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JCMC 340 LLC v. JDS Dev. Holdings

Opinion

Index 650859/2022

03-04-2022

JCMC 340 LLC and 9-340 JC LLC, Plaintiffs, v. JDS DEVELOPMENT HOLDINGS LLC, and MICHAEL STERN, Defendants.

ANDREA MASLEY, J.S.C.

Unpublished Opinion

MOTION DATE 02/25/2022

DECISION + ORDER ON MOTION

ANDREA MASLEY, J.S.C.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 were read on this motion to/for *ORDER OF ATTACHMENT* Upon the foregoing documents, it is

Plaintiffs JCMC 340 LLC and 9-340 JC LLC move, pursuant to CPLR 6201, 6210 and 6212, for an attachment to be levied against any funds or other property held by nonparties 616 First Avenue LLC, JDS-BP Investors, LLC, Kensington Vanguard National Land Services, LLC, Kensington Vanguard National Land Services of NY, LLC and/or KV Settlement, LLC on behalf of defendants JDS Development Holdings LLC and/or Michael Stern and/or any entity owned or controlled by either of them,[1] including but not limited to 616 First Avenue Developer LLC. The sale of 616 First Avenue for [2] $850 million was scheduled to close on February 24, 25, March 1 or 2, 2022. (NYSCEF 11, Chetrit[2] aff ¶7.)

[1] Defendant JDS Development Holdings LLC, a Delaware limited liability company, is not authorized to conduct business in the State of New York. (NYSCEF 14, NY Department of State, Division of Corporations Search; NYSCEF 13, Delaware Department of State, Division of Corporations Search.) Defendant Michael Stern resides in Florida and is the sole member of JDS. (NYSCEF 24, Stern Aff¶38.)

[2] Joseph Chetrit is manager of plaintiff JCMC 340 LLC.

On March 1, 2022, this court issued a TRO directing the parties to hold $14,265,554.24 in escrow from the closing proceeds (to be held by the title company) pending further order of this court. (NYSCEF 39, Interim Order.)

In May 2018, "two affiliates of JDS Holdings entered into purchase and sale agreements to acquire the respective membership interests of JCMC and 9-340 in an entity called 340 Flatbush Partners LLC." (NYSCEF 24, Stern Aff ¶5.) The sale of those membership interests closed on April 22, 2019 with the total purchase price of $70 million. (*Id.*) "In connection with the closing, a portion of the $70 million total purchase price was paid through the Note - a $20 million promissory note given by JDS Holdings as Maker to plaintiffs collectively as Payee" which matured on April 20, 2022. (*Id.*; NYSCEF 4, Note) The Note was secured by Stern's personal guarantee. (NYSCEF 5, Guaranty). In addition, the loan was secured by a Pledge and Security Agreement. (NYSCEF 25, Pledge and Security Agreement). In the Pledge and Security Agreement, JDS Cherry Street LLC (JDS Cherry Street, an affiliate of JDS Holdings) gave plaintiffs "a first priority security interest" in certain "Collateral," consisting of (a) 100% of the membership interests in an entity called Cherry Street Owner LLC; and (b) all of JDS Cherry Street's other rights with respect to that entity. (*Id.* at Recital D and §2.1).

The Note provides for JDS Holdings to make monthly payments of interest only, at a rate of 10% per annum. (NYSCEF 4, Note § 2). The Note allows defendants to [3] extend that maturity date to October 22, 2020 in exchange for a fee and higher interest rate. (*Id.* § 5; *see id.* § 1). Stern claims to have paid the extension fee, admittedly late, which also triggers a higher interest rate which was to begin May 22, 2020. (NYSCEF 24, Stern ¶¶ 13-14 and [4] 3.) Plaintiffs dispute the extension. Therefore, an issue of fact exists as to whether the default occurred in April or October 2020, but there is no dispute that there is an unpaid balance on the Note.

Defendants admittedly stopped making interest payments around July 2020. (*Id.* 1117.)

On January 5, 2021, defendants paid $10,000,000 to plaintiffs, of which plaintiffs applied $4,365,554.24 to outstanding interest and other charges and $5,634,445.76 to principal, leaving the principal sum of $14,365,554.24. (NYSCEF 3, Chetrit Aff ¶6.)

On February 23, 2022, plaintiffs initiated this action with a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. (NYSCEF 2, Notice of Motion.) According to plaintiffs, since January 6, 2021, interest on the Note has been accruing at the rate of $7,980.86 per day making the outstanding balance $17,645,687.70, including interest. Plaintiffs contend that they were compelled to file this action by Stern's repeated promises to pay. Indeed, according to plaintiffs, Stern promised, yet again, to pay plaintiffs from the proceeds of the sale of the Copper buildings but took no steps to arrange for that payment.

On February 24, 2022, plaintiffs filed this motion for an attachment without mentioning the pledge and security agreement other than to attach the Note where it is mentioned once on page 3. (NYSCEF 4, Note § 7.)

CPLR 6212 provides: [5]

> "the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."

Plaintiffs assert two grounds under CPLR 6201, which provides:

> "An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:
>
> 1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or...
>
> 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or..."

CPLR 6201(1) is satisfied because JDS is a Delaware limited liability company which is not qualified to do business in the State of New York. (*Reed Smith LLP v Leed HR, LLC*, 156 A.D.3d 420, 421 [1st Dept 2017][CPLR 6201(1) was satisfied where defendant, a Kentucky LLC, was not qualified to do business in New York].) Likewise, Stern is a resident of Florida. Accordingly, it is unnecessary to reach plaintiffs' assertion of fraud to satisfy CPLR 6201(3).

With one minor exception, defendants fail to identify any viable counterclaims. Defendants paid a higher interest rate for April and May 2020. (NYSCEF 24, Stern Aff n 3.) However, defendants insist that the increased interest was not due to begin until May 22, 2020. (NYSCEF 4, Note § 5). Therefore, defendants may have a counterclaim for over payment of interest for two months. Otherwise, the court rejects defendants' assertion of a counterclaim arising from plaintiffs' allegedly unreasonable failure to approve a construction loan as too amorphous at this stage of the litigation to constitute [6] a viable counterclaim to offset the amount of damages alleged by plaintiffs. (NYSCEF 24, Stern aff ¶33.) Plaintiffs' acknowledgement of a potential counterclaim, which may delay this abbreviated action under §213, does not make it less amorphous.

Defendants argue that an attachment remedy is not available because the $20 million loan was originally secured by a pledge and security agreement on Cherry Street. Accordingly, relying on *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 A.D.3d 49 (1st Dept 2013), defendants insist that plaintiffs cannot show an identifiable risk that judgment will not be paid. Defendants also insist that since Stern is a very successful New York developer responsible for making the New York skyline what it is today, he has the ability to pay, and he promises to do so if and when a judgement issues. And yet, to date, he has failed to do so.

Plaintiffs counter that the pledge and security agreement is no longer as valuable as it was in 2018 because of an adverse decision affecting the property development. (See *Little Cherry, LLC v Cherry Street Owner LLC*, Index No. 654136/2016 [Sup Court, NY County] NYSCEF 242, April 9, 2021 decision.)

Plaintiffs' contention is entirely speculative. Even if the adverse decision resulted in a diminution in value of the property, the property is surely not worthless. Indeed, the record is replete with references to the Cherry Street project which indicate there is value to the project. (NYSCEF 24, Stern Aff ¶¶16-24; NYSCEF 34, Feb. 22, 2022 email from plaintiffs; NYSCEF 33, Jan. 7, 2022 email from plaintiffs.) Moreover, the purpose of the attachment remedy against nonresidents is to give security for the debt. (*ITC Entertainment, Ltd. v Nelson Film Partners*, 714 F.2d 217, 220 [2d Cir 1983].) "'Such a debtor, pending litigation, might sell his property, and remain at home, in which event he [7] could not be reached by any of the provisional remedies or supplementary proceedings provided by [New York] laws.'" (*Id.* [internal quotation marks and citation omitted].) Here, plaintiffs' debt is secured.

Accordingly, it is

ORDERED that plaintiffs' motion for an attachment is denied and the TRO is vacated. [7]

Case Details

Full title: JCMC 340 LLC and 9-340 JC LLC, Plaintiffs, v. JDS DEVELOPMENT HOLDINGS...

Court: Supreme Court, New York County

Date published: Mar 4, 2022

Citations

Copy Citation

2022 N.Y. Slip Op. 30698 (N.Y. Sup. Ct. 2022)