

J-Bar Reinforcement Inc. v Crest Hill Capital LLC

2017 NY Slip Op 32108(U)

October 3, 2017

Supreme Court, New York County

Docket Number: 650404/2016

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

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J-BAR REINFORCEMENT INC.,

Plaintiff,

DECISION/ORDER

Index No. 650404/2016
Motion Seq. No. 003

-against-

CREST HILL CAPITAL LLC,

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this loan default action plaintiff J-Bar Reinforcement Inc. (“J-Bar”) moves for an order: (i) confirming the report of Special Referee Ira Gammerman pursuant to CPLR § 4403 and 22 NYCRR § 202.44; (ii) granting summary judgment in lieu of the complaint if the report of the Special Referee is confirmed; and (iii) imposing sanctions and attorneys’ fees against defendant Crest Hill Capital LLC (“Crest Hill”) pursuant to CPLR § 8303-a and 22 NYCRR § 130-1.1(a).

J-Bar originally moved for summary judgment in lieu of complaint and, in opposition Crest Hill and co-defendant Mantis Funding LLC (“Mantis Funding”) asserted, among others, that the summary judgment should be denied because they did not know that Ron Meyers, attorney for J-Bar, had the authority to send a July 16, 2015 non-extension notice (the “Non-Extension Notice”).

In an interim decision and order dated September 16, 2016, I held J-Bar’s motion in abeyance pending receipt of the report of a Special Referee, who was charged with

hearing and reporting on the issue of whether Crest Hill knew or reasonably should have known that attorney Ron Meyers had the authority to send the Non-Extension Notice on behalf of J-Bar (the “Referred Issue”). I dismissed the action against Mantis Funding as its name did not appear on the Non-Extension Notice, thus Mantis was not then in default.

On December 1, 2016, Special Referee Gammerman issued a report, in which he held that, because the parties had so stipulated on the record, the answer to the Referred Issue was yes. (the “Referee Report”).

In opposition to J-Bar’s motion to confirm the Referee’s Report and for judgment on the defaulted loan, Crest Hill cross-moves for an order (i) pursuant to the Court’s inherent authority to vacate or modify its own erroneous ruling to either (a) vacate the decision and order, and instead dismiss this action, or, in the alternative, (b) resettle and clarify the decision and order so as to provide that J-Bar may not execute upon or enforce its judgment against Crest Hill until such time as Crest Hill has fully satisfied its debt obligations to its senior lenders, and (ii) pursuant to CPLR § 2201 and CPLR § 5204, staying proceedings to enforce payment of any judgment to be entered against Crest Hill until such time as Crest Hill has fully satisfied its debt obligations to its senior lenders.

Discussion

1. Referee’s Report

CPLR § 4403 states that upon the motion of any party or upon the judge’s initiative, the judge “may confirm or reject, in whole or in part, the verdict of an advisory jury or the report of a referee to report.” A “special referee’s findings of fact and

credibility will generally not be disturbed where substantially supported by the record.”

RC 27th Ave. Realty Corp v. N.Y. City Hous. Auth., 305 A.D.2d 135, 135 (1st Dep’t 2003). I find that Special Referee Gammerman’s report and recommendation to the Referred Issue is supported by the record because the parties stipulated that the answer to the Referred Issue was “yes.” Accordingly, the Referee Report is confirmed.

2. Summary Judgment in Lieu of Complaint

As the Referee found that the deliverance of the Non-Extension Notice by Ron Meyers was sufficient and effective, the loan repayment plus interest was due on January 16, 2016. Accordingly, J-Bar has demonstrated a *prima facie* case by proof of the signed note and failure to make the repayment. Based on the foregoing reasons, I grant J-Bar’s motion for summary judgment in lieu of the complaint on the issue of liability.

3. Attorney’s Fees and Sanctions

J-Bar argues that the Court should impose attorney’s fees, costs, and sanctions against Crest Hill for asserting that it did not know that Meyers had authority to send the Non-Extension Notice. Section 130-1.1 of the Codes, Rules and Regulations of New York provides, in relevant part, that the court “may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct.” Conduct is considered frivolous if it is completely without merit or undertaken to primarily harass another party. *See* 22 NYCRR § 30-1.1(c). Upon reviewing the parties’ submissions, I find that Crest Hill’s conduct cannot be characterized as completely without merit or

undertaken for the primary purpose of harassment. Therefore, J-Bar's motion for sanctions is denied.

4. Cross-Motion to Vacate and to Stay This Proceeding

"A motion pursuant to CPLR § 5015 to vacate a judgment or order is addressed to the trial court's sound discretion, subject to reversal only where there has been a clear abuse of that discretion." *Maddux v. Schur*, 53 A.D.3d 738, 739 (3d Dep't 2008). A motion to vacate a judgment or order can be made "on several grounds, including newly-discovered evidence that probably would have produced a different result, fraud or misconduct by an adverse party and lack of jurisdiction." *Pritchard v. Curtis*, 101 A.D.3d 1502, 1503 (3d Dep't 2012).

Crest Hill proffers no new evidence to show why the previous decision and order should be vacated. On J-Bar's initial motion for summary judgment in lieu of complaint, I found that J-Bar had made out a *prima facie* case for judgment on its promissory note. Crest Hill argues, once again, that a junior lender like J-Bar cannot bring an action against a defaulting borrower where, as here, the borrower has an outstanding debt to a senior lender and there is a subordination agreement between the junior lender and senior lender preventing the junior lender from collecting on the junior debt before the senior lender is paid in full.¹ I previously partially rejected this argument, because it would be

¹ J-Bar and Crest Hill's senior lenders, Dominion Capital, LLC and DC CHMF I, LLC (together, "the Senior Lenders") executed a Subordination Agreement, dated as of July 17, 2014, in which J-Bar subordinated its debt to that of the Senior Lenders. J-Bar also agreed not to seek repayment of its junior debt until repayment of, or default under, the senior debt.

commercially unreasonable to perpetually deny a junior creditor the right to reduce a defaulted, unpaid junior debt to a judgment. *See, e.g., Kornfeld v. NRX Technologies*, 93 A.D.2d 772, *aff'd* 62 NY2d 686 (1984) (“Any question in terms of priority as to the rights of the plaintiffs as against other creditors has no bearing upon the plaintiffs' right to judgment as against the [defendants]”); *Imtrac Indus. v. Glassexport Co.*, 1996 U.S. Dist LEXIS 1022 at *16 (S.D.N.Y. 1996) (“Subordination affects only the *priority* of debt, not the *existence* of the underlying liability. The subordination clause in the [agreement at issue] impacts only [plaintiff's] right to collect, not its entitlement to judgment.”).²

However, I agree with Crest Hill that *execution* on the judgment must await payment in full of the Senior Lenders, or termination of the Subordination Agreement between J-Bar and the Senior Lenders. Accordingly, while I grant judgment in favor of J-Bar on the defaulted promissory note, execution on the judgment will be stayed in accordance with the terms of the Subordination Agreement between J-Bar and the Senior Lenders. Lastly, considering my grant of summary judgment to J-Bar, Crest Hill's motion to stay this proceeding is moot.

In accordance with the foregoing, it is

² It may very well be advantageous for a junior lender to reduce a defaulted debt to judgment even if the junior lender cannot execute on the judgment because of a subordination agreement. For example, post-judgment interest on the junior debt may exceed the interest rate set forth in the junior loan. Moreover, a judgment on the junior debt may trigger a default on the senior debt. A default on the senior debt may, in turn, start the process whereby the junior creditor may collect on the judgment, once the senior lender is paid on the defaulted senior debt.

ORDERED that plaintiff J-Bar Reinforcement Inc.'s motion to confirm the referee report is granted;

ORDERED that plaintiff J-Bar Reinforcement Inc.'s motion for summary judgment in lieu of the complaint against defendant Crest Hill Capital LLC is granted on the issue of liability; and it is further

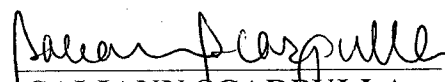
ORDERED that the parties are directed to appear on October 25, 2017 at 2:15 to discuss the most expeditious manner to determine the outstanding amount of principal and interest due; and it is further

ORDERED that plaintiff J-Bar Reinforcement Inc.'s motion for sanctions is denied; and it is further

ORDERED that defendant Crest Hill Capital LLC's motion to vacate or stay this proceeding is denied.

This constitutes the decision and order of the Court.

DATE: 10/3/17


SALIANN SCARRULLA,
JSC