

U.S. Bank N.A. v Jeremias

2010 NY Slip Op 31585(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 112370/09

Judge: Emily Jane Goodman

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 _____

Index Number : 112370/2009
U.S. BANK NATIONAL ASSOC.
 VS.
JEREMISA, HARRY
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

is decided per attached

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

FILED

JUN 25 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/21/10

[Signature]

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 17

-----X

U.S. BANK NATIONAL ASSOCIATION, as
Administrative Bank and as a Bank,

Plaintiff,

Index No. 112370/09

-against-

HARRY JEREMIAS, HENRY ORLINSKY and
FRANCISCO PUJOL a/k/a
FRANCISCO PUJOL MENESES,

Defendants.

Emily Jane Goodman, J.S.C.:

Plaintiff U.S. Bank National Association (U.S. Bank) moves,
pursuant to CPLR 3213, for an order granting summary judgment in
lieu of complaint based on five guarantees executed by defendants
in connection with three loans. For the reasons stated below, the
motion is denied.

Plaintiff is a nationally chartered bank. Non-party PHH Owner
LLC (PHH), is the owner of certain real property located at 15-21
and 23-29 Renwick Street, New York, New York (the Property).
Defendants Harry Jeremias, Henry Orlinsky and Francisco Pujol are
principals of PHH.

Pursuant to a Loan Agreement dated August 29, 2007, plaintiff
agreed to loan PHH up to an aggregate principal of \$55,266,972.80.
Under the Loan Agreement, plaintiff made three loans to PHH: 1) an

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

Initial Loan up to \$24,100,000.00 (Initial Loan); 2) a Building Loan up to \$28,969,904.93 (Building Loan); and 3) a Project Loan up to \$2,197,067.87 (Project Loan). Each loan was evidenced by a Note. The purpose of the loans was to enable PHH to purchase the Property and develop it into residential condominium units.

The various defendants executed a total of six guarantees in connection with the loans. Orlinsky and Pujol jointly executed payment guarantees in connection with the Initial Loan, the Building Loan and the Project Loan (collectively Payment Guarantees). Orlinsky and Pujol also jointly executed a Continuing Guaranty for the benefit of U.S. Bank.¹ All three defendants jointly executed a Completion Guaranty and a Recourse Carve-Out Guaranty.

According to plaintiff, PHH never developed the Property. Plaintiff commenced the instant action in August of 2009 by filing a Summons and a Notice of Motion for Summary Judgment in Lieu of Complaint. Plaintiff alleges that PHH defaulted on repayment of amounts owed under the various loans, and plaintiff seeks to recover such payments from the defendant-guarantors.

"CPLR 3213 provides an accelerated procedure for commencement and pursuit of an action where a right to payment can be

¹ According to plaintiff, this guaranty has been satisfied and is not at issue on this motion.

ascertained from the face of a document, without regard to extrinsic evidence." *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 (1st Dept 2000). "To establish a prima facie case, plaintiff must present an 'instrument for the payment of money only' and evidence of a failure to make the payment called for by its terms." *Id.*, quoting *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 (1975). "[T]he only permissible extrinsic evidence would be 'simple proof of nonpayment or a similar de minimis deviation from the face of the document.'" *Diversified Investors Corp. v DiversiFax, Inc.*, 239 AD2d 231, 233 (1st Dept 1997), quoting *Weissman v Sinorm Deli, Inc*, 88 NY2d 437 (1996). Here, plaintiff has not demonstrated that it is entitled to accelerated relief under CPLR 3213.

First, the court finds that the Completion Guaranty and the Recourse Carve-Out Guaranty do not qualify as instruments for the payment of money only, because both agreements guaranteed both payment and performance of all of the borrower's obligations, including the completion of the construction on the Property. Where an "agreement includes the guarantee of both payment and performance within its terms, it is not an instrument for the payment of money only, and thus, may not support a CPLR 3213 motion." *Dresdner Bank AG. (NY Branch) v Morse/Diesel, Inc.*, 115 AD2d 64, 68 (1st Dept 1986); see *Associated Capital Services Corp.*

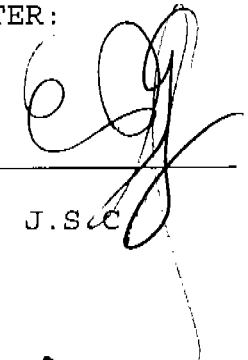
v *Lichtenstein*, 94 AD2d 736 (2d Dept 1983).

Moreover, all of the guarantees require more than a de minimis deviation from the face of the document to determine how much money would be owed. Even assuming, for the sake of argument, that PHH defaulted on the underlying Notes, factual questions remain as to how much money was actually advanced by plaintiff pursuant to each Note, and how much principal and interest would be owed to plaintiff. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied.

This Constitutes the Decision and Order of the Court.

DATED: June 21, 2010

ENTER:


J.S.C.

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE