

Texas 1845, LLC v Kyaw
2011 NY Slip Op 32501(U)
September 15, 2011
Sup Ct, Nassau County
Docket Number: 3202/2011
Judge: Lawrence K. Marks
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X	
TEXAS 1845, LLC,	:
	:
Plaintiff,	:
	:
- against -	: Index No. 3202/2011
	:
MYINT J. KYAW,	:
	:
Defendant.	:
-----X	

LAWRENCE K. MARKS, J.

Plaintiff Texas 145, LLC ("Texas 145") moved for summary judgment in lieu of complaint, pursuant to CPLR § 3213.

Defendant Myint J. Kyaw cross-moved for a stay of this action, during the pendency of a related action, pursuant to CPLR § 2201.

BACKGROUND

This action involves plaintiff's claim for recovery under personal guaranties by defendant Kyaw for corporate promissory notes. The notes regard two airplanes,¹ which were intended to be used by the corporate entities, Wu Aviation Corp. and Wu Air Corp., as part of a charter business.

¹ Specifically, the aircraft at issue are a Bombardier Inc., model CL-600-2B19, serial number 7481, and registration marks N75983 and N88WU; and a British Aerospace, model BAE 125-1000A, serial number NA1002, build number 259009, and registration marks N229U and NI68WU. Graham Suppl Aff for TRO, ¶ 1.

On December 15, 2006, Wu Aviation Corp. entered into a Promissory Note Aircraft Loan, under which it was to repay Key Equipment Finance, Inc. (“Key Equipment”) \$6,600,000, plus interest. Meyer Aff, Exh A. A Personal Guaranty of the Aircraft Promissory Note was entered into the same day by defendant Kyaw. Meyer Aff, Exh B.

On October 11, 2007, Wu Air Corp., a different corporate entity, entered into a Promissory Note Aircraft Loan, under which it was to repay Key Equipment \$8,342,505, plus interest. Meyer Aff, Exh C. A Personal Guaranty of the Aircraft Promissory Note was again entered into the same day by defendant Kyaw. Meyer Aff, Exh D.

On December 31, 2008, Wu Air Corp. entered into another Promissory Note Aircraft Loan, under which it was to repay Key Equipment \$5,000,000, plus interest. Meyer Aff, Exh E. Kyaw entered into a Personal Guaranty of the Aircraft Promissory Note, dated December 30, 2008. Meyer Aff, Exh F.

By letters dated October 14, 2010, Kyaw was informed that the promissory notes were in default and referred for collection. Meyer Aff, Exhs G, H.

In December 2010, the three promissory notes were assigned by Key Equipment to Plaintiff Texas 1845, LLC. Meyer Aff, Exhs I, J.

Plaintiff commenced this action via a motion for summary judgment in lieu of complaint.

Plaintiff alleges that the balance it is due from defendant is not less than \$18,882,965.94, plus interest, fees and costs. Meyer Aff, ¶ 45.

DISCUSSION

Plaintiff contends that this is simply “an action to collect on three unconditional and absolute payment guaranties of loans.” Mot Br at 1. It argues that by their express terms, the personal guaranty agreements absolutely and unconditionally require defendant to pay the entire unpaid balances in the event that the corporate entities fail to meet their payment obligations. Mot Br at 1-2.

Of particular import, the Guaranties provide that the

Guarantor expressly waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor or both, in any action or proceeding, in any court, arising on, out of, under, by virtue of, or in any way relating to the Loan Documents, this Guaranty or the transactions contemplated thereby or hereby.

Meyer Aff, Exhs B, D, F at ¶ 4.

Plaintiff further notes that the Guaranties specify that it, as the lender’s successor in interest, “shall not be required to pursue any right or remedy it may have against the Borrower under the Loan Documents or otherwise (and shall not be required first to

commence any action or obtain any judgment against Borrower) before enforcing this Guaranty against Guarantor.” Meyer Aff, Exh B, D, F at ¶ 2 (parenthetical in the originals).

Defendant argues that plaintiff failed to make out its prima facie case. He contends that the default notices are deficient, as they fail to provide the accounting required to establish the amount actually owed. Cross Mot Kyaw Aff, ¶ 12.

Defendant also opposes the motion, contending that by its related federal action, plaintiff is seeking to “double dip” and, should it succeed in both actions, would recover twice. Cross Mot Kyaw Aff, ¶ 14. He further argues that plaintiff also seeks repossession and sale of the airplanes at issue. Cross Mot Kyaw Aff, ¶ 15. The Court notes that, since commencement of this action, plaintiff has in fact seized for repossession at least one of the airplanes at issue. Further, plaintiff has explicitly stated to the Court that it intends to sell that airplane.

Defendant further argues that plaintiff not only has not, but cannot, state with certainty that it is entitled to the sum certain amount claimed while simultaneously initiating a sale of the collateral airplanes. Cross Mot Capetola Aff, ¶ 13. Defendant posits that “the possibilities of inconsistent and/or excess outcomes is troubling.” Cross Mot Capetola Aff, ¶ 23.

Before the Court at this time, is only the motion for summary judgment in lieu of complaint. For a document to be an instrument for the payment of money only, for

purposes of CPLR § 3213, the instrument must facially set forth the amount owed to plaintiff. *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 (1996). However, the law is clear that where extraneous proof is needed to determine the amount due, summary judgment in lieu of complaint should be denied. *Ippolito v. Family Medicine of Tarrytown and Ossining, LLP*, 46 A.D.3d 752, 753 (2d Dep’t 2007); *Khoury v. Khoury*, 280 A.D.2d 453, 454 (2d Dep’t 2001).

Inasmuch as plaintiff failed to proffer evidence of an amount certain, its motion pursuant to CPLR § 3213 is defective. Plaintiff attempted to correct this error in its reply papers. Reply Br at 4-5. That is insufficient. Procedurally, defendant was entitled to see and oppose plaintiff’s claims in his own papers.

At argument, the Court granted the parties the opportunity to submit supplemental case law, if they wished, on the issue of whether this Court could grant this motion on liability only. The parties both opted to submit additional papers. Neither provided the Court with any precedent permitting such action.

Interestingly, in plaintiff’s supplemental papers, it asserts that allowing defendant to present evidence on the amount owed would be reforming the guarantees, and that “this Court has no discretion” to do so. Pl Suppl Br at 2. Plaintiff argues that obtaining a judgment is different from enforcing it and, should plaintiff attempt to enforce a judgment for a sum certain after it has been made whole, defendant could then argue that payment has been made. Pl Suppl Br at 7. This is consistent with plaintiff’s position throughout

its appearances in this action. Indeed, in its reply papers, and at oral argument, plaintiff argues that if there is an overage of recovery, defendant could commence a new action against plaintiff, thereafter, under CPLR §3016(d), for an amount recovered by plaintiff against defendant. Reply Br at 8.

The Court sees no reason to do this. As plaintiff notes, summary judgment in lieu of complaint provides a mechanism by which the Court may, in an accelerated manner, resolve the action without the need for the filing of a complaint. Mot Br at 8. The purpose of summary judgment in lieu of complaint is “to provide quick relief.” *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 443 (1996).

However, since plaintiff’s filing of the summary judgment in lieu of complaint, the action of the parties have proven to the Court that this is - - contrary to plaintiff’s assertions - - far from a simple and straight forward claim merely for the repayment of money owed. Each party has sought this Court’s aid, alleging the need for emergent relief to preventing the other from maintaining control over an airplane at issue. *See* 3/16/11 Order to Show Cause and Temporary Restraining Order, brought by plaintiff; 3/24/11 Emergency Order to Show Cause, brought by defendant. Indeed, the second request for emergency relief, brought by defendant, regarded plaintiff’s seizure of one of the airplanes. This followed the Court’s Order, after the first request for emergency relief, brought by plaintiff, which left that airplane in defendant’s control but precluded defendant or the corporate entities from taking it out of the country.

Additionally, plaintiff has commenced related actions in other courts. At this time this Court is aware of actions in State Court in Maine and the United States District Court for the Eastern District of New York. Graham Suppl Aff for TRO, ¶ 39; Exh O (“the Maine TRO”); Cross Mot Kyaw Aff, Exh G (“the Maine action”); Cross Mot Kyaw Aff, Exh F (“the federal action”).

As the Second Department stated, “the Supreme Court should have denied the plaintiff’s motion for summary judgment in lieu of complaint because outside proof was needed to determine the amount due to the plaintiff, if any, under the subject note.”

Ippolito v. Family Medicine of Tarrytown and Ossining, LLP, 46 A.D.3d 752, 753 (2d Dep’t 2007). The same is true in the instant action.

Plaintiff’s failure to establish a sum certain is fatal to its motion for summary judgment in lieu of complaint. As such, the specific provisions of the guarantees upon which plaintiff relies are not dispositive. Additionally, given the related proceedings in multiple other courts, and the parties’ litigious conduct and multiple demands for emergent relief in this action, the Court denies plaintiff’s motion for summary judgment in lieu of complaint with prejudice.

Plaintiff may file a complaint in this Court with regard to these claims within sixty (60) days from the date of this Decision and Order.

Inasmuch as plaintiff's motion for summary judgment in lieu of complaint is denied, defendant's cross motion for a stay of the summary judgment proceedings is denied as moot.

The Court has considered the parties' other arguments, and finds them unavailing.

Accordingly, it is

ORDERED that plaintiff Texas 1845, LLC's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the cross motion of defendant Myint J. Kyaw, for a stay, is denied; and it is further

ORDERED that plaintiff Texas 1845, LLC may file a complaint in this Court with regard to the claims in this action, if at all, within sixty (60) days from the date of this Decision and Order.

This constitutes the Decision and Order of the Court.

Dated: September 15, 2011

ENTER:


J.S.C.
ENTERED

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COUNTY CLERK'S OFFICE