Stonehill Inst. Partners, L.P. v Frac Diamond Aggregates LLC
2014 NY Slip Op 32977(U)
November 10, 2014
Supreme Court, New York County
Docket Number: 654300/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

STONEHILL INSTITUTIONAL PARTNERS, L.P. and ELLE INVESTMENTS, LLC,	:	
Plaintiffs,	:	Index No. 654300/2013
-against-	:	DECISION AND ORDER
FRAC DIAMOND AGGREGATES LLC, RYAN L. HESS, ALLIANCE CONSTRUCTION GROUP LLC, E-COSYSTEMS, LLC, H&H AGGREGATES, LLC, H&H TRUCKING L.L.C., PROTEMP, LLC, SUN COAST CONTRACTING SERVICES, LLC, TEAM PRO-TREE, LLC, and TITAN RENTALS, LLC,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Stonehill Institutional Partners, L.P. and Elle Investments, LLC (collectively, Plaintiffs) have brought an enforcement action to obtain an order of reference, to confirm sale, and to determine the amount of a deficiency judgment against defendants Frac Diamond Aggregates LLC, Ryan L. Hess (Mr. Hess), Alliance Construction Group LLC, E-cosystems, LLC, H&H Aggregates, LLC, H&H Trucking L.L.C., Protemp, LLC, Sun Coast Contracting Services, LLC, Team Pro-Tree, LLC, and Titan Rentals, LLC (collectively, Defendants). Defendants have moved to dismiss this motion on three grounds. First, they claim that one of the Defendants, Alliance Construction Group LLC (ACG) is in bankruptcy proceedings in Mississippi, is subject to bankruptcy's automatic stay, and is an indispensible party to this litigation (CPLR 3211 (a) (10)). Second, they claim that the Plaintiffs fail to state ripe claims (CPLR 3211 (a) (7)). Third, they claim, with respect to Mr. Hess, individually, that, Plaintiffs

filed an action against him through their administrative agent, Spectrum Origination LLC (Spectrum), and that action (Enforcement Action) involved identical claims and equivalent parties (CPLR 3211 (a) (4)). Alternatively, Defendants ask the court to stay this action pursuant to CPLR 2201 pending the litigation of identical issues in Mississippi Bankruptcy Court or construe the automatic stay (11 USC § 362) to apply here because any determination is likely to affect ACG.

Background

Frac Diamond Aggregates (FDA) and ACG borrowed $30,800,000 from Defendant's or their predecessors pursuant to a Credit Agreement dated as of May 18, 2012 (the Credit Agreement). FDA granted a security interest in the form of a Deed of Trust on a mine located in Hancock County, Mississippi (the Mine). ACG granted a security interest in its leasehold interest for its drying facility located in Pearl County, Mississippi, together with certain equipment and personal property (Drying Facility Assets). The other Defendants (the Guarantor Defendants) guaranteed the obligations of FDA and ACG.

By letter dated May 13, 2013, Spectrum, the Plaintiffs' Administrative Agent, notified the borrowers that their failure to pay interest on May 10, 2013, or within the applicable grace period, constituted an event of default under the Credit Agreement (the Event of Default). By letter dated July 16, 2013, Spectrum again advised borrowers of one or more Events of Default. By letter dated July 30, 2013, Spectrum yet again notified borrowers of the continuing Events of Default, that Spectrum elected to accelerate the maturity date of the loan, and demanded immediate repayment of all principal and interest. Notwithstanding this notice and demand, the borrowers failed to repay any principal or interest. By letters dated July 30, 2013, Spectrum demanded that the Guarantor Defendants repay the principal and interest due on the loan.

At a non-judicial foreclosure held on October 1, 2013 in Hancock County, Mississippi, the Mine was sold at auction. Spectrum, on behalf of the Plaintiffs, submitted a $4,000,000 credit bid, and acquired the Mine through Mine Assets Holding, LLC. Although Spectrum sought to foreclose on the Drying Facility Assets, on October 3, 2013 creditors of ACG filed an involuntary bankruptcy proceeding under Chapter 11 of the United States Bankruptcy Code, thereby staying the foreclosure.

Prior to the Mine foreclosure, but after default, Spectrum commenced the Enforcement Action against Mr. Hess, pursuant to CPLR 3212, seeking amounts due under his guaranty. Spectrum foreclosed on the Mine during the pendency of the Enforcement Action and Mr. Hess asserted that the public auction sale price did not reflect the fair market value of the Mine. This court rejected Mr. Hess's arguments and granted Spectrum's motion for summary judgment in lieu of complaint (the April 18 Decision and Order), crediting $4,000,000 to Mr. Hess's account. A judgment, taking into account the credit and interest due, in favor of Spectrum for $34,107,375.78 was entered on the May 27, 2014.

Discussion

Plaintiffs are entitled to an order of reference to confirm the sale of the Mine and to determine the amount of the deficiency judgment. Defendants' motion to dismiss or for a stay is denied.

Plaintiffs have complied, in filing this motion, with the requirements of New York Real Property Actions and Proceedings Law (RPAPL) 1371. Section 1371 requires that a motion for leave to enter a deficiency judgment and for an order confirming the sale be entered within 90 days of the sale of a mortgaged property, or the proceeds of sale will be deemed full repayment of the underlying loan. RPAPL § 1371(3).

Defendants are incorrect in asserting that ACG is a necessary and dispensable party, and that its inability to participate in these proceedings warrants dismissal under CPLR 3211 (a) (10). The law is clear that a borrower is not a required party to a lawsuit between lender and guarantor. "A guarantee is a contract separate from and independent of the underlying contract [...] Indeed, the specific purpose of a guarantee is to give the beneficiary recourse separate from any action against the principal debtor [...]." *Cong. Factors Corp. v. Meinhard Commercial Corp.*, 129 Misc. 2d 726, 728 (Sup. Ct., N.Y. County 1985). It would be contrary to the very purpose of a guarantee if the lenders did not have the ability to seek collection from the guarantors, separate and apart from their ability to bring a claim against the borrowers.

Plaintiffs' claims are not premature, and Defendants' motion to dismiss under CPLR 3211 (a) (7) also fails. RPAPL § 1371 explicitly requires that this motion be brought within the ninety-day window subsequent to foreclosure. Plaintiffs have done so.

Defendants' argument that this action is duplicative of the Enforcement Action reveals a misunderstanding of the claims at issue in each of these actions. The Enforcement Action was brought to enforce the obligations of the guaranty against Mr. Hess. The instant action is brought under RPAPL § 1371, which provides for a motion to confirm a sale and for a deficiency judgment.

The case Defendants rely on in support of their argument that the instant action is duplicative of the Enforcement Action actually supports the Plaintiffs' position. *See Harry M. Stevens, Inc. v Medina*, 63 AD2d 925 (1st Dept 1978). In *Harry M. Stevens*, the court held that actions are only duplicative where they involve "the same parties and issues in which plaintiff will have a resolution of the question which he presents here." 63 AD2d at 925 (emphasis added). The question this court was asked to answer in the Enforcement Action

(Is Mr. Hess liable to Spectrum under the guaranty?) is not the same question it is asked to answer in the instant action (What is the appropriate deficiency amount?).

Under the doctrine of collateral estoppel, this court's ruling with respect to the amount of the judgment has a preclusive effect with respect to Defendants' ability to relitigate that determination. The doctrine of collateral estoppel applies where the parties to the current action were in privity with respect to the decision in a prior action, where that decision was based on the same issue now before the court, and where the party in the prior action had a full and fair opportunity to contest the decision now said to be controlling. *Schwartz v Pub. Adm'r of Bronx Cnty.*, 24 NY2d 65, 71 (1969).

Mr. Hess and the other Guarantor Defendants are in privity, as Mr. Hess is the sole member of both ACG and the Rowan Group LLC, which in turn are the sole members of the Guarantor Defendants. Mr. Hess also signed each of the guaranties on behalf of each of the Guarantor Defendants on the same day. *See e.g. Laramie Springtree Corp. v Equity Residential Props. Trust*, 38 AD3d 850, 852 (2d Dept 2007) (Parties held to be in privity and collateral estoppel applied where "[b]oth entities have the same president, Mark Silverman, and the same principals. Silverman also entered into both Agreements on the same day for each of the Laramie entities."). The issue of the fair market value of the Mine was litigated in the Enforcement Action, due to Mr. Hess's raising it in his defense. To relitigate the issue would impair the prior decision. *See Provident Bank v Tropp*, 2014 NY Misc LEXIS 1380, at *3. Finally, Mr. Hess did have a full and fair opportunity to contest the deficiency amount in the Enforcement Action, as demonstrated by the fact that (1) the Enforcement Action was in the same forum, (2) Spectrum sought roughly $30 million, (3) Mr. Hess was represented by competent and experienced counsel, (4) Guarantor Defendants rely on largely the same evidence, and (5) the same law

applies. *See Ryan v N.Y. Tel. Co.*, 62 NY2d 494, 501 (1984) ("Among the specific factors to be considered [in determining whether a party had a full and fair opportunity to litigate an issue] are the nature of the forum and the importance of the claim in the prior litigation, the incentive to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in applicable law and the foreseeability of future litigation.").

Defendants' contention that these proceedings should be stayed pursuant to CPLR 2201, pending the resolution of the Mississippi Bankruptcy proceedings, is not warranted, as the parties' intent with respect to jurisdiction is ultimately controlling. *Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 (1st Dept 1995). Since the parties agreed "to submit to the exclusive jurisdiction of, and venue in, any state court located in the City and County of New York," in the forum selection clause of their guaranty agreements, it is clear that this court is the proper forum for resolution of this case.

When considering whether a stay should be issued in favor of federal proceedings, a court must ask (1) which forum is better suited to resolve all the issues, and (2) which forum has the greater expertise in the trial of such issues. *Grand Cent. Bldg. v N.Y. & Harlem R.R. Co.*, 59 AD2d 207, 210 (1st Dept 1977). Here, the law to be applied is the New York Real Property Actions and Proceedings Law, as determined by the agreed upon terms of the Credit Agreement and guaranty agreements signed by all the parties. It is not important for these purposes that the real property sits in Mississippi. The cases that Defendants cite in support of that proposition do not address a situation in which a contract between the parties selects a forum other than that where the real property sits, which take precedence over the location of the property. Additionally, Defendants' argument that the issues should be tried in a court that possesses

familiarity and expertise with the trial of such issues (*Gen. Aniline & Film Corp. v Bayer Co.*, 305 NY 479, 485-86 (1953)), actually militates against submitting this issue to the Bankruptcy Court. The motion that Plaintiffs seek is not a Bankruptcy Court issue, but a real property law issue that concerns the Guarantor Defendants, and not the party in bankruptcy.

Lastly, the automatic stay from bankruptcy proceedings that applies to ACG should not be extended to Guarantor Defendants in this case. It is black letter law that Section 362 of the Bankruptcy Code cannot be invoked to stay proceedings involving guarantors. *Beltrone v Gen. Schuyler & Co.*, 229 AD2d 857, 858 (3d Dept 1996).

Conclusion

Accordingly, it is

ORDERED that plaintiffs' motion to confirm the sale of the Mine is granted; and it is further

ORDERED that plaintiffs are owed a deficiency judgment of $34,106,840.78, as of May 27, 2014, plus interest at the statutory rate from that same date, and costs and disbursements upon submission of a bill of costs, as taxed by the Clerk aggregating $_____; and it is further

ORDERED that plaintiffs shall submit a judgment, which the Clerk is directed to enter.

Dated: November 10, 2014

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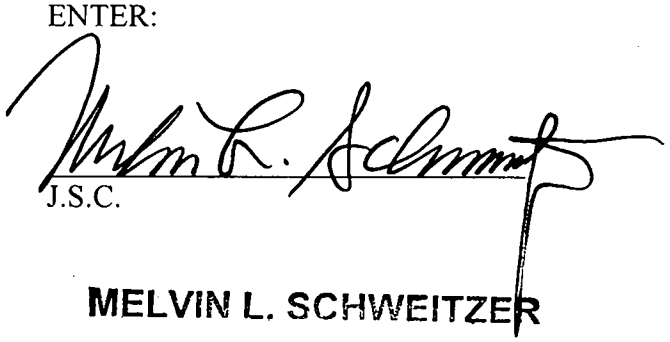

J.S.C.

MELVIN L. SCHWEITZER