

Itkin v Fyre Media, Inc.
2018 NY Slip Op 30350(U)
February 23, 2018
Supreme Court, New York County
Docket Number: 652570/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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OLEG ITKIN,

Plaintiff,

INDEX NO. 652570/2017
MOTION SEQ. NO. 002

DECISION AND ORDER

- v -

FYRE MEDIA, INC., FYRE FESTIVAL, LLC, and WILLIAM
MCFARLAND,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 25, 38, 39, 40, 41, 42, 43, 44, 45, 47

were read on this application to/for SUMMARY JUDGMENT (BEFORE JOIND)

HON. SALIANN SCARPULLA:

In this action to recover on various notes and a personal guaranty, plaintiff Oleg Itkin (“Itkin”) moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendants Fyre Media, Inc. (“FMI”), Fyre Festival, LLC (“FFL”), and William McFarland (“McFarland”).

Background

This action arises out of a music festival McFarland organized to take place in in the Bahamas during April and May of 2017 (“Fyre Festival”). Itkin made a series of three loans related to the Fyre Festival in early 2017 (“Notes”).

FMI executed a convertible promissory note to Itkin on February 13, 2017, in which FMI received \$200,000.00 in exchange for either payment of principal with interest or conversion of the note into shares upon specified terms (“First Note”). Accompanying the First Note is a side letter, dated February 13, 2017, between Itkin and FMI, in which FMI agreed to buy back the First Note with a 125% return, *i.e.*, \$250,000.00, on May 31, 2017, upon Itkin’s request.

Then, on February 27, 2017, Itkin and FFL entered into an agreement, in which Itkin invested \$300,000.00 in exchange for a 105% minimum payment, *i.e.*, \$315,000.00, due no later than January 27, 2018 (“Second Note”). Itkin and FFL entered into another agreement on April 21, 2017, in which Itkin invested an additional \$200,000.00 in exchange for either a share of the Fyre Festival’s revenue or a 120% minimum payment, *i.e.*, \$240,000.00, due no later than May 1, 2017 (“Third Note”). Section 7(i) of the Third Note contains an arbitration clause stating that:

“ANY DISPUTE OR CLAIM ARISING OUT OF OR IN RELATION THIS CONTRACT, OR THE INTERPRETATION, OR THE INTERPRETATION, MAKING, PERFORAMNCE, BREACH OR TERMINATION THEREOF, SHALL BE FINALLY SETTLED BY BINDING ARBITRATION IN NEW YOUR [sic] CITY UNDER THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION BY ONE ARBITRATION APPOINTED IN ACCORDANCE WITH SAID RULES. JUDGMENT ON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF.”

Pursuant to section 4 of the Third Note, “the minimum payment is guaranteed by . . .

[FMI] . . . additionally [] by [FFL’s] account receivables . . . [and] tertiary [] by []

McFarland and all of his public securities.” In a side letter accompanying the Third Note,

dated April 24, 2017, McFarland guaranteed the Third Note's minimum payment with his stock in non-party Facebook ("Side Letter Guaranty").

Ultimately, the Fyre Festival was unsuccessful. Itkin attests that "Defendants agreed to accelerate repayment of all loans . . . to May 1, 2017" and he submits a screenshot of text messages, in which McFarland "Confirmed" a "[M]ay 1st payout of all the loans[.]"

On May 10, 2017, Itkin demanded payment on the Notes by a series of certified letters sent to defendants and addressed to McFarland ("Demand Letter"). Itkin attests that to date, he has received no payment for the balance due on the Notes.

Itkin now moves for summary judgment in lieu of complaint against defendants, jointly and severally,¹ in the amount of \$805,000.00 together with statutory interest and attorney fees and costs. Although FMI and FFL have not appeared in this action, McFarland submits opposition denying personal liability with respect to the First and Second Note and opposing summary judgment on the Side Letter Guaranty pursuant to the Third Note's arbitration clause.

Discussion

A plaintiff may commence an action by summary judgment in lieu of a complaint "[w]hen an action is based upon an instrument for the payment of money" CPLR § 3213. "[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms'" *Weissman*

¹ Itkin does not distinguish between the rights and obligations of defendants with respect to the Notes and guaranty involved.

v Sinorm Deli, Inc., 88 N.Y.2d 437, 444 (1996) (citation omitted). “The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document” *Id.*

Regarding the First Note as between Itkin and FMI, the present motion is premature. The proof demonstrates that Itkin requested payment and commenced this action three weeks prior to the due on demand date, contradicting Itkin’s assertion that FMI failed to make payment in accordance with the terms of the First Note. Moreover, the text messages Itkin submits do not unequivocally demonstrate an agreement to accelerate repayment when such evidence does not qualify as appropriate proof on a CPLR § 3213 motion for summary judgment. Accordingly, Itkin’s motion is denied as to FMI, the debtor of the First Note, because Itkin failed to establish his entitlement to judgment as a matter of law against it.

Regarding the Second and Third Note as between Itkin and FFL, non-party creditors have filed an involuntary bankruptcy petition against FFL in the United States Bankruptcy Court for the Southern District of New York, triggering an automatic stay of all judicial proceedings against it. *See* 11 USC 362(a)(1). Accordingly, I deny Itkin’s motion to the extent he seeks summary judgment against FFL as the debtor of the Second and Third Note.

As for McFarland,² the only basis upon which to hold him individually liable is the Side Letter Guaranty, which he individually executed as a guarantor of the Third Note. However, McFarland opposes summary judgment pursuant to the Third Note's arbitration clause.

Third Note contains a broad arbitration clause. "Although the [Side Letter Guaranty] executed by [McFarland] does not contain a similar provision, generally, 'documents executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so long as they are 'substantially' contemporaneous' " *Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1038 (2d Dep't 2017). Here, the Third Note and Side Letter Guaranty should be interpreted together because Itkin is a signatory to substantially contemporaneous agreements that cover the same subject matter. Under these circumstances, I find that Itkin and McFarland agreed to be bound by the arbitration clause. Accordingly, I deny Itkin's motion to the extent he seeks summary judgment against McFarland as the guarantor of the Side Letter Guaranty and direct Itkin to commence arbitration on the Side Letter Guaranty.

In accordance with the foregoing, it is

² Generally, "[t]he automatic stay provisions of the Federal bankruptcy laws 'do not extend to nonbankrupt codefendants[.]'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC*, 13 A.D.3d 89 (1st Dep't 2004) (citation omitted).

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

ORDERED that plaintiff shall serve a formal complaint upon defendant Fyre Media, Inc. within 20 days of the date of this decision and defendant Fyre Media, Inc. shall move against or serve an answer to the complaint within 20 days after service thereof; and it is further

ORDERED that plaintiff is directed to arbitrate his claim against defendant William McFarland for payment under the Side Letter Guaranty; and it is further

ORDERED that all proceedings in this action against defendant Fyre Festival, LLC are hereby stayed, except for an application to vacate or modify said stay.

This constitutes the decision and order of the Court.

2/23/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

REFERENCE