

TPC Art Fin., LLC v Shagalov
2020 NY Slip Op 33906(U)
November 24, 2020
Supreme Court, New York County
Docket Number: 650699/2020
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

TPC ART FINANCE, LLC

Plaintiff,

- v -

SHAGALOV, ANATOLE

Defendant.

-----X

INDEX NO. 650699/2020
MOTION DATE 10/19/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

Pursuant to two loan agreements, plaintiff TPC Art Finance LLC agreed to provide non-party Nature Morte LLC (the Borrower) with a total of \$4,725,000 in financing, exclusive of interest. Defendant Anatole Shagalov entered into two guaranty agreements where, inter alia, he absolutely and unconditionally guaranteed both loans, and waived all defenses he would otherwise have a right to assert in an action to enforce the guaranties. The Borrower defaulted on one loan in April 2018 and the other one in January 2019. Plaintiff contends that the outstanding balance owed to plaintiff pursuant to the loans is \$1,764,400.05.

Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, on the ground that this is an action based upon instruments for the payment of money only and the corresponding guaranties, that no triable issue of fact exists, directing the entry of judgment for plaintiff and against defendant in the amount of \$1,764,400.05, and for attorneys' fees.

For the following reasons, plaintiff's motion is granted.

FACTS

On October 27, 2017, plaintiff and the Borrower executed a Loan Agreement (the October Loan Agreement [NYSCEF Doc No. 7]), and a Security Agreement (the October Security Agreement [NYSCEF Doc No. 8]), pursuant to which plaintiff agreed to provide a loan in the amount of \$600,000 to the Borrower (the October Loan) (*see* October 27, 2017 promissory note [NYSCEF Doc No. 9]).

The October Loan Agreement provided for an interest rate of 13% per annum (*see* October Loan Agreement, § 2.6 [b]). The default interest rate, due “[i]f the principal amount of the Loan and any other amount payable by the Borrower hereunder shall not be paid when due,” was the lesser of (1) 19.5% per annum, or (2) the maximum legal interest rate (the October Default Rate) (*see id.*, §§ 1.1, 2.6 [c]). The October Loan matured one year from the date plaintiff funded the October Loan to the Borrower (*see id.*, § 1.1).

When the Borrower failed to remit the interest payment due on April 6, 2018, the principal amount on the October Loan became due on April 13, 2018, and the 19.5% default interest rate became activated (affidavit of Michael Hansen, plaintiff’s managing director, ¶ 5 [NYSCEF Doc No. 4]).

On December 4, 2017, the Borrower and plaintiff executed a Loan Agreement (the December Loan Agreement [NYSCEF Doc No. 10]), and a Security Agreement (the December Security Agreement [NYSCEF Doc No. 11]), pursuant to which plaintiff agreed to provide a loan in the amount of \$4,125,000 to the Borrower (the December Loan) (*see* December 4, 2017 promissory note [NYSCEF Doc No. 12]). There were two amendments to the December Loan Agreement (*see* NYSCEF Doc Nos. 13 [Amendment No. 1] and 14 [Amendment No. 2]).

The December Loan Agreement provided for an interest rate of 12.5% per annum (*see* December Loan Agreement, § 2.6 [b]). The interest rate as of June 30, 2018 for the December Loan, as provided in Amendment No. 1 to the December Loan Agreement, is 18% (*see* December Loan Agreement, §§ 1.1, 2.6 [c]; Amendment No. 1 § 1.3) The December Loan was to mature one year from the date plaintiff funded the December Loan to the Borrower (*see* December Loan Agreement, § 1.1).

Pursuant to Amendment No. 1 to the December Loan Agreement, the maturity date of the December Loan was extended to June 28, 2019 (*see* Amendment No. 1, § 1.1).

Pursuant to Amendment No. 2 to the December Loan Agreement, the Borrower agreed to pay plaintiff \$75,000 as an “Additional Reserve” to cover against interest accruing on the December Loan (*see* Amendment No. 2, § 1.1).

On January 10, 2019, the Borrower defaulted on the December Loan, by failing to make the \$75,000 Additional Reserve payment within seven business days after the December 21, 2018 due date (Hansen aff, ¶ 10).

On December 4, 2017, plaintiff and defendant executed an Irrevocable Limited Guaranty Agreement dated October 11, 2017 (the First Guaranty [NYSCEF Doc No. 5]), as well an Irrevocable Limited Guaranty Agreement dated December 4, 2017 (the Second Guaranty [NYSCEF Doc No. 6]) (collectively, the Guaranties).

Plaintiff contends that, as a result of the Borrower’s failure to make payments when due, the full remaining unpaid balance on the October Loan, including compound interest, is \$189,490.38 (*see* invoices pursuant to October Loan Agreement [NYSCEF Doc No. 15]; Hansen aff, ¶ 13).

Plaintiff further contends that, as a result of the Borrower's failure to make payments when due, the full remaining unpaid balance on the December Loan, including compound interest, is \$1,574,909.67 (*see* invoices pursuant to December Loan Agreement [NYSCEF Doc No. 16]; Hansen aff, ¶ 14).

Pursuant to the First Guaranty, defendant “unconditionally guarantees to [plaintiff] the [October] Loan, any interest and fees thereon, and any other obligations of Borrower under the Loan Documents” (*see* First Guaranty, ¶ 1). Defendant also “acknowledges and agrees that his liability hereunder is primary, direct and immediate,” and that “neither . . . the existence of any claim, setoff or other rights which the Surety may have at any time against the Borrower or Lender, shall extinguish or affect the obligations of Surety hereunder” (*see id.*, ¶ 5).

Pursuant to the Second Guaranty, defendant “unconditionally guarantees to [plaintiff] the [December] Loan, any interest and fees thereon and any other obligations of Borrower under the Loan Documents (*see* Second Guaranty, ¶ 1). Defendant also “acknowledges and agrees that his liability hereunder is primary, direct and immediate,” and that “neither . . . the existence of any claim, setoff or other rights which the Surety may have at any time against the Borrower or Lender, shall extinguish or affect the obligations of Surety hereunder” (*see id.*, ¶ 5).

DISCUSSION

Pursuant to CPLR 3213, when an action is premised “upon any judgment” or “instrument for the payment of money only,” a plaintiff may move for summary judgment in lieu of a complaint. The motion should then be granted as a matter of law (*Boland v Indah Kiat Fin. (IV) Mauritius Ltd.*, 291 AD2d 342, 343 [1st Dept 2002] [“CPLR 3213 is available ‘where a right to payment can be ascertained from the face of a document’”] [citation omitted]; *Kornfeld v NRX Tech.*, 93 AD2d 772, 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984] [granting summary judgment

in lieu of complaint where the “series of notes which had been issued, beginning in November of 1980, constituted instruments for the payment of money only within the terms of CPLR 3213”). An unconditional guaranty is an instrument for the payment of “money only” within the meaning of CPLR 3213 (*European Am. Bank & Trust Co. v Schirripa*, 108 AD2d 684, 684 [1st Dept 1985]).

“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]; accord *Cooperatieve Centrale Raiffeisen–Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]; *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 575 [2d Dept 2008]). Thus, submission of an unconditional guaranty along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212 (*European Am. Bank & Trust Co.* 108 AD2d at 684).

Thereafter, “the burden shifts to the defendant to establish, by admissible evidence, ‘the existence of a triable issue with respect to a bona fide defense’” (*Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008] [citation omitted]).

“A guaranty is a promise to fulfill the obligations of another party, and is subject ‘to the ordinary principles of contract construction’” (*Cooperatieve Centrale Raiffeisen–Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch*, 25 NY3d at 492 [citation omitted]). Under those principles, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms’ (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

“Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are ‘absolute and unconditional,’ have been consistently upheld by New York courts” (*Cooperatieve Centrale Raiffeisen–Boerenleenbank*,

B.A., “Rabobank Intl.,” N.Y. Branch, 25 NY3d at 493). ““Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses”” (*id.* [citation omitted]; *see e.g. United Orient Bank v Bao Lee, 223 AD2d 500 [1st Dept 1996]* [where guaranties contained waivers of all defenses other than payment, defendants precluded from asserting claims of release]).

Plaintiff is entitled to summary judgment in lieu of complaint pursuant to CPLR 3213, as it has established the *prima facie* elements necessary to enforce defendant’s written guaranties. As set forth in the Hansen affidavit, plaintiff has demonstrated the existence of the two guaranties between plaintiff and defendant, the October Guaranty on October 11, 2017 and the December Guaranty on December 4, 2017, guaranteeing payment of the two promissory notes. Both guaranties provide that defendant “unconditionally guarantees to [plaintiff] the Loan, any interest and fees thereon and any other obligations of Borrower under the Loan Documents”. Plaintiff has also demonstrated the underlying debt, as well as the nonpayment.

Because defendant has not paid the amounts due to plaintiff under the October and December promissory notes, for which he guaranteed payment in the October and December Guaranties, plaintiff is entitled to summary judgment against defendant (*see e.g. Reliance Constr. Ltd. v Kennelly, 70 AD3d 418, 419 [1st Dept 2010]* [“(p)laintiff made a prima facie showing for summary judgment by proving the absolute and unconditional guaranties and the guarantors’ failure to perform”]; *Bank of Am., N.A. v Solow, 59 AD3d 304, 304 [1st Dept 2009]* [“(p)laintiff demonstrated its entitlement to summary judgment by establishing the existence of a guaranty and submitting an affidavit of nonpayment”).

In opposition, defendant fails to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank,*

B.A. “Rabobank Intl.,” N.Y. Branch, 25 NY3d at 492; *Cutter Bayview Cleaners, Inc.*, 57 AD3d at 710). Pursuant to the clear terms of the Guaranties, defendant waived any defenses to his liability under the Guaranties:

“[Defendant] waives notice of acceptance of this Guaranty, presentment, demand, protest, notice of protest, notice of dishonor, notice of non-payment, any defenses available to a surety, endorser or guarantor under applicable law, and any right to require suit against the Borrower before enforcing this Guaranty”

(First Guaranty, ¶ 2; Second Guaranty, ¶ 2).

This co language is “sufficiently specific to constitute valid waivers of defenses” (*JFURTI, LLC v Singal*, 171 AD3d 611, 611 [1st Dept 2019]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-210 [1st Dept 2007]; *see also Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 [1st Dept 2010] [a provision of a guaranty that the guarantor waives all defenses and counterclaims is valid]).

Accordingly, although defendant challenges the amount owed, and seeks an accounting, contending that he is not indebted to plaintiff because of “plaintiff’s breaches of the agreement, violations of UCC Article 9, bad faith, and breaches of fiduciary duty” (affirmation of Richard Paul Stone, Esq. [NYSCEF Doc No. 21], ¶ 8), these claims are unavailing, as he clearly waived all defenses he would otherwise have a right to assert in an action to enforce the Guaranties.

Consequently, the court is constrained to enter summary judgment in lieu of complaint, as plaintiff seeks to enforce instruments for the payment of money only, and it is clear there is no triable issue or material question of fact (*see e.g. Punch Fashion, LLC v Merchandise Factors Corp.*, 180 AD3d 520, 522 [1st Dept 2020] [(d)efendants . . . contend that there are triable issues of fact as to whether the amount sought by (plaintiff) included improper chargebacks and should be offset by defendants’ damages and inventory under (plaintiff’s) control. Defendants’ absolute and unconditional guarantees preclude such defenses”] [internal citations omitted]; *LFR*

Collections LLC v Blan Law Offices, 117 AD3d 486, 486 [1st Dept 2014] [“(p)laintiff’s motion for summary judgment in lieu of complaint was properly granted” as defendant “signed an unconditional guarantee in which he waived the right to interpose a defense”]; *Constructamax, Inc. v CBA Assoc.*, 294 AD2d 460, 460 [2d Dept 2002] [granting summary judgment in lieu of complaint where “the defendants failed to raise any viable defenses to the note”])

Accordingly, plaintiff is entitled to summary judgment in lieu of complaint with respect to the Guaranties in the amount of \$1,764,400.05. Pursuant to paragraph 2 of the Guaranties, plaintiff is also entitled to summary judgment with respect to its attorneys’ fees and costs (*see W6 Facility X, LLC v West 6 Care Ctr., Inc.*, 169 AD3d 968, 969-970 [2d Dept 2019]) [“(t)he plaintiff also established its prima facie entitlement to judgment as a matter of law on the issue of liability on its cause of action to recover attorney’s fees insofar as asserted against the guarantor” as “the guaranty provided for the recovery of attorney’s fees in connection with an action to enforce the lease or guarantee”)]. However, because plaintiff fails to support its request for attorneys’ fees with any documentation, the court denies this portion of the motion, without prejudice, with leave to renew upon submission of the appropriate documentation.

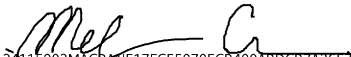
The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is granted to the extent that plaintiff is entitled to summary judgment in the amount of \$1,764,400.05, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$1,764,400.05, together with interest at the statutory rate from January 30, 2020 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate,

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's motion for attorneys' fees is denied, without prejudice, with leave to renew upon submission of the appropriate documentation.


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<u>11/24/2020</u> DATE		<u>MELISSA ANNE CRANE, J.S.C.</u>
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 <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE