

**D.B. Zwirn Special Opportunities Fund, L.P. v SCC  
Acquisitions, Inc.**

2009 NY Slip Op 32270(U)

September 21, 2009

Supreme Court, New York County

Docket Number: 601591/08

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

*Justice*

Index Number : 601591/2008

INDEX NO. 601591/08

**D.B. ZWIRN SPECIAL**

MOTION DATE 4/24/09

vs.

**SCC ACQUISITIONS, INC.**

MOTION SEQ. NO. 001

SEQUENCE NUMBER : 001

MOTION CAL. NO. 37

SUMMARY JUDGMENT

The following papers, numbered 1 to 2 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-B

PAPERS NUMBERED

1-2

Memo of Law In Opposition Exhibits

Reply Memo of Law

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**

SEP 22 2009

COUNTY CLERK'S OFFICE  
NEW YORK

**MICHAEL D. STALLMAN**  
J.S.C.

Dated: 9/22/09  
New York, New York

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 7

-----X  
D.B. ZWIRN SPECIAL OPPORTUNITIES FUND, L.P.,

Plaintiff,

-against-

Index No.  
601591/08

SCC ACQUISITIONS, INC. and JOHN DOE 1 through  
JOHN DOE 100,

**Decision and Order**

Defendants.

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

Motion Sequence Numbers 001 and 002 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

Plaintiff D.B. Zwirn Special Opportunities Fund, L.P. (D.B. Zwirn) moves for partial summary judgment of liability on its complaint based on defendant SCC Acquisitions, Inc.'s (SCC) guarantees. Defendant SCC Acquisitions moves for summary judgment dismissing all of the claims in the complaint.

D.B. Zwirn, as the lender, brought this action to recover the deficiencies resulting after non-judicial foreclosure sales of properties, for which it loaned money, based on SCC's guarantees. The guarantees were non-recourse, carve-out guarantees, in which the guarantor's obligations become concurrent with the borrower's only upon the happening of certain events. These events included, among other things, the borrower's distribution of any sums in violation of the loan documents; physical waste of the property; material misrepresentation, fraud, or intentional misconduct; the failure to pay charges which create liens; filing for or joining in a petition in bankruptcy; and an

admission by the borrower in writing that it is insolvent or unable to pay its debts. These events or acts can impair or jeopardize the lender's security interest, and, therefore, were carved out of the otherwise non-recourse nature of the guaranties. D.B. Zwirn claims that the borrower under its loans had made an admission, in writing, in financial statements that it submitted to D.B. Zwirn, as required under the loans, that it was insolvent and unable to pay its debts. Therefore, D.B. Zwirn claims that SCC Acquisitions is liable under its guarantees. SCC challenges that the financial statements are such an admission, arguing that the admission must be to a third party, and cannot be contained in documents required by the loans.

### **BACKGROUND**

D.B. Zwirn is a large hedge fund that invested its money in high risk transactions, such as high risk real estate financing (Affidavit of Suzanne Kelley in Support of Defendant SCC Acquisitions, dated March 16, 2009, ¶ 3). SCC and its affiliates, the SunCal entities, are residential and commercial real estate developers. SCC Acquisitions is the parent of its SunCal affiliates, SunCal Northlake, LLC, Palmdale Hills Property, LLC, SCC/Rancho Mirage LLC, SunCal Copper Canyon, LLC, and SunCal-Southwind JV, LLC (Affidavit of Stephan Elieff in Support of Defendant SCC Acquisitions, dated March 17, 2009, ¶¶ 1-2). SunCal Copper Canyon and SunCal-Southwind are the borrowers on loans from D.B. Zwirn (*id.*).

#### **Southwind Loan**

On May 1, 2006, D.B. Zwirn entered into a loan agreement with SunCal-Southwind as the borrower for a revolving loan in the amount up to \$75 million to redevelop residential apartments in California (Complaint, ¶ 7). In connection with this loan, SCC executed and delivered to D.B. Zwirn a Carve Out Guaranty, pursuant to which it guaranteed to D.B. Zwirn payment, fulfillment,

and performance of the "Guaranteed Obligations" (Southwind Guaranty) (Exhibit A to Complaint, Southwind Carve Out Guaranty, at 1-3). The term "Guaranteed Obligations" is defined to include any actual loss incurred by the lender in connection with any application or appropriation of any insurance proceeds, condemnation proceeds or any other sums in violation of the terms of the loan documents; physical waste by the borrower regarding the property; failure by the borrower to deposit all sums required under the loan documents or failure to remit Net Cash Flow After Debt Service to lender; fraud, material misrepresentation, or willful misconduct committed by the borrower or guarantor in connection with the loan documents; any obligations or liabilities of the borrower or guarantor arising under the Environmental Agreement; and the failure to pay charges for labor or materials that create liens (*id.*, § 1 [a] [i] - [vi], at 1-2). The "Guaranteed Obligations" further included the outstanding principal amount of the loan, together with attorneys fees' and court costs, incurred by the lender in connection with: any breach of certain restrictions in the loan instrument; in the event the borrower or guarantor files or joins in a voluntary or involuntary bankruptcy petition; or an affiliate joins in a request for appointment of a custodian, receiver, trustee, or examiner; or "(e) Borrower makes an assignment for the benefit of creditors, or admits, in writing, its insolvency or inability to pay its debts as they become due" (*id.*, § 1 [b] [i]-[ii] [e], at 2). The Southwind Guaranty provided that it was an irrevocable, absolute, continuing guaranty of payment and performance (*id.*, § 2, at 3). It further provided that the guarantor waived any rights or defenses which it might have resulting from any representations, warranties or statements made by the lender to induce the guarantor, and waived any other legal or equitable discharge or defense of the guarantor (*id.*, § 3, at 3).

On August 21, 2007, SunCal-Southwind provided D.B. Zwirn with financial reports which

indicated net sales proceeds of a little over \$131 million, but total costs of over \$142 million, with a negative project land profit of \$10 million, and a negative 8.24% profit margin on land revenue (Exhibit 5 to Plaintiff's Notice of Motion). The reports indicated a current loss on the project of over \$17.6 million, projecting an eventual \$10.8 million loss without restructuring (*id.* at 1). The financial reports further showed that the purchase price of the land was \$73 million, but that the net value, as of August 21, 2007, was just over \$38 million (*id.* at 2). The financial reports proposed a restructuring of the capital structure of the loan, in which \$25 million of D.B. Zwirn's loan would be converted to equity, and DB. Zwirn would fund 100% of the equity in the future, not SCC as originally conceived with regard to the project (*id.* at 3 & n5).

On August 28, 2007, D.B. Zwirn sent SunCal-Southwind a Notice of Event of Default for its failure to make payment of \$446,216.01 as required under the Southwind Loan Documents (Complaint, ¶ 18). SunCal-Southwind failed to cure the default, and on March 6, 2008, a non-judicial foreclosure sale occurred. The three properties underlying the loan were sold to D.B. Zwirn for a total of \$72 million (*id.*, ¶¶ 19-20). At the time of the sale, the outstanding indebtedness owed pursuant to the Southwind Loan Documents was \$80,834,370.31. Thus, on that date, \$8,834,370.31 remained due (the Southwind Deficiency) (*id.*, ¶ 21).

### **Copper Canyon Loan**

On July 25, 2005, D.B. Zwirn loaned \$35 million to SunCal Copper Canyon for the acquisition and pre-development financing of land in Nevada (Complaint, ¶ 12). In connection with the loan, SCC executed and delivered to D.B. Zwirn a guaranty, in which it guaranteed the payment, fulfillment, and performance of the "Guaranteed Obligations" (Copper Canyon Carveout Guaranty) (Exhibit B to Complaint, Copper Canyon Guaranty, at 1-3). The "Guaranteed Obligations" were

defined exactly the same as in the Southwind Guaranty (*id.*). The Copper Canyon Carveout Guaranty included identical provisions regarding its continuing nature and waivers (*id.*, §§ 2-3, at 3).

The Copper Canyon Loan matured on July 25, 2007. SunCal Copper Canyon failed to pay off the unpaid principal balance due of \$35 million plus interest, as required by the loan documents (*id.*, ¶ 22). On July 27, 2007, D.B. Zwirn sent SunCal Copper Canyon a Notice of Default, and SunCal Copper Canyon failed to cure that default (*id.*, ¶¶ 22-23).

On August 9, 2007, D.B. Zwirn received a balance sheet (dated as of July 31, 2007) and income statement, a project cost summary, a project cost detail, and a general ledger detail from SunCal Copper Canyon, as required by the loan documents (Exhibit 4 to Plaintiff's Notice of Motion). These financial documents indicated that SunCal Copper Canyon had a little over \$3,000 cash on hand, and that it had accounts receivable of \$187,000. The documents further indicated, however, that it had accounts payable of nearly \$1.8 million, and current liabilities of \$36.8 million. The cash and accounts receivable was insufficient to service the debt or to pay the \$500,000 to \$700,000 of monthly expenses projected by SunCal Copper Canyon (*id.*, ¶ 29 & n1; see Exhibit 4 to Plaintiff's Notice of Motion).

On February 27, 2008, a non-judicial foreclosure sale was held, and the property was sold to D.B. Zwirn for \$37,631,425.48 (*id.*, ¶¶ 23-24). Therefore, there is a deficiency due under the Copper Canyon Loan of \$2,871,341.28 plus fees, costs, and interest (*id.*, ¶ 26).

On May 23, 2008, D.B. Zwirn demanded that SCC honor its guaranty obligations with respect to both the Southwind and the Copper Canyon Carveout Guarantees (Exhibit 6 to Plaintiff's Notice of Motion).

D.B. Zwirn commenced this action asserting four causes of action. The first and third seek recovery of the unpaid deficiency remaining after the foreclosure sales on the Southwind Guaranty and the Copper Canyon Guaranty respectively, and the second and fourth claims seek recovery of legal and other expenses incurred by D.B. Zwirn in enforcing the guarantees.

In its answer, SCC admitted that SunCal-Southwind and SunCal Copper Canyon entered into the loans with D.B. Zwirn, defaulted on the loans, and failed to cure their defaults, and that SCC entered into the guarantees with regard to those loans (Exhibit 9 to Plaintiff's Notice of Motion, Answer). SCC, however, denied that the borrowers performed any act that triggered SCC's guaranty obligations. Its first affirmative defense asserts that plaintiff misrepresented that the guarantees were non-recourse. SCC's second defense contends that no triggering event occurred, because the guarantees could only be triggered by an involuntary bankruptcy, assignment for the benefit of creditors, or where the borrower admitted in writing its inability "to meet obligations to third parties aside from the Borrower as they came due, which impaired the security interest of Plaintiff" (*id.*, Answer, Second Defense). The third defense asserts that the parties were mistaken as to the meaning and effect of the guarantees. The fourth defense is that if the guarantees are interpreted as alleged by plaintiff, there was a failure of consideration. The fifth defense is that, by representing that the guarantees were non-recourse, plaintiff is estopped from enforcing them. The sixth and seventh defenses are that, because of plaintiff's misrepresentation, it has waived the right to enforce the guarantees, and is barred by the doctrine of unclean hands. The eighth and ninth defenses are that plaintiff's misrepresentation constitutes a material breach of the guarantees and is a breach of the covenant of good faith and fair dealing.

In moving for summary judgment, D.B. Zwirn asserts that SCC has admitted that the

borrowers entered into the loans, SCC entered into the guarantees, the borrowers failed in their payment obligations, the collateral for the loans were sold in foreclosure sales, D.B. Zwirn demanded payment of the deficiency remaining due on both loans based on the guarantees, and that SCC has failed to pay. It further asserts that SCC admits that it provided plaintiff with the financial statements and projections, and that, as a matter of law, these statements demonstrated that the borrowers, SunCal-Southwind and SunCal Copper Canyon, were unable to pay their debts as they were coming due, or that they were insolvent. Thus, D.B. Zwirn argues that these documents plainly were admissions by the borrowers, triggering the guarantees. With respect to SCC's defenses, D.B. Zwirn argues that each defense asserts that the guarantees are only triggered where the borrower makes an admission to a third party other than the lender of its inability to meet obligations, that this inability impairs plaintiff's security interest, and that plaintiff misrepresented the nature of this triggering event. It contends that the defenses are conclusory, simply state legal conclusions, fail to plead sufficient facts, and, thus, are insufficient as a matter of law. It also argues that the guarantees do not require that the financial disclosures must be made to third parties, nor do they require that the admissions cannot be contained in financial disclosures otherwise required by the loan documents.

In opposition and in support of its own motion for summary judgment, SCC contends that D.B. Zwirn cannot establish that SCC is liable on the guarantees at issue, because no "bad acts" have occurred that would trigger liability. It argues that D.B. Zwirn's argument that the financial statements are admissions of insolvency is contrary to the law, its prior construction of the guarantees, and contrary to the parties' understanding at the time they negotiated the guarantees. It urges that, because D.B. Zwirn had to draw conclusions from the financial statements that the

borrowers were insolvent and/or unable to pay their debts, the financial statements were not an admission. It also urges that, because the borrowers were obligated to provide these financial statements both periodically and on demand under the loan documents, they could not qualify as admissions in writing under the guarantees. Finally, SCC urges that the admission in writing must be to a third person in order for it to qualify as a "bad act" which would threaten D.B. Zwirn's interest in the collateral. Alternatively, SCC contends that the provision is ambiguous and the court must consider the affidavits of both parties' negotiating agents, and that it was fraudulently induced into entering into the guarantees.

#### DISCUSSION

Partial summary judgment of liability is granted to D.B. Zwirn as to all four claims in its complaint, and the issue of damages is referred to a Special Referee to hear and report with recommendations.

Summary judgment is appropriate where an action turns on the construction of a contract, and the contractual language is unambiguous (*Namad v Salomon Inc.*, 74 NY2d 751, 753 [1989]; *Hay Group Inv. Holding v Saatchi & Saatchi Co.*, 223 AD2d 458, 459 [1<sup>st</sup> Dept 1996]). Where the contract is unambiguous, the parties' intent must be found within the four corners of the document (*ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1<sup>st</sup> Dept 2003]), and the writing should be enforced according to its terms (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; see *American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1<sup>st</sup> Dept 1990], *lv denied* 77 NY2d 807 [1991] [where the parties' intent can be determined from face of contract, interpretation is a matter of law, and case is ripe for summary judgment]). The court will not consider extrinsic evidence "to create ambiguities not present on the face of the document" (150

*Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1<sup>st</sup> Dept 2004] [citations omitted]).

A writing is ambiguous only where “the agreement on its face is reasonably susceptible of more than one interpretation” (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; accord *Beacon Music Co. v G. Schirmer, Inc.*, 141 AD2d 484, 486 [2d Dept 1988]). The language of a contract is not ambiguous simply because the parties offer differing interpretations (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]; *Moore v Kopel*, 237 AD2d 124, 125-26 [1<sup>st</sup> Dept 1997]).

Here, the Southwind and Copper Canyon Guarantees are clear and unambiguous, and D.B. Zwirn has demonstrated that SCC’s liability under the guarantees was triggered. Section 1 (a) of the Guarantees sets forth the “Guaranteed Obligations” to include loss, liability, cost, damage and expenses, incurred by the lender, resulting from appropriation of any insurance or condemnation proceeds or other sums in violation of the loan documents; physical waste by the borrower or guarantor; failure of the borrower to deposit sums required under the loan documents; fraud, misrepresentation or misconduct by the borrower or guarantor; any obligations and liabilities of borrower or guarantor under the Environmental Agreement; and the failure to pay labor or material charges that create liens on the property. Section 1 (b) of the Guarantees requires that SCC pay the outstanding principal amount of the loan, and all other amounts due under the loan documents, together with court costs and attorneys’ fees, (ii) in the event (a) the borrower or guarantor files or joins in a voluntary or involuntary bankruptcy petition; or (b) any affiliate files or joins in the filing of an involuntary bankruptcy petition against the borrower or guarantor; (c) the borrower or guarantor files an answer consenting to or acquiescing in an involuntary petition filed against borrower or guarantor, (d) any affiliate consents to or acquiesces in or joins in an application for appointment of

a custodian, receiver, trustee, or examiner of borrower or guarantor or “(e) Borrower . . . admits, in writing its insolvency or inability to pay its debts as they become due” (Exhibit 1 to Plaintiff’s Notice of Motion, Guarantees, § 1). Subsection (a) guarantees the specific damages caused by certain acts or omissions, while subsection (b) guarantees the entire indebtedness under specified circumstances. This language indicates that the guarantees are non-recourse except on the occurrence of these specified events that the lender, D.B. Zwirn, wished to discourage or take action with respect to. There is no requirement that there be a “bad act” by the borrower, only that the event specified in Section 1 occurred. Once this specified event occurred, SCC’s obligations would become concurrent with the borrower, and it would be liable on the guaranty.

The triggering event asserted here is in Section 1 (b) (ii) (e). This subsection clearly provides that SCC’s guaranty obligation is triggered upon the borrower’s admission in writing that it cannot pay its debts as they become due, or that it is insolvent, that is, that its liabilities exceed its assets. Contrary to SCC’s interpretation, this subsection does not require that this admission be made to a third person. “[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing” (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [quotations omitted]). If the parties had intended that the admission must be to a third party, they could have easily included that language – they did not.

Neither do the guarantees require that the written admission be independent of the financial statements and reporting provided in accordance with the loan documents, or that the inability to pay its debts was restricted to debts other than the one owed to plaintiff. With regard to the debt owed to plaintiff, to exclude this from the determination of insolvency does not make logical sense. Plainly,

in determining insolvency, all assets and liabilities are considered (*see e.g. Sequa Corp. v Gelmin*, 1996 WL 745448, \*54 [SD NY 1996] [disclosure that borrower could not repay loan in foreseeable future, was admission of inability to pay debts], *affd in part, revd in part on other grounds* 156 F3d 136 [2d Cir 1998]). As to the financial disclosures, they were required under the loan documents to enable plaintiff, as the lender, to protect its investment by invoking its contractual rights under the loans and guarantees. Indeed, courts have considered borrower's financial disclosures in determining whether they actually constituted a written admission of insolvency (*see e.g. Magten Asset Mgt. Corp. v Bank of N.Y.*, 15 Misc 3d 1132 [A], \*5-6, 841 NYS2d 219 [Sup Ct, NY County 2007] [Fried, J] [whether financial reports, in the form of 8K and 10K SEC filings, were admissions in writing of borrower's inability to pay debts as they become due]; *G.K. Alan Assoc. Inc. v Lazzari*, 20 Misc 3d 1120 [A], \*4, 867 NYS2d 374 [Sup Ct, Nassau County 2008] [financial statements constitute admission as to value of company]). To interpret that the guarantees contain these restrictions or requirements regarding the borrower's written admission, this court would have to add significant terms, creating a different guaranty between the parties. Because the court finds the guarantees unambiguous, the extrinsic evidence submitted by SCC will not be considered to alter the plain meaning of this provision (*see Nissho Iwai Europe v Korea First Bank*, 290 AD2d 331, 332 [1<sup>st</sup> Dept][extrinsic evidence of what party intended at time of contracting not considered where contract unambiguous], *affd* 99 NY2d 115, 121-122 [2002] [ambiguity does not arise from silence but from what was written so imperfectly that its meaning is doubtful]).

With regard to whether the record evidence establishes that the borrowers, SunCal-Southwind and SunCal Copper Canyon, admitted in writing their insolvency or inability to pay their debts as they became due, plaintiff has established such admissions and SCC fails to raise any triable issue. SCC

never, in fact, argues that the borrowers were able to pay their debts as they became due, or in any way challenges the substantive interpretation of the financial disclosures offered as such admissions. When financial statements clearly indicate that the borrower's liabilities exceed its assets, the borrower is effectively stating that it is insolvent. Moreover, SCC does not dispute that the financial statements submitted by SunCal-Southwind to plaintiff were not just ordinary financial statements required by the loan documents. Rather, they were being used in the borrower's attempt to convince plaintiff to restructure the loans, because it was unable to pay its debts.

The financial summary submitted to plaintiff on August 21, 2007 with regard to SunCal-Southwind establishes that SunCal-Southwind was insolvent and unable to pay its debts as they became due. The financial summary reported that the borrower had a current loss on the project of over \$17.6 million, which was the cash it had invested, and projected a loss of over \$10 million, a negative statement as to value. It also reported net sales proceeds of \$131 million, but total costs at \$142 million (Exhibit 5 to Plaintiff's Notice of Motion, at 1). It further indicated that while the purchase price of the properties was \$73 million, their net value was only \$38 million (*id.* at 2). SunCal-Southwind also submitted to plaintiff a financial summary report which proposed a restructure of the capital in order to significantly decrease its interest expense by \$22 million so that it could pay its debts, by proposing that plaintiff convert one third, or \$25 million, of its debt into equity, and agree to fund 100% of the equity in the future. These financial summaries indicated that SunCal-Southwind was insolvent and unable to pay its debts, including servicing the debt to plaintiff. In fact, several days after these financial reports were submitted to plaintiff, SunCal-Southwind failed to make payment of over \$446,000 due to plaintiff, defaulting on the loan, which led to foreclosure. For SCC to avoid summary judgment, it would have to show that these financial summary reports are

incorrect, and that SunCal-Southwind was not insolvent, to raise a factual issue. It has not, and, in fact, makes no challenge to them. Accordingly, SCC has failed to raise a triable issue, and its liability under the Southwind guaranty has been triggered.

Plaintiff has also established that the financial reports, submitted to it by SunCal Copper Canyon on August 9, 2007, are an admission that the borrower was insolvent. SunCal Copper Canyon's balance sheet, for the month ended July 31, 2007, shows that its current assets were just over \$192,000.00, but that its current liabilities were over \$2.4 million (Exhibit 4 to Plaintiff's Notice of Motion). That obvious circumstance, of liabilities exceeding assets, demonstrates insolvency in the ordinary, plain English meaning of the word. The contract documents do not specifically define insolvency differently. SunCal Copper Canyon defaulted on the loan by failing to pay the loan balance and interest which was due on July 25, 2007. Again, it is telling that SCC does not argue, or present any evidence, that the borrower was solvent or was able to pay its debts as they became due, or otherwise challenge the interpretation of the financial statements and balance sheet. Therefore, SCC has failed to raise a factual dispute on this issue, and its liability under the SunCal Copper Canyon Guaranty has been triggered.

In its opposition, SCC addresses only three of its affirmative defenses – fraudulent inducement, mistake, and waiver. With respect to its fraudulent inducement defense, SCC asserts that when negotiating the guarantees, plaintiff described them as “non-recourse except for standard carveouts,” that it relied upon these representations, which were incorporated into the loan documents, and that this is contrary to plaintiff's current position regarding the guarantees. The Guarantees provide that the “Guarantor hereby waives any rights and defenses which such Guarantor might have as a result of any representation, warranty or statement made by Lender or its agents to

such Guarantor in order to induce Guarantor to execute this Guaranty” (Exhibit 1, Guarantees, § 3 [b]). This waiver provision is clear, specific, and unconditional, and bars SCC’s defense of fraudulent inducement (*see Citibank, N.A. v Plapinger*, 66 NY2d 90, 92 [1985]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [1<sup>st</sup> Dept 2007], *lv dismissed* 10 NY3d 741 [2008]; *Marine Midland Bank v CES/Compu-Tech, Inc.*, 147 AD2d 396, 397 [1<sup>st</sup> Dept 1989]). The court notes that both parties were sophisticated business entities represented by counsel. The Guarantees also provide that the guarantor “further waives any other circumstance that might otherwise constitute a legal or equitable discharge or defense of the Guarantor” (Exhibit 1, Guarantees, § 3 [b]). This broad waiver provision waives the defenses raised in SCC’s answer, including mistake, failure of consideration, estoppel based on misrepresentation, and breach of contract and of the duty of good faith based on misrepresentation.

As to the amounts due under the Southwind and the Copper Canyon Guarantees, this court hereby refers the issue, as well as costs and fees due under the Guarantees, to a Special Referee to hear and report with recommendations.

### CONCLUSION

Accordingly, it is

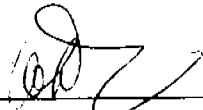
ORDERED that the plaintiff’s motion for partial summary judgment of liability on the complaint is granted, and it is further

ORDERED that the issue of damages is hereby 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 the defendant's motion for summary judgment is denied.

Dated: September 1, 2009  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

WALTER D. STALLMAN  
J.S.C.

**FILED**  
SEP 22 2009  
COUNTY CLERK'S OFFICE  
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# NEW YORK COUNTY SUPREME COURT - SPECIAL REFEREE CALENDAR

## INFORMATION SHEET

**Title of Action: D.B. Zwirn Special Opportunities Fund, LP**

**Index No.: 601591/2008**

**Issues Referred to HEAR AND REPORT: Damages—Amount due under guarantees, and costs and fees**

**Estimated Time Needed for Hearing: 1-2 days**

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