

<b>Gamma Lending Omega LLC v Kaminski</b>
2020 NY Slip Op 33782(U)
November 13, 2020
Supreme Court, New York County
Docket Number: 653374/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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GAMMA LENDING OMEGA LLC,
Plaintiff,

- v -

MATTHEW KAMINSKI, BRENDA KAMINSKI
Defendant.

INDEX NO. 653374/2018
MOTION DATE 09/03/2020, 09/15/2020
MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 162, 163 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 158, 159, 160, 161, 165, 166 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents and for the reasons set forth on the record (11/13/2020), Matthew Kaminski and Brenda Kaminski's (collectively, the Guarantors) motion to reargue (Mtn. Seq. 004) the decision and order (the Prior Decision; NYSCEF Doc. No. 133), dated August 28, 2020, is denied and Gamma Lending Omega LLC's (the Plaintiff) motion for summary judgment (Mtn. Seq. 003) is granted.

The Relevant Facts and Circumstances

Familiarity with the facts is presumed and the court adopts the terms as defined in the Prior Decision (see Mtn. Seq. 001). Briefly, in the Prior Decision, the court granted the Guarantors' motion to compel solely to the extent that the Plaintiff would respond to certain requests for admission, but denied requests for document production and spoliation sanctions (see NYSCEF

Doc. No. 133). Significantly, the court addressed the effect of a separate action in Minnesota, in which judgment was entered against the Borrowers of the same loan obligations that the Plaintiff now seeks to recover against the Guarantors:

As an initial matter, the parties each discuss the effect of the findings and holdings of the Minnesota Action. Collateral estoppel prevents a party, or one in privity with a party, from relitigating an issue that was decided against it (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). There are two elements for collateral estoppel to apply: “(1) that the identical issue was necessarily decided in the prior proceeding and is decisive of the present action, and (2) that there was a full and fair opportunity to contest that issue in the prior proceeding” (*id.* at 665-666).

Thus, inasmuch as the Guarantors now seek to obtain documents to contest the legality of the late charges in this action, they cannot do so as the Minnesota Court of Appeals already resolved this issue when it determined that the late charges were valid and enforceable (NYSCEF Doc. No. 105). This finding from the Minnesota Action applies to the Guarantors because they are plainly in privity with the Minnesota Action defendants (i.e., the Change of Control provision was tripped if their ownership fell below a certain percentage of the Borrower), who were the Borrower and another guarantor of the same loan obligations that the Guarantors now seek to avoid (*see APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610, 610 [1st Dept 2015] [defendant guarantor collaterally estopped from disputing amount due to plaintiff landlord as determined in separate landlord-tenant action because guarantor was in privity with the tenant]).

As discussed further below, they were more than in privity – the Guarantors controlled the Borrower. Simply put, the Minnesota Action defendants had a full and fair opportunity to contest the late charge, including an unsuccessful appeal to the Minnesota Court of Appeals. As a result, the Guarantors are estopped from contesting the enforceability of the late charges in the present action and the Plaintiff is not required to produce any documents concerning the same.

(*id.* at 7-8).

The Plaintiff subsequently filed a motion for summary judgment on September 3, 2020 and the Guarantors filed a motion to reargue on September 15, 2020, both of which are before the court.

## Discussion

### A. Motion Sequence 004 (the Guarantors' Motion to Reargue)

To succeed on a motion for reargument, a party must demonstrate that the court either (1) overlooked or misapprehended the relevant facts, or (2) misapplied a controlling principle of law (*William P. Paul Equip. Corn. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Reargument is not intended “to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*Haque v Daddazio*, 84 AD3d 940, 242 [2d Dept 2011]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

The court neither overlooked nor misapprehended the relevant facts or law. With respect to the facts, the court properly reviewed the testimony of the Plaintiff’s three corporate officers when denying the production of certain document requests and spoliation sanctions (NYSCEF Doc. No. 133 at 11-15).

In regards to the law, the Prior Decision held that the Plaintiff was not required to produce documents concerning the enforceability of late charges under the Loan Agreement because the Guarantors were collaterally estopped from disputing these charges due to a decision of the Minnesota Court of Appeals (*id.* at 7-8). In reaching this conclusion, the court held that the Minnesota Court of Appeals had already litigated the identical issue of whether the late charge was enforceable (*id.* at 7). Inasmuch as the Guarantors now rely on the affidavit of Patrick Summer, counsel for the Borrowers in the Minnesota Action, to argue the Guarantors were not represented by counsel for the Borrowers in that action, this does alter the court’s prior determination that the Guarantors were both in privity with the Borrower and controlled the

Borrower, such that there was a full and fair opportunity to contest the issue of late charges in the Minnesota Action (*id.* at 7-8, citing *APF 286 Mad LLC v Chittur & Assoc. P.C.*, 132 AD3d 610, 610 [1st Dept 2015]). Notwithstanding the Guarantors' disagreement with the court's Prior Decision, they cannot now use the instant motion to reargue the issue of collateral estoppel or present arguments different from those originally asserted (*see Foley, supra*).

To the extent that the Guarantors assert that the Plaintiff waived the defense of collateral estoppel by failing to plead the same in its answer to the Guarantors' answer and counterclaims (NYSCEF Doc. No. 38), filed October 8, 2018, the court disagrees because the Plaintiff had referred to the Minnesota Action and the Borrower's appeal to the Minnesota Court of Appeals in its amended complaint (NYSCEF Doc. No. 20), filed August 27, 2018, and the Guarantors cannot now claim any surprise or prejudice from the same (CPLR § 3018 [b]). In any event, the Minnesota Court of Appeals' decision on the late charge was filed April 22, 2019 (NYSCEF Doc. No. 151), approximately 6 months after the initial pleadings were filed in this action, and the Plaintiff cannot have been expected to raise the issue of collateral estoppel without the final decision from the Minnesota Court of Appeals. Accordingly, the Guarantors' motion to reargue is denied.

#### **B. Motion Sequence 005 (the Plaintiff's Motion for Summary Judgment)**

On a motion for summary judgment, the movant "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], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In order to enforce a

written guaranty on summary judgment, the plaintiff must prove (1) the existence of the guaranty, (2) the underlying debt, and (3) guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). Once a *prima facie* showing is made, the defendant must present admissible evidence that raises a triable issue of fact to preclude liability (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

### **1. First Cause of Action (Breach of the Payment Guaranty)**

Here, the Plaintiff has adduced evidence to establish a *prima facie* breach of the Payment Guaranty: (i) the Guarantors executed the Payment Guaranty (NYSCEF Doc. No. 153 at 40:20-41:23; NYSCEF Doc. No. 154, ¶ 8), (ii) there exists an underlying debt of \$2,878,245.99 (NYSCEF Doc. No. 152), and (iii) the Guarantors did not perform under the Payment Guaranty which obliged the Guarantors to "absolutely and unconditionally" guaranty all interest payments, fees, and other expenses due under the loan, which sums the Guarantors have undisputedly failed to satisfy.

The Guarantors do not adduce any evidence to raise a triable issue of fact in opposition to the motion for summary judgment. Inasmuch as the Guarantors assert that Minnesota law should apply to the instant motion, the Guarantors fail to adequately explain the basis for this argument and in any event, the Payment Guaranty contains a choice of law provision that requires the application of New York law (NYSCEF Doc. No. 146, § 7(1)). In addition, for the reasons set forth above and in the Prior Decision, the Guarantors are collaterally estopped from contesting the enforceability of the late charge due to the Minnesota Action.

## 2. Second Cause of Action (Breach of the Limited Recourse Guaranty)

The Plaintiff has adduced evidence that (i) the Guarantors executed the Limited Recourse Guaranty (NYSCEF Doc. No. 153 at 42:4-43:5; NYSCEF Doc. No. 154, ¶ 9) and (ii) there exists an underlying debt of \$2,878,245.99 (NYSCEF Doc. No. 152).<sup>1</sup> With regards to the Guarantors' performance under the Limited Recourse Guaranty, the Limited Recourse Guaranty incorporated defined terms from the Loan Agreement and provided,

... that the Obligations shall be fully recourse to Guarantor in the event that ... ***Borrower fails to obtain Lender's prior consent to any Transfer (including, without limitation, any Change of Control)***, except to the extent expressly permitted by the Loan Documents;

(NYSCEF Doc. No. 147, § 1 (b)(iv) [emphasis added]).

In the Loan Agreement, a "Transfer" is defined as:

... ***the sale, transfer, conveyance, mortgage, pledge or assignment of*** (i) the Property or any part thereof, or any direct legal or beneficial interest therein; or (ii) ***any ownership interest in Borrower***, or any direct or indirect owner of Borrower, direct or indirect, legal or equitable.

(NYSCEF Doc. No. 143, § 8.1 (c) [emphasis added]).

Furthermore, a "Change of Control" consisted of any of the following:

(a) the failure of Talon Real Estate Holding Corp., a Utah corporation, to Control the management of Borrower, or (b) the failure of the Entity Guarantor to be the sole member of Borrower, or (c) ***the failure of the Individual Guarantors to own at least twenty percent (20%) of the aggregate direct or indirect ownership interests in Borrower.***

(*id.*, § 1.1 [emphasis added]).

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<sup>1</sup> For the avoidance of doubt, the Limited Recourse Guaranty also contains the same New York choice of law provision, which mandates the application of New York law (NYSCEF Doc. No. 147, § 7(1)).

Pursuant to a Contribution Agreement (the **Contribution Agreement**; NYSCEF Doc. No. 149), dated June 27, 2018, by and between Talon OP, L.P (**Talon**) and First Capital Real Estate Operating Partnership L.P. (**First Capital**), Talon agreed to “contribute, convey and quit claim ... all of [Talon’s] right title and interest in [Borrower]” for the consideration of “2,495,321 OP Units ... having an aggregate value of \$40,000,000 ... and a [sic] not to exceed credit of \$58,000,000 for the Existing Indebtedness adjusted to a net of \$40,000,000” (*id.*, §§ 1, 2.2). In other words, the sale of Borrower under to the Contribution Agreement was clearly a “Transfer” under the Limited Recourse Guaranty, of which the Borrower never obtained consent from the Plaintiff for. This finding is reinforced by a Form 8-K, filed with the United States Securities and Exchange Commission, whereby Mr. Kaminski as CEO of Talon Real Estate Holding Corp. reported that,

On June 27, 2018, [**Borrower**], a subsidiary of Talon OP, L.P., which is the entity through which Talon Real Estate Holding Corp. (Talon) conducts substantially all of its business, **was sold by Talon to a large publicly held real estate company.**

(NYSCEF Doc. No. 150 [emphasis added]).

Under these circumstances, the Plaintiff has established a breach of the Limited Recourse Guaranty. To the extent that the Guarantors rely on the deposition testimony of Matthew Kaminski where he asserted that the Borrower was not sold, but conveyed to First Capital because the consideration received was not cash, but limited partnership units (NYSCEF Doc. No. 153, at 51-53), Mr. Kaminski’s self-serving evidence is insufficient to raise a triable issue of fact as to the undisputed transfer of the Borrower’s interest under the Contribution Agreement, which was an unambiguous breach of the express terms of the Limited Recourse Agreement.

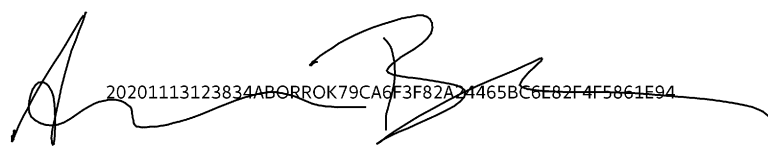
Moreover, the Guarantors' affirmative defenses and counterclaims are dismissed because the Guarantors failed to object to dismissal of the same in their opposition papers. Accordingly, the Plaintiff's motion for summary judgment is granted.

Accordingly, it is

ORDERED that the Guarantors' motion to reargue (Mtn. Seq. 003) is denied; and if is further

ORDERED that the Plaintiff's motion for summary judgment (Mtn. Seq. 004) is granted; and it is further

ORDERED that the Plaintiff is directed to submit a judgment on notice within 7 days of this decision and order.

  
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11/13/2020  
DATE

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ANDREW BORROK, 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 type="checkbox"/>	REFERENCE