SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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CAPITAL ONE TAXI MEDALLION FINANCE,

Plaintiff,

DECISION/ORDER
Index No. 651841/2015

-against-

PATTON R. CORRIGAN and MICHAEL LEVINE

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Capital One Taxi Medallion Finance ("Capital One" or "plaintiff") moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendants Patton R. Corrigan and Michael Levine (collectively, "Guarantors") on guarantees, with effective dates of April 6, 2012, and to award plaintiff judgment against Guarantors for $57,201,109.22 plus interest. In its notice of motion, Capital One also seeks "all of its costs, charges and expenses, including attorneys' fees and disbursements, incurred in enforcing the Guarantees." This motion is being decided along with motion sequence number 001 in *Transit Funding Associates LLC v. Capital One Equipment*, Index No. 652346/2015 ("TFA Action").

Plaintiff Capital One and Transit Funding Associates LLC ("TFA") entered into a revolving advised line of credit for $80 million. By the Loan and Security Agreement ("Loan Agreement"), Capital One agreed to make revolving loans to TFA ("Advances"), such that TFA could "borrow, repay pursuant to th[e] [Loan] Agreement and reborrow" between $50,000 and $80 million. Loan Agreement Section 2.1(c). Advances could be extended until June 30, 2012, and Advances not repaid by June 30, 2012 were due on the Loan's maturity date, July 1, 2012. *Id.* Pursuant to a Third Extension Agreement, the maturity date was extended to December 1, 2014.

Plaintiff brings this action to recover on two guarantees, both with effective dates of April 6, 2012 (individually, "Guaranty" and collectively, "Guarantees"), executed by the Guarantors in favor of Capital One, by which the Guarantors guaranteed the obligations of TFA to Capital One. Each Guaranty states,

> [t]he Guarantor hereby absolutely, irrevocably and unconditionally guarantees to the Lender the full and prompt payment by the Borrower of all monetary Borrower's Liabilities when and as the same shall become due and the full performance by the Borrower of all of its non-monetary Borrower's Liabilities to the Lender. The Guarantor hereby absolutely, irrevocably and unconditionally agrees that upon any default by the Borrower in the timely payment of any monetary Borrower's Liabilities to the Lender, the Guarantor will promptly pay the same, and upon any default by the Borrower in any non-monetary Borrower's Liabilities, the Guarantor will promptly perform the same.

Each Guaranty also makes each Guarantor liable, "as primary obligor and not merely as a surety" for amounts TFA owes Capital One, along with "interest . . . and all attorneys' fees, costs and expenses of collection incurred by the Lender in enforcing any of such Borrower's Liabilities."

Each Guaranty also states that "the obligations of the Guarantor under this Guaranty . . . shall not be affected, modified or impaired by any state of facts or the happening from time to time of any event, including . . . [t]o the extent permitted by law, any other circumstances which might constitute a legal or equitable discharge or defense of a surety or a guarantor." Each Guaranty further states that the

> Guarantor's liability hereunder shall in no way be limited or impaired by . . . the invalidity, irregularity or unenforceability, in whole or in part, of any of the Loan Documents, this Guaranty or any other instrument or agreement executed or delivered to Lender in connection with the Loan, except to the extent that there is a final adjudication by a court of competent jurisdiction of a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities.

On December 1, 2014, the Loan matured, with $57,201,109.22 due, along with interests and costs. Plaintiff alleges that TFA did not pay the amounts due under the relevant documents, and it had not yet paid five days after payment was due, constituting an Event of Default pursuant to

Section 7.1(a) of the Loan Agreement. Pursuant to the Guarantees, "[u]pon the occurrence of an Event of Default . . . the Lender may, without notice to the Guarantor or any other person, make the Borrower's Liabilities to the Lender, whether or not then due, immediately due from and payable hereunder by the [Guarantors]." Each Guaranty also states that "[t]he Lender . . . shall have the right to proceed first and directly against the Guarantor under this Guaranty without proceeding against or exhausting any other remedies which it may have and without resorting to any other security held by the Lender."

In support of its motion, plaintiff argues that it has evidenced its *prima facie* case for summary judgment. It also argues that summary judgment in lieu of complaint is appropriate because "the Guarantees are instruments for the payment of money only."

In opposition to the motions, defendants argue that summary judgment is inappropriate because there are genuine issues of fact as to whether the Guarantors are liable on the Guarantees, as well as whether the waivers of defenses are relevant and enforceable in this action.

Discussion

"[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.' The instrument does not qualify if outside proof is needed, other than simply proof of nonpayment or a similar de minimis deviation from the face of the document." *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 (1996) (internal citations omitted).

Here, plaintiff has made out its *prima facie* claim, by submitting the Loan Agreement and promissory note, the Guarantees, a Third Extension Agreement, and the Amended Affidavit of John P. O'Gorman, Capital One's Assistant Vice President, wherein he states that TFA is in default. *See Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v. Navarro*,

25 N.Y.3d 485, 492 (2015); *German Am. Cap. Corp. v. Oxley Dev. Co., LLC*, 102 A.D.3d 408, 408 (1st Dep't 2013).

In opposing plaintiff's motion, defendants argue, *inter alia*, that each Guaranty limits the Guarantor's liability should a court deem that a defense applies to TFA's default. Specifically, as quoted above, each Guaranty states that

> Guarantor's liability hereunder shall in no way be limited or impaired by . . . the invalidity, irregularity or unenforceability, in whole or in part, of any of the Loan Documents, this Guaranty or any other instrument or agreement executed or delivered to Lender in connection with the Loan, except to the extent that there is a final adjudication by a court of competent jurisdiction of a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities.

However, "a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities" is what is being determined in the TFA Action. The Guarantors' liabilities under the Guarantees are enmeshed with TFA's defenses to the default. *See Cooperative Centrale*, 25 N.Y.3d at 492 (citation omitted) ("Thereafter, 'the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense.'") *Cf. German Am. Cap. Corp.*, 102 A.D.3d at 408–409 ("Such a defense, which rests upon an apparent claim of breach of a loan agreement provision regulating the availability of certain loan proceeds for marketing purposes, is separate from Oxley's unequivocal and unconditional obligation to repay the monies it was loaned."). Having raised a triable issue of fact, plaintiff's motion for summary judgment in lieu of complaint is denied. *See Bonds Fin., Inc. v. Kestrel Tech., LLC*, 48 A.D.3d 230, 231 (1st Dep't 2008).

In accordance with the foregoing, it is hereby

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

ORDERED that the plaintiff's moving papers, consisting of its notice of motion, memoranda of law, the Amended Affidavit of John P. O'Gorman, and the exhibits thereto, are hereby deemed the complaint in this action and the defendant's answering papers, consisting of defendants' memorandum of law, the Affidavit of Patton R. Corrigan and the exhibits thereto, and the Affidavit of Michael Levine and the exhibits thereto, are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 208, 60 Centre Street, on September 7, 2016, at 2:15 PM.

This constitutes the decision and order of the Court.

DATED: 7/15/16

JSC
HON. SALIANN SCARPULLA