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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Index Number : 602536/2007

VOLO LOGISTICS LLC

VS

VARIG LOGISTICA S.A.

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/15/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
OCT 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/6/08

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

0SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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VOLO LOGISTICS LLC and
CAT AEREA LLC,

Plaintiffs,

-against- Index No. 602536/07

VARIG LOGISTICA, S.A. and
VOLO DO BRASIL S.A.,

Defendants.

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Hon. Richard B. Lowe, III:

This action arises out of the alleged default by defendant Varig Logistica, S.A. (VarigLog) on seven loans from plaintiffs Volo Logistics LLC (Volo) and CAT Aerea LLC (CAT) in the principal amount of $87,435,616.66.

Plaintiffs now move for summary judgment on their claims against VarigLog, seeking to enforce the loan agreements that they allege became due upon the sale of VarigLog's subsidiary, VRG Linhas Aereas S.A. (VRG).

FACTS

The general facts of this matter were previously discussed in this Court's decision dated January 16, 2008 and shall not be repeated here, except to the extent necessary to decide this motion.

During the second half of 2006 and early 2007, Volo and CAT made seven loans to VRG and its affiliates, including VarigLog (Aff. of Larry M. Teitelbaum, ¶ 2). Five of the loans were made to VRG and later assumed by VarigLog; two of the loans were made directly to VarigLog:

Loan 1 – Loan Agreement, dated September 12, 2006, between

CAT and VRG in the amount of $18,300,000.00 (see id., Exh 1). Pursuant to a certain Debt Assumption Agreement dated December 8, 2006 (the December Assumption Agreement), VarigLog assumed VRG's obligations on this loan.

Loan 2 – Loan Agreement, dated September 12, 2006, between CAT and VRG in the amount of $29,700,000.00 (see id., Exh 2). Pursuant to a certain Debt Assumption Agreement dated June 12, 2007 (the June Assumption Agreement), VarigLog assumed VRG's obligations on this loan.

Loan 3 – Loan Agreement, dated October 25, 2006, between Volo and VRG in the amount of $10,650,000.00 (see id., Exh 3). Pursuant to the December Assumption Agreement, VarigLog assumed VRG's obligations on this loan.

Loan 4 – Loan Agreement, dated November 17, 2006, between Volo and VRG in the amount of $10,765,823.06 (see id., Exh 4). Pursuant to the December Assumption Agreement, VarigLog assumed VRG's obligations on this loan.

Loan 5 – Loan Agreement, dated December 5, 2006, between Volo and VRG in the amount of $3,307,093.60 (see id., Exh 5). Pursuant to the December Assumption Agreement, VarigLog assumed VRG's obligations on this loan.

Loan 6 – Loan Agreement, dated December 13, 2006, between Volo and VarigLog in the amount of $8,852,376.74 (see id., Exh 6).

Loan 7 – Loan Agreement, dated December 13, 2006, between Volo and VarigLog in the amount of $5,860,232.26 (see id., Exh 7)

(id., ¶ 3).

According to the terms of the Loan Agreements:

The total amount of the Loan will be repaid on the date that is the earlier to occur of (a) the expiration of the Term, and (b) the occurrence of a Sale of the COMPANY [or the "BORROWER]

(see id., Exhs 1-7, Clause Three). A "Sale of the COMPANY" or "Sale of BORROWER" means

"the disposal in one or more transactions of all or substantially all of the assets or operations owned by" VRG (see id., Exhs 1-7, Definitions).

On March 28, 2006, GOL Linhas Aereas Inteligentes (GOL) announced that it had agreed to acquire the total share capital of VRG, conditioned on obtaining regulatory approval. GOL further announced that VRG would be acquired by GTI S.A. (GTI), GOL's wholly-owned subsidiary (id., ¶ 6).

On April 3, 2007, GOL received approval from Brazil's National Civil Aviation Agency to complete the transfer of VRG to GTI. The sale of VRG to GTI closed on April 9, 2007 (id., ¶ 7). Thus, a sale of VRG occurred on April 9, 2007 (id., ¶ 8).

Plaintiffs contend that, as a result of GTI's acquisition of all the shares of VRG, under the express terms of the Loan Agreements, a "Sale of BORROWER," and a "Sale of the "COMPANY" occurred on April 9, 2007, making each of the seven loans immediately due and payable to plaintiffs.

Plaintiffs assert that VarigLog has failed and refused to pay Loans 1 though 7 upon the sale of VRG (see id., ¶ 9).

Plaintiffs then brought this action. Plaintiffs' motion for summary judgment was initially returnable on March 24, 2008. By stipulations dated March 11, 2008, April 9, 2008, April 23, 2008, the return date was adjourned three times. Although, pursuant to the April 23rd stipulation, VarigLog's opposition was due on April 30, 2008, VarigLog did not file an opposition prior to the adjourned return date of May 9, 2008. Rather, on April 29, 2008, VarigLog's counsel, Holland and Knight LLP, moved for an order authorizing it to withdraw as counsel of record for VarigLog. During a conference held on May 12, 2008, plaintiffs consented

to a final adjournment to allow Ira Greenberg of Edwards Angell Palmer & Dodge LLP to be substituted into the case as VarigLog's new counsel, and to afford him the opportunity to investigate whether VarigLog was able to present any viable defenses to the summary judgment motion.

However, VarigLog still did not file an opposition to the summary judgment motion. Instead, on May 28, 2008, Mr. Greenberg submitted a letter to the court in which he states that "I have been directed by my client, defendant Varig Logistica, S.A., more particularly at the instance of the financial monitors associated with the Brazilian court, to request another short adjournment of the time for it to decide whether to oppose the pending summary judgment motions."

On June 14, 2008, at a hearing before this court, plaintiffs' counsel sought an order granting the summary judgment motion on default. In response, Mr. Greenberg reiterated his request for an additional short adjournment to respond to the summary judgment motion. In response to a question by the court, Mr. Greenberg admitted, however, that this request did not emanate directly from the Brazilian court. Of note, Mr. Greenberg did not mention the issue of whether VarigLog even has a viable defense to plaintiffs' motion for summary judgment.

DISCUSSION

Given the fact that VarigLog's request for an additional adjournment does not emanate directly from the Brazilian court, and in the face of VarigLog's silence as to a viable defense, VarigLog's request for an adjournment is denied. Moreover, VarigLog's failure to submit papers in opposition to the motion for summary judgment, despite the lengthy adjournments of the return date of motion, constitutes a default on the motion (*see Shannon v*

City of New York, 275 AD2d 671 [1st Dept 2000]; *Castro v Transit USA, Inc.*, 10 Misc 3d 142 [A] [App Term, 1st Dept 2006]). Accordingly, plaintiffs' motion for summary judgment is granted on default.

In addition, it is clear that VarigLog has no defense on the merits, as under the plain language of the Loan Agreements, payment of the loans are due and payable in light of the undisputed sale of VRG. Where, as here, the case concerns loan agreements, "[p]laintiff is entitled to summary judgment when it proves that it is the holder of the instrument, that defendant is in default and defendant fails to submit evidentiary facts demonstrating triable issues with respect to a bona fide defense" (*DH Cattle Holdings Co. v Kuntz*, 165 AD2d 568, 570 [3d Dept 1991] [internal citation omitted]; *see also Coniglio v Regan*, 186 AD2d 708, 708 [2d Dept 1992 ["The plaintiff established a prima facie case by proof of the promissory note and the appellant's failure to make payments in accordance with the terms of the note"], citing *Banner Indus., Inc. v Key B.H. Assocs., LP*, 170 AD2d 246 [1st Dept 1991]). Here, the Teitelbaum Affidavit establishes a prima facie case for summary judgment by proof of the Loan Agreements, and VarigLog's failure to make payments in accordance with the terms of the Loan Agreements.

The New York Court of Appeals has consistently held that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *accord South Rd. Assoc., LLC v International Business Machs. Corp., 4 NY3d 272 [2005]; Cellular Tel. Co. v 210 East 86th Street Corp.*, 44 AD3d 77 [1st Dept 2007]). Thus, construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners

of the instrument and should be enforced according to its terms (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470 [2004]). The court should "construe the agreements so as to give full meaning and effect to the material provisions" *(Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). A court should not adopt an interpretation which would leave any provision without force and effect *(see Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]) Further, a contract should be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] [citations omitted]; *Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473 [1st Dept 2007]).

In accordance with the above principles of contract interpretation, it is clear that the Loan Agreements are unambiguous on their face. Specifically, under the express terms of the Loan Agreements, each loan was required to be paid upon the sale of VRG, which occurred on April 9, 2008. However, VarigLog has failed to make the payments called for by the terms of the Loan Agreements.

Loans 1 through 5 define "BORROWER" as VRG (Teitelbaum Aff., Exhs 1-5, Definitions). Loans 1 through 5 state:

> The total amount of the Loan will be repaid on the date that is the earlier to occur of (a) the expiration of the Term, and (b) the occurrence of a Sale of BORROWER

(Teitelbaum Aff., Exhs 1-5, Clause Three). The defined term "Sale of BORROWER" included several potential events, including the sale of all of the assets of VRG. In its Answer, VarigLog admits that VRG was sold to GTI (see Answer, ¶ 17). Thus, under the defined terms of the Loan Agreements, a "Sale of BORROWER" occurred on April 9, 2007, when the sale of VRG to GTI

closed. The sale of VRG triggered VarigLog's repayment obligations under Loans 1 through 5. VarigLog, however, has failed and refused to pay Loans 1 through 5 (see Teitelbaum Aff., ¶ 9). Accordingly, VarigLog has breached Loans 1 through 5, and judgment in favor of CAT must entered on Loans 1 and 2, and judgment in favor of Volo entered on Loans 3, 4 and 5.

Unlike Loans 1 through 5, with respect to which VarigLog assumed the repayment obligations, Loans 6 and 7 were made directly to VarigLog by Volo. Loans 6 and 7 define "COMPANY" as VRG (see id., Exhs 6 and 7, Definitions). Loans 6 and 7 state:

> The total amount of the Loan will be repaid on the date that is the earlier to occur of (a) the expiration of the Term, and (b) the occurrence of a Sale of the COMPANY

(see id., Exhs 6 and 7, Clause Three).

As set forth above, a sale of VRG occurred on April 9, 2007, when the sale of VRG to GTI closed. This "Sale of the COMPANY" triggered VarigLog's repayment obligations under Loans 6 and 7. VarigLog, however, has failed to, and refuses to, repay Loans 6 and 7 (see id., ¶ 9). Accordingly, VarigLog has breached Loans 6 and 7, and judgment in favor of Volo must be entered on these loans.

Plaintiffs are also entitled to recover interest and its costs. According to the Loan Agreements, an "Event of Default" occurs upon the failure "to punctually pay any amount due hereunder on the date such payment is due and payable ... the totality of the principal and any and all other amounts due [are] immediately due and payable, without diligence, presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived" (see id., Exhs 1, 3-7, Clause Six; Exh 2, Clause Five).

The Loan Agreements calculate interest as follows:

> The principal amount unpaid and outstanding hereunder shall bear interest from the date hereof until paid in full, at the fixed rate of one per cent (1%) per annum (the "Interest Rate"). Interest at such rate shall accrue and be calculated on the basis of the actual number of days elapsed in a year of 360 days, and shall be payable together with the amount of principal of the Loan

(see id., Exhs 1-7, Clause Three). The Loan Agreements also provide:

> In case an Event of Default has occurred and is continuing, the interest rate applicable to the Loan shall be increased by one percentage point (1%) per annum above the rate of interest applicable hereunder (the "Default Rate"), and all outstanding principal of the Loan shall bear interest at the Default Rate. Interest at the Default Rate shall accrue from the initial date of such Event of Default until that Event of Default is cured or waived by LENDER

(see id., Exhs 1-7, Clause Six, First Paragraph). Volo asserts that it has not waived the Event of Default arising from VarigLog's failure to repay the loans upon the sale of VRG (id., ¶ 12).

Each of the Loan Agreements also provide for recoupment of Volo's and CAT's reasonable costs and expenses, including reasonable attorney's fees and expenses, incurred in connection with its efforts to collect all amounts due under the subject agreements:

> The BORROWER [COMPANY] hereby agrees to pay on demand all reasonable costs and expenses (including, without limitation, all reasonable fees, expenses and other client charges of counsel to the LENDER) incurred by the LENDER in connection with the enforcement of the LENDER'S rights, and the collection of all amounts due, hereunder. ... The obligations of BORROWER [COMPANY] under this clause shall survive the payment in full of the Loan and any interest thereon

(id., Exhs 1-7, Clause Thirteen).

Thus, under the Loan Agreements, plaintiffs are entitled not only to a judgment in their favor in the principal amounts of the Loan Agreements plus accrued interest, but also for all costs and expenses, including without limitation the attorney's fees plaintiffs incurred to bring

this action.

Accordingly, plaintiffs' motion for summary judgment is granted in the amount of $87,435,616.66, on default. However, summary judgment is granted as to liability only, and the issues of the amount of interest due and the costs recoverable, including, but not limited to, plaintiffs' expenses and attorneys' fees, will be referred to a Special Referee to hear and report.

Accordingly, it is

ORDERED that the motion for summary judgment is granted on default as to liability for the loans in the principal amount of $87,435,616.66; and it is further

ORDERED that the issues of the amount of interest due on the loans, and the amount of costs to which plaintiffs are entitled, including, but not limited to, plaintiffs' expenses and attorneys' fees, are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1], upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to

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[1] Copies are available in Room 119 at 60 Centre Street, and on the Court's website.

place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: October 6, 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III