SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ELLEN M. COIN J.S.C. PART 63
Justice

Index Number : 651104/2012
GREYSTONE CAPITAL PARTNERS,
vs
VALCOM, INC.
Sequence Number : 003
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION AND CROSS-MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 12/5/13

ELLEN M. COIN, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 63

----------X

GREYSTONE CAPITAL PARTNERS, INC.,

Plaintiff,

- against -

VALCOM, INC.,

Defendant.

----------X

VALCOM, INC.,

Defendant/
Third-Party Plaintiff,

- against --

VINCENT VELLARDITA,

Third-Party Defendant.

----------X

Index No.: 651104/2012
Subm. Date: July 24, 2013
Mot. Seq.: 003

DECISION AND ORDER

For Plaintiff:
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For Defendant:
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Papers considered in review of this motion:

Numbered	**Papers**
Notice of Motion with Attached Exhibits	1
Memorandum of Law in Support of Motion	2
Notice of Cross-Motion with Attached Exhibits	3
Memorandum of Law in Opposition	4
Reply Memorandum of Law in Support of Motion	5

ELLEN M. COIN, J.:

This action concerns the alleged failure of defendant to abide by the terms of a settlement agreement, which was the result of a prior action (*Greystone Capital Partners, Inc. v Continental*

Stock Transfer & Trust Co., Valcom, Inc., and Vincent Vellardita, Index No. 651761/2011, Supreme Court, New York County). Specifically, plaintiff alleges that defendant has breached the "make whole" provision of the agreement, which obligated Valcom to pay the difference between $0.05 a share of Valcom stock, and the price that plaintiff was able to obtain on the open market.

Plaintiff Greystone Capital Partners, Inc. (Greystone) moves pursuant to CPLR 3212 for summary judgment in the amount of $132,311.52 on the ground that it is entitled to enforcement of an unambiguous settlement agreement as a matter of law. Plaintiff also moves for an inquest to determine the amount of its attorney's fees pursuant to the settlement agreement.

Defendant Valcom, Inc. (Valcom) cross-moves pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the settlement agreement is a modification of a criminally usurious note and is thus unenforceable. Greystone opposes the cross-motion, arguing that the settlement agreement is not a loan and thus cannot be criminally usurious.

Background

Greystone is a an investment firm with its primary place business in Boca Raton, Florida. Valcom is a publicly traded company (symbol VLCO on the Over The Counter Bulletin Board) which owns various media assets, with its principal place of business in Boonton Township, New Jersey.

In 2008, Valcom emerged from Chapter 11 bankruptcy protection, and sought to sell "convertible" notes in 2009 in order to raise money for operational needs. A convertible note provides the investor with the option to be paid in cash or stock. On January 6, 2009, Valcom sold a $100,000, 10% one-year convertible note to Omnireliant Holdings, Inc. (Omnireliant). The note included a conversion rate of $0.10 per share, giving Omnireliant the right to purchase

one million shares. The one-year term elapsed, and Valcom found itself in default by failing to repay the principal.

On July 22, 2010, Omnireliant assigned the defaulted note to Greystone for cash consideration. Greystone and Valcom amended the note (Amendment No. 1) to a higher annual interest rate of 18%, and a conversion price of either 30% of the lowest price during the 10 days prior to the conversion date, or 30% of the closing price on July 22, 2010. In consideration for the higher interest rate and modified conversion pricing, Greystone extended the note's maturity date for a year from the execution of the assignment to July 22, 2011.

On the same day Greystone purchased and amended the note, it commenced an action in the Twelfth Judicial Circuit in and for Sarasota County, Florida to have a debt settlement agreement approved by judicial decree. The action concerned a number of outstanding invoices Valcom had not paid, which were purchased by Greystone. The amount of the invoices and legal fees due to Greystone was calculated as $47,185.34, and was to be paid in the form of 4,718,534 common shares of Valcom stock. On July 23, 2010, the Florida Court approved the settlement as fair to Valcom. The Florida action was unrelated to the note.

On March 23, 2011, Greystone notified Valcom of its intent to convert $10,000 of the note to shares at $0.0018 per share, calculated by using the provision of Amendment No.1 which allows for a conversion price of 30% of the lowest price during the 10 days prior. Valcom did not deliver the stock. On June 24, 2011 Greystone commenced the aforementioned prior action for breach of the amended note. Shortly after commencement of the action, the parties and their counsel engaged in settlement talks, resulting in the settlement agreement on August 19, 2011. On September 8, 2011, Greystone filed a notice of discontinuance with prejudice in the prior action.

The terms of the settlement agreement included the delivery of 10,000,000 shares of Valcom common stock, a cash payment of $100,000 to Greystone, cancellation of the note, and an attorneys' fees clause. Additionally, the settlement agreement contained a "make whole payment" provision, which effectively guaranteed Greystone a minimum price of $0.05 a share for any stock sold within a year of the execution of the settlement agreement. The instant action was commenced when Valcom failed to pay $132,311.52 that Greystone demanded as per the make whole provision.[1]

Shortly after being served with the instant motion for summary judgment, Valcom purchased an index number for a third party complaint against its former CEO, Vincent Vellardita. Mr. Vellardita was served by "nail and mail" service at his residence in Florida on July 12, 2013. The third party complaint alleges that Mr. Vellardita breached his fiduciary duties by diverting funds for his personal use, that he engaged in tortious conduct and that to the extent Greystone was damaged, Mr. Vellardita should be held liable based upon common law indemnity and contribution.

Discussion

When moving for summary judgment and dismissal, the burden is on the defendant to "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. To meet this burden, Valcom must make a showing that the settlement agreement is a criminally usurious and unenforceable loan.

[1]Valcom performed its obligations with regard to the $100,000 cash payment, and delivery of 10 million shares of common stock.

"To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate" (*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013]). If any of these conditions is not satisfied, the defense of usury will fail.

Valcom has not proffered any authority holding that a settlement agreement in an action for nonpayment of a loan must itself constitute a loan, nor is the court aware of any. "If the transaction is not a loan, there can be no usury, however unconscionable the contract may be" (*Seidel v 18 E. 17th St. Owners, Inc.*, 79 NY2d 735, 744 [1992][internal quotation marks and citation omitted]).

"In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning" (*Vermont Teddy Bear Co. Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). The very title of the document itself conveys an intent to settle the prior action, not to modify a defaulted note. Likewise, the language of the agreement contains no indication of an intent to modify the note. Section four of the settlement agreement is a general release which discharges *all* claims and liabilities which accrued before the date of the settlement agreement and limits all obligations to those within the settlement agreement itself. Section five reads in part "Upon the clearance of the $100,000 payment due hereunder in Section 1 and receipt of the Shares, Greystone shall dismiss the Action with prejudice and cancel the Note . . . " (*see* exhibit B of Silvana Costa Manning in support of cross-motion, at 3).

Valcom did pay the $100,000 and delivered the shares, and thus, the note was extinguished, not modified. Section six states "[T]his Settlement Agreement has been made in

order to avoid the expense, burden, and inconvenience of litigation" (*id.*). Section seven is a merger clause, reading in part "any and all previous understandings between the parties hereto with respect to the subject matter contained herein are superseded and merged into this Settlement Agreement" (*id.*).

Therefore, a plain reading of the settlement agreement reveals that its purpose is to resolve the dispute on the defaulted note without the expense of litigation, not to function as a loan or a modification of the note. As it did not take shape of a loan or forbearance, the settlement agreement is not, and cannot, be found usurious as a matter of law.

Further, Valcom waived any affirmative defense of illegality when it settled the prior action. With the advice of counsel, Valcom explicitly and unequivocally relinquished its right to litigate the note in consideration for avoiding the expense of litigation. Having reached settlement on the note, Valcom cannot now resurrect and retry its prior action in the current forum.

Valcom's argument that the settlement agreement is void as an *ultra vires* contract due to fraud, collusion and lack of authority is not persuasive. This argument is based solely on conjectural and speculative allegations in the affidavits submitted in opposition to Greystone's motion. The allegations include that some of the invoices in the Florida settlement were purportedly related to Vincent Vellardita's personal expenses, and that Greystone was not forthcoming in discovery about the Florida action. "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). These bare and speculative accusations do not rise to the threshold of raising a material issue of fact. Additionally, the allegations primarily concern wrongful acts by Vellardita, claims which

Valcom is properly pursuing in its third-party action.

Similarly, the allegations that Vellardita did not have authority to enter into agreements with Greystone fail. Acts of corporate agents, "and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to [the corporation]" (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). "A corporation must, therefore, be responsible for the acts of its authorized agents even if particular acts were unauthorized" (*id.* [citations omitted]). "Even where an officer acts to the detriment of corporate interests, the law imposes no duty on a third party who deals with the corporation to inquire into its employee's actual authority. The risk of loss from an unauthorized act of a dishonest employee falls on the corporation which appointed him to act on its behalf and not on the party who relies on his apparent authority" (*Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 363 [1st Dept 2008]). Irrespective of whether Vellardita had actual authority to enter into the various agreements with Greystone, Valcom is bound by them.

Vaclom's argument implicates the issue of the "adverse interest" exception to imputation of corporate authority. Valcom's allegation that Vellardita incurred the underlying business debt to partially pay for personal expenses fails to trigger its application. "To come within the exception, the agent must have *totally abandoned* his principal's interests and be acting *entirely* for his own or another's purposes. . . . This rule avoids ambiguity . . . and reserves this most narrow of exceptions for those cases–outright theft or looting or embezzlement–where the insider's misconduct benefits only himself. . ." and constitutes *total abandonment* of corporate interests. (*Kirschner*, 15 NY3d at 466-67[internal quotation marks and citation omitted]). Because Valcom does not offer any evidence that Vellardita used the entirety of the incurred debt

to pay for personal expenses[2], with no portion of the funds going towards Valcom's *bona fide* business needs, it does not meet the test of complete adversity and thus cannot shift the burden of Vellardita's alleged malfeasance onto Greystone. (*See Whitney Group, LLC v Hunt-Scanlon Corp.*, 106 AD3d 671, 672 [1st Dept 2013]; *see also Concord Capital Mtg, LLC v Bank of America, N.A.*, 102 AD3d 406, 406 [1st Dept 2013]).

Valcom's assertion that the motion must be denied in order for more discovery to take place also fails. "While it is true that CPLR 3212 (f) permits an opposing party to obtain further discovery under certain circumstances, it should not be resorted to where, as here, there has been a failure to demonstrate that the sought discovery is anything more than a fishing expedition" (*Greenberg v McLaughlin*, 242 AD2d 603, 604 [2d Dept 1997]). Vague and conclusory allegations and insinuations which are directed at a third party will not result in the denial of summary judgment on an unambiguous contract. The discovery that Valcom seeks is related to the allegedly wrongful and improper acts of its former president and CEO, Vincent Vellardita. Greystone should not be denied what is contractually due to it because defendant now believes its former employee did not act in its best interests. Greystone's motion for summary judgment is granted in its entirety.

In accordance with the foregoing, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Greystone

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[2]Indeed, Valcom alleges that an unspecified portion of the funds was misappropriated and does not claim total loss. Further, Valcom does not argue that Vallardita never performed any business functions benefitting the company.

Captial Partners, Inc. and against defendant Valcom, Inc. on plaintiff's first cause of action in the amount of $132,311.52, together with interest at the statutory rate of 9% per annum from February 17, 2012 until the entry of judgment, as calculated by the Clerk, and costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that the Clerk shall sever and continue the second cause of action for reasonable attorney's fees, and within 60 days of the date of this order, plaintiff shall file a note of issue and certificate of readiness and schedule an inquest on notice to all parties to determine the amount of reasonable attorney's fees recoverable; and it is further

ORDERED that the Clerk of Court shall sever and continue the third-party action. This constitutes the Decision and Order of the Court.

Dated: December 5, 2013

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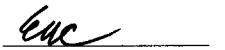

Ellen M. Coin, A. J.S.C.