

Bay City Capital Fund V, L.P. v Hirsch

2014 NY Slip Op 30251(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 653249/2012

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Bay City Capital

INDEX NO. 653249/2012

- v -

MOTION DATE 8/29/13

Hirsch

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED
2-20, 22-36

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 9/16/14

Shirley Werner Kornreich
SHIRLEY WERNER KORNREICH
L.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Scanned to 119 on 1/16/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
BAY CITY CAPITAL FUND V, L.P., & BAY
CITY CAPITAL FUND V CO-INVESTMENT
FUND, L.P.,

Index No.: 653249/2012

DECISION & ORDER

Plaintiffs,

-against-

LEON HIRSCH, ROBERT KNARR &
TURI JOSEFSEN,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiffs, Bay City Capital Fund V, L.P. and Bay City Capital Fund V Co-Investment Fund, L.P., move for summary judgment in lieu of complaint against defendants Leon Hirsch, Robert Knarr, and Turi Josefsen pursuant to CPLR 3213. Plaintiffs' motion is granted, on consent, for the reasons that follow.

Factual Background

On January 14, 2011, plaintiffs, defendants, and non-party JHK Investments, LLC (JHK) entered into a Credit Agreement, Promissory Note, Security Agreement, Pledge Agreement, and Guarantee, whereby plaintiffs loaned \$20,346,072.92 to JHK, to be repaid by January 14, 2012 (the Loan). The interest rate on the Loan is the greater of (a) Libor plus 10% or (b) 11%, increasing an additional 4% in the event of default.¹ Under the Guarantee, defendants unconditionally guaranteed JHK's obligations under the Loan and waived all defenses in the

¹ The Credit Agreement provides that a specified Alternative Base Rate will be used to calculate interest if certain conditions (set forth in Section 2.11) occur.

event of JHK's default. The Guarantee provides that JHK's filing of a bankruptcy petition constitutes an event of default. The Guarantee further provides that defendants must pay plaintiffs' collection costs and attorneys' fees in the event of default.

JHK failed to repay the Loan by January 14, 2012. On January 25, 2012, plaintiffs, defendants, and JHK entered into a First Amendment to the Credit Agreement and Amended and Restated Notes, whereby the maturity date of the Loan was extended to March 4, 2012, JHK was advanced an additional \$750,000, and defendants reaffirmed their obligations under the Guarantee. JHK failed to repay the Loan by March 4, 2012. To date, plaintiffs have not received any further payments under the Loan.

On August 29, 2012, JHK filed a bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut. This was an event of default under the Loan, entitling plaintiffs to collect the outstanding principle and interest from defendants.

Plaintiffs commenced this action on September 17, 2012, by filing the instant motion for summary judgment in lieu of complaint, asserting a claim for: (1) \$31,892,633, which represents the amount of principle and interest due under the Loan as of September 11, 2012; (2) default interest from September 12, 2012 to the date judgment is entered; and (3) costs and attorneys' fees.

In Affidavits dated March 11 and March 12, 2013, defendants admit that there is no issue of triable fact and that defendants have no defenses to the instant motion. However, with plaintiffs' consent, the court delayed issuing the instant decision so that the parties could work out a global settlement of their various disputes. After months of negotiations, the parties have

yet to reach a settlement. Plaintiffs, however, reached a compromise with defendants, whereby the instant decision would be issued but judgment would not yet be entered. In any event, since a reference to a Special Referee is necessary to compute interest and attorneys' fees, the court's regular practice is not to direct the entry of judgment until after the Referee's report is confirmed. This was conveyed to the parties' counsel during a telephone conference held on January 14, 2014, and the ordering language below reflects this understanding.

Discussion

"Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is 'based upon an instrument for the payment of money only or upon any judgment.'" *Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). "An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time." *Id.*, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 (1996). "However, '[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.'" *Id.* A motion for summary judgment in lieu of complaint is governed by the usual standards for motions for summary judgment brought pursuant to CPLR 3212. *McBean v Goodman*, 27 Misc3d 1212(A), at *2 (Sup Ct, Kings County 2010), citing *Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985).

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated*

Fur Mfrs., Inc., 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs have established their *prima facie* case by submitting evidence of defendants' default on their obligations under the Loan. Defendants have stipulated that summary judgment should be granted against them. Therefore, the court grants summary judgment to plaintiffs against defendants in the amount of \$31,892,633 and default interest from September 12, 2012 to the date judgment is entered. The calculation of plaintiffs' costs and attorneys' fees and the updated calculation of default interest is referred to a Special Referee to hear and report. Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiffs, Bay City Capital Fund V, L.P. and Bay City Capital Fund V Co-Investment Fund, L.P., is granted against defendants Leon Hirsch, Robert Knarr, and Turi Josefsen, in the amount of \$31,892,633

plus (1) default interest from September 12, 2012 until entry of judgment; and (2) plaintiffs' claim for costs and attorneys' fees; and it is further

ORDERED that the calculation of said default interest and attorneys' fees is referred to a Special Referee to hear and report; and it is further

ORDERED that pending receipt of the report and a motion pursuant to CPLR 4403, final determination of that branch of the motion is held in abeyance; and it is further

ORDERED that judgment shall not be entered in this action until the court issues a decision on confirmation of the Referee's report, unless the parties stipulate otherwise; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee.

Dated: January 16, 2014

ENTER:


SHIRLEY WERNER KORNREICH
J.S.C