go out of business. For the same reason—that it is at risk of going out of business—Sparta argues that balance of the equities are in its favor.

In opposition to the motion, defendants argue that Sparta has not shown a likelihood of success on the merits. It argues that plaintiff does not have standing to bring this lawsuit because a corporation cannot assert a civil usury defense. Defendants also argue that while a corporation can assert a criminal usury defense, it cannot affirmatively set aside a contract based on civil or criminal usury. Additionally, defendant argues that Sparta has not shown a likelihood of success on the merits because the Agreements at issue here have previously been upheld and the plaintiff otherwise has failed to adequately allege usury; the conspiracy claim is not actionable in New York; the fraud claim is conclusory and lacks requisite specificity; and the breach of the covenant of good faith and fair dealing is not actionable without a breach of contract claim.

Defendants also argue that Sparta has not shown a threat of irreparable harm because it failed to provide facts to support its conclusion on the subject. Additionally, in an affidavit, Seth Kramer, Managing Director of VVG, states that the promissory note at

issue in this motion contains a provision that "limits the amount of shares that VVG can own at any given time to a maximum of 4.99% of the issued and outstanding shares of stock of the Plaintiff." He additionally states that "at the time that the instant conversion was issued, the Plaintiff had a minimum of eighty-seven million, three hundred and forty thousand, eight hundred and twenty-seven (87,340,827) shares of issued and outstanding shares of stock. The request of VVG falls within that 4.99% limitation."

Finally, defendants argue that the balance of the equities tips in its favor because while Sparta only faces the possibility of a temporary drop in the value of its stock, VVG will be unable to "exercise[e] its contractual rights and will cause a potential loss of its entire investment of some $99,000."

Discussion

"A party seeking a preliminary injunction must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Gilliland v. Acquafredda Enters., LLC*, 92 A.D.3d 19, 24 (1st Dep't 2011). "Because a showing of probable irreparable harm is 'the single most important prerequisite for the issuance of a preliminary injunction,' the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal citations and quotation marks omitted).

Here, Sparta claims that it will be irreparably harmed without an injunction because conversion of the stock will cause the stock to become valueless, resulting in the

plaintiff going out of business. However, Sparta has put forth no evidence of irreparable harm beyond the conclusory statements of its CEO. *See* Affidavit of Anthony Havens ("If the Defendant VVG converts the stock shares of the Plaintiff and sell[s] the same as threatened on or after November 27, 2015, SPARTA as a company, will have to cease operations as a going concern as the value of the stock will plummet rendering the corporation worthless."). These statements are do not carry Sparta's burden of showing irreparable harm. *See Vill. of Honeoye Falls v. Elmer*, 69 A.D.2d 1010, 1010 (4th Dep't 1979) ("The conclusory statements submitted by plaintiff in support of its application are without factual evidentiary detail and fail to establish that irreparable harm will occur in the absence of injunctive relief.").

Moreover, Sparta has not shown that flooding the market has or will occur due to the provision within the Note that limits the amount of stock that VVG could beneficially own to 4.99% of outstanding shares. Because it has failed to show irreparable harm, Sparta's motion for a preliminary injunction is denied. *See Lisanti v. Zekus*, 2013 N.Y. Misc. LEXIS 6709, 2013 NY Slip Op 33767 (U), at *2 (Sup Ct, Westchester County 2013) (finding that plaintiff's allegations related to harm could be compensated by damages and stating "Plaintiff's failure to demonstrate an irreparable injury absent the injunction is fatal to the motion and, accordingly, plaintiff's motion for a preliminary injunction, pursuant to CPLR 6301, is denied.").

In its amended complaint, Sparta alleged damages in excess of $15,000,000. However, this Court is not satisfied that this case meets the $500,000 monetary threshold for the Commercial Division as set forth in 22 NYCRR 202.70(a), particularly in light of

the fact that plaintiff brought this order to show cause on a $33,000 loan and in light of the fact that, through his affidavit, Seth Kramer alleges that only three loans between plaintiff and VVG, totaling $99,000, remain outstanding. Accordingly, I refer the action to the General Clerk's Office for reassignment to a general IAS Part.

In accordance with the foregoing, it is hereby

ORDERED that Sparta Commercial Services Inc.'s motion for a preliminary injunction to enjoin defendants from converting Sparta Commercial Services Inc.'s common stock, selling shares of Sparta common stock that they received in accordance with certain agreements, and enjoining Jersey Stock Transfer LLC from transferring to the other defendants any more shares of Sparta Commercial Services Inc.'s common stock is denied; it is further

ORDERED that Sparta Commercial Services Inc.'s request for an order requiring defendants to return to plaintiff the residual shares of Sparta Commercial Services Inc.'s common stock that they received in accordance with certain agreements is denied; and it is further

ORDERED that the temporary restraining order granted on November 27, 2015 and extended on December 3, 2015 is vacated; and it is further

ORDERED that the action is respectfully referred to the General Clerk's Office for reassignment to a general IAS Part.

This constitutes the decision and order of the Court.

DATE : 2/2/16

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