

New York Commercial Bank v Pullo

2013 NY Slip Op 30744(U)

March 4, 2013

Sup Ct, NY County

Docket Number: 653452/12

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

NEW YORK COMMERCIAL BANK

INDEX NO. 653452/12

-v-

MOTION DATE _____

PAUL J. PULLO and GENE V. PULLO

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *by plaintiff for summary judgment is GRANTED per the attached Decision and Order.*

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

Dated: March 4, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X

NEW YORK COMMERCIAL BANK,

Plaintiff,

-against-

PAUL J. PULLO and GENE V. PULLO,

Defendants.

-----X

Index No. 653452/12

DECISION AND ORDER

Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This is a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. Defendants' payment obligations arise pursuant to personal guarantees in favor of plaintiff with respect to the debt of their wholly-owned fuel oil distribution entities.

Background

In May 2012, New York Commercial Bank (NYCB) entered into a financing agreement (Financing Agreement) with three fuel oil distribution entities (Borrowers) providing for a revolving line of credit in the maximum amount of \$55,000,000. Paul and Gene Pullo (Guarantors) jointly and severally guaranteed (the Guarantees) the Borrowers' payment obligations under the Financing Agreement.

The Borrowers defaulted under the terms of the Financing Agreement by drawing down loans in excess of an amount permitted by a formula set out therein. NYCB notified the Borrowers of non-compliance with the terms of the Financing Agreement, and, in September 2012, notified the Borrowers that the entire amount of the indebtedness under the Financing Agreement had become due and payable.

NYCB also demanded that Guarantors jointly and severally pay the full amount due under the Financing Agreement. Guarantors have not paid under the Guarantees.

Borrowers filed for bankruptcy relief, and, in the bankruptcy proceeding, their Chief Restructuring Officer admitted overdrawing funds under the Financing Agreement and that the entire amount of debt outstanding under the Financing Agreement had become due and payable.

Discussion

Guarantors oppose this motion on the grounds that NYCB has not proven the Borrowers' default and that resort to extrinsic evidence is needed to prove the case, and therefore the Guarantees are not instruments for the payment of money only. Neither argument has merit.

The statement of Borrower's Chief Restructuring Officer in the bankruptcy proceeding admitted both the Borrowers' overdrawing under the Financing Agreement, and the acceleration of all amounts borrowed thereunder. The default has been proven and, in fact, no need to review documents other than the Guarantees is necessary. Even were it necessary to review the Financing Agreement, New York law is clear that this does not prevent NYCB from successfully moving pursuant to CPLR 3213. *Embraer Fin. Ltd. v Servicios Aeros Profesionales, S.A.*, 42 AD3d 380 (1st Dept 2007).

A cursory review of the Financing Agreement also shows that Borrowers' filing of a bankruptcy petition constitutes an event of default permitting NYCB to declare all amounts borrowed under the Financing Agreement to be due and payable. This, again, proves the amount due.

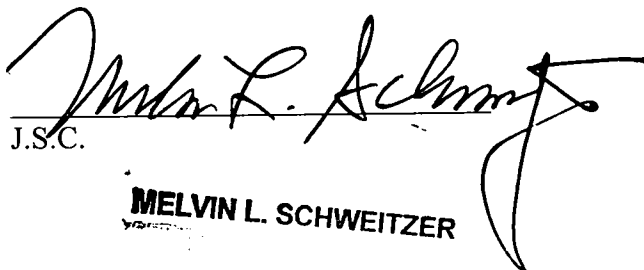
Plaintiff's motion for summary judgment is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted.

Dated: March 3⁴, 2013

ENTER:


J.S.C.
MELVIN L. SCHWEITZER