

<b>Borremans v Gardner</b>
2019 NY Slip Op 30660(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 651772/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
MARC HENRY BORREMANS

Plaintiff,

-against-

JENA GARDNER, JAMES SALEH, AND JG WORLDWIDE  
LLC,

Defendants.  
-----X

Masley, J:

Index No.: 651772/2018

Motion Seq. No. 001

In motion sequence number 001, plaintiff Marc Henry Borremans moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendants JG Worldwide LLC (JG), Jena Gardner and James Saleh.

Borremans was the former sole member and owner of nonparty BIA LLC (BIA). Pursuant to a Membership Interest Purchase Agreement, dated July 3, 2017 (PA), Borremans sold all of his interest in BIA to JG for an aggregate purchase price of \$1,175,000. (NYSCEF Doc. No. 17). Of that \$1,175,000, JG agreed to pay \$175,000 to Borremans within five days of the closing date, and \$1,000,000 to Borremans pursuant to a secured promissory note dated July 3, 2017 (Note). (NYSCEF Doc. No. 18).

Under the Note, JG agreed to pay Borremans the \$1,000,000 in monthly instalments together with interest. The Note also required JG to make a balloon payment 8 months from the closing date in the amount of \$275,000 to Borremans, subject to certain terms and conditions. Gardner and Saleh simultaneously executed an agreement, also dated July 3, 2017, guaranteeing JG's obligations under the Note (Guaranty Agreement). (NYSCEF Doc No. 19.)

It is undisputed that JG did not tender payments under the Note for February 1, 2018 and March 1, 2018 and the balloon payment due on March 3, 2018. Accordingly, on March 15,

2018, Borremans served JG with a letter declaring an event of default under the Note for non-payment of dues. The letter declared the “Entire Note balance due and payable now.” (NYSCEF Doc. No. 7.) A written notice was also served on Gardner and Saleh on April 2, 2018, setting forth reasons for the right to receive payment under the Guaranty Agreement. (NYSCEF Doc. No. 9.)

#### Discussion

CPLR 3213 provides, “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” CPLR 3213 is generally used to enforce commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness, such that a *prima facie* case would be made out by the instrument and a failure to make the promised payments. (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dept 2017].) Accordingly, a plaintiff may establish entitlement to judgment to recover on a promissory note by submitting evidence of the note, and an affidavit of the plaintiff attesting to the defendant’s failure to make payment on the note. (*German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408, 408 [1st Dept 2018].) Once the plaintiff submits evidence establishing his or her entitlement to judgment, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense. (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012].) With respect to judgment on a guaranty, a plaintiff meets his or her *prima facie* burden by proving the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty. (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.” N.Y. Branch v Navarro* 25 NY3d 485, 492 [2015].) The burden once again shifts to the

defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense. (*Id.*)

#### The Note

Borremans alleges that JG's failure to make payments under the Note is an event of default and grounds for an accelerated summary judgment. In support of this motion, Borremans submits the Note (NYSCEF Doc. No. 4), the Guaranty Agreement (NYSCEF Doc. No. 5), his affidavit (NYSCEF Doc. No. 3), and an affirmation of Michael V. Rella, counsel for Borremans. (NYSCEF Doc. No. 6.)

In opposition, JG relies on the terms of the Note and PA, contending that the Note is not an instrument for the payment of money only. JG maintains that both Section 12 of the Note and Section 6.1(f) of the PA expressly grant JG with a right to set off and withhold amounts due under the Note. Therefore, JG asserts that the promise to pay is expressly conditional because it is subject to the terms and conditions in the PA. Indeed, JG informed Borremans about the decision to exercise the right to set-off under the PA in a letter dated March 19, 2018. (NYSCEF Doc. No. 8.) Furthermore, JG alleges that Borremans' representation in Section 2.22 of the PA that BIA's books and records are, "complete and accurate in all material respects and have been maintained in accordance with the applicable requirements of Law" is inaccurate. This fact is allegedly dispositive because losses are defined in Section 6.1(a) of the PA to include any breach of representations and warranties made by Borremans. (NYSCEF Doc. No. 17 at page 26.)

For purposes of CPLR 3213, "an instrument for the payment of money only" must be a written unconditional instrument. Documents which set forth more than the simple promise by

the obligor to pay a sum of money may not be sued upon by way of CPLR 3213.” (*Technical Tape, Inc. v Spray Tuck, Inc.*, 131 AD2d 404, 406 [1st Dept 1987].)

Here, the Note provides that JG may,

“withhold and set-off any Losses under the Purchase Agreement against amounts due hereunder in accordance with Section 6.1(f) of the Purchase Agreement.”

(NYSCEF Doc. No. 4 at ¶ 12.)

Section 6.1(f) of the PA provides the terms under which Defendant JG may offset and withhold amounts due under the Note. Specifically, it states,

“Subject to other provisions set forth in this Article VI, Buyer shall have the right to withhold and set-off any Losses against any amounts due or may be due under the Note or the Royalty Agreement. If any such amount under the Note or the Royalty is so set-off, the amount of such set-off shall be treated as an adjustment to the Purchase Price. In the event that any such outstanding claims for indemnification have not been finally determined in accordance with this Article VI at the time of such set-off, the Buyer shall have the right to withhold from any payment due under the Note or the Royalty Agreement the Buyer Indemnified Party's reasonable estimate of the maximum amount of Losses the Member would be obligated to pay the Buyer Indemnified Party with respect to such claim in accordance with this Article VI and, upon final resolution of such claim in accordance with this Article VI, the claim shall be set-off against the amount so withheld and the remaining balance, if any, shall be paid pursuant to the Note or the Royalty Agreement, as applicable, within five (5) Business Days.”

(NYSCEF Doc. No. 17 at 29.)

Accordingly, Section 12 of the Note makes payment under the Note, subject to the terms and conditions in Section 6.1(f) of the PA. This makes the Note conditional, and thus, unqualified for summary judgement in lieu of complaint. Accordingly, the Note is not an instrument for the payment of money only and cannot serve as a predicate for a CPLR 3213 motion. Borremans' reliance on *Craven v Rigas* (71 AD3d 1220 [3d Dept 2010]) is unavailing because in that case, the court specifically stated that although the note referenced an underlying

stock purchase agreement, the reference served only to describe the security interest that the plaintiff reserved in the stock. Here, however, the Note references the PA for additional purposes such as the conditions under which payment obligations may be withheld.

Furthermore, in *Craven v Rigas*, the court noted that the evidence of setoffs did not preclude application of CPLR 3213 because the plaintiff presented an accurate accounting of the amount due, of which there was no genuine dispute. Here, Borremans has submitted no such accounting and there is a genuine issue of fact as to these set offs. Therefore, Borremans' motion for summary judgment in lieu of complaint is denied.

#### The Guaranty Agreement

Borremans claims that the Guaranty Agreement is an instrument for the payment of money only within the meaning of CPLR 3213. He alleges that Gardner and Saleh are in default of their obligations under the Guaranty Agreement, and thus, they are each personally liable for JG's obligations under the Note. Specifically, Borremans claims that after making a demand on JG for payments, Borremans demanded payment allegedly due from Gardner and Saleh under the Guaranty Agreement. No such payments were made by them. Borremans asserts that the non-payment places Gardner and Saleh in default of their obligations under the Guaranty Agreement.

A guarantor is only liable upon the noncompliance of the principal obligor.

(*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Int'l," N.Y. Branch v. Navarro*, 25 NY3d at 494-495.) Stated otherwise, "the guarantor's liability accrues only after default on the part of the principal obligor." (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 10, [1st Dept 2006].)

Section 1 of the Guaranty Agreement states that:

“Subject to the terms of this Guaranty - the Guarantors hereby absolutely, unconditionally and irrevocably guarantee jointly and severally, to the Member the due and punctual payment of the Buyer’s obligation under the Note (“the Liabilities”).”

(NYSCEF Doc. No. 5 at ¶ 1.)

Section 2 of the Guaranty Agreement states that:

“If the Buyer fails to make a payment of any of the Liabilities in accordance with the terms of the Note and such payment has not been made or the failure to make such payment has not been resolved within the Notice Period (as defined below), the Guarantors shall promptly, upon written notice from the Member setting forth with reasonable specificity the matters which have given rise to the right of the Member to receive payment pay to the Member the amount necessary to satisfy such payment obligation in full. As used herein [sic] the term “Notice Period” shall mean the twelve (12) Business Day period following the Member's written demand to Buyer for payment of the Liabilities.”

(*Id.* at 2.)

Accordingly, to establish that Gardner and Saleh defaulted in their obligations to pay under the Guaranty Agreement, Borremans must demonstrate first that there is a default on the part of JG. However, as noted above, Borremans has failed to establish that the non-payment of the abovementioned monthly installments and the balloon payment amounts to non-compliance by JG. Indeed, JG’s obligations under the Note, i.e. the “Liabilities”, are subject to set-off provisions in the PA. There are factual issues that need to be resolved concerning JG’s “Liabilities” that preclude summary judgment. (*Cherlin v Epstein*, 261 AD2d 345 [1st Dept 1999].)

Accordingly, it is hereby,

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

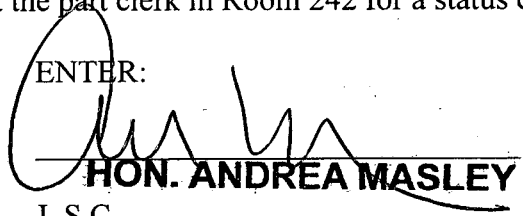
ORDERED that Borremans shall serve a formal complaint upon defendants within 20 days of service on Borremans' counsel of a copy of this order with notice of entry and defendants shall answer or otherwise respond to the complaint within 20 days after service thereof; and it is further

ORDERED that the parties contact the part clerk in Room 242 for a status conference.

DATED:

3/18/19

ENTER:



HON. ANDREA MASLEY

J. S.C.