SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MENO HOLDINGS SPV, LP

Plaintiff,

- v -

JUSTIN HAUGE,

Defendant.

INDEX NO. 654283/2021

MOTION DATE 06/14/2022, 06/09/2022

MOTION SEQ. NOS. 005, 006

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 77, 78, 83, 84, 85, 89

were read on this motion to DISMISS COUNTERCLAIMS AND STRIKE DEFENSES.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 79, 80, 81, 82, 86, 87

were read on this motion to CONVERT MOTION TO DISMISS TO SUMMARY JUDGMENT.

Plaintiff Meno Holdings SPV, LP ("Plaintiff" or "Meno") moves to dismiss Defendant Justin Hauge's ("Defendant" or "Hague") counterclaims and strike Defendant's affirmative defenses (NYSCEF 71) pursuant to CPLR 3211(a)(1), (a)(7) and CPLR 3211(b). Defendant moves pursuant to CPLR 3211(c) to convert Plaintiff's motion into a motion for summary judgment (NYSCEF 79). Plaintiff's motion to dismiss and strike is GRANTED IN PART and DENIED IN PART and Defendant's motion to convert is DENIED.

BACKGROUND

Meno and Hague entered into three Forward Purchase and Sale of Securities Agreements (the "Contracts") pursuant to which Meno paid $1,402,000 to Hague who agreed to deliver shares of Airbnb common stock subject to certain conditions and after certain transfer

restrictions expired (Complaint ¶1 and Exs. A-C [NYSCEF 1] and Answer ¶1 [NYSCEF 54]). The Contracts provide that Hague – one of Airbnb's first employees who was granted certain stock options – is the "Seller" and that Meno is the 'Purchaser" and, generally, that Meno would purchase shares from Hague to be delivered when they became freely transferable by Hague. Hague does not dispute that he entered the Contracts and received $1,402,000 in the aggregate from Meno but argues, among other things, that certain conditions have not been met, that certain defenses (including usury) may apply, and that the Contracts violate Sections 5 and 12 of the Securities Act of 1933 (15 USCA §§ 77e, 77l) (Answer ¶¶ 4-5, Counterclaims 1-2) because they concern unregistered put options sold to Hague by Meno.

Prior to the commencement of this action, on May 24, 2021, Defendant Hague and others filed a complaint for declaratory judgment and tortious interference with respect to the Contracts in the Northern District of California in *Pristavec v. Meno Holdings SPV, LP,* 21-CV-04458-EMC (the "California Action"). Following several amendments, Judge Edward M. Chen dismissed the California Action for lack of subject matter jurisdiction and found, with respect to Hague's claims under the Securities Act, that Hague and his co-plaintiffs "did not purchase put options, but instead are sellers of securities, they are not purchasers with a right to sue the seller of securities under the Securities Act" (*Pristavec v Meno Holdings SPV, LP*, 21-CV-04458-EMC, 2022 WL 888440, at *9 [ND Cal Mar. 25, 2022]). Judge Chen concluded that "[v]iewed in light of the procedural history of this matter, the ongoing New York state court breach of forward purchase contract action, and the contracts themselves, this Court concludes that the assertion of Section 12 and Section 5 violations of the Securities Act is an improper attempt to obtain federal subject matter jurisdiction over a state-law matter. Plaintiffs' asserted claim as

purchasers under Section 12 and Section 5 are wholly frivolous. There is no basis for federal jurisdiction" (*Id.*).

Plaintiff filed its motion to dismiss and to strike approximately six weeks after Judge Chen issued his decision (NYSCEF 71). Hague has appealed the dismissal of the California Action to the United States Court of Appeals for the Ninth Circuit (9th Cir. Case No. 22-15479) and that appeal remains *sub judice*.

DISCUSSION

A. The Motion To Convert To Summary Judgment Is Denied

CPLR 3211(c) provides:

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

"The court may treat a motion to dismiss as one for summary judgment when both parties request such treatment, deliberately chart a course for summary judgment, or indicate that only issues of law remain" (*McGivney v Sobel, Ross, Fliegel & Suss, LLP*, 36 Misc 3d 1230(A) [Sup Ct New York County 2011] *citing Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988] [other citations omitted]). The Court has discretion to determine whether to convert a motion to dismiss to summary judgment and properly declines to do so where a request is made by only one party (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 319-321 [1st Dept 1987]).

Plaintiff's motion seeks to dismiss Defendant's counterclaims pursuant to CPLR 3211(a)(1) based on documentary evidence, specifically the Contracts, and CPLR 3211(a)(7) for failure to state a claim. Plaintiff's motion also seeks to dismiss Defendant's affirmative defenses pursuant to CPLR 3211(b). The only evidence submitted by Plaintiff with its motion are filings

made in the California Action (Affirmation of Philip M. Bowman at Exs. A-D [NYSCEF 73-77]). The only evidence submitted by Defendant in opposition to Defendant's motion is an April 19, 2022, email between counsel citing to supplemental authority (Affirmation of Jennifer N. Huckleberry in Opposition at Ex. A [NYSCEF 84-85]).

Defendant Hague's principal argument in support of conversion is that during the May 10, 2022, preliminary conference Plaintiff Meno represented that it did not anticipate needing discovery and that it intended to move for summary judgment. (Affirmation of Jennifer N. Huckleberry in Support ¶¶2-8 [NYSCEF 81] and Defendant's Memorandum of Law at 1-2 [NYSCEF 80]). However, on May 13, 2022, the Court entered a Preliminary Conference Order (NYSCEF 70) pursuant to which discovery remains ongoing and there is no dispute that "Meno did in fact propound discovery. . ." (NYSCEF 80 at 2).

The Court holds that conversion of Plaintiff's motion to dismiss to summary judgment is not appropriate (*Four Seasons Hotels Ltd.*, 127 AD2d 324, *supra*). First, Plaintiff has opposed conversion (NYSCEF 86). Second, the Contracts and filings in the California Action advanced by Plaintiff may be considered "documentary evidence" under CPLR 3211(a)(1) and Plaintiff did not "deliberately chart a course for summary judgment" by relying on those documents. (*Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010][collecting authorities]). Third, Defendant's representations about Plaintiff's counsel's off-the-record comments at the preliminary conference are not sufficient to contradict the resulting Preliminary Conference Order authorizing discovery and subscribed to by counsel for the parties (*Grant v Almonte*, 168 AD3d 428 [1st Dept 2019] *citing* CPLR 2104 [case citations omitted]).

Accordingly, Defendant's motion for conversion pursuant to CPLR 3211(c) is denied. Plaintiff's request for sanctions pursuant to 22 NYCRR 130-1.1, made in its memorandum in opposition (NYCEF 86 at 8), is denied.

B. Plaintiff's Motion to Dismiss The Counterclaims and Strike Affirmative Defenses is Granted in Part

a. Legal Standards

A motion to dismiss under CPLR 3211(a)(1) is appropriately granted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). The court may consider the plain language of the Contracts in assessing a motion pursuant to CPLR 3211(a)(1) (*Tavarez v LIC Dev. Owner, L.P.,* 205 AD3d 565, 567 [1st Dept 2022]).

"In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference'" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] *quoting AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.,* 5 N.Y.3d 582, 591, 808 N.Y.S.2d 573, 842 N.E.2d 471 [2005]). A defendant may move for dismissal under both CPLR 3211(a)(1) and (7) (*Tavarez, supra*).

CPLR 3211(a) may be invoked by a plaintiff to seek dismissal of a counterclaim (*Gong v Savage*, 75 Misc 3d 1217(A) [Sup Ct New York County 2022]). "On a motion to dismiss affirmative defenses pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011][collecting cases]; *see also Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 749 [2d Dept 2010]).

b. Defendant's Counterclaims are Dismissed

Both of Defendant's counterclaims rely on an assertion that "Meno sold Hague put options for the sale of Airbnb stock in exchange for contingent Airbnb security interests." (Counterclaims ¶3 [NYSCEF 54]). Hague admits that he entered the Contracts. (Counterclaims ¶12). Generally, "put options" are "agreements to buy stock within a specified time at a specified price. . ." (*Matter of Todd v State Tax Com'n*, 90 AD2d 244, 245 [3d Dept 1982]). The Court agrees with Judge Chen's analysis in the California Action as to why Hague did not purchase put options under the Contracts.[1] In sum, the plain language of the Contracts does not provide Defendant Hague with put options, and dismissal is granted pursuant to CPLR 3211(a)(1) and (7) based on documentary evidence and failure to state a claim (*3502 Partners LLC v Great Am. Ins. Co. of New York*, 204 AD3d 525, 526 [1st Dept 2022]). The Contracts' plain language "flatly contradicts" Defendant Hague's assertion (under Section 4 of the Contracts or otherwise) that he purchased put options, warranting dismissal of the counterclaims asserting violations of the Securities Act (*Siller v Third Brevoort Corp.*, 145 AD3d 595, 595 [1st Dept 2016]).[2]

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[1] As Judge Chen observed: "The contracts at issue -- which recite Plaintiff is selling securities to Meno – do not reference a 'put' option, or even suggest that Plaintiffs are *purchasing* securities from Meno. Notably, in a put option, the buyer pays a premium for the right (but not the obligation) to sell shares at a specified price – the option buyer has the *choice* of selling the security. *See, e.g., Applestein v. Medivation Inc.*, No. 10-CV-00998, 2010 WL 3749406, at *4 (N.D. Cal. Sept. 20, 2010) ('a put option is a contract in which one party buys the right to sell particular securities at a specified price at or within a specified time to another party') (internal quotation marks and citation omitted). Here, the plain language of the contracts confers upon Defendant (Meno) the right to purchase the sellers' shares thereby affording Meno the right to seek the extraordinary remedy of specific performance" (*Pristavec,* 2022 WL 888440, at *8, *supra*).

[2] While the Court agrees with Judge Chen's analysis, it is not (as Plaintiff suggests) bound to do so by principles of collateral estoppel. First, Plaintiff's notice of motion does not invoke CPLR

c. Defendants Affirmative Defenses are Dismissed in Part

Although Plaintiff's Notice of Motion seeks dismissal of each of Defendant's twelve affirmative defenses, it does not argue for dismissal of Defendant's first, third and tenth affirmative defenses. Defendant's second, fourth through ninth and eleventh through twelfth affirmative defenses are dismissed.

With respect to Defendant's second affirmative defense, the Court disagrees that the Contracts are "loans" susceptible to a usury defense. In *Adar Bays, LLC v GeneSYS ID, Inc.* cited by Defendants, the Court of Appeals held that usury may be a defense in the context of convertible options (*i.e.*, where the balance on a note may be converted to shares at a fixed discount and the lender's discretion) (37 NY3d 320, 334 [2021]). The Court of Appeals determined that "[w]hen determining whether a transaction is a loan, substance—not form—controls. Several factors help distinguish loans from equity purchases and joint ventures, which are not subject to the usury laws" (*Id.* [citations omitted]). Defendant's contention that the shares have increased in value since he agreed to sell them does not convert the Contracts into a loan transaction. As correctly determined by Judge Chen in the California action, and independently determined here, the Contracts were for a sale of securities (*Pristavec, supra,* 2022 WL 888440, at *9). The Contracts are not loans and the usury defense is dismissed.

3211(a)(5). Second, a federal court's dismissal for lack of subject matter jurisdiction is generally not considered on the merits – and therefore not entitled to estoppel effect – because it would deprive a plaintiff of their right to bring a potentially meritorious case in state court (*Copeland v Fortis*, 08 CIV. 9060 (DC), 2010 WL 2102454, at *1 [SDNY May 20, 2010]). In these circumstances, the appropriate course of action is for the Court to independently assess Plaintiff's motion under CPLR 3211(a)(1) and (7) (*Lamontagne v Bd. of Trustees of United Wire, Metal and Mach. Pension Fund*, 183 AD2d 424, 425 [1st Dept 1992]).

Defendant's fourth (unclean hands), fifth (unenforceable penalty), sixth (illegality), seventh (estoppel), eighth (public policy/illegality under the Securities Act), ninth (unconscionability), eleventh (conditions precedent) and twelfth (prior material breaches) are not stated with any degree of particularity and are duplicative of the dismissed counterclaims. Dismissal of these affirmative defenses is therefore warranted (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]; *Moran Enterprises, Inc. v Hurst*, 96 AD3d 914, 917 [2d Dept 2012] [dismissing defenses asserting "conclusions of law without any supporting facts" albeit without prejudice]).

* * * *

Accordingly, it is

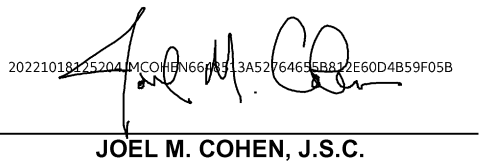
ORDERED that Plaintiff's motion to dismiss Defendants counterclaims is **GRANTED**; it is further

ORDERED that Plaintiff's motion to dismiss or strike Defendant's affirmative defenses is **GRANTED IN PART** and Defendant's second, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth affirmative defenses are dismissed and **DENIED IN PART** as to Defendant's first, third and tenth affirmative defenses; it is further

ORDERED that Defendant's motion to convert Plaintiff's motion to summary judgment is **DENIED;**

ORDERED that the parties appear for a telephonic compliance conference on November 15, 2022 at 11:30 am with the parties submitting a joint letter pursuant to Section IV of the Court's Practices and Procedures at least one week in advance of the conference and that the parties provide dial-in information to sfc-part3@nycourts.gov in advance of the conference.

This constitutes the decision and order of the Court.



10/18/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE