SHORT FORM ORDER

INDEX NO.: 7738-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 8-20-09
SUBMITTED: 11-12-09
MOTION NO.: 001-MD
002-XMG; CASE DISP

BROWN BARK III, L.P., as assignee of FEDERAL DEPOSIT INSURANCE CORP., as receiver for First Integrity Bank, N.A.,

Plaintiff,

-against-

AGBL ENTERPRISES, LLC, FRANK ROMEO and CONNIE YANG,

Defendants.

FOSTER & WOLKIND, P.C.
Attorneys for Plaintiff
80 Fifth Avenue, Suite 1401
New York, New York 10011

ROBERT J. CAVA, P.C.
Attorney for Defendants
1038 Little East Neck Road
West Babylon, New York 11704

JOHN K. MOSS, P.C.
Attorney for Defendants
400 Garden City Plaza, Suite 435
Garden City, New York 11530

Upon the following papers numbered 1 35 read on this motion to dismiss and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-3 ; Notice of Cross Motion and supporting papers 4-23 ; Answering Affidavits and supporting papers 24-34 ; Replying Affidavits and supporting papers 35 ; it is,

ORDERED that the motion by the defendants for an order dismissing the plaintiff's complaint is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order dismissing the defendants' counterclaims and affirmative defenses and for summary judgment in its favor is granted; and it is further

ORDERED that the plaintiff recover from the defendant AGBL Enterprises, LLC,

damages in the amount of $875,516.15 with interest at the contractual default rate of 24.99% from January 23, 2009, until the date of this order and at the statutory rate thereafter plus late fees in the amount of $91,037.61 and attorney's fees in the amount of $6,975.00; and it is further

ORDERED that the plaintiff recover from the defendants Frank Romeo and Connie Yang damages in the amount of $800,113.81 with interest at the contractual default rate of 24.99% from January 23, 2009, until the date of this order and at the statutory rate thereafter plus late fees in the amount of $91,037.61 and attorney's fees in the amount of $6,975.00.

On October 26, 2007, the defendant ABGL Enterprises (hereinafter "AGBL") executed a promissory note in favor of First Integrity Bank (hereinafter "First Integrity") in the amount of $937,000. On the same date, the individual defendants, Frank Romeo and Connie Yang, executed personal guarantees in which they unconditionally agreed to pay AGBL's obligations to First Integrity under the note. Additionally, the defendants executed a security agreement in which AGBL granted First Integrity a security interest in the collateral identified in that agreement. First Integrity subsequently disbursed more than $875,000 to the defendants. On May 30, 2008, First Integrity was closed by the Office of the Comptroller of the Currrency, and the Federal Deposit Insurance Corporation (hereinafter the "FDIC") was named as First Integrity's receiver. On August 22, 2008, the FDIC assigned to the plaintiff all of the FDIC and First Integrity's rights to the note, the security agreement, and the guarantees. Following such assignment, the defendants made a payment to the plaintiff. On August 26, 2008, AGBL defaulted on the note by failing to make the payment that was due on that date. AGBL then requested, and the plaintiff agreed, to a reduction of the usual monthly payments for a period of six months commencing in October 2008. AGBL made the reduced payments in October and November 2008, but defaulted again by failing to make the payment that was due on December 26, 2008. The plaintiff accelerated the note on January 23, 2009, and commenced this action on February 27, 2009. The defendants answered the complaint, asserting eleven affirmative defenses and three counterclaims. The defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (8) (lack of personal jurisdiction) or pursuant to CPLR 327 (inconvenient forum). The plaintiff cross-moves for an order dismissing the defendants' affirmative defenses and counterclaims and for summary judgment in its favor.

Although this motion is denominated as a motion to dismiss pursuant to CPLR 3211(a) (8), it is actually a motion for summary judgment on CPLR 3211(a) (8) grounds since service of an answer cut off the defendants' right to make a CPLR 3211 motion (*see generally*, CPLR 3211[e]; Siegel, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:52). However, any of the grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by way of a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (*see*, CPLR 3211[e]; Siegel, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:20). The defendants' answer includes as an affirmative defense lack of personal jurisdiction. Accordingly, the court will treat

the motion as one for summary judgment on CPLR 3211 (a) (8) grounds (*see*, CPLR 3211[c]); **Hertz Corp. v Luken**, 126 AD2d 446, 449) and for dismissal under CPLR 327.

In support of their motion, the defendants contend that AGBL is a Florida limited liability company with its principal place of business in Florida, that Romero and Young are domiciled in Florida, that the real property that secures the promissory note is located in Florida, that the money they borrowed was used to develop commercial real property in Florida, and that the plaintiff is a Delaware limited partnership with its principal place of business in Texas. The defendants contend that, since they do not have minimum contacts with New York, New York cannot exercise long-arm jurisdiction over them. The defendants also contend that, since none of the parties reside in New York and the property that secures the loan that is the subject of this action is located in Florida, New York would be an inconvenient forum in which to litigate this dispute.

CPLR 302 (a) (1) permits the New York courts to exercise personal jurisdiction over a nondomiciliary who transacts any business within the state if the plaintiff's claim arises from the transaction of such business (**Opticare Corp. v Castillo**, 25 AD3d 238, 243; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:6). Thus, the first requirement is that there be a transaction of business within New York (**Opticare Corp. v Castillo**, *supra* at 243). What constitutes the transaction of business has not been precisely defined, but it is clear that a single act may constitute a transaction as long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted (**Id.** at 243).

The Court of Appeals has held that the clearest case in which New York courts have CPLR 302 jurisdiction occurs when a defendant was physically present in New York at the time the contract establishing a continuing relationship between the parties was negotiated and made and the cause of action arose out of such contract (**Reiner & Co. v Schwartz**, 41 NY2d 648, 653). The parties agree that the promissory note and other documents that are the subject of this action were executed by the defendants in New York. Thus, the transaction-of-business requirement is satisfied. Moreover, the plaintiff's claim clearly arose out of the defendants' breach of the promissory note and other agreements that were executed here in New York. Accordingly, the court finds that it has personal jurisdiction over the defendants.

The choice-of-law provision in the construction loan agreement executed by the defendants and First Integrity is improperly submitted for the first time in the defendants' reply papers. Accordingly, the court declines to consider it (*see*, **Klimis v Lopez**, 290 AD2d 538 [and cases cited therein]).

Turning to the defendants' alternate grounds for dismissal, CPLR 327(a) permits the court to stay or dismiss an action in the interest of substantial justice when the court finds that the action should be heard in another forum. Under CPLR 327(a) and the common-law doctrine

of forum non conveniens, the court may dismiss an action when it determines that, although it has jurisdiction over the action, the action would be better adjudicated elsewhere (*see*, **Islamic Republic of Iran v Pahlavi**, 62 NY2d 474, 478-479). The burden is on the defendant to establish that the selection of New York as the forum will not best serve the ends of justice and the convenience of the parties (*see*, **Banco Ambrosiano v Artoc Bank & Trust**, 62 NY2d 65, 74; **Islamic Republic of Iran v Pahlavi**, *supra* at 479; **Globalvest Mgmt.Co. v Citibank, N.A.**, 7 Misc 3d 1023[A], at *4). If the balance of conveniences indicates that trial in the plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (*see*, **Globalvest Mgmt.Co. v Citibank, N.A.**, *supra* at *4). The court finds that a trial of this action will not be required. Accordingly, dismissal pursuant to CPLR 327(a) is denied.

The plaintiff has established, prima facie, its entitlement to judgment as a matter of law. The plaintiff has demonstrated that it is the holder of a promissory note executed by the defendant AGBL and personal guarantees executed by the defendants Romero and Yang. The plaintiff has also demonstrated that the defendants have failed to make payments in accordance with the terms of the note and guarantees (*see*, **North Fork Bank Corp. v Graphic Forms Assocs.**, 36 AD3d 676; **Judarl LLC v Cycletech, Inc.**, 246 AD2d 736, 737). In order to defeat the plaintiff's prima facie case, the defendants must come forward with evidence in admissible form demonstrating the existence of a triable issue of fact with respect to a bona fide defense (*see*, **Judarl LLC v Cycletech, Inc.**, *supra* at 737; **Abacus Real Estate Fin. Co. v P.A.R. Constr. & Maintenance Corp.**, 115 AD2d 576).

The defendants' conclusory and unsubstantiated allegations that the loan documents contain numerous inconsistencies and fail to meet the standards required for construction loans are insufficient to defeat the plaintiff's cross motion (*see*, **Zuckerman v City of New York**, 49 NY2d 557, 562).

The defendants contend that there are numerous issues of fact regarding the manner in which the loan was administered. The defendants contend, inter alia, that the lender paid in full a mechanic's lien that was overstated; that the lender made disbursements without confirming that work had been performed; and that there was collusion between the lender, the disbursing agent, and the contractor concerning disbursement of the loan proceeds. The defendants contend that, as a result, they were left with insufficient loan proceeds to complete the project. The defendants are, in effect, arguing that they did not receive consideration for the note. However, the promissory note clearly does not contain any qualifications of the defendants' obligation to pay. In order to successfully invoke the affirmative defense of lack of consideration, the burden is on the defendants to overcome the **D'Oench, Duhme** doctrine (*see*, **D'Oench, Duhme & Co. v Federal Deposit Ins. Corp.**, 315 US 447), which confers holder-in-due-course status upon the FDIC, as well as third-party assignees and transferees (*see*, **Cadle Co. v Newhouse**, 300 AD2d 526, 528; **AAI Recoveries v Pijaun**, 13 F Supp 2d 448, 451). Thus, the defendants must show that there is a written agreement that qualifies their repayment obligation, that First Integrity and the defendants executed such an agreement contemporaneously with the

note, and that First Integrity's board of directors or loan committee approved the agreement and maintained it as an official record of the bank (**Id.** at 451-452). The defendants have made no such showing. Accordingly the defense of lack of consideration must fail.

In view of the foregoing, the defendants' first counterclaim for breach of contract must also fail. The defendants' second and third counterclaims for negligence and breach of fiduciary duty are duplicative of the first counterclaim. To recover damages for tort in a contract matter, it is necessary to plead and prove a breach of duty distinct from or in addition to the alleged breach of contract (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, 243 AD2d 107, 118). The defendants have failed to allege or demonstrate that the plaintiff owed them a legal duty independent of the contractual duty and that the plaintiff breached that independent duty (*see*, **Clemens Realty v New York City Dept. of Educ.**, 47 AD3d 666, 667). Under New York law, neither the plaintiff nor First Integrity owed the defendants a fiduciary duty because the relationship between them was one of debtor and note-holding creditor (**SNS Bank v Citibank**, 7 AD3d 352, 354). Accordingly, the counterclaims are dismissed.

The defendants contend that the notes were secured by the personal guarantees of Romero and Yang, which were subsequently withdrawn. The guarantees executed by Romero and Yang provide, in pertinent part, as follows:

> Revocation and Termination of this Guaranty may be made by a notice in writing signed by the Undersigned...and delivered by U.S. mail, fax, or overnight delivery service...to the Lender...and shall become effective at the opening of business on the next business day of the Lender succeeding such delivery. Any such notice shall not affect or impair in any manner whatsoever the obligations of this Guaranty as to any indebtedness, draws or advances to Borrower by the Lender existing or committed at or before the time such notice become effective. The Undersigned shall have no liability or obligation as to any amount borrowed or advanced after the effective date of such revocation or termination.

The record reveals that Romero and Yang advised First Integrity that they were revoking their personal guarantees by letters dated December 27, 2007. The record also reveals that their letters were delivered on January 2, 2008. Thus, the revocations became effective on January 3, 2008. At that point, First Integrity had disbursed $800,113.81. Accordingly, the court finds that the Romero and Yang are not liable for the $75,402.34 that was disbursed after they revoked their guarantees.

Finally, under New York law, provisions in promissory notes for the payment of attorney's fees are enforceable (**AAI Recoveries v Pijaun**, *supra* at 452). Here, the promissory note provides that, in the event of default, each maker, guarantor, and endorser, jointly and

severally, shall pay the costs of collection, including reasonable attorney's fees. Moreover, under the guarantees executed by Romero and Yang, they are obligated to pay all costs incurred in enforcing payment and performance of the guarantees, including reasonable attorney's fees. The record reveals that the plaintiff has incurred legal fees in the amount of $6,975. This amount is clearly reasonable in relation to the note, which has a face value of $937,000. Accordingly, the court finds that the plaintiff is entitled to recover from the defendants legal fees in the amount of $6,975.

Dated: February 22, 2010

HON. ELIZABETH HAZLITT EMERSON

J.S.C.