

Petra Fund Reit Corp. v Belfonti
2008 NY Slip Op 30804(U)
March 13, 2008
Supreme Court, New York County
Docket Number: 0602487/2007
Judge: Richard B. Lowe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT

PART 76

Index Number : 602487/2007

PETRA FUND REIT

vs.

BELFONTI, MICHAEL

SEQUENCE NUMBER : # 001

PROTECTIVE ORDER

Justice

INDEX NO. 60248707

MOTION DATE 11/29/07

MOTION SEQ. NO. #001

MOTION CAL. NO.

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

NOTED FOR THE CLERK'S OFFICE

FILED

MAR 21 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/13/08

RICHARD B. LEVINE III

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 : IAS PART 56

-----X

PETRA FUND REIT CORP.,

Plaintiff,

Index No: 602487/07

-against-

DECISION AND ORDER

MICHAEL BELFONTI, RICHARD BELFONTI,
BELFONTI CAPITAL PARTNERS, LLC, BCP
FLORIN, LLC and DIAMOND GAMING
CORPORATION, N.V.,

Defendants.

FILED
MAR 21 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X

RICHARD B. LOWE III, J:

This dispute arises out of the recovery of the unpaid balance of a loan agreement secured by a personal guaranty. Motion sequence numbers 001, 002, and 003 are consolidated for disposition. In motion sequence number 001, Defendants move pursuant to CPLR 3103 for a protective order staying all discovery. In motion sequence number 002, Petra moves pursuant to CPLR 3212 for partial summary judgment on its first cause of action for recovery on the Guaranty. In motion sequence number 003, Defendant Diamond Gaming moves pursuant to CPLR 302(a)(3)(ii) to dismiss for lack of personal jurisdiction.

BACKGROUND

The Loan

In June 2006, Petra Mortgage Capital Corp. LLC ("Petra Mortgage") made a loan (the "Loan") in the amount of \$19,450,000.00 to BCP Florin, a company beneficially owned and controlled by Michael Belfonti ("Belfonti"). The Loan was to be used in connection with the

purchase by another Belfonti entity, the Wyndham Aruba Beach Resort & Casino (now known as the Westin Aruba Resort and Hotel, hereinafter referred to as the "Hotel").

The Loan was non-recourse and secured only by the equity in a holding company that owned the Hotel through its indirect subsidiary, Aruba Hotel Enterprises, N.V. ("AHE"). Thus, in the event that BCP Florin failed to repay the Loan or make any required Loan payment, Petra Mortgage would be limited to looking to the equity in BCP Florin to recover the loan amount. Additionally, the Loan required Petra's consent for any modifications to a "Major Lease" (as defined in the Agreement).

To provide Petra Mortgage an added measure of security for the Loan, the Belfontis executed a personal guaranty (the "Guaranty") in favor of Petra Mortgage ensuring the performance of certain obligations relating to the Loan.

Petra Mortgage assigned its rights under the Loan and the Guaranty to Petra REIT (together with Petra Mortgage, referred to as "Petra").

The Casino Lease

Around the time Petra Mortgage made the Loan to BCP Florin, AHE derived revenue from an operating agreement for the casino (the "Casino") located in the Hotel. The operating agreement (the "Casino Lease") between AHE and Diamond Gaming, the casino operator, required Diamond Gaming to make monthly rental payments to AHE in the amount of \$275,000.00. The operating agreement also provided for cancellation at will by either side upon thirty (30) day's notice.

The Purported Option Agreement

Petra alleges that before Petra Mortgage made the loan to BCP Florin, Belfonti, through

BCP Florin, entered into an agreement with the owner of Diamond Gaming in which Belfonti would be able to cause Belfonti Capital Partners ("BCP"), Belfonti's real estate investment entity based in New York, to purchase Diamond Gaming for a nominal sum.

Furthermore, Petra claims that after Petra Mortgage made the loan, Belfonti caused BCP to purchase the stock in the company that owned Diamond Gaming for \$1000.00.

Thus, following the loan, Belfonti owned and controlled AHE and Diamond Gaming - both parties to the Casino Lease. Petra alleges that it was unaware of the purported option agreement.

The Casino Lease Amendment

Petra alleges that Belfonti also caused AHE and Diamond Gaming to amend the Casino Lease. The purported amendment reduced the monthly rental payment from \$275,000.00 to \$60,000.00. The amendment also eliminated the at-will provision, binding AHE to a thirty-year lease, that could only be terminated for cause. Petra alleges that it was unaware of the amendment.

The Loan Default

In April 2007, BCP Florin defaulted on the Loan. Subsequently, Petra foreclosed on its security interest, and became the owner of AHE. Petra alleges that it was not until Petra took over control of AHE that it learned of the purported option agreement, Belfonti's ownership of Diamond Gaming and the Casino Lease amendment.

The Aruba Litigation

AHE and Diamond Gaming are also involved in proceedings in Aruba concerning the Casino Lease. AHE and Diamond Gaming are the only parties to the Aruba Litigation.

Diamond Gaming commenced an action on May 25, 007, seeking a judicial declaration that the Lease Amendment is valid and binding on AHE.

AHE commenced a proceeding on July 23, 2007 against Diamond Gaming to have Diamond Gaming summarily removed as the operator of the casino.

The Within Litigation

Under the terms of the Loan Agreement, the Casino Lease could not be amended without Petra's prior written consent. Neither Belfonti nor any of his companies sought or obtained Petra's consent to the Casino Lease amendment.

Petra commenced the within action seeking, among other things, recovery of the unpaid balance of the Loan pursuant to the Guaranty and to enforce the Guaranty against Belfonti.

Currently before the Court are three motions. In motion sequence number 001, Defendants move pursuant to CPLR 3103 for a protective order staying all discovery. In motion sequence number 002, Petra moves pursuant to CPLR 3212 for partial summary judgment on its first cause of action for recovery on the Guaranty. In motion sequence number 003, Defendant Diamond Gaming moves pursuant to CPLR 302(a)(3)(ii) to dismiss for lack of personal jurisdiction.

DISCUSSION

Motion for Protective Order

While CPLR 3103(a) allows the court discretion to limit or regulate disclosure devices and proceedings, due attention must be given to the rights of all parties (*Perez v Time Moving & Stor.*, 28 AD3d 326, 329 [1st Dept 2006]). Pursuant to the language of CPLR 3103, a protective order must be "designed to prevent unreasonable annoyance, expense, embarrassment,

disadvantage, or other prejudice to any person or the courts.”

Petra argues that a protective order is not warranted here because a final determination in the Aruba litigation will have no preclusive effect on the issues asserted in this action. Specifically, Petra argues that the issues being litigated here and Aruba lack identity, that there will not be a full and fair opportunity in the Aruba litigation to litigate any overlapping issue, and that there is no legal basis that an Aruban determination will narrow or moot the issues in this action.

Defendants argue that all discovery should be stayed pursuant to CPLR 3103¹ because the issues before the Court may be narrowed, or moot, after the Aruban court renders its decision on related issues. Reiterating this point during Oral Argument, counsel for Defendants assert that a decision in the Aruban court could completely eliminate the issues before this Court (Tr 11/29/07 45:11-18). Counsel explains that “if there was no damage, there was no transfer and if there was no transfer, there is no liability under the guarant[y]” (Tr 11/29/07 45:21-24). To support the proposition, Defendants assert two general arguments. First, Defendants argue that all discovery should be stayed here because a stay of discovery should issue where redundant actions exist. Second, Defendants argue that issues will be narrowed or moot because the doctrine of comity should apply to the Aruban court’s pending determination.

Defendants cite *Levy v Pacific Eastern Corp.* for the policy against redundant actions: later-commenced actions should be stayed pending determination the earlier-commenced action

¹CPLR 3103 is generally applied to stay discrete issues in dispute. To that end, CPLR 3103 is not generally used so broadly as to stay all discovery and effectively stay the proceedings. In contrast, CPLR 2201 permits a stay of the proceedings “in a proper case, upon such terms as may be just” (*Wallace v Merrill Lynch Capital Servs., Inc.*, 2006 NY Slip Op 50884U, *9 [Sup Ct, New York County 2006 Fried, J.]).

(154 Misc 655, 656 [Sup Ct, New York County 1935]). “It is accordingly well established that where a definitive ruling in one of two suits concurrently prosecuted will completely dispose of the controversy, one suit, in the absence of special circumstances, will be stayed pending the determination of the other, whether the actions are in the same jurisdiction” (*id.*). In *Levy*, the first action was commenced by the plaintiffs in New York State Supreme Court. Two days later a similar action was instituted in Delaware by another plaintiff. Both suits asserted an identical cause of action on behalf of the corporation. Additionally, it was undisputed that a “final judgment in either one of these actions would be *res adjudicata* upon the other” (*id.*).

Similarly, in the case of *El Greco Inc. v Cohn*, the court held that a stay was justified “where the State and Federal actions were virtually identical, the issues to be resolved overlapped and a more complete disposition of the parties’ respective contentions could be obtained in the earlier commenced Federal action” (*Pappas v Freund*, 172 Misc 2d 466, 473 [Sup Ct, New York County 1997], explaining *El Greco, Inc. v Cohn*, 139 AD2d 615 [2d Dept 1988]). The court in *El Greco* reasoned that staying the later-commenced State action was proper where the

parties in the two actions are virtually identical, the issues to be resolved overlap, and, moreover, the record discloses that a more complete disposition of the parties’ respective contentions can be obtained in the earlier-commenced Federal action. Additionally, considering the similarity of the issues involved, the imposition of a stay further avoids the risk of inconsistent adjudications, duplication of proof, and the potential waste of judicial resources.

(139 AD2d at 616-17.)

As the cases cited by Defendants generally support, a “stay pending determination of a related proceeding should be granted only when the other proceeding shares complete identity of parties, claims and relief sought,” or “when there is substantial identity between state and federal

* 8]
actions” (*Asher v Abbott Labs.*, 307 AD2d 211, 211 [1st Dept 2003]).

Here, Defendants fail to demonstrate the essential condition of identity. The parties named in the Complaint here are Petra Fund REIT Corp. (Plaintiff) and Michael Belfonti, Richard Belfonti, Capital Partners, LLC, BCP Florin, LLC, and Diamond Gaming Corporation N.V. (collectively Defendants). The parties in the Aruban action AHE (Plaintiff) and Diamond Gaming Corporation N.V. (Defendant). To be clear, however, this Court has not lost sight that AHE is a company that Petra owns and Diamond Gaming is a company that Belfonti owns.

Not only are the parties different, but the causes of action are also different. The causes of action here are for recovery of the unpaid balance of the Mezzanine Loan pursuant to the Guaranty, enforcement of the Guaranty, various violations under New York Debtor and Creditor Law, aiding and abetting fraudulent conveyances, indemnity, and tortious interference (Compl ¶¶ 69-226). The principal claim in the Aruban litigation relates to eviction of Diamond Gaming as operator of the casino. The issues in the Aruban action relate to whether the Casino Lease agreement is enforceable and whether AHE should have been receiving rent at a certain level (*see* Tr 11/29/07 13:21-22; 14:1-5).

Without question, both litigations involve the same facts and events concerning the purported amendment of the Casino Lease, particularly the rent reduction. At the heart of the Aruban litigation is whether the rent reduction was made under commercially reasonable conditions pursuant to Aruban law. Here, the issue is whether the lease amendment, involving the above rent reduction, was a transfer that violated the Loan Agreement executed under New York law, thus, triggering liability under the Guaranty. Defendants offer conclusory statements that the requisite identity exists to grant a stay. Despite the common factual root, however,

resolution of the issues presented in both litigations will hinge on the application of each respective jurisdiction's controlling authority - here, New York law, and there, Dutch law - to the operative facts. While Defendants demonstrate that the facts and events in both litigations are identical, Defendants fail to demonstrate that the legal consequences in both litigations - through the application of controlling law to the facts and events - are identical. Accordingly, the Court finds that identity of issues is absent between the Aruba litigation and the instant litigation.

Furthermore, in order for Defendants' syllogism² to prove true, the Court must apply the doctrine of comity to the findings of the Aruban court to narrow or dispense "completely" the issues currently before this Court.³ If the Aruban court determines that there was no damage and this Court accords recognition to the Aruban court's determination, the issue here of liability would clearly be narrowed. On the other hand, if there is no basis to apply the doctrine of comity, then there is no basis to accord recognition to the Aruban court's determination. In turn, nothing here would be narrowed or mooted.

Defendants cite a number of cases to support the application of comity.

²If there was no damage, there was no transfer and if there was no transfer, there is no liability under the guaranty. (See Tr 11/29/07 45:21-24.)

³Defendants offer no rule which would require this Court to defer to the judgment of the Aruban court. Instead, the cases advanced by Defendants rely on the principle of comity. Judicial comity has been defined as [t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. The doctrine of comity is not a rule of law, but one of practice, convenience and expediency. It does not of its own force compel a particular course of action. Rather, it is an expression of one State's entirely voluntary decision to defer to the policy of another.

(*Derenzo v State Farm Mut. Ins. Co.*, 141 Misc 2d 456, 459 [Sup Ct, Rensselaer County 1988] [differentiating collateral estoppel from comity] [internal quotation marks and citations omitted].)

In *Greschler v Greschler*, the court stated that “[a]lthough not required to do so, the courts of this State generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity” (51 NY2d 368, 376 [1980]). However, the issue was whether the plaintiff, by failing to successfully challenge the jurisdiction of the Dominican Republic court, was precluded from assailing the validity of an agreement incorporated into the foreign divorce decree (*id.* at 375). To that end, *Greschler* has been followed when recognizing foreign divorce decrees (*see e.g. In re Estate of Lovick*, 201 AD2d 736 [2d Dept 1994]; *Becker v Becker*, 143 Misc 2d 500 [Sup Ct, Nassau County 1989]; *In re Estate of Brown*, 132 Misc 2d 811 [Sur Ct, Kings County 1986]).

Also distinguishable is the case of *Vlasic v Wyndham Int'l*, 451 F Supp 2d 1005 [Central District Ill 2006]. In it, the court held that “because trial in Illinois would be unnecessarily burdensome for the Defendant and this Court, dismissal is proper, and Defendants' Motion to Dismiss for *Forum Non Conveniens* is granted” (*id.* at 1012).

Lastly, the Florida case of *Nahar v Nahar* involved the administration of the decedent's intestate bank accounts (656 So 2d 225 [Fl Ct App 1995]). The decedent's widow argued that Dutch law did not apply and that the intestate assets were outside any probate proceedings. The decedent's adult children, from a former marriage, petitioned the Aruban Court of the First Instance to have the intestate assets administered under Dutch law. The Florida court stayed proceedings pending decision by the Aruban court on the previously filed petition for administration. In the Aruban action, the decedent's widow was ordered to transfer the intestate assets from the Florida accounts to Aruba. From that order the decedent's widow appealed, lost and appealed again to The Court of Cassation of the Netherlands [the highest court of the

Netherlands, and commonly referred to as “The Hague”). The Hague ruled that Dutch law, not Florida law, controlled the decedent’s estate. Recognizing that (1) the final judgments of, and certain interlocutory orders by, the highest court of a foreign nation are entitled to comity and (2) one of the two areas where foreign interlocutory orders should be recognized is spousal and children’s rights in a domestic relations case, the Florida Court of Appeal affirmed the trial court’s grant of comity to The Hague’s order (*id.* at 228, 229). However, several critical factors present in *Nahar* are absent here, thus, making *Nahar* inapplicable: the issue of domestic relations, the identity of parties and issues, and a determination from the highest court of the Netherlands - The Hague.

Generally, “[c]omity is not a mandate, but rather a voluntary decision to defer to the policy of another [jurisdiction]” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 72 [2006]). Also, “to determine the preclusive effect of a foreign court’s judgment, courts must look to the law of the foreign jurisdiction” (*cf. GATX Flightlease Aircraft Co. Ltd. v Airbus S.A.S.*, 15 Misc 3d 1143A, *6 [Supt Ct, New York County Moskowitz, J.], *affd* 40 AD3d 445 [1st Dept 2007]). “The foreign judgment must receive the same preclusive effect that it would enjoy in the foreign jurisdiction” (*id.*).

Entirely absent from Defendants’ briefs is a discussion of the scope of preclusion under Dutch law. Instead, Defendants argue that it is too early to determine the preclusive effect of an Aruban court’s judgment. The Court agrees that it would be premature to affirmatively find that collateral estoppel applies before the Aruban court renders judgment (*City of New York v Welsbach Elec. Corp.*, 2007 NY Slip Op 7910, *3 [2007] [This doctrine applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in

the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.]). However, if the issues in both litigations lack identity, there is no basis to apply collateral estoppel, and, thus, no basis to wait for the Aruban court's determination (*see id.*). A comparison of both litigations further illuminates the absence of identity and, therefore, further demonstrates the inapplicability of comity.

The Court of First Instance of Aruba in its Summary Proceeding Decision addressed the claim for eviction of Diamond Gaming from AHE by stating:

The essence of the case is about the considerable reduction of the rent. As this reduction was effected during a period in which Belfonti had the beneficial control of both contracting parties, the burden of proof whether the criterion formulated in Article 13-A, under f, of the Articles of Incorporation of AHE was complied with, rests with DG [Diamond Gaming] in principle.

(Navarro Declaration Ex C at ¶ 3.5.) Article 13-A(f) of the Articles of Incorporation of AHE obligated the Board of Managing Directors to “effect no transactions with an affiliated company of the corporation, except on commercially reasonable conditions comparable with those that are available for non-affiliated parties in ‘an arms length’ transaction” (*see id.*). Based on Diamond Gaming's expert report, the Aruban court found that it was not “plausible that the judge in the principal action will (also) award the claim [of eviction to AHE]” (*id.* at ¶¶ 3.5, 3.4). In more familiar terms, the Aruban court effectively found that Diamond Gaming demonstrated a likelihood of success that rent reduction was made under “commercially reasonable conditions,” as the term is defined under the Articles of Incorporation of AHE, an entity organized under the laws of Aruba.

In this action, Petra, the owner of AHE, seeks, among other things, to recover the unpaid balance of a loan agreement pursuant to a guaranty - two documents executed pursuant to New

York law. Petra argues that the purported amendment to the Casino Lease - the reduction of monthly rental payment from \$275,000.00 to \$60,000.00 and the elimination of the at will termination provision - operated to effect a Transfer in violation of the provisions of Section 2.11 of the Loan Agreement.

Moreover, Defendants have not responded to Petra's assertion that a finding by the Aruban court of no damage to Petra would not be inconsistent with a finding by the this Court of liability on the Guaranty. Indeed, Defendants concede that the preclusive effect resulting from the Aruban court's determination would be subject to the discretion of this Court:

the most efficient way to get these facts determined is to let the judges that have been working on this issue for several months determine them and *then your Honor can examine it to decide whether [the determination is] something your Honor wants to follow or not*, but certainly it is a factual question.

(Tr 11/29/07 36:3-10 [emphasis added].)

Thus, even though New York courts have applied the doctrine of comity to the determination of a foreign court, Defendants fail to demonstrate that, here, circumstances exist militating similar application. Accordingly, because the Court finds that Defendants fail to demonstrate entitlement to a protective order staying all discovery, Defendants' motion is denied.

Motion for Summary Judgment

It is basic that to obtain summary judgment, the movant must "establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]).

Petra argues that a plain reading of the Guaranty demonstrates that Petra is entitled to

judgment as a matter of law.

The Guaranty provides that “in the event . . . (ii) of a Transfer . . . in violation of the provisions of Section 2.11 of the [Loan Agreement] . . . then the Guaranteed Obligation shall also include the unpaid balance of the Debt” (Kornblau Aff Ex D at 3).

A Transfer is defined as “conveyance, assignment, or other disposition” . . . “of all or any portion of any legal or beneficial interest in the Collateral” (Kornblau Aff Ex A at C-12).

Additionally, in order to trigger liability under the cited provision of the Guaranty, there must be a violation of the provisions of Section 2.11 of the Loan Agreement (Kornblau Aff Ex D at 3). Section 2.11 of the Loan Agreement reads:

Borrower shall not, without the prior consent of Lender, in any manner allow a Transfer to occur or enter into any agreement which expressly restricts Borrower from making amendments, modifications or waiver to the Loan Documents. Without the express prior written consent of Lender, Borrower shall not, and shall not cause or permit Owner or Equity Holders to, enter into any consensual sale or other similar transaction with respect to the Property (or any direct or indirect interest therein) or impair or otherwise adversely affect the interests of Lender in the Collateral or any portion thereof or any interest therein.

(Kornblau Aff Ex A at 19).

At odds are two extreme readings of the terms of the Guaranty, and, by incorporation, the terms of the Loan Agreement. Petra proposes a reading that would trigger liability upon any Transfer of the Collateral. Petra argues that the amendment to the Casino Lease - the reduction of monthly rental payment from \$275,000.00 to \$60,000.00 and the elimination of the at-will termination provision - operated to effect a Transfer in violation of Section 2.11 of the Loan Agreement. Further, the amendment constituted a Transfer because it caused a conveyance, assignment or other disposition of all or any portion of any legal or beneficial interest in the

Collateral. The amendment violated Section 2.11 of the Loan Agreement because it constitutes a Transfer in any manner without the prior consent of Petra. Thus, Petra asks this Court to interpret the Guaranty as imposing liability for the unpaid balance because the amendment, made without Petra's consent, operated to effect a Transfer in violation of Section 2.11 of the Loan Agreement, as a matter of law.

Conversely, Defendants propose a number of alternative interpretations of the Guaranty and Loan Agreement. Defendants argue that the Guaranty requires a violation of more than one provision of Section 2.11 of the Loan Agreement, that the Guaranty requires the Transfer to adversely impact the Collateral to constitute a violation of Section 2.11, and that Section 2.11 requires a limitation on a Transfer as it relates to the Loan Documents. Thus, Defendants argue that Petra's reading of the condition for liability is not a plain, unambiguous interpretation.

To defeat summary judgment the opponent must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions, of fact or of law, are insufficient (*Ehrlich v American Moninger Greenhouse*, 26 N Y 2d 255, 259 [1970]). Courts may resolve ambiguities appearing in the documents on a motion for summary judgment when there are only documents to interpret (*see Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342, 349 [1955]). Where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language (*R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002]). The mere assertion by a party that contract language is ambiguous is not, in and of itself, enough to raise a triable issue of fact precluding summary judgment (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). However, if the intent must be determined by disputed evidence or inferences outside the written words of the instrument there is a question of fact

presented (*Ashland Management v Janien*, 82 NY2d 395, 401-402 [1993]; *Mallad Constr. Corp. v County Fed. S&L Ass'n*, 32 NY2d 285, 290-91 [1973]).

Here, the Court finds that the Guaranty may be construed in a manner other than the construction advanced by Petra. The Guaranty provides that liability is triggered if there is “a violation of the provisions of Section 2.11 of the Loan Agreement” (Kornblau Aff Ex D at 3). Section 2.11 of the Loan Agreement provides, in part: “Borrower shall not, without the prior consent of Lender, in any manner allow a Transfer to occur or enter into any agreement which expressly restricts Borrower from making amendments, modifications or waiver to the Loan Documents” (Kornblau Aff Ex A at 19). While the “or” indicates that the provision is in the disjunctive, Petra reads the “or” as separating the provision such that the clause preceding the “or” is an independent clause, unmodified by the remainder of the provision.⁴ Alternatively, as Defendants seem to argue, the provision may be read such that only the conditions “allow a Transfer to occur” and “enter into any agreement” are in the disjunctive, and that the clause “which expressly restricts Borrower from making amendments, modifications or waiver to the Loan Documents” modifies either condition.⁵

Accordingly, because Petra fails to establish an unambiguous construction of the relevant provisions as a matter of law, summary judgment is inappropriate (*LoFrisco v Winston & Strawn*

⁴“Borrower shall not, without the prior consent of Lender, in any manner allow a Transfer to occur *or* . . .”

⁵“Borrower shall not, without the prior consent of Lender, in any manner *allow a Transfer to occur which expressly restricts Borrower from making amendments, modifications or waiver to the Loan Documents;*” *or* “Borrower shall not, without the prior consent of Lender, in any manner *enter into any agreement which expressly restricts Borrower from making amendments, modifications or waiver to the Loan Documents.*”

LLP, 42 AD3d 304, 307-308 [2007]; *accord NFL Enters. LLC v Comcast Cable Communications*, 2008 NY Slip Op 1647, *5 [1st Dept 2008]).

Seizing on Plaintiffs use of language “adversely affect” in its moving brief, Defendants also argue that Plaintiffs are not entitled to summary judgment because Plaintiffs fail to address whether the Collateral was adversely affected. Despite the use of the language in its brief, Plaintiffs seek summary judgment only on the ground that the Guaranty does not require a showing of an adverse impact (*see Mem in Support of Motion for Partial Summary Judgment at 10-12*). Thus, further discussion of whether the Collateral was adversely affected is unnecessary.

Motion to Dismiss

In deciding personal jurisdiction, a two-part analysis is required. First, it must be determined whether the defendant is amenable to jurisdiction under the long-arm provisions, and then whether jurisdiction comports with federal due process (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). A plaintiff opposing the motion to dismiss bears the burden of proving personal jurisdiction over a defendant (*DiStefano v Carozzi North Amer., Inc.*, 286 F3d 81, 84 [2d Cir 2001]). Where the motion is made prior to discovery, however, the plaintiff may defeat the motion by alleging facts constituting prima facie evidence of jurisdiction (*PDK Labs, Inc. v Friedlander*, 103 F3d 1105, 1108 [2d Cir 1997]).

In New York, jurisdiction can be premised on commission of a tortious act “out of the state” causing injury “within the state” . . . if he . . . “(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce” (*see CPLR 302(a)(3)(ii)*).

The conferral of jurisdiction under this provision rests on five elements: First, that

defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce. (*LaMarca*, 95 NY2d at 214.)

Petra argues that jurisdiction over Diamond Gaming is proper under CPLR 302(a)(3)(ii) because Diamond Gaming committed a tortious act in Aruba causing injury in New York, Diamond Gaming expected its tortious act to have consequences in New York, and Diamond Gaming derives substantial revenue from international commerce. Petra argues that the fourth prong is satisfied because Belfonti, the owner of Diamond Gaming, knew that the Casino Lease amendment would have consequences in New York. Because Belfonti, on behalf of BCP Florin, signed the Loan Agreement, Belfonti must have known that modification of the Casino Lease was a violation of the Loan Agreement and that the violation has consequences in New York. Petra argues that the fifth prong is satisfied because Diamond Gaming derives substantial revenue from international commerce because a significant percentage of Diamond Gaming's customers are visitors not from Aruba.

Here, Diamond Gaming contests the fourth and fifth elements, however, the Court addresses the fifth element first. As to the defendant deriving substantial revenue from interstate or international commerce, the defendant must engage in business that exceeds a "local character" (*LaMarca*, 95 NY2d at 215).

The court in *Ingraham v Carroll* held that clients who may be traveling from out-of-state to seek services in the defendant's home state do not convert an otherwise local enterprise to an

interstate enterprise (90 NY2d 592, 599 [1997]). The court explained that

A physician does not sell his or her services in interstate commerce by treating unsolicited patients that travel into the physician's home State seeking health care. Indeed, to the physician, the patient's residence is largely irrelevant to the provision of medical services. Unlike a manufacturer who introduces a product into the stream of commerce expecting it to be sold in other States, a physician treating patients in his or her home State is providing a service that is inherently personal, and local, in nature. Undisputably, all of respondent's revenue is derived from such local medical services, provided in Vermont. In this respect, respondent's revenue is even less interstate in character than that of a renowned medical specialist, the bulk of whose income may be earned from treating out-of-State patients.

(*Id.* at 599-600.) Similarly, here, Petra cannot convert Diamond Gaming into a business that receives substantial revenue from international commerce by asserting that a significant number of international residents travel to Aruba seeking to gamble at Diamond Gaming. Accordingly, Petra fails to satisfy the fifth element to confer personal jurisdiction under CPLR 302(a)(3)(ii). Therefore, Diamond Gaming's motion to dismiss for lack of personal jurisdiction is granted.

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that the motion (motion sequence number 001) for a protective order is denied; and it is further

ORDERED that the motion (motion sequence number 002) for summary judgment is denied; and it is further

ORDERED that the motion (motion sequence number 003) to dismiss is granted and the complaint is dismissed as against Diamond Gaming with costs and disbursements to Diamond Gaming as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 13, 2008

ENTER:

FILED
MAR 21 2008
NEW YORK
COUNTY CLERKS OFFICE

J.S.C.