SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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LEIGH LOMBARDI FAMILY TRUST,

Plaintiff,

-against-

KIERAN BRUSH,

Defendant.

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DECISION AND ORDER

Index No. 150631/11

HON. ANIL C. SINGH, J.:

Plaintiff moves to confirm the Special Referee's report and recommendation dated August 30, 2013, pursuant to CPLR 4403, and for summary judgment in lieu of complaint pursuant to CPLR 3213. Defendant opposes the motion and cross-moves to reject the report and recommendation, and to dismiss this matter on grounds of inconvenient forum.

In an order dated July 11, 2012, this Court directed that the matter be set down for a traverse before a Special Referee to hear and report on the issue of service.

Following a hearing, Special Referee Phyllis Sambuco issued a fact-specific, six-page report and recommendation. The report reflects that the referee carefully weighed all of the testimony and evidence presented at the hearing.

CPLR 4403 provides that this Court has the power to confirm, in whole or in part, reports of Special Referees. Such reports are not binding, but are intended "merely to inform the conscience of the court" (Matter of Gehr v. Board of Education of City of Yonkers, 304 N.Y. 436, 440 [1952] (internal quotation marks and citation omitted). However, it is "well settled that a special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (RC 27th Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1st Dep't 2003; see also Namer v. 152-54-56 W. 15th St Realty Corp., 108 A.D.2d 705, 706 [1st Dept., 1985]; Spodek v. Feibusch, 55 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1st Dept., 2007]; Kardanis v. Velis, 90 A.D.2d 727 [1st Dept., 1982]). "The court, in confirming a referee's report, properly defers to the findings of the referee, who was in the best position to weigh the evidence and make credibility determinations" (92 N.Y.Jur.2d References section 57).

Contrary to defendant's contention, the Special Referee did not place the burden on him to demonstrate that he was properly served. Based on the testimony adduced at the traverse hearing, plaintiff satisfied its burden of demonstrating that defendant was personally served with process. To the extent that defendant challenges the credibility and factual findings of the Special

Referee, we find that these findings are substantiated by the record.

Having addressed the motion to confirm and the cross-motion to reject the referee's report and recommendation, we turn next to plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213.

"A plaintiff is entitled to an accelerated procedure to commence and pursue an action to recover on an instrument for the payment of money only" (DDS Partners, LLC v. Celenza, 6 A.D.3d 347, 348 [1st Dept., 2004]). A plaintiff establishes its entitlement to summary judgment in lieu of complaint on such instrument made by defendant by establishing execution, delivery, demand and failure to pay (Solomon v. Langer, 66 A.D.3d 508 [1st Dept, 2009]).

Attached to plaintiff's moving papers is the sworn affidavit of Leigh Lombardi, who states that she is the sole beneficiary and trustee of plaintiff Leigh Lombardi Family Trust. She asserts that on October 18, 2010, defendant Kieran Brush agreed to be personally responsible pursuant to the terms of a personal guaranty for repayment of a loan made by plaintiff in the sum of $200,000. According to Ms. Lombardi, plaintiff has not been paid any amount relating to the loan for $200,000, despite demand.

The alleged personal guaranty states in pertinent part as follows:

For and in consideration of good and valuable consideration paid to

> Kieran Brush, whose address is Suite 12B, 308 East 72nd Street, New York, NY 10021 ("Guarantor"), the receipt and sufficiency of which is hereby acknowledged, and for the purpose of enabling Hestia Financial, Inc., a Texas corporation, with its principal place of business located at 2626 Cole Avenue, Suite 200, Dallas, Texas 75204 ("Debtor"), to borrow certain funds from the Leigh Lombardi Family Trust, a trust domiciled in the State of Texas at 2810 Tomas Ave., Dallas, Texas 75204 ("Holder"), and recognizing that, but for this Guaranty, such loan would not be made by Holder to Debtor, Guarantor hereby unconditionally guarantees to Holder the full and prompt payment when due at maturity on October 29, 2010 (i) that certain promissory ("Note"), made by Debtor, payable to the order of Holder in the principal sum of TWO HUNDRED THOUSAND AND NO/100 DOLLARS ($200,000.00) and (ii) a one-time interest fee on the Note of TWENTY THOUSAND AND NO/100 DOLLARS ($20,000).

(Lombardi Affidavit, exhibit B).

On its face, the guaranty is not signed by the defendant, even though there is a blank line for his signature.

"The guarantee is clearly an instrument for the payment of money only upon which a motion pursuant to CPLR 3213 may be brought" (First Interstate Credit Alliance, Inc. v. Sokol, 179 A.D.2d 583, 583 [1st Dept., 1992]). "Plaintiffs establish[] a prima facie case by proof of the existence and genuineness of the instrument and the failure to make payments thereunder" (Id.).

In a sworn affidavit in opposition to the motion, defendant Kieran Brush states that he never signed the guaranty because he was on a trip to China in

October 2010. Although the guaranty was emailed to his Blackberry phone, he contends that he was unable to open, review or read the guaranty, which was an attachment to the e-mail, because "the function did not work at that time to allow me to open documents."

A plaintiff has not established its prima facie entitlement to accelerated judgment pursuant to CPLR 3213 where its claim, based on a guaranty, requires resort to external documents (Metal Management, Inc. v. Esmark Inc., 49 A.D.3d 333 [1st Dept., 2008]).

Because it is undisputed that defendant was in China at the time the guaranty was allegedly executed, plaintiff seeks to rely upon a series of e-mails to prove that defendant had "reviewed" the guaranty and agreed to "accept the terms and conditions" of the guaranty.

"An evidentiary showing that a person in fact signed [a guaranty] may be required in order to charge that person as guarantor" (63 N.Y.Jur.2d Guaranty and Suretyship section 48).

In light of the fact that the personal guaranty at issue in this matter is unsigned, outside proof is needed, other than that of nonpayment or a similar de minimus deviation from the face of the instrument. Because extrinsic evidence in the form of e-mails is needed to establish the validity of the personal guaranty, the

instrument is not amenable to accelerated disposition pursuant to CPLR 3213.

Finally, we turn to defendant's cross-motion to dismiss on the grounds of inconvenient forum.

Subdivision (a) of CPLR 327 states:

> When the court finds in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

Defendant contends that the sole New York contact in this matter is that he "happened to own an apartment in New York and that apartment had nothing to do with the transaction at issue." He asserts further that plaintiff could sue in Texas, where it and most of the witnesses and documents are located, or Bermuda or Australia, where defendant resides.

In response, plaintiff contends that, at the time of service of this action, defendant owned and lived in the apartment in Manhattan and conducted business out of New York. Further, plaintiff asserts that the sum of $275,000 is currently being held in escrow as security in defendant's bank account located in New York, pursuant to a so-ordered stipulation to which defendant agreed.

"A motion to change venue is addressed to the sound discretion of the

court" (Montero v. Elrac, Inc., 16 A.D.3d 284, 285 [1st Dept., 2005]).

Upon carefully weighing the opposing factors, the Court in its discretion finds that defendant has not met its burden of demonstrating that plaintiff's selection of New York as the forum for litigation is not in the interest of substantial justice.

Accordingly, it is

ORDERED that the report of the referee is hereby confirmed; and it is further

ORDERED that defendant's cross-motion is denied; and it is further

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff's moving papers are hereby deemed the complaint in this action, and the defendant's answering papers are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on May 28, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 4/7/14
New York, New York

Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE