IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

COLLEGE HEALTH & INVESTMENT, L.P.,	)	
Plaintiff,	)	
v.	)	C.A. No. N15C-01-119 WCC
DIAMONDHEAD CASINO CORPORATION, a Delaware Corporation	)	
Defendant.	)	

Submitted: March 12, 2015
Decided: July 2, 2015

Defendant's Motion to Dismiss – DENIED

MEMORANDUM OPINION

Joseph B. Cicero, Esquire, Stephanie S. Habelow, Esquire, Chipman Brown Cicero & Cole, LLP, The Nemours Building, 1007 North Orange Street, Suite 1110, Wilmington, DE 19801. Attorneys for Plaintiff.

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CARPENTER, J.

Before this Court is Defendant's Motion to Dismiss the instant Complaint for mootness. For the foregoing reasons, the Court finds that the issue is not moot and Defendant's Motion to Dismiss is hereby **DENIED**.

FACTS

On March 1, 2010, Diamondhead Casino Corporation ("Defendant" or "Diamondhead") sent a Private Placement Memorandum ("PPM") to institutional investors soliciting an investment in convertible Promissory Notes. On March 25, 2010, College Health & Investment, L.P. ("Plaintiff" or "CHI") invested $150,000.00 with Defendant and received an executed Promissory Note (the "Note") in return. Pursuant to the terms of the Note, Defendant was required to pay $150,000 to Plaintiff by March 25, 2012 (the "Maturity Date") plus interest owed. Interest accrued at a rate of twelve percent (12%) annually. Defendant failed to repay the Note on the Maturity Date, and has made no payments since.

The Note defines an "Event of Default" as a failure to pay the principal balance or interest when the Note is due and when such failure continues for sixty (60) days after the Maturity Date. The Note also provides for remedies upon the occurrence of a default. Particularly, the Note provides that Plaintiff "may at any time at its option, (a) declare the entire unpaid principal balance of this Note,

together with all interest accrued hereon, due and payable, and thereupon, the same shall be accelerated and so due and payable."[1]

Plaintiff provided written notice to Defendant on September 22, 2014, demanding payment of the principal amount of the Note and interest from June 30, 2012 at twelve percent annually. On October 14, 2014, Defendant responded asserting that it did not have the funds to pay the Note. On January 15, 2015 the Plaintiff filed this action. Seven days later, on January 22, 2015, Defendant notified Plaintiff in writing that it would exercise the "Borrower's Right to Convert" pursuant to Section 2.1 of the Note, and convert the unpaid principal and interest to common stock. Section 2.1 of the Note provides Defendant the right to convert principal and interest due under the Note into Common Stock of the Defendant, "upon written notice to the [Plaintiff]…after a minimum of one hundred and eighty (180) calendar days from the Issue Date or, alternatively, after the price of the Common Stock of the [Defendant] is at or above One Dollar ($1.00) per share for thirty (30) consecutive business days prior to the date of written notice…."[2]

On February 11, 2015, Defendant moved to dismiss the Complaint asserting that they had tendered the relief requested by Plaintiff. Plaintiff contends that

[1] Note at §3.2.
[2] Note at §2.1.

Defendant's attempted conversion of the Note into common stock is invalid and does not warrant dismissal of the Complaint. The Court heard oral argument and this decision follows.

STANDARD OF REVIEW

The doctrine of mootness requires a court to dismiss a claim "if the substance of the dispute disappears due to the occurrence of certain events following the filing of an action."[3] However, if the "alleged injury still exists despite the occurrence of intervening events, a justiciable controversy remains, and the mootness doctrine will not operate to deprive the court of jurisdiction to hear the case."[4] "Because the requirement of an actual controversy goes directly to the court's subject matter jurisdiction over an action, a motion to dismiss based on justiciability grounds is properly viewed in the context of [Superior Court] Rule 12(b)(1), and the court may consider documents and materials extrinsic to the complaint."[5]

DISCUSSION

This is the case of a casino receiving $150,000, executing a note for that amount, paying nothing on the principal, defaulting and then asserting that they

[3] *Multi–Fineline Electronix, Inc. v. WBL Corp. Ltd.*, 2007 WL 431050, at *8 (Del.Ch. Feb. 2, 2007).
[4] *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 435 (Del. Ch. 2007) (citing *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del.Ch. Oct. 11, 2006)).
[5] *NAMA Holdings*, 922 A.2d at 435 n. 43 (Del. Ch. 2007).

have complied with the terms of the note by converting it to their common stock that has little or no value. If the Court was to find their argument had merit it would truly be declaring that they had hit the "Jackpot". Unfortunately for them, the Court will not play with their dice and finds the defendant's position is not supported by any reasonable reading of the terms of the note and their Motion will be denied.

First of all, there is no question that the Defendant has defaulted on the note. The maturity date of the note was March 25, 2012 and there have been no payments in satisfaction of the note. Section 3.1 of the promissory note states:

> The occurrence of any of the following events of default ("Event of Default") shall at the option of the Holder hereof, make all sums of principal and interest then remaining unpaid hereon and all other amounts payable hereunder immediately due and payable, upon demand, without presentment, or grace period, all of which hereby are expressly waived, except as set forth below:
>
> (a) *Failure to Pay Principal or Interest*. The Borrower fails to pay principal, interest, or other sum due under this Note when due and such failure continues for a period of sixty (60) business days after the due date.[6]

Since it has been more than three years since the note was due, the requirements of 3.1(a) have been met. The remedies upon default are set forth in Section 3.2 of the note and allow the holder of the note, Plaintiff in this case, to "declare the entire unpaid principal balance of this Note, together with all interest accrued hereon,

[6] Note at §3.1.

due and payable, and thereupon, the same shall be accelerated and so due and payable."[7] Here the Plaintiff notified the Defendant on September 14, 2014 that they were exercising the option of declaring the unpaid balance and interest immediately payable. When the Defendant failed to satisfy the note, the Plaintiff filed this action on January 15, 2015. Therefore there is no question that the Defendant is in default and the Plaintiff has appropriately exercised its options under the Note.

The Defendant argues that in spite of the default, they have the right to convert the amount of the loan to its common stock under Section 2.1 of the Note. On January 22, 2015, the Defendant sent Plaintiff a letter indicating they were converting the debt to common stock and it appears Defendant converted the principal into 300,000 shares. While the calculation as to interest is unclear to the Court, it also appears for the time period of June 2010 to the end of 2014 the unpaid interest was also converted into shares of stock. While the Court acknowledges the conversion right of the Defendant under the note, it finds that the right ceased when the maturity date of note passed and the Plaintiff exercised its default rights.

[7] Note at §3.2.

Section 4.6 of the note limited the Defendant's conversion right to a time period before the note matured. The provision in part states:

> The Borrower acknowledges that it has not and will not be permitted to assert any right of set-off or counterclaim with respect to its obligation to pay the principal and interest as of the Maturity Date as set forth herein and hereby waives any and all defenses it may have in the future with respect to such payment, except to the extent that (a) this Note has been converted into Common Stock in accordance with Article II *prior to the Maturity Date*…[8]

This provision would allow a set off of the common stock value but only if the conversion occurred before maturity. The intent of the parties also can be found in Diamondhead's Private Placement Memorandum of March of 2010 which was incorporated by reference into the note. The document reflects that "[to] the extent not previously paid, the principal due under the Note shall be payable in full on the Maturity Date, unless *previously converted* into the Borrower's Common Stock or accelerated due to the occurrence of an Event of Default." Taken together, the clear common sense reading of the documents reflect that the conversion right ends either at the date of maturity or upon the default of the note. Since both have occurred here, the Court finds the Defendant cannot satisfy the debt by its conversion to common stock and the matter is not moot. As such the Motion to Dismiss will be denied.

[8] Note at §4.6 (emphasis added).

It is also well settled in contract law that a "party who first commits a material breach of a contract cannot enforce the contract going forward."[9] Here, the essential purpose of the contract was to loan Defendant money for two years with a twelve percent annual interest rate. Plaintiff expected repayment of the principal amount, $150,000 by March 25, 2012, plus interest owed. Defendant did not repay the Note on that Date, and failed to pay interest after June 30, 2012. By failing to perform its obligations under the contract, Defendant defaulted on the Note and defeated the essential purpose of the contract. Therefore, Defendant has materially breached the Note, and cannot now ask the Court to enforce Section 2.1 of the Note against the Plaintiff. For these reasons, Defendant does not have the right to convert the remaining principal and interest into Common Stock, and cannot now assert that its obligations have been satisfied.

CONCLUSION

Based on the above reasoning, Defendant's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[9] *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, 2013 WL 3934992, at *21 (Del. Ch. July 24, 2013) (citing *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch.2003)).