

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MICHAEL D. STALLMAN**
Justice

PART 7

Index Number : 117290/2005
BUI, TRINITY
vs
INDUSTRIAL ENTERPRISES OF
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/16/07
MOTION SEQ. NO. _____
MOTION CAL. NO. 15

this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>3</u>
<u>4-7</u>
<u>8-9</u>
<u>10-13</u>


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/29/07


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
TRINITY BUI and TRINITY FINANCING INVESTMENTS
CORP.,

Index No. 117290/05

Plaintiffs,

- against -

INDUSTRIAL ENTERPRISES OF AMERICA, INC. and
JOHN MAZZUTO,

Defendants.

FILED

Decision and Order

JUL 12 2007

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs allege that Industrial Enterprises of America, Inc. (ILNP),¹ a publicly traded Nevada corporation formerly known as Advanced Bio/Chem, Inc. (AVBC), defaulted on payments and interest due under a series of promissory notes that AVBC/ILNP issued to plaintiffs. In addition to seeking payment, plaintiffs seeks to convert the promissory notes into shares of ILNP. Defendant John Mazzuto is the president and chief executive officer of ILNP. Defendants move for summary judgment dismissing the first six causes of action on the affirmative defense of release. Plaintiffs cross-move for summary judgment in their favor on the first six causes of action.

BACKGROUND

Plaintiff Trinity Bui is the president of plaintiff Trinity Financing Investments Corp. (TFIC) Pursuant to a loan agreement between TFIC and AVBC dated April 26, 2004, plaintiffs loaned \$100,000 to ILNP, evidenced by four promissory notes, which the parties refer to as Notes #1-4, each

¹The parties refer to this defendant by its former stock market ticker symbol, ILNP, to maintain consistency with the papers submitted to the Court in prior motions and to avoid confusion.

in the amounts of \$25,000. Note # 1 is issued to TFIC; Notes #2-4 are issued to Bui. The relevant terms of each of the notes provides that the holder may, during the 30 days prior to the note's maturity date or the earlier prepayment of the note, convert the note into shares of ILNP common stock. See Mazzuto Aff., Exs 7-10. Amendments to the promissory notes state that ILNP may not prepay all or any part of the principal of the notes.

On May 11, 2004, AVBC entered into an Asset Purchase Agreement with Power3 Medical Products, Inc. (Power3) and two Power 3 shareholders, one of whom was also the former Chief Executive Officer of AVBC. Under the terms of the Asset Purchase Agreement, Power3 agreed to acquire all the assets and liabilities of AVBC in exchange for 15 million shares of Power3 issued to AVBC. According to defendants, the Asset Purchase Agreement was part of a scheme of AVBC's previous officers to divert AVBC's assets to Power3. According to plaintiffs, Bui's shares in AVBC suffered a tremendous loss as a result of the transaction between AVBC and Power3.

On July 15, 2004, AVBC, Power3, and Bui executed a mutual release. The release provides, in pertinent part:

- “2. *Claim.* A claim has been made by TRINITY [Bui] with respect to the transaction between AVBC and PWRM [Power 3]. The claim of TRINITY is hereinafter referred to as the “Claim”.
3. *Release and Compromise.* In consideration for the agreements and compromises set forth herein, AVBC and PWRM agree, covenant and represent as follows:
 - 3.1 Release by TRINITY. TRINITY fully and finally acquits, releases and forever discharges AVBC and PWRM . . . of and from all claims, demands, damages, actions, causes of action, or suits . . . and for all losses or damages of every kind . . . whether heretofore or hereafter occurring . . . or whether known or unknown to TRINITY, for or because of or related to any matter or thing done . . . by AVBC . . . directly or indirectly, arising out of, attributable to, for, upon or by reason of the acts, facts and cause(s) of action encompassed

within or which may or could have been encompassed within the Claim identified in Section 2 hereinabove.

3.2 Release by AVBC and PWRM. In consideration of the foregoing release, promises, conditions and covenants by AVBC and PWRM, hereby fully and finally acquit, releases and forever discharge TRINITY . . . of and from any and all claims, demands, damages, actions, causes of action, or suits . . . and for all losses or damages of every kind . . . whether heretofore or hereafter accruing, or whether known or unknown to AVBC and PWRM, for or because of or related to any matter or thing done, omitted, or suffered to be done by TRINITY, directly or indirectly, arising out of, or attributable to, for upon, or by reason of the facts and cause(s) of action encompassed or which may or could have been encompassed within the Claim identified in Section 2 hereinabove.”

See Mazzuto Aff., Ex 13.

Plaintiffs commenced this action on December 13, 2005. The first four causes of action of the amended complaint allege that ILNP defaulted on Notes #1-4. The fifth and sixth causes of action allege that ILNP refused to recognize plaintiffs’ election to convert Notes #1-4 into shares of ILNP stock.

DISCUSSION

The standards for summary judgment are well settled.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Defendants argue that, given its broad language, the July 15, 2004 release discharged ILNP’s obligation under Notes #1-4. Plaintiffs argue that the release was intended to cover only Bui’s

claims as a shareholder of AVBC, not any claim related to the AVBC/ILNP's obligations under the promissory notes. Bui submits affidavits from Helen Park, the former Chairman of the Board of Trustees of AVBC, and from Steven Rash, CEO of Power3, who both state that the release was not intended to relate to the four promissory notes at issue. See Park Aff. ¶ 9; Rash Aff. ¶ 9. Plaintiffs maintain that, one year after the release was executed, ILNP's auditing firm sent plaintiffs letters to reconfirm the debts that ILNP owed under the four notes. See Bui Aff., Ex 2. Plaintiffs point out that, in March 2005, the notes were amended to provide that ILNP may not prepay all or any part of the principal due on the notes, and the amendment to each of the four notes identically states that, "except as modified by this Amendment, all of the terms and conditions of the Note shall remain in full force and effect." See Mazzuto Aff., Ex 14.

John Mazzuto, the current president and CEO of ILNP, claims that he would not have signed the amendments had he been aware of the release. Mazzuto Aff. ¶ 26. Defendants also argue that evidence of the parties' conduct after the execution of the release cannot be considered, because they contend that the release is unambiguous.

Pursuant to paragraph 12 of the release, the interpretation, construction, and performance of the release is governed by the law of the State of Texas. See Mazzuto Aff., Ex 13. Under Texas law,

"Releases must be construed like all other contracts. If a release is capable of a certain or definite legal meaning or interpretation, then effect must be given to the parties' intentions as expressed within the language of the release. A release will be construed in light of the facts and circumstances surrounding its execution. A general, categorical release clause must be construed narrowly. Any claims not clearly within the subject matter of a release are not discharged, even if such claims existed at the time the release was executed. The releasing instrument must 'mention' the claim to be released."

Boales v Brighton Builders, Inc., 29 SW3d 159, 167 (Tex App, 14th Dist 2000) (internal quotation

marks and citations omitted). “While parol evidence of the parties' intent is not admissible to create an ambiguity, a contract may be read in light of the surrounding circumstances to determine whether an ambiguity exists.” Founders Commercial, Ltd. v Trinity Universal Ins. Co., 176 SW3d 484, 490 (Tex App. 1st Dist 2004). “[T]hese circumstances include the commonly understood meaning in the industry of a specialized term, which may be proven by extrinsic evidence such as expert testimony or reference material.” XCO Production Co. v Jamison, 194 SW3d 622, 627-628 (Tex App. 14th Dist 2006). “Lack of clarity does not create an ambiguity, and ‘[n]ot every difference in the interpretation of a contract ... amounts to an ambiguity.’ Rather, an ambiguity arises when an agreement is susceptible to more than one reasonable meaning after application of established rules of construction.” Universal Health Servs., Inc. v Renaissance Women’s Group, P.A., 121 SW3d 742, 746 (Tex 2003) (internal citation omitted).

Defendants essentially contend that, pursuant to the release, Bui forgave the debt that ILNP owed under the promissory notes, because that debt was related to her “Claim” in the release. Although the release does not define Bui’s “Claim” in any specific way, defendants argue that ILNP’s obligations under the promissory notes are related, in that 1) a Letter of Intent to enter in the Asset Purchase Agreement was made on the same day as the loan agreement between plaintiffs and ILNP; and 2) the funds that Bui would have loaned to ILNP pursuant to the loan agreement would have been an asset conveyed to Power3 under the Asset Purchase Agreement. In support of their argument, defendants cite paragraph 7 of the release, which states, “The parties warrant that this Mutual Release is to be of the broadest nature and is to be dispositive of all matters between the parties hereto.” See Mazzuto Aff., Ex 13.

As plaintiffs indicate, defendants’ argument is without merit as to Note # 1, issued to TFIC,

which was not a party to the release. However broadly "Claim" is defined, Bui had no authority to release any claims belonging to TFIC under Note // 1, given that she executed the release in her individual capacity.

The language of the release does not give any certain or definite meaning to Bui's "Claim," except to state that Bui has made a claim with respect to the transaction between AVBC and Power3. Based on the circumstances surrounding the execution of the release, the parties clearly intended the "transaction between AVBC and Power3" to refer to the Asset Purchase Agreement. Defendants essentially interpret the release as to apply to any claims relating to Power3's acquisition. See Defendants' Mem. at 8. This interpretation is incorrect. The broad language of the release does not apply to all claims relating to the Asset Purchase Agreement itself. Rather, the release applies broadly only to the claims or causes of action that, directly, or indirectly, arises out of, is attributable to, or is encompassed or may be encompassed within Bui's "Claim." Defendants' argument only begs the question of what the parties meant by "Claim."

Given that the loan agreement is between AVBC and TFIC, and that Bui executed the release in her individual capacity, there appears to be little connection between ILNP's debt and the release. But for the fact that some of the promissory notes were issued to Bui instead of TFIC, defendants' interpretation of the release would be meritless.

At most, the vaguely defined "Claim," as set forth in the release, could be considered a latent ambiguity under applicable Texas law. "A latent ambiguity exists when the contract appears to convey a sensible meaning on its face, but it cannot be carried out without further clarification." Ludwig v Encore Medical, L.P., 191 SW3d 285, 290 (Tex App 2006). "For example, if a contract called for goods to be delivered to 'the green house on Pecan Street,' and there were, in fact, two

green houses on Pecan Street, a latent ambiguity would arise.” Healthcare Cable Sys., Inc. v Good Shepherd Hosp., Inc., 180 SW3d 787, 791 (Tex App 2005). Here, assuming that Bui asserted that Power3 should not have acquired AVBC’s assets because of loans that she made to AVBC, that would be consistent with “Claim” as defined in the release. If Bui asserted that Power3’s acquisition diminished the value of her AVBC shares, that would also be consistent with vague wording of “Claim.” Because there is more than one reasonable interpretation of “Claim,” it is a latent ambiguity. See Kelly v Rio Grande Computerland Group, 128 SW3d 759, 768 (Tex App 2004) (finding that “the subject matter of this Agreement” is a latent ambiguity).

When a latent ambiguity arises, “parol evidence is admissible for the purpose of ascertaining the true intention of the parties as expressed in the agreement.” Ludwig, 191 SW3d at 290. “[The Court] may look at other evidence in the summary judgment record concerning the parties’ intent, including evidence of their course of dealing.” Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Assn., 205 SW3d 46, 56 (Tex App 2006).

Here, the parties’ course of dealing refutes defendants’ interpretation that Bui forgave the ILNP’s debts under the four promissory notes. Had this been the parties’ intent, they would not have amended the promissory notes in March 2005, and would not have stated that, “except as modified by this Amendment, all of the terms and conditions of the Note shall remain in full force and effect.” See Mazzuto Affirm., Ex 14.

Therefore, defendants’ motion for summary judgment dismissing the first through fifth causes of action, on the basis of release, is denied. Based on the four amendments to the promissory notes, the validity of which is not disputed, the Court grants plaintiffs reverse summary judgment, striking the second affirmative defense of defendants’ answer, which asserts a release as a defense

to Notes #1-4.

As to the sixth cause of action, which seeks that Note #1 be converted into shares of ILNP common stock, defendants are entitled to summary judgment dismissing this cause of action. Note #1 provides that, "During the 30 days prior to the Maturity Date or the earlier prepayment of this Note pursuant hereto, the Holder may elect to convert the principal amount of this Note due and payable on the Maturity Date, and any payment of interest thereon, into shares of Common Stock." See *Mazzuto Aff.*, Ex 7. As discussed above, an amendment to Note #1 eliminated the possibility of prepayment of the amounts due. The Note defines the Maturity Date as "the later of (i) October 26, 2005 and (ii) the date 18 months following the date upon which the Company [ILNP] shall become fully compliant with its periodic reporting requirements under the Securities Exchange Act of 1934, as amended." See *ibid.*

According to defendants, ILNP did not become compliant with its reporting obligations until January 2005 (see *Mazzuto Aff.* ¶ 32), which plaintiffs do not dispute. Therefore, the Maturity Date of Note #1 is July 2006, the later of the two alternate maturity dates of Note # 1. The December 2, 2005 letter that TTIC sent to notify ILNP of its intent to convert the promissory note is outside the period of during which Note # 1 may be converted into ILNP shares, which is 30 days prior to July 2006, and thus invalid.

The Court need not address plaintiffs' remaining arguments in opposition to defendants' motion, which were directed to the interpretation and scope of the release.

Turning to plaintiffs' cross motion, plaintiffs maintain that they gave notice of their option to convert Notes # 2-4 by letter dated October 14, 2005, and to convert Note # 1 by letter dated December 2, 2005. See *Bui Aff.*, Exs 5-6. According to plaintiffs, ILNP never responded to either

letter, and has refused to permit plaintiffs to exercise their rights of conversion.

Notes #2-4 identically provide that, "During the 30 days prior to the Maturity Date or the earlier prepayment of this Note pursuant hereto, the Holder may elect to convert the principal amount of this Note due and payable on the Maturity Date, and any payment of interest thereon, into shares of Common Stock." See Mazzuto Aff., Exs 8-10. As discussed above, amendments to the notes eliminated the possibility of prepayment of the amounts due. The Maturity Date for Notes # 2-4 is defined as "the earlier of (i) October 26, 2005 and (ii) the date 18 months following the date upon which the Company [ILNP] shall become fully compliant with its periodic reporting requirements under the Securities Exchange Act of 1934, as amended." See Mazzuto Aff., Exs 8-10. The Maturity Date of Notes # 2-4 is October 26, 2005, which is earlier of the two alternate maturity dates. Bui notified ILNP of her intent to convert Notes #2-4 into shares within the 30 days prior to the Maturity Date of these notes. Bui therefore establishes a prima facie case for summary judgment in her favor as to these notes.

As discussed above, defendants' argument of release is unpersuasive. Therefore, the Court grants plaintiffs partial summary judgment in their favor as to liability on the fifth cause of action of the amended complaint. Because conversion of the promissory notes into shares is equitable in nature, i.e., specific performance, plaintiffs are not entitled to a jury trial on the issue of the number of shares to be issued to plaintiffs. See e.g. Cohn v Adler 139 AD2d 481, 482 (2d Dept 1988); JHL Associates v Frank, 107 AD2d 662, 663 (2d Dept 1985). Pursuant to CPLR 4317, the Court refers to a Special Referee to hear and determine the issue of the number of shares of ILNP common stock that defendants must issue to Bui in light of the conversion of Notes #2-4.

Because Bui is granted summary judgment on the cause of action to convert the principal and

accrued interest on Notes # 2-4 into shares of stock, she may not seek the relief of alternative causes of action alleging that ILNP defaulted on payment on these notes. Accordingly, the second, third, and fourth causes of action shall merge into judgment granted to her on the fifth cause of action.

Lastly, the cross motion is denied as to Note # 1, because TFIC notified ILNP of its intent to convert Note # 1 into shares of common stock long before the period during which the note may be converted into shares.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent that the sixth cause of action of the first amended complaint is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs are granted reverse summary judgment dismissing the second affirmative defense of the answer; and it is further

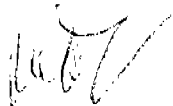
ORDERED that plaintiffs' cross motion for summary judgment is granted to the extent that plaintiffs are granted partial summary judgment as to liability on the fifth cause of action of the complaint, the fifth cause of action is severed and, pursuant to CPLR 4317(b), the issue of the number of shares of ILNP common stock that defendants must issue to Bui in light of the conversion of Notes #2-4 is referred to a Special Referee to hear and determine; and it is further

ORDERED that, in all other respects, plaintiffs' cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 29, 2007
New York, New York

ENTER:
FILED



J.S.C.

JUL 12 2007

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