

Interaudi Bank v Guerrand-Hermes

2006 NY Slip Op 30326(U)

March 13, 2006

Supreme Court, New York County

Docket Number: 0600687/2005

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
INTERAUDI BANK,
Plaintiff,

-against-

OLAF GUERRAND-HERMES, EVA BLAZEK and
AGU INVESTMENTS LTD.,

Defendants.
-----X

INDEX NO. 600687/2005

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: March 13, 2006

FILED
MAR 15 2006
COUNTY CLERK'S OFFICE
NEW YORK



KARLA MOSKOWITZ

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: I.A.S. PART 3

-----X
INTERAUDI BANK,

Index No. 600687/2005

Plaintiff,

-against-

DECISION and ORDER

OLAF GUERRAND-HERMES, EVA BLAZEK and
AGU INVESTMENTS LTD.,

Defendants.

-----X

KARLA MOSKOWITZ, J:

Plaintiff moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint. Defendants cross-move to dismiss the action as to the individual defendants on the grounds of improper service and, as to the corporate defendant, based upon both improper service and lack of personal jurisdiction.

Plaintiff Interaudi Bank (Interaudi) brings this action against defendant Olaf Guerrand-Hermes (Guerrand-Hermes), his wife, Eva Blazek (Blazek) and AGU Investments (AGU) to recover the full amount of an "Amended and Restated Promissory Note," dated December 19, 2003 (The Note). Guerrand-Hermes executed the Note and Blazek and AGU guaranteed it. Interaudi claims that the Note, in the face amount of \$166,000.00, represents the amount of a loan that it extended to Guerrand-Hermes, pursuant to a line of credit agreement, originally entered into in June 2001. The Note matured on December 31, 2004, and Guerrand-Hermes defaulted on his obligation. Interaudi asserts that it is entitled to default interest at 9.5 %, attorneys fees in the amount of approximately \$12,000.00, and a default penalty of four percent.

As to the issue of this Court's jurisdiction over AGU, Interaudi, as the party seeking to assert personal jurisdiction, bears the burden of proof (Bunkoff Gen. Contrs., Inc. v State Auto.

Mut. Ins. Co., 296 AD2d 699 [3d Dept 2002]). The parties do not dispute that AGU is a foreign corporation, located on the island of Nevis, West Indies. There is no evidence presented that AGU does any business in New York other than that it signed the guaranty, payable in New York. However, the guaranty, that is annexed to Interaudi's papers as Exhibit E does not incorporate the terms of the underlying note and does not otherwise provide for New York jurisdiction over AGU. The guaranty merely provides that "[it] shall be governed by and construed in accordance with the laws of the State of New York." Although New York State courts differ, the rule in the First Department is that a financial guaranty payable in New York is not a contract to perform services in New York that subjects a foreign guarantor to New York jurisdiction under CPLR 302 (a) (1) (Bank of Tokyo-Mitsubishi, Ltd. v Kvaerner, 243 AD2d 1 [1st Dept 1998]; Waldorf Assoc. v Neville, 141 Misc 2d 150, 154 [Sup Ct, NY County 1988] affd for reasons stated 155 AD2d 283 [1st Dept 1989]; cf., AI Trade Fin., Inc. v Petra Bank, 989 F2d 76 [2d Cir 1993]). Thus, absent proof of other contacts with this state, New York will not exercise jurisdiction based upon AGU's guarantee of the Note. Since Interaudi has not demonstrated that AGU has any other contacts in New York that would subject it to jurisdiction in this forum, the court is constrained to dismiss the action as to AGU.

The defendants also move to dismiss the action as to the individual defendants, Olaf Guerrand-Hermes and Eva Blazek, based upon improper service. Guerrand-Hermes and Blazek are both foreign nationals who do not live in New York. Blazek states that both she and Guerrand-Hermes are now living in Morocco and that they have no address at which anyone serve them.

Blazek also raises substantive objections to summary judgment in lieu of complaint on the Note. In 2003, at the time he signed the Amended Promissory Note and the guaranties,

Guerrand-Hermes gave Interaudi a security interest in his shares in Apartment 601 located at 1 West 67th Street. At that time, Guerrand-Hermes, who co-owned the apartment with his former wife, was involved in divorce litigation. As part of that litigation, the court appointed a receiver to sell the apartment. The receiver contested the validity of Interaudi's security interest and placed the sum of \$249,000 in escrow. Blazek contends that Interaudi settled its claim for \$65,000, that was too little; and, in addition, Interaudi did not credit that amount toward payment of the Note.

As to the issue of service upon the individual defendants, the Note that Olaf Guerrand-Hermes signed provides, in part, as follows:

THE BORROWER AND THE BANK HEREBY . . . AGREE . . .
THAT ANY PROCESS REQUIRED TO BE SERVED ON [The
Borrower]. . . MAY BE SERVED ON [Him] WITH THE SAME
EFFECT AS PERSONAL SERVICE WITHIN THE STATE OF
NEW YORK BY CERTIFIED OR REGISTERED MAIL
ADDRESSED TO [Him] AT [His] ADDRESS SET FORTH IN
THE AGREEMENT

(Plaintiff's Exhibit A).

The note sets forth Guerrand-Hermes' address as 1 West 67th Street, Apt. 601, New York, New York 10023. However, Interaudi acknowledges that, as a result of the pending sale of the apartment, it was aware that Guerrand-Hermes was no longer living at that address. Joseph Audi (Audi), the president and chairman of Interaudi Bank, states in his affidavit that he received correspondence from Guerrand-Hermes in 2003, in which he listed his father's home at the Chateau de Saint Firmin in Chantilly, France (the Chantilly house) as his return address. Audi also states that Guerrand-Hermes had told him that he was living at his father's home. Interaudi therefore attempted to serve both Guerrand-Hermes and Blazek at the New York address, by certified mail, and at the Chantilly house address by attempted personal delivery and by

registered mail.

The French process server in his affidavit indicates that he called the Chantilly house several times and visited the premises once, on March 10, 2005. Each time he contacted the home, he was told that Guerrand-Hermes and Blazek were “not currently in France” and were currently staying in Morocco. The process server states that he therefore complied with French law, Article 659 of the New Code of Civil Procedure, that provides that where the person to be served has no known domicile nor residence or workplace, the process server may prepare a report, detailing his unsuccessful search, and serve that report, plus the legal documents upon the last known address of the person to be served. The process server includes a copy of Article 659 to support his assertions (See Certificate of Accuracy).

Eva Blazek challenges this service of process by contending that she has never resided at the Chantilly house, and that her husband, to whom she has been married for less than two years, has not resided there since 1988. Blazek does not state how she knows that her husband has not resided at the Chantilly house since 1988.

The Convention of the Service Abroad of Judicial and Extra Judicial documents in civil or commercial matters (‘The Hague Service Convention) Treaty to which the United States is a signatory governs service of process upon a foreign national who is not present within this country. (20 UST 361). The Hague Service Convention provides the mandatory methods of service once service abroad is necessary or appropriate (See Luciano v Garvy Volkswagen, Inc., 131 AD2d 253 [3d Dept 1987]).

Article 2 of the Hague Service Convention provides that each contracting State is to designate a Central Authority to undertake to receive requests for service coming from other contracting States. Service within a foreign country should be made in accordance with that

country's internal law for service of domestic actions.

Here, as to Guerrand-Hermes, the process server made service in accordance with internal French law that provides for service where there is no known domicile, residence or workplace. Therefore, service upon Guerrand-Hermes was proper because the process server made it in accordance with the Hague Service Convention. Accordingly, the court rejects Guerrand-Hermes cross-motion to dismiss based upon improper service.

However, whether there was proper service upon Blazek is not as clear. Blazek states in her affidavit, dated April 2005, that she and her husband have been married less than two years. Unlike her husband, she did not correspond with Interaudi or in any way represent that she was living at the Chantilly house. Moreover, since she has been married less than two years, she may not have been living at that address at the time that Guerrand Hermes corresponded with Interaudi. Interaudi gives no indication as to why it believed that the Chantilly house was Blazek's last known address. Therefore, the court orders the parties to conduct a traverse hearing with respect to the issue of whether there was proper service upon Blazek.

As to Interaudi's motion for summary judgment in lieu of complaint, as a rule "CPLR 2313 is available where a right to payment can be ascertained from the face of a document" (Boland v Indah Kiat Fin. (IV) Mauritius Ltd., 291 AD2d 342, 343 [1st Dept 2002] quoting Matas v Alpargatas S.A.I.C., 274 AD2d 327, 328 [1st Dept 2000]). However, where a secured party seeks a deficiency judgment from the debtor, after sale of the collateral, the creditor bears the burden of showing that the sale was made in a commercially reasonable manner (McKinney's Uniform Commercial Code § 9-504; HSBC Bank USA v IPO, LLC, 290 AD2d 531 [1st Dept 2002]; Mack Fin. Corp. v Knoud, 98 AD2d 713 [2d Dept 1983]). Interaudi acknowledges that, after the filing of the papers in this action, it received \$65,000.00 from the sale of Guerrand-

Hermes apartment. It further acknowledges that \$249,000.00 of sale proceeds were held in escrow, but states that, at the time, Guerrand-Hermes' former wife had cross moved for a declaration that Interaudi had no right to proceeds from the sale of those shares. Interaudi states that, in an effort to protect its interest, it opposed the former wife's motion. It further alleges that Guerrand-Hermes was represented in those proceedings and that he submitted an attorney's affirmation in opposition to the motion.

Interaudi states that it believed that it would have ultimately lost its right to the shares and that it therefore settled with Guerrand-Hermes' former wife in receipt of \$65,000.00. Notably, Interaudi states that Guerrand-Hermes did not object to the settlement at that time. Given these circumstances, including that a receiver sold the collateral and that Guerrand-Hermes could have, but did not object to the settlement at the time it was made, he has failed to raise an issue of fact as to the commercially reasonable sale of the collateral. For this reason, Interaudi is entitled to summary judgment on the issue of liability.

Accordingly, based upon the foregoing, it is

ORDERED that the portion of defendants' cross-motion to dismiss the action based upon defective service of process and lack of jurisdiction is granted as to defendant AGU Investments Ltd., and the Clerk is directed to enter judgment in favor of defendant AGU and sever and continue the action as to the remaining defendants; and it is further

ORDERED that the issue of proper service of process upon defendant Eva Blazek is referred to a Special Referee to hear and report upon the issue as to her last known residence, and whether service was properly made in accordance with French law, with recommendations; and it is further

ORDERED that the portions of plaintiff's motion pursuant to CPLR 3213 and of

* 8]
defendants' cross-motion to dismiss the action as to Eva Blazek are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the portion of defendants' cross-motion to dismiss the action as to defendant Olaf Guerrand-Hermes is denied; and it is further

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted as against defendant Olaf Guerrand-Hermes as to liability; and it is further

ORDERED that the court directs an assessment of damages and attorneys fees against defendant Olaf Guerrand-Hermes; and it is further

ORDERED that within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office, together with the proper fees, if any, and the Clerk shall thereupon place this action upon the trial calendar for Part 3 for the assessment directed.

Dated: March 13, 2006

FILED
MAR 15 2006
COUNTY CLERK
ENTER:



J.S.C.