SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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DBI LEASE BUYBACK SERVICING LLC and DRAWBRIDGE INVESTMENTS LLC

Plaintiffs,

- v -

MULLEN AUTOMOTIVE, INC.,

Defendant.

INDEX NO. 651110/2023

MOTION DATE 05/02/2023; 06/23/2023

MOTION SEQ. NO. (MS) 001 003

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 32, 33, 34, 35, 36, 37, 38, 39, 58, 59, 61, 65, 66, 67, 68, 69, 84

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for DISMISS.

This litigation involves plaintiffs DBI Lease Buyback Servicing LLC and Drawbridge Investments LLC's assertion that defendant Mullen Automotive, Inc. improperly refused to issue to plaintiffs an option for the purchase of up to $25 million in defendant's convertible Series E Preferred Stock and an attendant warrant. Now pending is plaintiffs' motion for a preliminary injunction (MS 001), which defendant opposes, and defendant's motion to dismiss (MS 003), which plaintiffs oppose.

Background

Plaintiffs initiated this action with a complaint, as well as an order to show cause seeking equitable relief. By order of March 3, 2023, this court entered a temporary restraining order enjoining defendant from "(i) increasing the number of designated shares for any outstanding stock or agreeing to issue new preferred stock; and (ii) failing to maintain at least 500 million in authorized common shares" (NYSCEF # 26). In between the imposition of that order and oral argument, plaintiffs moved for contempt due to certain of defendant's actions taken on its corporate capital structure (MS 002). During oral argument, and by interim order entered on March 15, the court denied plaintiffs' motion for contempt, lifted and

vacated the temporary restraining order, and denied without prejudice plaintiffs' demand for defendant to advance costs and expenses (NYSCEF # 58).

The pending preliminary injunction plaintiffs now seek mirrors the relief sought in the temporary restraining order and would also require defendant "to execute the Final Series E Purchase Option" (NYSCEF # 26 at 2). Plaintiffs' initial request for an order requiring defendant "to file a certificate of designation for the Series E Preferred Stock" was withdrawn at oral argument (NYSCEF # 70 – Apr 18, 2023 Tr at 37:7-10).

Plaintiffs point to the June 17, 2022 sale of note letter agreement (the Agreement) as the basis for their right to the Series E option (NYSCEF # 8). According to the Agreement, plaintiffs sold to non-party Esousa Holdings LLC a note representing defendant's debt of over $25 million. The Agreement indicates that plaintiffs accepted a $3.5 million discount in the sale to Esousa in exchange for defendant's "obligation to execute and deliver definitive transaction documents providing for [plaintiffs'] Series E Purchase Option" (*id.* at 2). The parties agreed that the terms of the option would be "consistent, in all material respects" with the Schedule B attached to the Agreement (*id.*). Schedule B provides that an "[i]nitial draft Option Agreement documenting the Series E transaction reflecting the foregoing terms, including the terms of the Series E Preferred Shares, must be provided within 1 month of the purchase of the Note pursuant to the Agreement" (*id.* at 1 of Schedule B). Hence, the initial draft of the option agreement was due on July 17, 2022.

Defendant delivered a draft Option Agreement on July 22, 2022 (NYSCEF # 67 – MS 001 Opp at 14). Plaintiffs modified the draft and returned it to defendant on August 12, 2022 (NYSCEF # 1 – Verified Complaint, ¶¶ 44, 45). After that, plaintiffs heard and received nothing from defendant about the Agreement despite plaintiffs' several inquiries (*id.*, ¶ 46). Thus, on January 3, 2023, plaintiffs advised defendant that it was in breach of the Agreement. On January 13, 2023, defendant "finally returned a markup of the Series E Purchase Option," but, plaintiffs assert, "the markup retraded several material terms" (*id.*, ¶¶ 48-49).

Plaintiffs aver that the option would entitle them to purchase up to $25 million in Series E Preferred Stock, to be convertible into common stock, "with the number of shares [being] equal to $25 million divided by the lower of (x) the price of common stock at the time the option was executed or (y) the price at the time the option was exercised" (*id.*, ¶ 2). Converting the preferred stock into common stock would be accompanied by the issuance of "three warrants for every share of stock converted" (*id.*, ¶ 91). Such warrants allow plaintiffs to exchange each warrant on a cashless basis for common stock and "are worth $1.25 plus the Black Scholes Value"[1] (*id.*, ¶¶ 34, 39). The formula "dramatically increases the number of common shares Plaintiffs can acquire upon exercise as the share price decreases" (*id.*, ¶ 91).

[1] Plaintiffs define Black Scholes Value by reference to a function on Bloomberg (NYSCEF # 1 at 21 n *), which function they have not identified for the record.

Plaintiffs suggest that at a stock price of $0.25, upon full conversion of their preferred shares into common stock, defendant would be required to "have more than 1.5 billion in common shares available for resale" (*id.*, ¶ 96). As of July 12, defendant states that the stock price declined to $0.16 per share (NYSCEF # 84), suggesting this option may implicate even more than 1.5 billion common shares. Defendant has 5 billion authorized common shares (NYSCEF # 1, ¶ 5).

Plaintiffs contend that defendant has stymied compliance with the Agreement through amendments to its charter and changes to its capital structure (*id.*, ¶¶ 51-57). The changes, *inter alia*, increased (i) the number of authorized shares of preferred stock from 58 million to 500 million, and (ii) "the number of designated Series D shares . . . to 437,500,001 . . . [leaving] a mere 10,299,999 authorized Preferred Shares available for any Series E issuance[,]" which forecloses the issuance of Series E Preferred stocks as per the Agreement" (*id.*, ¶¶ 52-54). Defendant would allegedly need at least 104 million authorized Preferred Shares to be designated as Series E stock given defendant's stock price of $0.24 on February 23, 2023 (*id.*, ¶ 54).

Plaintiffs inform that the increase of the preferred stock to 500 million shares was mired in controversy as to the validity of its July 26, 2022 shareholder authorization to increase blank check preferred shares to 500 million. In turn, "the subsequent issuance of Series D Preferred were not validated until January 23, 2023, when the Delaware Court of Chancery ratified the amendment to the Charter" (*id.*, ¶ 58).

Thereafter, on February 22, 2023, plaintiffs' counsel demanded defendant execute and deliver the Series E Purchase Option in the form plaintiffs transmitted, asserting that it had "non-substantive changes to the conversion ratio" (*id.*, ¶¶ 82, 83; NYSCEF # 10 – Demand Email). Defendant ignored the demand. The Demand Email also sought advancement of attorney's fees, costs, and expenses pursuant to the Agreement should defendant fail to "consummate the Series E Purchase Option transaction" (NYSCEF # 8 at 2).

Plaintiffs now seek a preliminary injunction. They contend that they face imminent risk of the deprivation of their rights under the Agreement if defendant disposes its preferred stock. This would render their Series E Preferred Option to be junior to the series A, B, C, and D preferred stocks (NYSCEF # 3 at 13-14). They also seek advancement of fees and costs as per the Agreement explaining the irreparable nature of the harm absent the advancement because they are a small fund without a litigation budget (*id.* at 9-12; NYSCEF # 70 – Apr 18, 2023 Hearing Tr at 16:5-14). Further highlighting the irreparable harm they face, plaintiffs refers to defendant's declining and vulnerable financial condition as indicated in defendant's CEO's affidavit (NYSCEF # 69 – Reply at 5 referring to NYSCEF # 66 – Michery aff). Plaintiffs argue that the equities weigh in their favor because of defendant's bad faith as compared to plaintiffs' full performance of their contractual obligations and (NYSCEF # 3 at 17-19).

In opposition, among other points, defendant argues that: the preliminary injunction that plaintiffs seek is tantamount to the ultimate relief sought; and there is no enforceable option agreement but rather only an agreement to agree in that "one-page term sheet that specifically contemplates more formal documentation" (NYSCEF # 67 at 4-5, 18-19). Defendant posits that it "always contemplated that it would be able to finish its Series D preferred stock prior to commencing a Series E round of preferred stock" (*id.* at 6). And while the Agreement "recognizes that Plaintiffs would be granted options if there were Series E preferred stock, nothing in Schedule B [to that document] requires [defendant] to create Series E shares for Plaintiffs" (*id.* at 7).

As to plaintiffs' advancement of fees request, defendants respond that the advancement concept applies defensively, not to give plaintiffs a "war chest" to assert claims against defendant (NYSCEF # 67 at 12). Defendant disagrees that the language of the advancement clause to advance fees plaintiffs is "unmistakably clear"(*id.* at 12-13). Defendant posits that reading the clause as plaintiffs suggest would produce "an absurd result" (*id.* at 13).

Significantly, defendant argues that this action should not be before this court because (1) the Delaware Court of Chancery is the exclusive forum for this action in that plaintiff's claims fall squarely within defendant's forum selection provision in its charter, as well as its invocation of the internal affairs doctrine (NYSCEF # 67 at 19-20, citing NYSCEF # 37 at 22, Art X); and (2) plaintiffs are foreign limited liability companies not registered to do business in New York and cannot maintain a suit in New York under New York Limited Liability Law Section 808; in any event, defendant argues, there should be a CPLR 8501 bond and limited discovery to determine whether plaintiffs do business in New York (*id.* at 20-21).

In reply, plaintiffs assert that, based on the Agreement's mandatory forum selection clause providing for venue in New York, the Delaware Court of Chancery is not the forum for this dispute (*id.* at 6-7). While the preliminary injunction motion was under consideration, plaintiffs e-filed a letter on July 11 seeking the court's consideration of defendant's public statements as to "an investor financing moratorium for the balance of 2023" and proposal "to reincorporate from Delaware to Maryland" (NYSCEF # 83). Defendant responded by asserting that the public statements do not ameliorate plaintiffs' legal deficiencies (NYSCEF # 84).

The parties' arguments in defendant's motion to dismiss (MS003) generally track the contentions in the preliminary injunction motion, with further discussion of the statute of frauds and plaintiffs' declaratory judgment cause of action (NYSCEF #'s 80 – MS003 MOL; 81 – MS003 Opp; 82 – MS003 Reply).

Discussion

Entitlement to a preliminary injunction requires a showing of (1) likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). "The

decision to grant or deny provisional relief . . . is a matter ordinarily committed to the sound discretion of' this court (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

The court first addresses Defendants' argument on the internal affairs doctrine to take this action out of New York and before the Delaware Court of Chancery.

The Court of appeals has held:

> "[J]urisdiction in any case will be declined . . . where a determination of the rights of litigants involves regulation and management of the internal affairs of the corporation dependent upon the laws of the foreign State or where the court in which jurisdiction is sought is unable to enforce a decree if made or where the relief sought may be more appropriately adjudicated in the courts of the State or country to which the corporation owes its existence."

(Langfelder v Universal Lab'ys, 293 NY 200, 204 [1944]). And while there is no general rule that defines internal affairs,

> "courts have declined jurisdiction in cases involving foreign corporations in which plaintiffs have sought a declaration of rights with respect to their stock following a merger, to compel the redemption of stock or payment of dividends, [and] a declaration that would have the effect of altering the corporate structure or forcing dissolution."

(*Prescott v Plant Indus., Inc.*, 88 FRD 257, 260-262 [SD NY 1980]). This is particularly so upon "considerations of convenience or of efficiency or of justice point to the courts of the domicile of the corporation as the appropriate tribunals" (*Travis v Knox Terpezone Co.*, 215 NY 259 [1915]). In other words,

> "[R]ights of third parties, whether they happen to be stockholders or not, if the rights are such as they are recognized by our laws, may be enforced by our courts, unless they relate to such internal affairs of the corporation as ought to be regulated only by the courts of the state or country to which it owes its existence."

(*id.*).

Applying the above-stated law on the internal affairs doctrine, plaintiffs' motion for a preliminary injunction is denied. Plaintiffs seeks equitable relief that is more appropriately adjudicated in the Delaware Court of Chancery as provided in defendant's charter (*see Nothiger v Corroon & Reynolds Corp.*, 266 AD 299, 300, *affd*, 293 NY 682 [1st Dept 1944] [denying jurisdiction as to questions involving the construction of defendant's charter as applied to demand for payment of alleged obligations on preferred stock]).

To the extent plaintiffs suggest this is a simple contract suit (NYSCEF # 69 at 6), they are mistaken. Rather, plaintiffs seek injunctive relief that bears on the

issuance of new stock (*cf Travis*, 215 NY 259 [finding jurisdiction on an enforcement of contract action where the shares in controversy have been issued and assigned to the plaintiff, leaving only the registration of a perfected right]). In seeking the issuance of more Series E preferred stock, plaintiffs would have this court issue an order locking up defendant's capital structure, *in toto*, as to issuing preferred stock and for 10% of defendant's authorized common stock. While plaintiffs argue that they would be irreparably harmed absent an injunction on defendant's issuance of Series D preferred stock, plaintiffs fail to explain what effect such order may have on stakeholders' existing entitlements to defendant's stock. Plaintiffs are obviously aware of their putative rights interlocking with the Series D recipients. These interlocking rights are more appropriately adjudicated in the court of the state which defendant owes its existence – Delaware.

Plaintiff's argument that defendant "effectively waived" Article X of its charter[2] by agreeing in the Sale of Note to litigate in New York misses the point of the internal affairs doctrine. While Article X may serve to put putative stakeholders, such as plaintiffs, on notice about where certain claims would be litigated, the internal affairs doctrine itself precludes this court hearing this action (*see Cohn v Mishkoff-Costlow Co.*, 256 NY 102, 105 [1931] ["jurisdiction now invoked *must be denied*" in action seeking defendant corporation "to change its corporate structure by the redemption of its stock"] [emphasis added]) or, perhaps, as a matter of the exercise of this court's discretion (*Broida v Bancroft*, 103 AD2d 88, 91 [2d Dept 1984] [stating that even where an action "concerns the internal affairs of a foreign corporation," still it "should be entertained unless the same factors that would lead to dismissal under forum non conveniens principles suggest that New York is an inconvenient forum and that litigation in another forum would better accord with the legitimate interests of the litigants and the public"]). This court is unconvinced that litigation in New York will be appropriate.

Plaintiffs cite several cases in opposing application of the internal affairs doctrine here, but all are unavailing[3] (NYSCEF # 69 at 6-7). Plaintiffs' reliance on *Blue v Standard Coil Prod. Co.* (117 NYS2d 858 [Sup Ct, NY County 1952]), which rejected the internal affairs doctrine, is misplaced because the agreement at issue was for an exchange of defendant's common stock; not the issuance of a new series of preferred stock as here. Further, unlike *Blue*, the present matter is complicated by plaintiff's application to lock up defendant's capital structure.

Raybuck v USX, Inc. (961 F2d 484 [CA 4 1992]), in which the court rejected application of the internal affairs doctrine to the "simple contract suit" where the

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[2] NYSCEF # 69 at 6, referring to Article X of the Second Amended and Restated Certificate of Incorporation of defendant (NYSCEF # 37 at 22): "To the fullest extent permitted by law, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any action asserting a claim against the Corporation governed by the internal affairs doctrine."

[3] Plaintiffs fail to explain the applicability of *Mindspirit, LLC v Evalueserve Ltd.* (346 F Supp 3d 552, 581 [SDNY 2018]), which the court identified the inapplicability of the internal affairs doctrine to "a simple contract suit".

plaintiff "sought to recover damages," is similarly unavailing even though the court rejected (*id.* at 485). While *Rayback* raises unanswered questions as to how plaintiffs' proposed lockup of defendant's capital structure may affect any employees or other beneficiaries of any stock incentive plan defendant may already have in place (*id.* at 487), that case otherwise does not assist plaintiffs given that they seek equitable relief beyond contractual damages. Finally, *Luxor Capital Group LP v Altisource Asset Mgt. Corp.* (2020 WL 4557956 [Sup Ct, NY County, Aug 3, 2020, No. 650746/2020]) is inapposite as the forum selection clause debate did not involve the issue of whether the action would be more appropriately adjudicated in the state of incorporation. Further, *Luxor Capital* involved equitable relief for the redemption of preferred stock for cash, as the First Department's decision on the summary judgment motion made clear (217 AD3d 499, 500 [1st Dept 2023]), which raises different considerations than those here.

Plaintiffs' request for advancement of fees is also denied. Plaintiffs have not demonstrated irreparable injury should they not be paid funds to litigate. Plaintiffs misplace their reliance on cases awarding advance of fees for affirmative claims on summary judgment motions, wherein irreparable injury does not need to be demonstrated (NYSCEF # 69 at 1-2 citing *G2 FMV, LLC v Thomas*, 135 AD3d 421 [1st Dept 2016]; *Thomas v G2 FMV, LLC*, 2018 WL 1778318 at *1 (Sup Ct, NY County 2018]; *Crossroads ABL, LLC v Canaras Cap. Mgmt., LLC*, 35 Misc 3d 1238(A) [Sup Ct, NY County 2012], *affd*, 105 AD3d 645 [1st Dept 2013]). Plaintiffs' reliance on *Dupree v Scottsdale Ins. Co.* (96 AD3d 546 [1st Dept 2012]) is also not on point. That case involved an insurer's obligation to advance legal defense expenses (*id.*).

Finally, plaintiffs point to *Kaloyeros v Fort Schuyler Mgmt. Corp.* (55 Misc 3d 1082, 1090 [Sup Ct, NY County 2017], *affd*, 157 AD3d 1152 [3d Dept 2018]) which recognized that the failure to advance legal expenses can potentially constitute irreparable harm under a not-for-profit corporation law (*but see Blanchard v Tabulate, Inc.*, 2018 WL 11383043 at *2 [SD NY 2018] ["Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" ([quoting *Renegotiation Bd. v Bannercraft Clothing Co.*, 415 US 1, 24 1974]). Nonetheless, the present case does not involve not-for-profit law. And just as the *Kaloyeros* court found that plaintiff had not made its showing of irreparable injury (Kaloyeros, 55 Misc 3d at 1090), plaintiffs here have not made their showing. That their attorney stated at oral argument that they are a small fund without a litigation fund is insufficient (NYSCEF # 70 at 16:5-11). The court in *Kaloyeros* also distinguished between defensive proceedings and prosecution of affirmative claims, the latter of which the court found to be unavailable under the not-for-profit corporation law (*Kaloyeros*, 55 Misc 3d at 1088). Given this finding, the court need not and does not determine whether advancement of fees would even be appropriate without consideration of the lack of success plaintiffs have thus far had in litigating

a failed motion for contempt and a now-dismissed action. Nor does the court reach the balance of the parties' arguments going to the merits of this action.

Plaintiffs' motion for a preliminary injunction is denied. And based on the above finding that under the internal affairs doctrine, this action is better suited in the Delaware Court of Chancery, as provided by defendant's charter. Accordingly, defendant's motion to dismiss (MS003) is granted. As such, the court need not address the remaining issues raised in defendant's motion to dismiss.

Conclusion

In light of the foregoing, it is hereby

ORDERED that the motion (MS001) of DBI Lease Buyback Servicing LLC and Drawbridge Investments LLC (plaintiffs) for a preliminary injunction is denied; and it is further

ORDERED that the motion (MS003) of Mullen Automotive, Inc. (defendant) is granted on the basis that the Delaware Court of Chancery is the exclusive venue for this action; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing the complaint; and it is further

ORDERED that counsel for defendant shall serve a copy of this decision, along with notice of entry, on plaintiffs within ten days of entry.

08/25/2023
DATE

MARGARET CHAN, J.S.C.

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