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

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PAF-PAR LLC,

Plaintiff,

-against-

MICHAEL SILBERBERG and BEREL KARNIOL

Defendants.

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DECISION AND ORDER

Index No. 654384/2016
Mot. Seq. 001

Hon. Anil C. Singh, J.:

In this action seeking payment of a guaranty in the amount of $2 million, Paf-Par LLC ("Plaintiff" or "Paf-Par") filed a motion for summary judgment in lieu of a complaint under CPLR §3213. As part of this motion, Plaintiff alleged it cured the standing defect as determined by the Court of Appeals in the related action of Paf-Par LLC v. Silberberg, 24 N.Y.3d 910 (2014), and it timely sought redress in this court under CPLR 205(a). Michael Silberberg and Berel Karniol (together, the "Defendants") opposed and cross-moved seeking dismissal of Plaintiff's action and sanctions.

**Facts**

*Procedural History*

Plaintiff initially instituted an action on June 26, 2012 by making a motion for summary judgment in lieu of complaint. This Court, in an order dated February 6, 2013 dismissed Plaintiff's motion for summary judgment. See Paf-Par LLC v.

Michael Silberberg et al, 652243/2012 (Oing, J.). The court held that "plaintiff [could not] establish the existence of a debt for the very simple reason that the debt [had been] discharged pursuant to the terms of the loan modification agreement and pay off letter, and therefore plaintiff's claim for enforcement of a guarantee fail[ed]." Id. The court went on to hold that the underlying debt was "not merely reduced, but discharged by way of modification and by way of the borrower's payment under the loan modification of $11 million." Id.

The Appellate Division, First Department affirmed the decision and order of the court. Specifically, the First Department held that the language of the guaranty "[could not] operate to make the guarantor liable for more than what the primary obligor was obligated to pay and did pay." Paf-Par LLC v. Silberberg, 118 A.D.3d 446, 446 (1st Dept 2014). The First Department also concluded that plaintiff failed to establish standing. Id. at 446-47. The Court of Appeals granted leave to appeal and affirmed the First Department with costs, holding that "in this action pursuant to CPLR 3213, Paf-Par LLC failed to demonstrate standing to maintain the action." Paf-Par LLC v. Silberberg, 24 N.Y.3d 910 (2014) (together with the prior related decisions, "Paf-Par I").

*Substantive Facts*

In July 2007, seven limited liability companies (the "Borrower") borrowed $13 million from CAD Funding LLC ("CAD"), Plaintiff's predecessor-in-interest. Borrower and CAD entered into a Promissory Note, dated July 14, 2006, and was secured by properties in and around Syracuse, New Yok. In order to secure this loan, CAD required Michael Silberberg and Berel Karniol (together, the "Defendants") to execute a Guaranty, dated July 14, 2006 (the "Guaranty"). Neither party disputes that, by the terms of the Guaranty, Defendants made a joint and several promise to repay $13 million in "Guaranteed Obligations," meaning all of Borrower's obligations under the Loan Documents which included the "Security Instrument, the Note, the Assignment, and any and all other agreements, instruments, certificates, or documents executed and delivered by borrower ... in connection with the Loan." Guaranty, §1.2; see also Mortgage, Security Agreement, Assignment of Rents and Fixture Filing, dated July 14, 2006.

Therefore, the Guaranty is allegedly Defendant's separate obligation to repay the Guaranteed Obligations. See Guaranty, §1.1 (Defendants "absolutely, irrevocably and unconditionally guarantee to Lender (and its successors and assigns), jointly and severally, the payment and performance of the Guaranteed Obligations ..."). According to Plaintiff, Defendants' liability under the Guaranty is independent of the Note and is fixed at $13 million unless the Guaranty itself—and no other loan document—is modified in writing. See Guaranty, §5.5. Defendants

claim that because the "Guaranteed Obligations" are defined in the Guaranty to include the borrowers' obligations under the Loan Documents, and "Loan Documents" are defined in the Security Instrument as including the Promissory Note, then the Guaranty thereby covers any modified "Promissory Note," which defines itself to include any modifications thereof.

The parties agree that on December 16, 2008, one of the properties securing the mortgage was sold and the sum of $1 million was paid by the Borrowers to the lender and the outstanding principal was reduced to $12 million. See Silberberg Aff. ¶6. On or about July 24, 2009, the parties executed a Loan Modification and Extension Agreement (the "Modification Agreement"), under which the principal amount due under the Promissory Note was reduced to $11 million, provided that defendants paid the loan in full and $1 million upon the signing of the Modification Agreement.

Although Plaintiff agrees that the Modification Agreement was entered into, Plaintiff contends that the Borrowers were obligated to repay $9 million of the remaining $11 million in Guaranteed Obligations and that Defendants are jointly and severally responsible for paying the remaining $2 million in defaulted Guaranteed Obligations. Specifically, the Modification Agreement states,

> Lender and Borrower agree that a novation is expressly denied and is not intended to be effected, and except as amended or modified by this

> [Modification Agreement], the terms, provisions, conditions, rights, duties and obligations contained in the Loan Documents [including the Note] shall remain unchanged and unimpaired by this Agreement and are in full force and effect.

Modification Agreement, §6.

On or about September 25, 2009, Plaintiff issued a Payoff Letter to the Borrower, stating that the principal due under the Promissory Note was $8 million. On or about September 2009, Borrowers paid the full amount of $8,091,251.67 under the Payoff Letter. Upon this payment, Plaintiff assigned the Loan Documents to Syracuse Retail Funding, LLC ("Syracuse"), which, according to the Assignment of Mortgage, included all "notes or obligations described in said mortgage." Plaintiff alleges that the Guaranty was never paid off because Defendants still owed Plaintiff $2 million, the difference between the amount due under the Note and guaranteed under the Guaranty, and the $11 million in principal the Borrowers paid.

## Argument

### Legal Standard

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id. Summary judgment

is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986).

Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The court's role is "issue-finding, rather than issue-determination." Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

Whether this Action is Barred by *Res Judicata* based upon Paf-Par I

Plaintiff's action is not barred by *res judicata* based on the decision of the First Department and the Court of Appeals in Paf-Par I. "A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes." Pullman Group, LLC v. Prudential Ins. Co. of America, 297 A.D.2d 578 (1st Dept 2002); see also Tong v. Hang Seng Bank, 210 A.D.2d 99, 100 (1st Dept 1994). This holding on res judicata grounds even applies where the court had already dismissed a party's prior action on substantive grounds. Pullman Group, 297 A.D.2d at 578 ("The

dismissal of plaintiff's prior action, based on the determination that plaintiff neither owned the intellectual property at issue, nor had an express assignment of the rights thereto is therefore not a bar to the instant action.").

Additionally, "dismissal for...lack of standing...[is] not intended to have any determinative effect 'on the merits' of the action." 10 Weinstein-Korn-Miller, N.Y. Civ. Pract. ¶5011.11, at 50-116 (2d ed.). "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347 (1999).

Defendant's reliance on Landau v. LaRossa, Mitchell & Ross, 862 N.Y.S.2d 316 (2008), is misplaced. The Court of Appeals in Landau held that "when the disposition of a case is based upon a lack of standing only, the lower courts have not yet considered the merits of the claim." Id. at 384, citing Matter of Schulz v. State of New York, 81 N.Y.2d 336, 347 (1993). Similarly, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred." O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981); see also Toscano v. 4B's Realty VII Southampton Brick & Tile, LLC, 84 A.D.3d 780 (2d Dept 2011); Hoffer v. Bank of America, N.A., 136 A.D.3d 750 (2d Dept 2016).

"A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes." Tap Holdings, LLC v. Orix Fin. Corp., 109 A.D.3d 167, 177 (1st Dept 2013) quoting Tico, Inc. v. Borrok, 57 A.D.3d 302 (1st Dept 2008). "If applied too rigidly, res judicata has the potential to work considerable injustice. 'In properly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one.'" Landau, 862 NY.S.2d at 320, quoting Matter of Reilly v. Reid, 45 N.Y.2d 24, 28 (1978).

Here, it is unclear whether the claim was brought to a final conclusion. When a dismissal for lack of standing should have been granted, courts may be precluded from issuing judicial decisions on the merits, as the decisions "can have no immediate effect and may never resolve anything." Hirschfeld v. Hogan, 60 A.D.3d 728, 729 (2d Dept 2009). It is clear that Plaintiff lacked standing in Paf-Par I. Thus, without obtaining the proper documentation to establish proper standing, the decision of the First Department would fail to resolve the matter. The First Department held that the language of the guaranty "[could not] operate to make the guarantor liable for more than what the primary obligor was obligated to pay and did pay." Paf-Par LLC v. Silberberg, 118 A.D.3d 446, 446 (1st Dept 2014). However, the Court of Appeals ruled that Paf-Par failed to establish standing but remained silent as to whether its decision operated as an affirmance of the First Department's

ruling on the guaranty. Following the clear policy set forth, *supra*, this court will not deprive Plaintiff its day in court.

Defendant's contention that there is specific language that the Court of Appeals would have used if it intended to limit its affirmance to a holding on the standing issue is misguided. See Def. Opp. Memo., p. 4[1]. This court is unaware of any language indicating that the Court of Appeals limits its affirmance to a holding on the standing issue but not on the merits of the case.

Finally, the action is timely under CPLR §205(a). CPLR §205(a) provides, in relevant part,

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff...may commence a new action upon the same transaction or occurrence...within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

[1] "The Court of Appeals could have specifically limited its affirmance to a holding on the standing issue, but did not. It 'affirmed' the appellate order, which decided the case on the merits. As an example in contrast, see State by Lefkowitz v. Parker, 30 N.Y.2d 964, 965 (1972), where the Court specifically preserved a new suit and therefore drafted the affirmance differently: ("Order affirmed, without costs, on the sole ground that the Attorney-General is without standing to maintain this proceeding under section 63 of the Executive Law. Matter of State of New York v. Parkchester Apts. Co., 28 N.Y.2d 842. Dismissal is without prejudice to such other action or proceeding as they may be advised, by or on behalf of the tenants as owners of the deposits held in trust by the landlords, to compel compliance with the statute effective September 1, 1970 or to such other action or proceeding by public authority as may be authorized and appropriate.)".

The original complaint in Paf-Par I was timely commenced. The supposed breach of the Guaranty occurred on July 15, 2009 and Paf-Par I was commenced on June 26, 2012, within the six-year statute of limitations imposed under CPLR §213(2). This action commenced within six months of the March 24, 2016 Court of Appeals' decision that terminated Paf-Par I.

Whether Plaintiff Has Cured its Standing

Plaintiff has not cured its standing based solely upon the evidence of the assignment from the original lender, CAD, to Plaintiff. Plaintiff must also show that it is still a party to the Guaranty, which it cannot do.

Under the Restatement (Third) of Suretyship and Guaranty, "it can usually be assumed that a person assigning an underlying obligation intends to assign along with it any secondary obligation supporting it. Thus, unless there is agreement to the contrary … assignment of the underlying obligation also assigns the secondary obligation." See also Stillman v. Northrup, 109 N.Y.473 (1888) ("it is well settled that the assignment of a bond and mortgage carries with it the guaranty of payment or collection, although not mentioned in the assignment."); Midland Steel Warehouse Corp. v. Godinger Silver Art Ltd., 276 A.D.2d 341, 343 (1st Dept 2000) ("A guarantee is an agreement to pay a debt owed by another that creates a secondary liability and thus is collateral to the contractual obligation."); Hayden Asset V, LLC

v. JGBR, LLC, 44 Misc. 3d 1220(A) (Sup. Ct. Suffolk Cnty. July 21, 2014) ("Because of a guaranty's link to the principal obligation, an obligee's assignment of the principal obligation is sufficient to manifest the requisite intent to assign the guaranty, absent some prohibitory term in the guarantee itself.").

The parties agree that plaintiff assigned all of the Loan Documents to Syracuse Retail Funding, LLC ("Syracuse") in the Assignment of Mortgage, dated September 25, 2009. This assignment included all "notes or obligations described in said mortgage." See Assignment of Mortgage. Plaintiff contends that the Guaranty contains certain prohibitory terms that contradicts a finding that the Guaranty is a secondary liability or collateral to the principal obligation. Specifically, Plaintiff argues that the Guaranty states that it is a "primary," "joint and several," and "absolute and unconditional" obligation of the Guaranteed Obligations. See Guaranty, Article 2. The Guaranty further states that no "modification," "forbearance," "adjustment," "compromise," or "alteration or rearrangement" with the Borrower would "reduce or discharge" Defendants' obligations under the Guaranty. Id. at §1.2. Therefore, according to Plaintiff, the Guaranty is a primary, not a secondary, liability, and that it was not transferred in the Assignment of Mortgage.

Here, it is unclear whether there is an agreement to the contrary, as required under the Restatement (Third) of Suretyship & Guaranty, that would require this

court to hold that the Guaranty was not transferred in the Assignment of Mortgage. The sections of the Guaranty on which Plaintiff relies do not apply where the Guaranteed Obligations are not merely reduced, but are discharged, by way of the Loan Modification Agreement and Borrowers' payment under said agreement. As there is no agreement to the contrary regarding whether the Guaranty became a primary obligation in either the Guaranty or the Loan Modification Agreement, the Guaranty is a secondary obligation that was transferred in the Assignment of Mortgage to Syracuse. As a result, Plaintiff does not have standing to assert this issue, as the Loan Documents were transferred to Syracuse, thereby making Syracuse the Lender under the Promissory Note and the party with standing in this action.

Defendants' also argue that there is no standing because the Guaranty Assignment from CAD to Plaintiff is not authentic. Expert verification of a signature is only warranted where there is a genuine triable issue of fact. See Pasqualini v. Tedesco, 248 A.D.2d 604 (2d Dept 1998); Seoulbank, New York Agency v. D&J Exp. & Imp. Corp., 270 A.D.2d 193 (1st Dept 2000); Lane Crawford Jewelry Ctr., Inc. v. Han, 222 A.D.2d 214 (1st Dept 1995). The disputed signatory, Mr. Lichtenstein, has confirmed that the signatures on the Guaranty Assignment are his and explained that he uses different signature styles, which he can prove through the submission of other documents. Similarly, the Guaranty Assignment and his initial

Affidavit contain the same signature style. Therefore, Defendants have not raised a genuine triable issue of fact as to the authenticity of Mr. Lichtenstein's signature.

Plaintiff's Motion for Summary Judgment in Lieu of a Complaint and Defendants' Cross-Motions

Plaintiff's motion for summary judgment in lieu of a complaint is denied and Defendants' cross-motion to dismiss this action is granted. In order to establish a prima facie case to enforce a guaranty, a plaintiff must show (1) the existence of a debt and (2) the primary obligor's default on that debt. Superior Fid. Assur., Ltd. v. Schwartz, 69 A.D.3d 924 (2d Dept 2010). Plaintiff cannot establish that the debt is still in existence.

Although not binding, this court finds the First Department's holding in Paf-Par v. Silberberg, 118 A.D.3d 446 (1st Dept 2014), persuasive. Ruling on facts identical to those presented in this case, the court held that "since a guaranty 'is a contract of secondary liability … a guarantor will be required to make payment only when the primary obligor has first defaulted.'" Id., quoting Weissman v. Sinorm Deli, 88 N.Y.2d 437, 446 (1996). The court went on to find that Defendants guaranteed the payment under a promissory note. Borrowers satisfied these obligations under the Loan Modification and Extension Agreement and the Payoff Letter signed by Plaintiff. Id.

Additionally, the court found that plaintiff "did not make out a prima facie case, since it did not show that the guarantors failed to make a payment called for by the terms of their guaranty." Id. The Payoff Letter showed that Borrowers owed $8 million on the loan, which had been indisputably paid off. As a guarantor cannot be bound if there is no longer any debt owed and therefore can never owe more than the principal obligor, and the debt has been paid, Plaintiff has not established a prima facie case for summary judgment. See Walcutt v. Clovite Corp., 13 N.Y.2d 48 (1963); H.H. & F.E. Bean, Inc. v. Travelers Indemnity Co., 67 A.D.2d 1102 (4th Dept. 1979). As Plaintiff has failed to establish the existence of a debt, it necessarily follows that it cannot satisfy the second prong outlined in Schwartz, namely, a default on the debt owed.

Plaintiff's reliance on factually similar cases is misguided. In 136 Field Point Circle Holding Co., LLC v. Invar International Holding, Inc., 2016 WL 1086554 (2d. Cir. Mar. 21, 2016), the Second Circuit upheld a Guaranty, whereby defendant "absolutely, unconditionally, and irrevocably guarantee[d] to [plaintiff] … the full … payment [of $25,000 per month] … under the Lease," including a $1,000,000 holdover payment "in the event [defendant] overstayed the term of the Lease." Id., at *1.

The defendant "overstayed the term of the Lease," which triggered the liquidated damages clause, thus creating a new "valid underlying debt" defendant

was bound to satisfy. Id. Plaintiff relies on the court's use of Cooperative Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro, 25 N.Y.3d 485 (2015), noting that "where a guaranty provides that it is 'absolute and unconditional irrespective of ... any lack of validity or enforceability of the agreement ... or ... any other circumstance which might otherwise constitute a defense,' the guarantor is precluded from asserting a defense as to the 'existence of a valid *underlying debt*.'" 136 Field Point, 2016 WL 1086554, at *2 (emphasis added). In the present case, however, Plaintiff's Payoff Letter stated an outstanding obligation of $8 million under the Promissory Note, which Borrowers paid in full. Thus, there was neither an underlying debt or a default in payment thereof. See id., citing City of New York v. Clarose Cinema Corporation, 256 A.D.2d 69, 71 (1st Dept 1998).

Similarly, in Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 188 F.3d 31, 33 (2d Cir. 1999), plaintiff loaned funds to a hotel developing company whose president, among others, guaranteed the loan under an agreement containing "a general waiver of defenses." Id. Following the borrowing company's default, the company's controlling shareholder released the company—not the original guarantors, including the company's president—from the debt obligation, which the president nevertheless secured through a letter directing defendant bank to hold the funds in escrow until

the satisfaction of the loan or the plaintiff lender's instructions, which instructions defendant disregarded as nonbinding. Id.

Noting that "a guarantor can consent in advance to remain liable even after" the principal debtor is discharged from an obligation, such as by "a waiver of defenses that is broad enough to preclude the defense of release in a subsequent creditor action," the court found defendant bank liable to plaintiff. Id. at 34-35 citing, *e.g.*, Inland Credit Corp. v. Weiss, 63 A.D.2d 640 (1st Dept 1978). Unlike in Compagnie Financiere, where the underlying debt remained entirely unpaid, in the present case, there was simply no outstanding obligation to enforce against defendant and thus no transferrable liability.

Therefore, Plaintiff's motion for summary judgment in lieu of a complaint is denied and Defendants' cross-motion to dismiss this action is granted.

Defendant's Cross-Motion for Sanctions

Defendants' motion for sanctions to be imposed on plaintiff pursuant to 22 NYCRR §130-1.1 is denied.

A court has the discretion to "award ... costs in the form of reimbursement for actual expenses" and/or impose financial sanctions for frivolous conduct. Ortega v. Rockefeller Ctr. N. Inc., 2014 N.Y. Misc. LEXIS 6079 at *4 (Sup. Ct. N.Y. Cnty. Oct. 3, 2014). Conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

Id. This determination is discretionary and the court declines Defendant's invitation to impose sanctions.

Accordingly, it is hereby

ORDERED that Paf-Par LLC's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that defendants motion to dismiss the action in its entirety is granted; and it is further

ORDERED that defendants motion for sanctions is denied.

Date: January 30, 2017
New York, New York

Anil C. Singh