

DCF Capital, LLC v US Shale Solutions, LLC

2017 NY Slip Op 31597(U)

July 13, 2017

Supreme Court, New York County

Docket Number: 654495/2016

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

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 : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/11/17
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) 31-41

Answering Affidavits — Exhibits _____ | No(s) 42

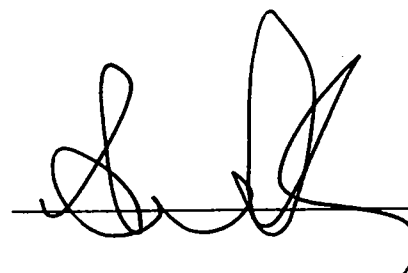
Replying Affidavits _____ | No(s) 43-45

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: 7/12/17

 _____, 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

-----X
DCF CAPITAL, LLC,

Index No.: 654495/2016

Plaintiff,

DECISION & ORDER

-against-

US SHALE SOLUTIONS, LLC,

Defendant.
-----X

SHIRLEY WERNER KORNREICH, J.:

In its January 24, 2017 decision on defendant’s motion to dismiss, the court explained that “[t]his case concerns defendant’s failure to make timely interest payments to plaintiff on notes governed by an indenture.” *See* Dkt. 16.¹ The court denied defendant’s motion because section 316 of the Trust Indenture Act precludes enforcement of the indenture’s no action clause. *See id.* at 5-6. Plaintiff now moves for summary judgment. Defendant opposes the motion. For the reasons that follow, plaintiff’s motion is granted.

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). 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

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

Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562.

After defendant's motion to dismiss was denied, it filed an answer (Dkt. 20), a preliminary conference was held on February 23, 2017 (Dkt. 22), discovery was completed by March 23, 2017, the parties filed a joint statement of undisputed fact on April 12, 2017 (Dkt. 23), and plaintiff filed a Note of Issue on April 20, 2017 (Dkt. 30). Plaintiff filed the instant motion for summary judgment on April 26, 2017, arguing that defendant's non-payment is undisputed and, therefore, there is no question of fact about its entitlement to judgment on the \$1 million of principal, \$250,000 in missed interest payments between September 1, 2015 and March 1, 2017, \$31,250 in accrued default interest through March 1, 2017, plus further accrued interest since that date. *See* Dkt. 32 at 8-9.

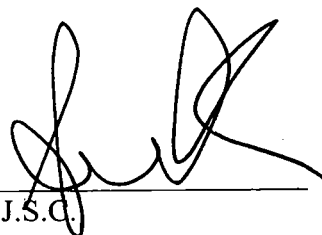
In opposition, defendant does not dispute its non-payment or plaintiff's calculation of the amounts owed. Rather, defendant argues that summary judgment should be denied because plaintiff supposedly failed to prove that it presently owns \$1 million of the subject notes. *See* Dkt. 42 at 5-6. Defendant, it should be noted, does not actually deny that plaintiff owns those notes, but merely avers that plaintiff has not proffered sufficient proof of ownership. *See id.* at 6.

Defendant is wrong. Plaintiff submitted an affidavit of its managing partner (Dkt. 33), who affirmed his personal knowledge of plaintiff's ownership of the notes and provided supporting documentation (e.g., Dkt. 45). *See Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 359-61 (2015) (plaintiff establishes prima facie case by submitting affidavit from employee with personal knowledge of possession of note). Defendants have not raised a triable issue of fact. *See Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 (2016) ("a party may not create a feigned issue of fact to defeat summary judgment."). Accordingly, it is

ORDERED that the motion by plaintiff DCF Capital, LLC for summary judgment against defendant US Shale Solutions, LLC is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendant in the amount of \$1,281,250 plus 12.5% interest from March 2, 2017 to the date of this decision and 9% statutory pre-judgment interest thereafter until the date judgment is entered.

Dated: July 13, 2017

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH
J.S.C**