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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Justice

Alpha Capital Anstalt

- v -

Klepfisz, Alan

INDEX NO. 602250/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
FEB 03 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/1/10

HON. JUDITH J. GISCHE J.S.C.

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: PART 10

----------x

Alpha Capital Anstalt and,
Osher Capital, Inc.,

Plaintiffs,

-against-

Qtrax, Inc. and Allan Klepfisz,

Defendants.

----------x

DECISION/ORDER
Index No.: 602256-09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf n/m (CPLR 3213) w/ KZ affirm, exhs	1
Def's opp w/ AK affid, exhs	2
Def's application adjourn w/ WN affirm	3
Pltf's reply w/ KZ affirm, exhs	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiffs, Alpha Capital Anstalt ("Alpha") and Osher Capital, Inc. ("Osher") against defendants Qtrax, Inc. ("Qtrax") and Allan Klepfisz ("Klepfisz") in connection with an agreement made relating to a prior money judgment awarded to plaintiffs. Klepfisz is the president and CEO of Qtrax. The court presently has before it the plaintiffs' motion for summary judgment in lieu of a complaint. CPLR § 3213. The motion is opposed by defendants, who argue that the motion should be denied and this case converted into a conventional action.

Applicable Law

Where an action is commenced under CPLR § 3213, the instrument upon which it is based must be for the payment of money only. An instrument for the payment of money only exists if plaintiff can show a prima facie case just by proof of the instrument and that there is a failure to make payments called for by its terms. Seaman-Andwall Corp. v. Wright Mach. Corp., 31 A.D.2d 136 (1st Dept. 1968). An unconditional guaranty is an instrument for the payment of money only, whether or not it recites a sum certain. European Am. Bank v. Cohen, 183 AD2d 453, 453 (1st Dept 1992). Although the need to consult the underlying loan documents to establish the amount of liability does not affect the availability of CPLR § 3213 [European Am. Bank v. Cohen, *supra*], to establish its prima facie case against guarantor, the lender must set forth the notes, an unconditional guaranty to pay, and nonpayment thereof. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 AD2d 541 (1st Dept 1992). To defeat the motion, the guarantor must come forward with proof showing the existence of a triable issue of fact with respect to a bona fide defense. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 AD2d at 542.

Arguments Presented

On May 1, 2009, this Court entered a prior judgment awarding Alpha $468,921.64 and awarding Osher $85,558.15 against Brilliant Technologies Corporation ("BTC" or "Brilliant") and LTD Networks, Inc. ("LTD"). Alpha Capital Anstalt, et al. v. Brilliant Tech. Corp., et al. (Sup. Ct. NY County. 603243/08). BTC and LTD

subsequently entered into an electronic agreement (the "Agreement") with plaintiffs, on June 1, 2009, in which plaintiffs agreed to forbear in their attempts to collect on the judgments until June 22, 2009, at which time BTC and LTD were to pay the judgments in full. In exchange for the forebearance, Qtrax agreed to pay the judgment and Klepfisz agreed he would personally guaranty the judgment.

It is undisputed that the terms of the Agreement were set forth in the May 26, 2009 email from Kenneth Zitter, attorney for plaintiffs, addressed to Wallace Neel, attorney for defendants, and the June 1, 2009 reply of Allan Klepfisz. The two emails constituting the parties' Agreement provides as follows:

> May 26, 2009 email:
>
> "1. Brilliant will wire transfer the sum of $500,487.24 to arrive in the Kenneth A. Zitter special account on or before June 22, 2009, with time of the essence . . . .
>
> 2. Brilliant will issue and deliver to plaintiffs, prior to close of business on June 1, 2009, with time of the essence, 35 million shares of Qtrax stock . . . . In the event all of the funds are not timely paid, Alpha Capital and Osher Capital may retain all of the shares as liquidated damages for their forebearance [sic] in collecting on their judgments. . . . In the event Brilliant pays all funds timely, then Alpha Capital shall return the certificate for 25,000,00 shares but may retain the certificate for 4,150,000 shares and Osher Capital shall return the certificate for 5,000,000 shares but may retain the certificate for 850,000 shares.
>
> 3. Provided Brilliant is not in default hereunder, Plaintiffs shall forebear in attempting to collect on the judgments. . . .
>
> 4. Regardless of whether or not Plaintiffs perform under this agreement, and in consideration of Plaintiffs entering into this agreement, Allan Klepfisz hereby personally guarantees to plaintiffs the full payment (not collection) of the judgments entered on May 1, 2009. . . . Klepfisz's email acceptance of this agreement shall constitute his written signature to this personal guaranty."

June 1, 2009 email from Allan Klepfisz:

"I, Allan Klepfisz, hereby agree to the terms below. The shares will be issued forthwith."

Defendants do not dispute that this agreement binds Qtrax and Klepfisz personally. BTC and LTD failed to pay the remaining balance of the judgments, $500,487.24, by June 22, 2009, as had been agreed. BTC and LTD requested extensions of the forbearance period to June 29, 2009 and then to July 9, 2009. Plaintiffs agreed to these two extensions, without any conditions. BTC and LTD requested yet another extension. This time, plaintiffs agreed to grant the extension to defendants on condition that BTC and LTD wire the sum of $50,000 to plaintiffs' special account. Defendants agreed and had the check delivered to Plaintiffs on July 1, 2009. That payment was returned for insufficient funds.

Plaintiffs argue that BTC and LTD did not pay the money judgments obtained in the prior action and that, in accordance with the Agreement between plaintiffs and defendants, Allan Klepfisz and Qtrax are responsible to pay plaintiffs the amount of $500,487.24 plus interest from June 22, 2009, attorneys' fees, and costs and disbursements.

Defendants state that Qtrax is a private start-up company that provides a free and legal music downloading service. Defendants submit that Qtrax has experienced typical start-up company issues, but that it is emerging in the global market, specifically in Asia, and that the current lawsuit by Alpha and Osher are imperiling its success.

Furthermore, defendants argue that plaintiffs' demand for 35 million shares of Qtrax stock, worth $0.50 per share, is an attempt by plaintiffs to extract $17.5 million as

liquidated damages for Plaintiffs' forbearance in collecting on the underlying judgment. Defendants argue that this provision of the Agreement renders the entire guaranty void and unenforceable as a matter of law and public policy. Defendants contend that plaintiffs fail to state a valid claim since: (1) the entire contract is unconscionable as a disproportionate "penalty" rather than a reasonable reflection of damages; (2) the entire arrangement is usurious; and (3) the security interest in the shares have value far in excess of the allegedly guaranteed debt. Defendants state that the above issues render this case unsuited for accelerated judgment under CPLR § 3213.

Discussion

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). An instrument for the payment of money qualifies for CPLR § 3213 treatment if it contains an unconditional promise by the debtor to repay lender the moneys advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634, (2nd Dept. 1992). The moving party is entitled to summary judgment unless the other party comes forward with evidentiary proof sufficient to raise an issue as to the defenses to the instrument. Afco Credit Corp. v. Boropark, *supra*.

For the reasons that follow, the Court finds that the Agreement is an instrument for the payment of money only and that the Agreement does not impose interest in a usurious amount. Further, there is no basis for any finding of unconscionability.

Accordingly, plaintiffs are entitled to summary judgment against defendants and they are entitled to judgment against defendants in the amount demanded, to wit: $500,487.24, plus interest thereon from June 22, 2009 at a statutory rate of 9% per annum.

Here, the instrument upon which plaintiffs' motion for CPLR § 3213 is based is an Agreement represented by an exchange of emails between both parties, upon which defendant Allan Klepfisz affixed his name in the form of an electronic signature. "An electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." STL § 304 (2).

Further evidence of an agreement and that Allan Klepfisz served as the personal guaranty thereof is the $50,000 check delivered to defendants on July 1, 2009 that was returned for insufficient funds. Partial payment may establish a prima facie entitlement to judgment as a matter of law. Montalbano, Condon & Frank, P.C. v. Rodi, 54 A.D.3d 1012 (2nd Dept. 2008).

The mere presence of a security provision will not necessarily disqualify the [agreement] as an "instrument for the payment of money only." Health-Chem Corp. v. Blank, 176 A.D.2d 469 (1st Dept. 1991). Additionally, the 35 million shares of Qtrax stock requested by plaintiff in paragraph 2 of the Agreement was used as a form of collateral to ensure that defendants paid plaintiff the amount owed. A security provision does not necessarily condition defendants' obligation or require any additional performance, such as would render CPLR § 3212 treatment inapplicable. Health-Chem Corp. v. Blank, *supra*.

Plaintiffs signed the Agreement containing paragraph 2 and the conditions thereof, agreeing to provide the shares as collateral. Usury only applies to things taken or received as *interest* for the forbearance of money. GOL § 5-501(2). Here, the 35 million shares were used purely as a form of collateral to secure payment of the principal obligation and not as interest for the forbearance of enforcement. This is apparent from the Agreement, which provides in paragraph 2 that: "[r]etention of such shares shall not effect the accrual of interest on the outstanding judgments. . . ". Moreover, Qtrax is not a publicly traded company and the stocks were self-valued by defendants at a rate of $.50 per share, which is not an objective evaluation. The face of the stock certificate itself states that Qtrax stock has a par value of only $.00001. Therefore, defendants' argument that provision 2 of the Agreement renders the entire guaranty void and unenforceable as a matter of law and public policy does not raise any issue of triable fact.

The Agreement unequivocally requires defendants to pay plaintiffs $500,487.24, due on June 22, 2009. The Agreement qualifies as an instrument for the payment of money. Therefore, plaintiffs have established entitlement to summary judgment against defendant (see Afco Credit Corp. V. Boropark, *supra*).

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Agreement expressly provides that defendants are liable for plaintiffs' reasonable attorneys fees, costs and

expenses incurred in this action. Plaintiffs have not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what plaintiffs may recover from defendants for its reasonable attorneys fees, costs and disbursements to hear and determine. Plaintiffs are hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Plaintiff's motion pursuant to CPLR § 3213 for summary judgment against defendant is granted in all respects; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiffs Alpha Capital Anstalt and Osher Capital, Inc. against defendants Alan Klepfisz and Qtrax, Inc., jointly and severally, in the amount of $500,487.24, plus interest thereon from June 22, 2009 at the statutory rate of 9% per annum; and it is further

ORDERED that the issue of what Plaintiff may recover from Defendant for its reasonable attorneys fees, costs and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that within the next 60 days, Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference identified herein can be assigned.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 1, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.