

**Lufthansa Technik AG v Synergy Aerospace Corp.**

2020 NY Slip Op 31407(U)

May 14, 2020

Supreme Court, New York County

Docket Number: 651737/2019

Judge: Joel M. Cohen

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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: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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LUFTHANSA TECHNIK AG

Plaintiff,

- v -

SYNERGY AEROSPACE CORP.,

Defendant.

INDEX NO. 651737/2019

MOTION DATE 12/17/2019

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion for SUMMARY JUDGMENT.

This is one of two cases in which a Lufthansa entity – here, Plaintiff Lufthansa Technik AG (“LHT”) – seeks to hold Defendant Synergy Aerospace Corp. (“Synergy”) liable under an unconditional guaranty (the “Guaranty”).<sup>1</sup> LHT is now seeking summary judgment on its claim for breach of that Guaranty. In opposition, Synergy argues that fact questions surrounding several terms in the Guaranty preclude summary judgment. For the reasons set forth below, LHT’s motion is granted.

**BACKGROUND**

The Court presumes the parties’ familiarity with the background facts of the case. In a nutshell, the Guaranty dated March 16, 2018 obligated Synergy to “unconditionally and absolutely guarantee[ ] to LHT the full and prompt payment when due, upon demand in writing from LHT to [Synergy’s] attention of any and all amounts payable” by a Synergy-affiliated

<sup>1</sup> In the other case, with Index No. 651123/2019, the plaintiff is Lufthansa Technik Aero Alzey GMBH (“LTAA”).

airline to LHT (*see* NYSCEF 56 at ¶7 [LHT Rule 19-a Statement]; NYSCEF 53 at 1 [Company Guaranty]). The Guaranty referenced, and reinforced, an underlying agreement between LHT and the Synergy-affiliated airline, under which LHT provided technical services and components for the airline's planes (NYSCEF 56 at ¶¶4, 8-10). The airline defaulted on its obligations under the underlying agreement by failing to pay \$9,473,381.34 owed to LHT for services provided from July 28, 2017 through February 22, 2019 (*id.* at ¶19). LHT then demanded, through several letters, that Synergy pay \$5 million to LHT under the terms of the Guaranty (*id.* at ¶21). Synergy has failed to do so (*id.* at ¶¶22, 25).

### DISCUSSION

A party moving for summary judgment pursuant to CPLR 3212 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once a prima facie showing has been made, the burden then shifts to the opposing party to produce admissible evidence “sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d at 562; *see Leumi Fin. Corp. v Richter*, 24 AD2d 855, 855 [1st Dept 1965] [“To require a trial such fact issue must be genuine, bona fide and substantial.”] [affirming summary judgment in plaintiff's favor], *affd.*, 17 NY2d 166 [1966]).

“On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty” (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006], citing *City of*

*New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept. 1998]). “A guaranty is . . . subject to the ordinary principles of contract construction” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 492 [2015]). Therefore, a written agreement, such as a guaranty, “that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms” (*see id.* at 493, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Synergy does not dispute the existence of the Guaranty, but does identify three issues that it says preclude summary judgment in LHT’s favor: (1) whether LHT gave adequate notice to Synergy to trigger Synergy’s obligations under the Guaranty, (2) whether LHT’s demand to Synergy furnished “reasonable details” about the underlying missed payments, and (3) whether LHT was supposed to negotiate in good faith with Synergy before bringing an enforcement action like this one. None of these arguments, however, raise triable fact issues in light of the plain language of the Guaranty.

**A. To the Extent Notice is a Condition Precedent to Synergy’s Obligations Under the Guaranty, LHT Gave Such Notice**

First, Synergy fails to raise an issue of fact concerning LHT’s compliance with the notice provision of the Guaranty. Under the Guaranty, Synergy “unconditionally and absolutely guarantee[d] to LHT the full and prompt payment when due, **upon demand in writing from LHT to [Synergy’s] attention** of any and all amounts payable by [the airline] to LHT” (NYSCEF 53 at 1) (emphasis added). Synergy reads “upon demand in writing from LHT to [Synergy]” as a condition precedent to its repayment obligations, and further contends that such notice was never given (*see Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]) [“A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the

agreement arises.”]; *see also VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 194-95 [1st Dept 2019] [“In determining whether a given clause makes an event a condition, doubtful language should be interpreted as a promise rather than an express condition, especially where a finding of express condition would increase the risk of forfeiture by the obligee.”]).

The Court need not rule on whether the notice language creates a condition precedent: even if it does, LHT has established that it complied with the notice requirements under the Guaranty. Section 15 of the Guaranty prescribes the form of notice. Under § 15.2, “[a]ny communication will either be delivered by hand or sent by first class prepaid post to LHT or [Synergy] at its address and marked for the attention of the person referred to below unless it has communicated another address to the other in which case it must be sent to the last address so communicated.” LHT’s General Counsel avers that “[o]n February 22, 2019, LHT hand-delivered a letter to [Synergy] advising that the Airline had failed to comply with its payment obligations” and that “[p]ursuant to Paragraph 15 of the Guaranty, LHT hand-delivered the letter to [Synergy] . . . to the attention of” Synergy’s director (NYSCEF 51 at ¶¶20, 22 [Molins Aff.]; *see* NYSCEF 54 [Molins Aff. Ex. C]). LHT’s Senior Credit Manager, too, avers that LHT hand-delivered this letter to Synergy’s attention on February 22, 2019 (NYSCEF 67 at ¶¶17-19 [Fischer Aff.]). And in addition, LHT submits evidence that it sent a follow-up letter on February 25, 2019, to the legal department of the Synergy-affiliated airline, which the Guaranty identifies as Synergy’s agent for service of process.

Synergy’s response – that it “has no records showing that the February 22, 2019 letter was hand-delivered or that the February 25, 2019 letter was mailed by first-class prepaid post to the legal department of [the airline]” (NYSCEF 61 at ¶6 [Welch Aff.]) – is immaterial to its liability under the Guaranty. According to Paragraph 15, “[a] communication sent by LHT under

this clause 15 **will be deemed to have been received . . . if delivered by hand, at the time of delivery**” (emphasis added). By contrast, “[a] communication by [Synergy] will be deemed made only when actually received by LHT[.]” Regardless of whether Synergy documented its receipt of LHT’s hand-delivered letter, the parties agreed on a contractual arrangement in which Synergy’s actual receipt is not necessary for purposes of notice.

### **B. The Guaranty Does Not Require LHT to Provide Invoices to Synergy**

Next, there is no triable issue of fact regarding proof of the airline’s missed payments that LHT sent to Synergy as part of LHT’s demand. Section 11 of the Guaranty provides that “[a]ny certificate, determination or notification by LHT as to a rate or any amount payable under this Company Guarantee is (in the absence of manifest error) conclusive evidence of the matter to which it relates and shall contain reasonable details of the basis of determination.” As part of its February 22, 2019, demand to Synergy, LHT attached a 12-page Statement of Account showing the airline’s unpaid invoice amounts from July 28, 2017 through February 22, 2019 (*see* NYSCEF 67 at ¶10). For every unpaid invoice, the Statement of Account lists the date of the invoice, the document number, “Purchase Order / Description,” the amount of the invoice, and the amount overdue (NYSCEF 54). On its face, the Statement of Account satisfies LHT’s obligation to provide “reasonable details of the basis of [its] determination.”

Synergy finds the Statement of Account to be “clearly deficient,” the main deficiency being that “[w]ithout any of the underlying invoices, it is impossible for Synergy to determine whether the amount sought by [LHT] contains a ‘manifest error’” (NYSCEF 60 at 11 [Synergy Opp.]). But that argument contradicts the plain language of the Guaranty. As written, the Guaranty permits “[a]ny . . . notification by LHT” to serve as conclusive evidence, *unless* Synergy can identify some “manifest error.” Synergy has not articulated any “manifest error[s]”

in the Statement of Account itself. And the Guaranty does not entitle Synergy to see invoices from LHT in order to confirm the existence of such errors. Synergy's argument, which rewrites the Guaranty to impose additional obligations on LHT, is untenable as a matter of law (*see Vt. Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."]; *Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498-499 [1st Dept. 2016] [holding that affidavits from CFO and accounts receivable manager, which included a table of all payments by a defaulting tenant, were sufficient to prove the underlying debt and the guarantor's breach]).

**C. LHT Was Not Required to Engage in Good-Faith Negotiation with Synergy Prior to Bringing this Suit**

Finally, Synergy's argument that LHT was required to negotiate in good faith with Synergy before bringing this action also fails to create a triable fact issue. While Section 17.1 of the Guaranty provides that the parties "agree to negotiate in good faith and a timely manner to resolve any Dispute or claim arising out of or in connection with or relating to this Company Guarantee," the very next sub-section makes clear that "clause 17 is for the benefit of LHT only." And as LHT points out, the company did attempt to negotiate with Synergy about the Guaranty obligation, but Synergy failed to respond to any of LHT's multiple communications well in advance of this litigation (*see* NYSCEF 66 at 7).

Therefore, it is:

**ORDERED** that LHT's motion for summary judgment is Granted; it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment in favor of Plaintiff Lufthansa Technik AG and against Defendant Synergy Aerospace Corp. in the amount of \$5,000,000, together with interest at the statutory rate from the date of February 22, 2019, until

the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; it is further

**ORDERED** that the portion of Plaintiff's motion seeking reasonable attorneys' fees, costs and disbursements is severed, and those issues are referred to a Judicial Hearing Officer (JHO) to hear and determine; it is further

**ORDERED** that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

**ORDERED** that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; it is further

**ORDERED** that Plaintiff's counsel shall serve a copy of this order with notice of entry on defendants within five days and that counsel for Plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

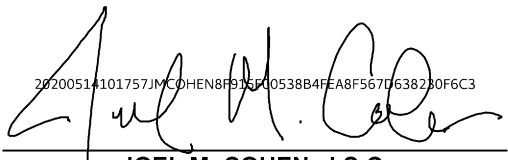
**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; it is further

**ORDERED** that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

**ORDERED** that Plaintiff shall serve this Order with Notice of Entry on Defendant within 5 days of the date of this Order, unless additional time is needed in light of the public health situation.

This constitutes the Decision and Order of the Court.

5/14/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input checked="" type="checkbox"/>	REFERENCE