

Garrison Special Opportunities Fund, LP v Brenner

2010 NY Slip Op 33810(U)

March 24, 2010

Sup Ct, New York County

Docket Number: 650464/09

Judge: Barbara R. Kapnick

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

BARBARA R. KAPNICK

PART 39

J.S.C. Justice

Index Number : 650464/2009

GARRISON SPECIAL OPPORTUNITIES FUND

vs.

BRENNER, STEPHEN

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

INDEX NO. 650464-09

MOTION DATE 3/24/10

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were 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

and cross motion are decided in accordance with the accompanying memorandum decision.


RECEIVED

MAR 25 2010

MOTION SUPPORT OFFICE

NYS SUPREME COURT - CIVIL

Dated: 3/24/10.



BARBARA R. KAPNICK

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):

CD 15

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
GARRISON SPECIAL OPPORTUNITIES FUND
LP,

Plaintiff,

-against-

DECISION/ORDER
Index No. 650464/09
Motion Seq. No. 001

STEPHEN BRENNER and DANIEL ROBBINS,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

This action arises out of an alleged Guaranty of Payment dated as of July 20, 2007 (the "Guaranty"), by which defendants Stephen Brenner and Daniel Robbins purportedly guaranteed the payment of the indebtedness and obligations of the Borrower, Alfa One Holdings, LLC ("Alfa One"), to the Lender, plaintiff Garrison Special Opportunities Fund LP ("Garrison"), a private lending institution, up to the amount of \$5,300,000.00, under a Promissory Note and Loan Agreement in the principal amount of \$19,389,938.00.¹

Under the Note, full payment of the outstanding principal balance of the Loan was due and payable by Alfa One on the maturity date of July 20, 2009. Plaintiff claims that Alfa One failed to pay

¹ Section 7 of the Guaranty contains a New York choice of law provision, and further provides that "any suit, action or other legal proceeding arising out of or relating to this Guaranty may be brought in a court of record in the City and County of New York, State of New York or in the Courts of the United States of America located in the Southern District of New York".

any of the amount due, and thus, by notice dated July 20, 2009, Garrison demanded payment from the defendants under the terms of the Guaranty.

Plaintiff now moves for an order pursuant to CPLR § 3213 granting summary judgment in lieu of Complaint in the amount of \$5,300,000.00 on the ground that this action is based upon an instrument for the payment of money only, i.e., the Guaranty, which is now due and payable, and entering judgment in such sum pursuant to CPLR §§ 5012 and 5016. *See, Bank of America, N.A. v Solow*, 59 AD3d 304, 304-305 (1st Dep't 2009), *lv to app disp'd*, 12 NY3d 877 (2009), which held that summary judgment in lieu of complaint was appropriate where "[t]he guaranty was absolute and unconditional, expressly waived demand or presentment and was expressly made a primary obligation of the defendant, so that no formal demand, beyond the motion in lieu of complaint itself, was necessary to state a cause of action on the guaranty (citation omitted)."

Defendants oppose the motion and cross-move for an order pursuant to CPLR § 2201 staying this action pending the resolution of related litigation pending in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida; i.e., (i) a declaratory judgment action in which Alfa One and its principals, Brenner and Robbins, seek to declare the Loan invalid; and (ii) a

foreclosure action brought by Garrison against Alfa One based on its alleged default under the loan documents.

Defendants, however, claim that they agreed to sign a limited guaranty where they would only personally guarantee the loan repayment if Alfa One committed fraud, and dispute the authenticity of the Guaranty that plaintiff relies on.

According to Robbins, the Guaranty agreement annexed to the moving papers "is not an accurate representation of the guaranty agreed to by the parties in connection with this Loan." He claims that it is his "recollection that the signature pages found on the document attached to Plaintiff's papers were originally part of another document, and I did not execute the guaranty in its current form."

However, defendants' own counsel acknowledged receipt of the document entitled, "Guaranty of Payment", in an opinion letter dated July 18, 2007.

Moreover, Section 4 ("Unconditional Character of Obligations of Guarantor") of the Guaranty provides, in relevant part, as follows:

- (a) The obligations of Guarantor hereunder shall be irrevocable, absolute and unconditional, irrespective of

the validity, regularity or enforceability, in whole or in part, of this Guaranty, the Loan Agreement, the Note, or the other Loan Documents or any provision thereof, [emphasis supplied] or the absence of any action to enforce the same, any waiver or consent with respect to any provision thereof, the recovery of any judgment against Borrower, Guarantor or any other Person or any action to enforce the same, any failure or delay in the enforcement of the obligations of Borrower under the Note, the Loan Agreement, the Mortgage or any other Loan Document or Guarantor under this Guaranty or the other Loan Documents to which Guarantor is a party, or any setoff, counterclaim, and irrespective of any other circumstances which might otherwise limit recourse against Guarantor by Lender or constitute a legal or equitable discharge or defense of a guarantor or surety...

* * *

(c) Except as otherwise specifically provided in this Guaranty, Guarantor hereby expressly and irrevocably waives all defenses in an action brought by Lender to enforce this Guaranty based on claims of waiver, release, surrender, alteration or compromise and all setoffs, reductions, or impairments, whether arising hereunder or otherwise.

Accordingly, based on the papers submitted and the oral argument held on the record on January 5, 2010, this Court finds that plaintiff has demonstrated its entitlement to summary judgment in lieu of complaint. Plaintiff's motion is, therefore, granted, and defendants' cross-motion to stay this action pending the determination of the Florida litigation is denied.

The Clerk may enter judgment in favor of plaintiff Garrison Special Opportunities Fund LP and against defendants Stephen Brenner and Daniel Robbins in the principal amount of

\$5,300,000.00, together with interest to be calculated by the Clerk, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Plaintiff's claim for attorney's fees is severed and continued and an assessment thereof is hereby directed.

Upon filing of a note of issue, the payment of the proper fees, if any, and service of a copy of this order with notice of entry, the Clerk of the Trial Support Office shall place this matter on the appropriate trial calendar for the above-directed assessment.

This constitutes the decision and order of this Court.

Date: March 27, 2010


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.