National Credit Union Admin. Bd. v Bouzaglou
2018 NY Slip Op 32095(U)
August 27, 2018
Supreme Court, New York County
Docket Number: 651540/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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NATIONAL CREDIT UNION ADMINISTRATION BOARD, ACTING IN ITS CAPACITY AS CONSERVATOR OF MONTAUK CREDIT UNION

Plaintiffs

v

PAULA BOUZAGLOU, EFFY TAXI LLC, PAULA TAXI LLC, KAREEN TAXI LLC, JOELLE TAXI LLC, VERONIQUE TAXI LLC, ARIELLE TAXI LLC, IGAL TAXI LLC, RIKA TAXI LLC,

Defendants.

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Index No. 651540/16

DECISION AND ORDER

MOT SEQ 001

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff, National Credit Union Administration Board (NCUAB), acting in its capacity as conservator of Montauk Credit Union, moves pursuant to CPLR 3025(b) and 3212 for leave to amend the caption in and for summary judgment on the complaint. The defendants Paula Bouzaglou, Effy Taxi LLC, Paula Taxi, LLC, Kareen Taxi, LLC, Joelle Taxi, LLC, Veronique Taxi, LLC, Arielle Taxi, LLC, Igal Taxi, LLC, and Rika Taxi, LLC, oppose the motion and cross-move for summary judgment dismissing the complaint. The motion is granted to the extent that the caption is amended and the plaintiff is awarded summary judgment on the causes of action which are to recover for breach of contract, and the

motion is otherwise denied. The cross motion is denied.

II. BACKGROUND

The plaintiff seeks to recover on eight separate promissory notes executed by the defendant Paula Bouzaglou, both in her individual capacity, and as guarantor of eight limited liability companies (LLCs) that she owned and managed. The notes memorialized loans made to Bouzaglou and her LLCs to finance their purchase of eight separate taxi medallions. Although the plaintiff asserts causes of action to recover for breach of contract, unjust enrichment, and on an account stated in connection with each of the notes, it expressly withdraws all causes of action other than those to recover for breach of contract and on the guaranties.

In support of its motion, the plaintiff submits the pleadings, an attorney's affirmation, an affidavit of Lawrence S. Jones, vice president of Bethpage Federal Credit Union (BFCU), as successor by merger to Montauk Credit Union (MCU), the notes and related loan agreements, and notices of default and acceleration of payment dated February 16, 2016, which were sent by MCU to the defendants. Jones authenticates the notes and the notices of default and acceleration.

The plaintiff's submissions show that, on January 21, 2014, MCU and Bouzaglou, in her capacity as individual borrower and

guarantor, entered into eight separate loan agreements and security agreements with MCU for the benefit of her and the defendant Effy Taxi, LLC, Paula Taxi, LLC, Kareen Taxi LLC, Joelle Taxi, LLC, Veronique Taxi, LLC, Arielle Taxi, LLC, Igal Taxi, LLC, and Rika Taxi, LLC, respectively, to finance the purchase of taxi medallions by each of the LLCs. Bouzaglou executed eight separate promissory notes in her capacity as "borrower," and all of the loan documents also identified her as "guarantor" and president and secretary of the relevant LLC. The principal amount of the loans was $704,000, with interest at the rate of 4.5% per year, payable in 59 monthly installments, with a balloon payment due on January 21, 2019. As set forth in the loan documents, a default occurred when the borrower failed to "pay the full amount of each monthly payment" on the due date. The documents further provide that, upon default, the note holder may send a written notice demanding payment of the overdue amount by a date certain, and that failure to comply may result in the note holder requiring immediate payment of the full amount of the outstanding principal, plus interest.

Jones asserts that all of the defendants defaulted by failing to make the required monthly payments. He sets forth the dates of default, and avers that MCU notified the defendants of their default by letters dated February 11, 2016, which are annexed to his affidavit. The eight letters, which were mailed

to Bouzaglou and each of her LLCs, requested payment of the past due amount within 30 days in order to avoid acceleration of the debts. Jones asserts in his affidavit that the defendants failed to cure the default or make the accelerated payments.

The complaint asserts 24 causes of action against Bouzaglou, representing causes of action to recover for breach of contract, on an account stated, and for unjust enrichment in connection with all 8 loans and promissory notes. Three causes of action are asserted against each of the LLCs under the same theories of recovery, referable to the particular note on which each LLC was identified as a borrower. Since the plaintiff has expressly withdrawn the causes of action to recover on an account stated and for unjust enrichment, the only claims remaining against the defendants are to recover for breach of contract and on Bouzaglou's guarantees.

The plaintiff thus seeks summary judgment on the first cause of action against Bouzaglou and Effy Taxi, LLC, in the sum of $694,387.63, plus contractual interest from August 21, 2015; on the fourth cause of action against Bouzaglou and Rika Taxi, LLC, in the sum of 691,934.71, plus contractual interest from September 21, 2015; on the seventh cause of action against Bouzaglou and Paula Taxi, LLC, in the sum of $690,343.40, plus contractual interest from October 21, 2015; on the tenth cause of action against Bouzaglou and Joelle Taxi, LLC, in the principal

sum of $691,355.24, plus contractual interest from October 21, 2015; on the thirteenth cause of action against Bouzaglou and Kareen Taxi, LLC, in the sum of $691,355.88, plus contractual interest from October 21, 2015; on the sixteenth cause of action against Bouzaglou and Veronique Taxi, LLC, in the sum of $691,355.70, plus contractual interest from October 21, 2015; on the nineteenth cause of action against Bouzaglou and Arielle Taxi, LLC, in the sum of $691,357.98, plus contractual interest from October 21, 2015; and on the twenty-second cause of action against Bouzaglou and Igal Taxi, LLC, in the sum of $691,352.91, plus contractual interest from October 21, 2015.

The defendants served and filed separate answers, generally denying the allegations in the complaint, and asserting, as an affirmative defense, that they were not in default under the loan agreements and notes. They submit the affidavit of Bouzaglou, who asserts that the loans were being serviced by a third-party manager, and that she had no knowledge of whether the payments were made or not. She thus does not factually dispute that the defendants failed to make any required monthly payment. Bouzaglou also asserts that the plaintiff wrongfully demanded payment of the outstanding balance under the loan agreements, since the balloon payments required thereunder were not due until June 21, 2019. She also maintains that the plaintiff is not the proper party, and that the defendants never received any notice

of the merger of MCU into BFCU, or the assignment of the loans and notes to BFCU. In addition, Bouzaglou denies that she has any personal liability for the debts.

III. DISCUSSION

A. Amendment of Caption

That branch of the plaintiff's motion which is to amend the caption to reflect MCU's merger into BFCU, effective March 31, 2016, is granted. The plaintiff offers documentary evidence of the merger from the Office of Public & Congressional Affairs of the National Credit Union Administration, a federal agency that oversees national credit unions. In addition, Jones, in his affidavit, confirms that BFCU is the successor by merger to MCU.

CPLR 1018 provides that, "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." "The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court." Aurora Loan Servs. LLC v Lopa, 130 AD3d 952, 952 (2nd Dept. 2015). Where the validity of the assignment and/or acceptance of a note has been established, and there is no prejudice to the defendants, substitution of the assignee or successor, and the concomitant amendment of the caption, is warranted. See HSBC Guyerzeller

Bank AG v Chascona N.V., 42 AD3d 381 (1st Dept. 2007); Fairbanks Capital Corp. v Nagel, 289 AD2d 99 (1st Dept. 2001); see also Chase Home Fin., LLC v Howland, 149 AD3d 1405 (3rd Dept. 2017).

As this court previously ruled in National Credit Union Admin. Bd. v Kats, Index No. 651537/16 (Sep. 27, 2017), in which Jones submitted a similar affidavit, it was proper to substitute BFCU, as successor by merger to MCU, as the plaintiff in an action commenced by the NCUAB, as conservator of MCU. Since the merger of MCU into BFCU does not affect the defendants' obligations under the note, they cannot claim prejudice. Hence, BFCU, as successor by merger to MCU, is substituted as the plaintiff in place and stead of the NCUAB, as conservator of MCU, and the caption is amended accordingly.

B. Breach of Loan Agreements and Promissory Notes

It is well settled that 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 demonstrate the absence of any material issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action. See Zuckerman v City of New York, supra. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. See id.

The plaintiff's submissions establish its prima facie entitlement to judgment as a matter of law on all of the causes of action to recover for breach of contract, as it showed that there was "formation of a contract between the parties, performance by the plaintiff['s] [predecessor-in-interest], the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). Where, as here, a contractual obligation is a promissory note, a plaintiff met its burden by proving the existence of the subject note and nonpayment according to its terms. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008).

The breach of contract causes of action also seek to recover from Bouzaglou on her guaranties of the LLCs' respective contractual obligations. "Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement" (Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 [1st Dept. 2012], quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept.

1991]), and the liability of the obligor and the guarantor is joint and several. See 104 W. 27th St. Realty, Inc. v Lim, 110 AD3d 551 (1st Dept. 2013).

The plaintiff's proof shows that Bouzaglou, as both individual obligor and guarantor of the obligations of all eight LLCs, which were additional obligors, executed the subject promissory note and loan agreements in her individual capacity, on behalf of the LLCs, and in her capacity as guarantor. The proof further shows, prima facie, that Bouzaglou executed the notes and loan agreements in consideration of the loans, that she and the LLCs failed to pay installments when due, and have not paid anything on the notes since 2015, despite due demand and notice of acceleration under the terms of the notes. The plaintiff has thus made a prima facie showing that it is entitled to recover the principal sums set forth above, plus interest from the respective dates of default under the notes.

The defendants' submissions fail to raise a triable issue of fact in opposition to that showing. Bouzaglou's assertion that the balloon payments are not due until June 21, 2019, ignores the express terms of the default provisions in the loan documents, which permit the plaintiff to accelerate the entire obligation upon default. In addition, the submissions make clear that Bouzaglou signed the loan documents both in her individual capacity as "borrower," and as president, secretary, and

guarantor of the LLCs.

Nor is it relevant that Bouzaglou claims that neither she nor the LLCs received formal notice of the merger of MCU into BFCU prior to this motion. The merger was finalized only nine days after this action was commenced. As the plaintiff correctly notes, where a merger occurs, "[n]o formal assignment is required to effect a transfer of assets of a merged corporation to the receiving corporation." Ladino v Bank of. Am., 52 AD3d 571, 572-573 (2nd Dept. 2008); see Barclay's Bank of N.Y., N. A. v Smitty's Ranch, Inc., 122 AD2d 323 (3rd Dept. 1986). Pursuant to Banking Law § 602, a "receiving corporation shall be considered the same business as each corporation merged into it." The statute further provides that

> "any reference to a merged corporation in any contract, . . . whether executed or taking effect before or after the merger, shall be considered a reference to the receiving corporation if not inconsistent with the other provisions of the contract."

BFCU thus became "vested with all the property, rights and powers of any corporation so acquired." HSBC Bank USA v 85th Estates Co., 4 AD3d 306, 307 (1st Dept. 2004). The defendants have cited, and research has revealed, no authority requiring either the NCUA or BFCU to provide it with any particular notice of the merger before BFCU could exercise its statutorily acquired rights. See generally Onglingswan v Chase Home Fin., LLC, 104 AD3d 543 (1st Dept. 2013), revg 2011 NY Slip Op 32854 (U) (Sup.

Ct., N.Y. County, Oct. 3, 2011), and reinstating decision at 2010 NY Slip Op 30410 (Sup. Ct., N.Y. County, Mar. 3, 2010) (failure to provide borrower with notice of lender's merger into the defendant bank is not a ground upon which to deny summary judgment to the bank). Hence, the defendants cannot defeat the plaintiff's right to summary judgment with that argument.

Thus, that branch of the plaintiff's motion which is for summary judgment on the causes of action to recover for breach of contract is granted.

C. Cross Motion for Summary Judgment

The defendants' cross motion for summary judgment is premised on their contention that the plaintiff is not a proper party, arguing, in essence, that the plaintiff lacks standing to prosecute the action. In the first instance, the defendants waived that contention by failing to raise it as a defense in their answer or by making a pre-answer motion to dismiss the complaint on that ground. See CPLR 3211(e); Dermot Co., Inc. v 200 Haven Co., 58 AD3d 497 (1st Dept. 2009); Security Pac. Natl. Bank v Evans, 31 AD3d 278 (1st Dept. 2006).

In any event, the NCUAB is the governing body of the federal agency that oversees the operation and liquidity of national credit unions. The NCUA may close a credit union and appoint itself liquidating agent or conservator. Upon doing so, the NCUA "succeed[s] to . . . all rights, titles, powers, and privileges

of the credit union, and of any member, account holder, officer, or director of such credit union with respect to the credit union and the assets of the credit union." National Credit Union Admin. Bd. v United States Bank Natl. Assn, 2018 US App LEXIS 21418, 2018 WL 3650830 (2nd Cir., Aug. 2, 2018). The NCUA board may thereafter "collect all obligations and money due the credit union," and may "realize upon the assets of the credit union." Id. The NCUA Board thus has standing to collect all obligations due to MCU, over which it was appointed conservator, and to approve the merger of MCU into BFCU. As explained above, upon the approval of the merger, BFCU succeeded to all rights of collection under the notes previously held by MCU and thereafter held by the NCUA Board.

To the extent that the defendants contend that BFCU lacks standing, or is not the proper party, that contention is also without merit, since a plaintiff can establish standing by demonstrating, as BFCU did here, that the prior note holder merged into it. See Citimortgage, Inc. v Goldberg, 134 AD3d 880 (2nd Dept. 2015); JP Morgan Chase Bank, N.A. v Shapiro, 104 AD3d 411 (1st Dept. 2013); JP Morgan Chase Bank Natl. Assn. v Miodownik, 91 AD3d 546 (1st Dept. 2012).

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent

that the caption is amended and the plaintiff is awarded summary judgment on the first, fourth, seventh, tenth, thirteenth, sixteenth, nineteenth, and twenty-second causes of action, which are to recover for breach of contract and on the personal guaranties, and the motion is otherwise denied; and it is further,

ORDERED that the caption of the action is amended to read as follows:

BETHPAGE FEDERAL CREDIT UNION,
as successor by merger to
MONTAUK CREDIT UNION,

Plaintiff,

v

PAULA BOUZAGLOU, EFFY TAXI, LLC, PAULA TAXI, LLC, KAREEN TAXI, LLC, JOELLE TAXI LLC, VERONIQUE TAXI LLC, ARIELLE TAXI LLC, IGAL TAXI LLC, and RIKA TAXI LLC,

Defendants.

;

and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), who are thereupon directed to amend their records to reflect such change in the caption herein; and it is further,

ORDERED that the defendants' cross motion for summary judgment dismissing the complaint is denied; and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment in favor of the plaintiff and against the defendants

(1) Paula Bouzaglou and Effy Taxi, LLC, jointly and severally on the first cause of action in the sum of $694,387.63, plus interest at the rate of 4.5% per annum from August 21, 2015;

(2) Paula Bouzaglou and Rika Taxi, LLC, jointly and severally on the fourth cause of action in the sum of $691,934.71, plus interest at the rate of 4.5% per annum from September 21, 2015;

(3) Paula Bouzaglou and Paula Taxi, LLC, jointly and severally on the seventh cause of action in the sum of $690,343.40, plus interest at the rate of 4.5% per annum from October 21, 2015;

(4) Paula Bouzaglou and Joelle Taxi, LLC, jointly and severally on the tenth cause of action in the sum of $691,355.24, plus interest at the rate of 4.5% per annum from October 21, 2015;

(5) Paula Bouzaglou and Kareen Taxi, LLC, jointly and severally on the thirteenth cause of action in the sum of $691,355.88, plus interest at the rate of 4.5% per annum from October 21, 2015;

(6) Paula Bouzaglou and Veronique Taxi, LLC, jointly and

severally on the sixteenth cause of action in the sum of $691,355.70, plus interest at the rate of 4.5% per annum, from October 21, 2015;

(7) Paula Bouzaglou and Arielle Taxi, LLC, jointly and severally on the nineteenth cause of action in the sum of $691,357.98, plus interest at the rate of 4.5% per annum from October 21, 2015; and

(8) Paula Bouzaglou and Igal Taxi, LLC, jointly and severally on the twenty-second cause of action in the sum of $691,352.91, plus interest at the rate of 4.5% per annum from October 21, 2015.

This constitutes the Decision and Order of the court.

Dated: August 27, 2018

ENTER: _____
J.S.C.
HON. NANCY M. BANNON