

<b>Marty &amp; Dorothy Silverman Found. v 3-Legged Dog, Inc.</b>
2020 NY Slip Op 33489(U)
October 21, 2020
Supreme Court, New York County
Docket Number: 650505/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

*Justice*

-----X

MARTY AND DOROTHY SILVERMAN FOUNDATION,  
  
Plaintiff,

**INDEX NO.** 650505/2020

**MOTION DATE** 10/15/2020

**MOTION SEQ. NO.** 001, 003

- v -

3-LEGGED DOG, INC., KEVIN CUNNINGHAM  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 22  
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28, 29,  
30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41  
were read on this motion to/for STAY.

Upon the foregoing documents, it is

ORDERED that the motion by defendants 3-Legged Dog, Inc. and Kevin Cunningham for  
a stay of this action (motion sequence no. 003) is granted to the extent of staying the action as  
against 3-Legged Dog, Inc., and the motion is otherwise denied; and it is further

ORDERED that the action as against defendant 3-Legged Dog, Inc. is hereby severed, and  
stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or  
modify this stay upon the final determination of, or vacatur of the stay issued by the Bankruptcy  
Court in the proceeding *Matter of 3-Legged Dog, Inc.*, Case No. 1-20-42384, pending before the  
United States Bankruptcy Court for the Eastern District of New York; and it is further

ORDERED that motion for summary judgment in lieu of complaint by plaintiff the Marty and Dorothy Silverman Foundation (motion sequence no. 001) is granted to the extent of granting the motion on default, without opposition, as against defendant Kevin Cunningham on the issue of his liability; and it is further

ORDERED that counsel for defendants shall serve a copy of this order along with notice of entry within twenty (20) days; and it is further

ORDERED that issue of damages, including reasonable attorneys' fees, is referred to a Special Referee to hear and report with recommendations, as set forth below; and it is further

ORDERED that the cross motion by plaintiff for an order, pursuant to CPLR 5229, restraining defendant Kevin Cunningham from selling, assigning, or transferring any assets and directing him to submit to an examination (motion sequence no. 003) is denied without prejudice to renewal; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the amount of damages, together with the issue of the reasonable attorneys' fees, costs, and expenses incurred by plaintiff in the present action; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)), 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/suptctmanh](http://www.nycourts.gov/suptctmanh) at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the ‘References’ link on the court’s website) 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; and it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and defendant Kevin Cunningham shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff’s papers, and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance

with the Rules of that Part; and 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 counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

## MEMORANDUM DECISION

Motion sequence nos. 001 and 003 are consolidated for disposition.

This action arises out of an alleged default on a loan agreement. In motion sequence no. 001, plaintiff the Marty and Dorothy Silverman Foundation (plaintiff or MDSF) moves, pursuant to CPLR 3213, for summary judgment in lieu of a complaint against defendants 3-Legged Dog, Inc. (3LD) and Kevin Cunningham (Cunningham) (together, defendants). In motion sequence no. 003, defendants move for a stay based on the bankruptcy petition filed by 3LD. Plaintiff opposes the application and cross-moves for an order under CPLR 5229 restraining Cunningham from selling, assigning, or transferring any assets and directing him to submit to an examination.

## BACKGROUND

Plaintiff is a not-for-profit corporation licensed to do business in this state (NY St Cts Elec Filing [NYSCEF] Doc No. 3, Lorin Silverman [Silverman] aff, ¶ 2). Non-party FJC (FJC) is a New York, not-for-profit corporation that provides loans to other not-for-profit organizations (*id.*, ¶ 3). 3LD is a New York not-for-profit corporation involved in the arts, technology and media industries (*id.*, ¶ 4). Cunningham is 3LD's founder (*id.*, ¶ 5).

On August 17, 2005, plaintiff and FJC, together as “Lender,” and 3LD, as “Borrower,” executed a loan agreement (the Loan Agreement) for \$1 million (the Loan), with the Loan proceeds remitted to 3LD in a series of advances made at 3LD's request (NYSCEF Doc No. 5, Silverman aff, exhibit A at 1-2 [section 1.1 [a], [b]]). The Loan Agreement provides that “[t]he Loan shall be evidenced by a promissory note or notes (the ‘Note[s]’)” with interest on the unpaid principal payable quarterly at the prime rate plus three percent (*id.* at 2 [section 1.2]). The document also reads, in pertinent part, as follows:

“The entire principal amount remaining outstanding and any unpaid interest under the Note(s) shall be payable four (4) years from the

date of the first advance; provided, however, that any amounts due under the terms of the Note(s) that remain unpaid after maturity shall bear interest at a rate per annum equal to the lesser of eighteen percent or the highest interest rate permitted by law. Each Note shall be fully benefited by the terms and conditions of this Loan Agreement”

(*id.*) (emphasis in original).

3LD pledged the proceeds from grants and commitments from the City of New York; proceeds from the Curated Rental Program; receivables from the Special Arts Project; ownership of the shares in a wholly-owned “C” corporation, Shape of Time; and 3LD’s equipment as collateral for the Loan (*id.* at 17 and 22).

Article 6 discusses defaults, and in particular, section 6.1 (a) provides that a default under the Loan Agreement shall include a “default in any payments due under any Note(s) or any other amount payable by the Borrower hereunder within fifteen (15) days after the same shall have become due and payable” (NYSCEF Doc No. 5 at 10). As remedies in the event of a default, plaintiff and FJC may declare the entire principal immediately due and payable, commence judicial proceedings, and enforce a lien and a right of set-off against any balance in 3LD’s accounts held with plaintiff and FJC (*id.* at 12 [section 6.3]). Section 7.9 allows for the recovery of attorneys’ fees, and states, in part, that:

“The Borrower agrees that whenever an outside attorney is used by Lender to perform legal work in connection with this Loan Agreement, or to collect or enforce the Note or to enforce, declare or adjudicate any rights or obligations under this Loan Agreement, whether by suit or any other means whatsoever, the Borrower shall reimburse the Lender for all reasonable attorneys fees, together with all costs and expenses of such consultation, collection, enforcement or adjudication, which shall constitute part of the principal due under the Note. . . . The obligations of the Borrower under this Section shall survive the repayment of the Loan and the surrender of any loan documents.”

(*id.* at 14-15).

The Loan Agreement has been amended 19 times since 2005 (NYSCEF Doc No. 3, ¶ 15). The amendments account for increases in the Loan principal (NYSCEF Doc No. 6, Silverman aff, exhibit B at 2), to document additional loans made by plaintiff so 3LD could “make payment of the interest due ... under the existing Loan Agreement,” to pay for 3LD’s operating expenses, to furnish 3LD with working capital (*id.* at 5, 7, 9, 11, 13, 15, 17, and 19), to purchase or pay 3LD’s debts owed to others (*id.* at 21, 23, 25, 27 and 37), and to extend the maturity date on the Loan (NYSCEF Doc No. 3, ¶ 16).

According to the fourth amendment dated November 16, 2007, Cunningham agreed to personally guarantee the Loan (NYSCEF Doc No. 6 at 5), and on November 16, 2007, he executed a “Guarantee of Payment” (the Guarantee) in favor of plaintiff and FJC (NYSCEF Doc No. 9, Silverman aff, exhibit D at 1 and 3). The Guarantee states that Cunningham:

“hereby irrevocably and unconditionally guarantees the payment when due of of [sic] the obligations and liabilities of Borrower [3LD] due and to become due to MDSF from Borrower [3LD] under the Loan Agreement and Note(s) executed pursuant thereto, together with all interest thereon and all attorney’s fees, costs and expenses of collection incurred by MDSF in enforcing the terms of the Note(s). This Guarantee shall terminate after Borrower’s obligations for payment under the Note(s) have been satisfied”

(*id.* at 1).

Significantly, the Guarantee reads:

“MDSF may, at its option, proceed against the Guarantor in the first instance by suit, action or otherwise to collect any monies, the payment of which is guaranteed hereby, without first proceeding against Borrower or any other person, and without first resorting to any security held by it as collateral or to any other remedies at the same or at different times, as it may deem advisable. The liability of the Guarantor hereunder shall not be affected or impaired by the acceptance by MDSF of any security for, or other guarantors upon, any indebtedness, liability or obligation of Borrower to MDSF, or by any failure, delay, neglect or omission by MDSF to realize upon or protect such indebtedness, liability or obligation”

(*id.* at 1-2).

Subsequent amendments show Cunningham extended his Guarantee to each additional loan from plaintiff (NYSCEF Doc No. 6 at 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 39 and 42).

In the sixth amendment dated January 14, 2009, Cunningham agreed to pursue a life insurance policy for the Loan amounts (NYSCEF Doc No. 6 at 9). The seventh amendment dated March 10, 2009 shows that Cunningham was to purchase a “key person life insurance [policy]” for himself naming FJC and plaintiff as the beneficiaries (*id.* at 11-12).

According to the fifteenth amendment dated October 14, 2012, 3LD consented to establish a “Restricted Earmarked Account at FJC (‘3LD Lockbox Account’)” into which its clients would deposit all payments due to it (NYSCEF Doc No. 6 at 27 and 36). The amendment dictated that 3LD could withdraw a maximum of 88% of the funds deposited into that account for its operations and that it would leave a minimum of 12% of the funds to repay the interest and principal due to plaintiff on the Loan (*id.*). Additional terms concerning the 3LD Lockbox Account are reflected in an October 2012 letter from 3LD to FJC establishing the account (NYSCEF Doc No. 11, Silverman aff, exhibit F at 1). According to a sixteenth amendment dated December 23, 2013, 3LD would deposit all payments from all sources into the 3LD Lockbox Account (*id.* at 38), and under a seventeenth amendment dated April 1, 2015, plaintiff would withdraw \$5,000 from the 3LD Lockbox Account each month (*id.* at 41).

3LD executed nine promissory notes in favor of FJC for the following amounts and dates: \$125,000 dated September 28, 2005; \$220,000 dated October 11, 2005; \$350,000 dated November 29, 2005; \$625,000 dated January 6, 2006; \$180,000 dated January 26, 2006; \$500,000 dated March 29, 2006; \$500,000 dated April 28, 2006; \$480,000 dated August 21, 2006; and \$120,000

dated September 29, 2006 (NYSCEF Doc No. 7, Silverman aff, exhibit C-1 at 1, 7, 12, 17, 22, 27, 32, 37 and 42). The amounts on these promissory notes total \$3.1 million.

3LD executed 19 promissory notes in favor of plaintiff for the following amounts and dates: \$78,481 dated November 26, 2007; \$73,013 dated December 27, 2007; \$135,000 dated March 24, 2008; \$53,923 dated January 16, 2009; \$158,000 dated March 12, 2009; \$120,000 dated April 1, 2009; \$75,000 dated June 1, 2009; \$91,000 dated September 29, 2009; \$50,170 dated February 2, 2010; \$43,330 dated March 30, 2010; \$88,000 dated March 21, 2011; \$16,500 dated July 28, 2011; \$157,642.73 dated May 8, 2012; \$157,642.73 dated June 6, 2012; \$157,642.73 dated July 5, 2013; \$540,171 dated October 22, 2012; \$470,224.49 dated November 2, 2012; \$170,000 dated November 2, 2012; and \$279,136 dated January 14, 2013 (NYSCEF Doc No. 8, Silverman aff, exhibit C-2 at 1, 6, 11, 16, 21, 26, 31, 36, 41, 46, 51, 57, 63, 68, 73, 78, 84, 91 and 97). The amounts of these promissory notes total \$2,914,876.68.

Each promissory note contains similar language stating that in the event of a default as that term is defined in the Loan Agreement, 3LD “shall reimburse the holder hereof for all reasonable attorneys’ fees, together with all costs and expenses of such collection, enforcement or adjudication [on the Note], which shall constitute part of the principal due hereunder” (NYSCEF Doc No. 7 at 2; NYSCEF Doc No. 8 at 2).

Section 7.4 of the Loan Agreement allows plaintiff and FJC to assign their rights in the agreement (NYSCEF Doc No. 5 at 14), and by assignment dated April 30, 2010, FJC assigned all of its rights, title and interest in 3LD’s obligations under the Loan Agreement to plaintiff (NYSCEF Doc No. 10, Silverman aff, exhibit E at 1). Silverman, plaintiff’s president, attests that plaintiff paid FJC \$2,786,958.18 to purchase 3LD’s debt (NYSCEF Doc No. 3, ¶ 24).

After 3LD defaulted on making the minimum monthly payments, plaintiff served defendants with a “Notice of Default and Acceleration” dated March 3, 2017, and advised them that it would accelerate the debt unless it received payment in full by March 31, 2017 (NYSCEF Doc No. 12, Silverman aff, exhibit G at 1). The Loan has not been repaid.

### PROCEDURAL HISTORY

Plaintiff commenced this action by filing a summons and a motion for summary judgment in lieu of complaint (NYSCEF Doc No. 2). Defendants then moved under CPLR 2003 and 3012 (d) for an extension of time to answer (NYSCEF Doc No. 17). In a decision and order dated May 19, 2020, the court (Friedman, J.) granted defendants’ application, and extended their time to answer or respond to plaintiff’s motion to June 19, 2020 (NYSCEF Doc No. 24).

Defendants did not submit a response to plaintiff’s motion on the new return date. Instead, on June 22, 2020, 3LD filed a petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York, captioned *Matter of 3-Legged Dog, Inc.*, Case No. 1-20-42384, pending before the United States Bankruptcy Court for the Eastern District of New York (NYSCEF Doc No. 28, Erin M. Pamukcu [Pamukcu] affirmation, exhibit A at 1). Defendants now move for a stay of this action based on the bankruptcy filing, and plaintiff cross-moves for an order, pursuant to CPLR 5229, prohibiting Cunningham from transferring, assigning or otherwise disposing of his assets and directing him to submit to an examination about his assets.

### DISCUSSION

#### *Defendants’ Motion for a Stay*

The court turns first to defendants’ motion for a stay. It is well settled that the filing of a bankruptcy petition triggers an automatic stay of “the commencement or continuation, . . . of a judicial, . . . action or proceeding against the debtor that was, . . . commenced before the

commencement of the case under this title” (11 USC § 362 [a] [1]). “The stay is mandatory, it applies in all state and federal courts, and it takes effect immediately, thus rendering any actions against a debtor void ab initio” (*Levant v National Car Rental, Inc.*, 33 AD3d 367, 368 [1st Dept 2006] [internal citations omitted]). Defendants have demonstrated that plaintiff’s action against 3LD is subject to the automatic stay imposed by the Federal Bankruptcy Code (*see Levant*, 33 AD3d at 368; *Emigrant Sav. Bank v Rappaport*, 20 AD3d 502, 503 [2d Dept 2005]). Plaintiff has not opposed this facet of the motion. Thus, that branch of defendants’ motion is granted insofar as it seeks a stay of the action against 3LD.

The automatic bankruptcy stay, though, does not extend to a nonbankrupt codefendant (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC*, 13 AD3d 89, 89 [1st Dept 2004]; *Teachers Ins. & Annuity Assn. of Am. v Butler*, 803 F2d 61, 65 [2d Cir 1986] [collecting cases]); here, Cunningham has not filed for bankruptcy protection. Nevertheless, defendants advance two arguments in support of their contention that the bankruptcy stay also applies to Cunningham, who is 3LD’s founder, executive director and one of two full time employees (NYSCEF Doc No. 34, Cunningham aff, ¶¶ 1-2). First, defendants claim that an adverse decision against Cunningham in this action would negatively impact the bankruptcy proceeding by causing him to shift his attention away from that proceeding. Second, defendants claim that Cunningham’s liability as a guarantor is derivative of 3LD’s liability and maintain that the resolution of plaintiff’s claim against him would affect 3LD’s estate for bankruptcy purposes.

Plaintiff, in opposition, rejects the contention that Cunningham’s liability is derivative of 3LD’s, since his liability is predicated on the Guarantee. Plaintiff submits that any assertion that Cunningham’s attention would be diverted away from the bankruptcy proceeding is entirely speculative and adds that any such argument should be made in Bankruptcy Court.

In reply, defendants maintain that Cunningham has demonstrated a special or unusual circumstance to extend the automatic stay and that Cunningham need not resort to applying for a stay in Bankruptcy Court. Cunningham avers in an affidavit, that: he is responsible for nearly every aspect of 3LD's operations; he was heavily involved in coordinating the bankruptcy filing; and he continues to provide assistance in that proceeding (NYSCEF Doc No. 34, Cunningham aff, ¶¶ 2-4).

At the outset, this court has jurisdiction to determine the scope of the automatic bankruptcy stay against Cunningham (*see Beltrone v General Schuyler & Co.*, 229 AD2d 857, 857 [3d Dept 1996] [concluding that a state appeals court has jurisdiction to determine the scope of an automatic bankruptcy stay as it applies to nondebtors]; *Matter of Baldwin-United Corp. Litig.*, 765 F2d 343, 347 [2d Cir 1985] [stating that “[t]he court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay”]; *Pavers & Rd. Builders Dist. Council Welfare Fund v Core Contr. of N.Y., LLC*, 536 BR 48, 51 [ED NY 2015] [finding that “the state court ... was free to determine, as it did, that the automatic stay did not protect the nondebtor corporations, and to thereupon proceed to judgment in its case]). Thus, counter to plaintiff's position, defendants need not apply for a stay in Bankruptcy Court.

As stated above, the automatic bankruptcy stay normally does not extend to a nonbankrupt codefendant (*see Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 13 AD3d at 89). Further, “[i]t has been generally held that ‘the balance of the equities lies with plaintiffs when one defendant has received an automatic stay pursuant to 11 USC § 362 (a) [the bankruptcy law] and codefendants request a stay of the entire action’” (*Rosenbaum v Dane & Murphy*, 189 AD2d 760, 761 [2d Dept 1993]). That said, the bankruptcy stay may extend to a nondebtor codefendant where there are

unusual circumstances (*see Marcelino v Mon Cher 57 Inc.*, 2019 WL 2480402, \*3, 2019 US Dist LEXIS 100176, \*6 [SD NY, June 14, 2019, No. 18-CV-11148 (PAE) (JLC)]). An extension may be warranted “when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor’s estate” (*Queenie, Ltd. v Nygard Intl.*, 321 F3d 282, 287 [2d Cir 2003]). The burden rests with the nondebtor codefendant to establish that unusual circumstances exist (*see Knopf v Sanford*, 2019 NY Slip Op 30269(U), \*3 [Sup Ct, NY County 2019]; *accord Chord Assocs. LLC v Protech 2003-D, LLC*, 2010 WL 1257874, \*12, 2010 US Dist LEXIS 28465, \*33 [ED NY, Mar. 25, 2010, No. 07-5138 (JFB) (AKT)]).

In this action, Cunningham avers that he is responsible for nearly every aspect of 3LD’s operations as he is its founder and executive director. However, the mere fact that he is a 3LD officer or a principal, standing alone, is insufficient to extend the bankruptcy stay as to him (*see Gray v Hirsch*, 230 BR 239, 242 [SD NY 1999] [collecting cases]).

Next, defendants’ contention that Cunningham’s attention will be drawn away from the bankruptcy proceeding if this action is not stayed is wholly conclusory. Where a pending action poses a “serious threat of a material effect on ... [the debtor’s] financial or personnel needs for reorganization” (*Gray*, 230 BR at 243), an extension of the stay should be granted, particularly where a nondebtor principal is involved in negotiating or formulating plans for reorganization (*see Matter of North Star Contr. Corp.*, 125 BR 368, 371 [SD NY 1991]). Despite Cunningham’s averment that his “continued focus and efforts” are required in the bankruptcy proceeding (NYSCEF Doc No. 34, ¶ 4), 3LD has filed a petition for Chapter 7 liquidation, not a petition for Chapter 11 reorganization. Thus, “there is no risk to any reorganization” (*Uto v Job Site Services*, 444 BR 222, 224 [ED NY 2011] [internal quotation marks and citation omitted]). Given the lack

of detail in his affidavit,<sup>1</sup> it also is unclear what additional work Cunningham must complete in the bankruptcy proceeding, especially in view of 3LD's recent filings in that proceeding of its assets and liabilities and a statement of financial affairs (NYSCEF Doc No. 37, Leonard Benowich [Benowich] affirmation, exhibit 2; NYSCEF Doc No. 38, Benowich affirmation, exhibit 3, respectively).

Furthermore, while an “identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant” may be sufficient to extend the automatic stay (*Queenie, Ltd.*, 321 F3d at 288, quoting *A.H. Robins Co. v Piccinin*, 788 F 2d 994, 999 [4th Cir], *cert denied* 479 US 876 [1986]), defendants have not established that a judgment rendered against Cunningham in this action is the equivalent of a judgment against 3LD. Defendants have offered no admissible proof that Cunningham is 3LD's sole shareholder (*see Florists' Transworld, Inc. v New York Floral Group, Inc.*, 25 Misc 3d 1225[A], 2009 NY Slip Op 52292[U], \*2 [Sup Ct, NY County 2009] [granting a stay in an action brought to hold a corporation and its sole shareholder liable on a credit agreement and a written guarantee]). Significantly, Cunningham did not aver that he is 3LD's sole owner or shareholder. Thus, defendants have that not established that the continued prosecution of this action will adversely impact 3LD's estate (*see Empire Erectors & Elec. Co., Inc. v Unlimited Locations LLC*, 102 AD3d 419, 419 [1st Dept 2013]).

Nor will the automatic stay extend to a nondebtor codefendant, such as Cunningham, who is independently liable to the plaintiff (*see e.g. Kadesh v United Air Lines*, 2003 WL 435632, \*2, 2003 US Dist LEXIS 2548, \*6 [SD NY, Feb. 24, 2003, 02 Civ. 9058 (SHS)]). In cases involving a guarantor, “[g]uarantors of the debt of a corporation against which a proceeding has been commenced under the Bankruptcy Code, are not relieved from liability, . . . nor is a plaintiff

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<sup>1</sup> The court notes that defendants did not proffer Cunningham's affidavit until their reply.

prevented from proceeding against non-bankrupt individual defendant guarantors by the bankruptcy stay” (*Milliken & Co. v Stewart*, 182 AD2d 385, 386 [1st Dept 1992] [internal citations omitted]). Cunningham does not dispute that he executed the Guarantee, and his “status as guarantor is not an unusual circumstance justifying the imposition of the automatic stay pursuant to section 362 (a) (1)” (*Central Buffalo Project Corp. v Edison Bros. Stores*, 205 AD2d 295, 297 [4th Dept 1994]). Thus, that branch of defendants’ motion for a stay of the action against Cunningham is denied.

### ***Summary Judgment under CPLR 3213***

On its motion for summary judgment, plaintiff relies on an affidavit from Silverman. Silverman avers that plaintiff applied the balance of \$493.48 in the 3LD Lockbox to the debt on May 2, 2018 (NYSCEF Doc No. 3, ¶ 30), and that there are no funds in that account at present (*id.*, ¶ 32). She states that 3LD has made intermittent payments, although no payment on the Loan has been made since April 19, 2019 despite plaintiff’s repeated requests (*id.*, ¶¶ 31 and 33). Silverman attests that the “key man” life insurance policy Cunningham purchased was terminated on August 19, 2015 for nonpayment of premiums (*id.*, ¶ 23). She states that as of December 31, 2019, \$10,625,850.55, exclusive of interest at 18% per annum and attorneys’ fees, is due to plaintiff on the Loan (*id.*, ¶ 34). Plaintiff also contends that summary judgment should be granted on default because Cunningham has not opposed the motion despite having been granted an extension of time to do so.

CPLR 3213 provides, in part, that “[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.” “An unconditional guaranty is an instrument for the payment of ‘money only’ within the meaning of

CPLR 3213” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [internal citation omitted]). “[G]uaranties that are ‘absolute and unconditional,’ have been consistently upheld by New York courts” (*id.* at 493). A cause of action under a guaranty for payment accrues once there is a default of the payment obligation (*see Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY2d 138, 143 [1993]). “On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” (*Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521, 521 [1st Dept 2015] [internal quotation marks and citation omitted]).

As applied here, plaintiff has demonstrated prima face that Cunningham executed an absolute and unconditional guaranty of payment, the default by 3LD on the unpaid debt, and Cunningham’s failure to perform (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch*, 25 NY3d at 492; *8430985 Can. Inc. v United Realty Advisors LP*, 148 AD3d 428, 428 [1st Dept 2017]).

Cunningham has not submitted any opposition to the motion, and as discussed above, the court declines to extend the bankruptcy stay afforded to 3LD to him. As such, Cunningham has not challenged whether he executed the Guarantee (*see Citibank, N.A. v Villano*, 140 AD3d 553, 553 [1st Dept 2016]), nor has he challenged 3LD’s default. Consequently, plaintiff has demonstrated its entitlement to summary judgment, but only as to liability since it has not presented adequate proof of its calculations establishing the full amount of the outstanding debt (*id.*). Therefore, the calculation of damages is referred to a Special Referee to hear and report with recommendations, as set forth below. Furthermore, the Loan Agreement, promissory notes, and the Guaranty unambiguously provide that plaintiff may recover its reasonable attorneys’ fees in

any action or proceeding to collect and enforce each note (*see Nigri v Liberty Apparel Co., Inc.*, 76 AD3d 842, 844 [1st Dept 2010]). Accordingly, the amount of reasonable attorneys' fees plaintiff may recover in this action is also referred to a Special Referee to hear and report with recommendations (*see Andron v Libby*, 120 AD3d 1058-1059 [1st Dept 2014]; *Chen v Yan*, 109 AD3d 727, 731 [1st Dept 2013]).

### **CPLR 5229**

Plaintiff also cross-moves for an order restraining Cunningham from transferring or disposing of his assets and requiring him to submit to an examination. Defendants oppose on the ground that relief under CPLR 5229 is premature in the absence of a judgment or decision.

CPLR 5229, titled "Enforcement before judgment entered," states as follows:

"In any court, before a judgment is entered, upon motion of the party in whose favor a verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment."

CPLR 5229 "authorizes the trial court, by order, to permit the prevailing party to examine an adverse party and to grant a restraining order against him immediately after a verdict or decision is reached" (11 Weinstein-Korn-Miller, NY Civ Prac: CPLR ¶ 5229.00 [2019] [Online treatise]). "CPLR 5229 is designed to 'secure satisfaction of the judgment ultimately to be entered in the action'" (*Sequa Capital Corp. v Nave*, 921 F Supp 1072, 1076 [SD, NY 1996], quoting Fed Rules Civ Pro Rule 64).

As an initial matter, the motion is not premature, as defendants suggest (*see Morozov v ICOBOX Hub Inc.*, 2020 WL 5665563, \*3, 2020 US Dist LEXIS 149681, \*9 [SD NY, Aug. 18, 2020, No. 18 Civ. 3421 (GBD) (SLC)] [reasoning that relief is appropriate where partial summary has been granted]; *Coley v Vannguard Urban Improvement Assn.*, 2016 WL 7217641, \*6, 2016

US Dist LEXIS 172378, \*17 [ED, NY Dec. 13, 2016, 12-CV-5565 (PKC) (RER)] [granting relief under CPLR 5229 against the defendants to whom a default judgment was granted]). Nonetheless, plaintiff's cross motion is denied.

It is within the court's discretion whether to grant relief under CPLR 5229 (11 Weinstein-Korn-Miller, NY Civ Prac: CPLR ¶ 5229.04 [2019] [Online treatise]). For instance, the court may grant the motion where the plaintiff, as the prevailing party, offers proof that the defendant has been disposing of substantial assets by way of gifts or sales to others (*see Kaminsky v Kahn*, 46 Misc 2d 131, 132 [Sup Ct, NY County 1965]) or where there is sufficient proof to lead the court "to believe the danger exists that defendant[ ] may dispose of or divert assets to avoid a potential judgment" (*Gallegos v Elite Model Mgt. Corp.*, 1 Misc 3d 200, 203 [Sup Ct, NY County 2003]). Here, plaintiff has not articulated any facts from which the court may reasonably conclude that Cunningham has diverted, or will divert, assets to circumvent a judgment against him (*see TM Park Ave. LLC v Shapiro, Shapses, Block, LLP*, 2006 NY Slip Op 30753[U], \*3 [Sup Ct, NY County 2006]; *King v Unique Rigging Corp.*, 2006 WL 3335011, \*1, 2006 US Dist LEXIS 78439, \*3 [ED NY, Oct. 27, 2006, No. 01-CV-3797 (DLI)(VVP)]).

### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendants 3-Legged Dog, Inc. and Kevin Cunningham for a stay of this action (motion sequence no. 003) is granted to the extent of staying the action as against 3-Legged Dog, Inc., and the motion is otherwise denied; and it is further

ORDERED that the action as against defendant 3-Legged Dog, Inc. is hereby severed, and stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of, or vacatur of the stay issued by the Bankruptcy Court in the proceeding *Matter of 3-Legged Dog, Inc.*, Case No. 1-20-42384, pending before the United States Bankruptcy Court for the Eastern District of New York; and it is further

ORDERED that motion for summary judgment in lieu of complaint by plaintiff the Marty and Dorothy Silverman Foundation (motion sequence no. 001) is granted to the extent of granting the motion on default, without opposition, as against defendant Kevin Cunningham on the issue of his liability; and it is further

ORDERED that counsel for defendants shall serve a copy of this order along with notice of entry within twenty (20) days; and it is further

ORDERED that issue of damages, including reasonable attorneys' fees, is referred to a Special Referee to hear and report with recommendations, as set forth below; and it is further

ORDERED that the cross motion by plaintiff for an order, pursuant to CPLR 5229, restraining defendant Kevin Cunningham from selling, assigning, or transferring any assets and directing him to submit to an examination (motion sequence no. 003) is denied without prejudice to renewal; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (2) the amount of damages, together with the issue of the reasonable attorneys' fees, costs, and expenses incurred by plaintiff in the present action; and it is

further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), 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/suptctmanh](http://www.nycourts.gov/suptctmanh) at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the ‘References’ link on the court’s website) 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; and it is further

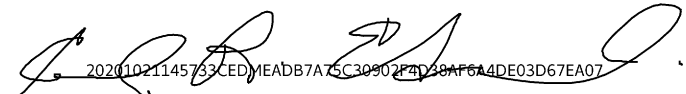
ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and defendant Kevin Cunningham shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff’s papers, and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and 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 counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

  
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10/21/2020  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: