

Merchants Cachet Inv. Partners LLC v Roche

2021 NY Slip Op 31697(U)

May 21, 2021

Supreme Court, New York County

Docket Number: 156663/2020

Judge: Arthur F. Engoron

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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: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

MERCHANTS CACHET INVESTOR PARTNERS LLC

Plaintiff,

- v -

ROBERT ROCHE,

Defendant.

-----X

INDEX NO. 156663/2020

MOTION DATE 10/08/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents and for the reasons stated hereinbelow, the instant motion by plaintiff, Merchants Cachet Investor Partners LLC (“MCIP”), pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant, Robert Roche (“Roche”), is denied.

Background

The facts, stated as simply as possible, are as follows. MCIP and non-party Cachet Hotel Group Limited Cayman L.P. (“CHGLC”) entered into a series of agreements including an Equity and Warrant Subscription Agreement (“the ESA”) and a Call Option Agreement, whereby MCIP agreed to purchase equity units in CHGLC for a specified price. A June 30, 2017 letter agreement amended the ESA and Call Option Agreement. (NYSCEF Doc. 5.)

A March 1, 2018 letter agreement (“the Put Option Agreement”) further amended the ESA, providing MCIP with an option to put (sell) its purchased equity units back to CHGLC at fixed prices set according to when and how much MCIP decided to sell. (NYSCEF Doc. 4, at § 4.) In addition, the Put Option Agreement states, in pertinent part, “[Roche] hereby guarantees the full and timely performance and payment of [CHGLC’s] obligations to [MCIP] hereunder and has simultaneously executed the guaranty in the form attached hereto as Exhibit A.” (Id., at § 4. d.) Pursuant to that provision, Roche executed a payment guaranty dated March 1, 2018 (“the Guaranty”), wherein Roche “guarantee[d] to [MCIP] ... the prompt and complete payment, as and when due and payable, of all of the Guaranteed Obligations now existing or hereafter incurred.” (NYSCEF Doc. No. 6, at § 2.) Pursuant to the Guaranty, Roche agreed that upon demand by MCIP, Roche would pay all amounts due under the Put Option Agreement within thirty days from MCIP’s demand, plus 9% interest per annum, compounded annually. (Id., at § 3.)

By letter dated July 1, 2020 (NYSCEF Doc. 7), pursuant to § 4. a. iv. of the Put Option Agreement, MCIP exercised its put option to sell 100% of its equity units in CHGLC, thereby requiring CHGLC to pay \$4,000,000.00 within ten days. (NYSCEF Doc. 4, at § 4. a. iv.) CHGLC failed to pay. Subsequently, by letter dated July 14, 2020 (NYSCEF Doc. 9), MCIP demanded Roche to pay the \$4,000,000.00 that the Guaranty required. Roche failed to pay.

MCIP now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against Roche in the amount of \$4,000,000.00 plus interest at the per diem amount of \$986.30 from August 22, 2020. In addition, MCIP requests that the Court retain jurisdiction over the instant matter so as to allow MCIP to apply for a supplemental judgment for fees and expenses in collecting the amounts due hereunder.

In opposition, Roche asserts, inter alia, the following: (1) the “intertwined” Guaranty and the Put Option Agreement do not constitute “instruments of the payment of money only” that CPLR 3213 requires, as, inter alia, these documents include other obligations such as the redemption of MCIP’s equity units in CHGLC, and because the Put Option Agreement extends Roche’s guaranty beyond the payment of money, as it provides for both payment and performance; (2) the Guaranty is not an “instrument containing an unconditional promise to pay a sum certain” that CPLR 3213 requires, as, inter alia, one must determine the amount due under the Guaranty by referring to the Put Option Agreement, which in turn sets forth alternative contingencies for payment; and (3) there are material issues of fact that preclude granting the instant motion.

In reply, MCIP asserts, inter alia, the following: (1) the Guaranty and Put Option Agreement constitute “instruments for the payment of money only,” as, inter alia, no additional performance of any condition precedent to payment is needed under the Guaranty or the Put Option Agreement, and thus, no other obligations, besides paying, exist; (2) the Guaranty and Put Option Agreement set forth an absolute and unconditional promise to pay a sum certain, as only one of the alternative contingencies provided for in the Put Option Agreement controlled given that MCIP exercised its put option after June 30, 2020 (according to the Put Option Agreement, NYSCEF Doc. 4, at § 4. a., the other alternative payment options available required MCIP to exercise its put option prior to June 30, 2020); and (3) there are no material issues of fact.

Discussion

To establish that it is entitled to the requested CPLR 3213 judgment, MCIP must submit “proof of the [instrument for the payment of money only] and a failure to make the payments called for by its terms.” Boland v Indah Kiat Fin. (IV) Mauritius, Ltd., 291 AD2d 342, 343 (1st Dept. 2002). To fulfill the “instrument for the payment of money only” requirement, the instrument relied upon must be “a written unconditional instrument, evidencing an obligation to pay a sum at a certain time over a stated period.” Maglich v Saxe, Bacon & Bolan, P.C., 97 AD2d 19, 22 (1st Dept. 1983). “Where the instrument requires something in addition to defendant’s explicit promise to pay a sum of money, CPLR 3213 is unavailable.” Weissman v Sinorm Deli, 88 NY2d 437, 444 (1996). Generally, a guaranty will be treated as an “instrument for the payment of money only” so long as the guaranty is an absolute and unconditional guarantee of payment. See Punch Fashion, LLC v Merchant Factors Corp., 180 AD3d 520, 521 (1st Dept. 2020).

Here, MCIP's instant motion does not qualify as an action "based upon an instrument for the payment of money only" for the following reasons.

First, the Guaranty is clearly subject to the terms and conditions of the Put Option Agreement, as the Guaranty expressly states that Roche guaranteed all the "Guaranteed Obligations" now existing or hereafter incurred. (NYSCEF Doc. 6, at § 2.) The Guaranty defines the term "Guaranteed Obligations" as "all obligations of [CHGLC] pursuant to paragraph '4' of the [Put Option Agreement], together with all reasonable fees and expenses incurred in collecting the same." (Id., at § 1.) Paragraph 4 of the Put Option Agreement sets forth the terms and conditions of MCIP's put option. Thus, MCIP cannot prove that the "Guaranteed Obligations" are not satisfied without referring to the Put Option Agreement, which in turn is an instrument for the payment of money and for the redemption of MCIP's equity interest. Furthermore, as the Put Option Agreement is merely a modification to the ESA, the Put Option Agreement is in turn subject to the terms and conditions of the ESA; this is clear given that the last section of the Put Option Agreement states that "[a]ll defined terms not otherwise defined herein shall have the meanings as set forth in the [ESA] ..., as the case may be." (NYSCEF Doc. 4, § 7.) See Hirsch v Rifkin, 166 AD2d 293, 294 (1st Dept. 1990) ("Where an instrument sued upon is subject to terms and conditions in a separate document, the accelerated procedure for judgment under CPLR 3213, based upon an instrument for the payment of money only, may not be employed.").

Second, the Guaranty is not for a sum certain. One must reference MCIP's demand notice to determine when the notice was sent and how many equity units MCIP was selling; then one must reference the Put Option Agreement. Thus, proof beyond the Guaranty, and even beyond the Put Option Agreement, is required to establish the amount owed to MCIP, taking the Guaranty outside the purview of CPLR 3213. See Weissman v Sinorm Deli, 88 NY2d 437, 444 (1996) ("[t]he 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.").

Lastly, the Guaranty goes beyond guaranteeing merely the payment of money. In fact, the Guaranty expressly states that it "is a guaranty of payment and performance" (emphasis added) (NYSCEF Doc.6, at § 4), and the Put Option Agreement states that Roche "guarantees the full and timely performance and payment of [CHGLC's] obligations to [MCIP] hereunder ..." (emphasis added) (NYSCEF Doc. 4, at § 4. d.).

This Court has considered MCIP's other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will deny MCIP's motion, pursuant to CPLR 3213, for summary judgment in lieu of complaint against Roche.

Conclusion

Thus, for the reasons stated hereinabove, the instant motion by plaintiff, Merchants Cachet Investor Partners, LLC, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant, Robert Roche, is hereby denied, and the case may proceed as a conventional action. Pursuant to CPLR 3213, MCIP's moving papers are hereby deemed the complaint, and

Roche's opposition papers are hereby deemed the answer, unless Roche wishes to interpose a formal answer within 30 days of the date of this decision.



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5/21/2021

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE