

Macquarie Invs. US Inc. v Ferreira
2021 NY Slip Op 31564(U)
May 5, 2021
Supreme Court, New York County
Docket Number: 652884/2020
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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MACQUARIE INVESTMENTS US INC.,

Plaintiff/Counterclaim Defendant,

- v -

VICTOR FERREIRA and KAREN FERREIRA,

Defendants/Counterclaim Plaintiffs.

INDEX NO.	652884/2020
MOTION DATE	
MOTION SEQ. NO.	001 and 003

DECISION + ORDER ON MOTIONS

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HON. BARRY R. OSTRAGER

Before the Court are two motions by plaintiff/counterclaim defendant Macquarie Investments US Inc. (“Macquarie”) to enforce a written Limited Guaranty signed by defendant/counterclaim plaintiff Victor Ferreira in favor of Macquarie and another signed by his wife, co-defendant Karen Ferreira (NYSCEF Doc. Nos. 3 and 4). The Guaranties were executed in 2015 in connection with a Facility Agreement between Macquarie, as Lender, and Big Apple Energy, LLC and Clear Choice Energy, LLC as Co-Borrowers. According to the recitals in each Guaranty, the Guarantors held an indirect equity interest in the Co-Borrower entities when the Guaranties were executed.

The Court heard very extended oral argument via Microsoft Teams on May 5, 2021 on the two pending motions, the first being a motion by Macquarie for partial summary judgment in its favor on its First and Third Causes of Action (seq. 001) and the second being a motion by Macquarie for an Order dismissing the Guarantors’ four counterclaims pursuant to various grounds under CPLR 3211(a). In accordance with the proceedings on the record, and as confirmed herein, both motions are granted.

In the summary judgment motion, Macquarie relies on the “absolute and unconditional” terms of the Guaranty. Section 2 of the Guaranty, entitled “Recourse Liability”, states that:

In the event of the occurrence of any Recourse Liability Event, Guarantor hereby irrevocably, unconditionally and absolutely agrees to assume and be responsible for the prompt and complete payment of the Guaranteed Obligations (as hereinafter defined). Such assumption and responsibility shall occur automatically upon the occurrence of any Recourse Liability Event without further action on the part of any Person. The Guarantor hereby irrevocably, unconditionally and absolutely agrees to indemnify and hold harmless the Collateral Agent [Macquarie] and each other Secured Party from and against any and all loss, cost, damage, liability or expense, including attorney’s fees and disbursements, suffered or incurred by any such Person by reason of the occurrence of any of the Recourse Liability Events.

Pursuant to Section 1(e) of the Guaranty, a “Recourse Liability Event” includes “any filing of a voluntary bankruptcy or insolvency proceedings or similar action by any Co-Borrower, Holdco or the Guarantor.”

It is undisputed that both Co-Borrowers filed for bankruptcy, which Macquarie asserts triggered the Guaranty and entitles it to summary judgment for the outstanding debt of approximately \$14.3M based on the First and Third Causes of Action sounding in Breach of the Guaranty based on the bankruptcy. *See City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept. 1998) (on a motion for summary judgment to enforce a written guaranty, all the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty). Macquarie adds that the fourteen Affirmative Defenses asserted by the Guarantors should be dismissed as barred by the fully enforceable, unambiguous terms of the Guaranty and also as lacking in merit. *See Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 NY3d 485, 493 (2015). Specifically, Macquarie relies on Section 8(a) of the Guaranty, which states in relevant part that the Guarantors’ obligations are “absolute and unconditional, irrespective of . . . setoff, counterclaim, . . . and

irrespective of any other circumstances which might . . . constitute a legal or equitable discharge or defense.”

Citing cases such as *Canterbury Realty & Equip. Corp. v. Poughkeepsie Sav. Bank*, 135 AD2d 102 (3rd Dep’t 1988), the Guarantors assert they have raised triable issues of fact precluding summary judgment based on the principle quoted in *Canterbury* that: “A promisee who prevents the promisor from being able to perform the promise cannot maintain suit for nonperformance; he discharges the promisor from duty. There are cases, also, in which a promisee discharges the promisor from his contractual duty *by unjustly causing the happening of a condition of that duty.*” 135 AD2d at 107 (quoting 6 Corbin, Contracts § 1265, at 52, with emphasis supplied); *see also Red Tulip, LLC v. Neiva*, 44 AD3d 204, 209 (1st Dept. 2007) (acknowledging the principle cited in *Canterbury* but distinguishing it on the facts). The Guarantors have submitted detailed affidavits from defendant Victor Ferreira and two others with personal knowledge (NYSCEF Doc. Nos. 87-89) to support their claim that that where, as here, a condition triggering a guaranty (i.e., the bankruptcy filing) is caused by the party benefitting from the guaranty (i.e., Macquarie), the benefitting party is precluded from enforcing the guaranty. At a minimum, the Guarantors assert they are entitled to discovery to develop their claims.

The Court disagrees with the Guarantors and finds that the absolute and unconditional language of the Guaranty entitles Macquarie to summary judgment on liability on the First and Third Causes of Action. The facts alleged by the Guarantors do not fall within the extremely narrow exception to the general rule in *Canterbury*. However, the Court cannot direct entry of a money judgment at this time because it is unclear from the papers the precise amount Macquarie claims to be due and the date of breach from which interest shall accrue and whether the

Guarantors dispute that amount in any way. Therefore, counsel shall meet and confer and exchange documents, if appropriate, in an effort to agree upon an amount due, the date of breach, and the applicable rate of interest so the Clerk of the Court can calculate the amount of any judgment to be entered.

Macquarie has also established its right to an award of attorney's fees pursuant to the above-quoted Section 2 of the Guaranty. Again, however, the Court lacks the information needed to determine an amount. Macquarie shall provide defendants' counsel with copies of its invoices, after which time the parties shall confer to determine whether an amount can be agreed upon without a hearing.

In the second motion argued on the record on May 5 (seq. 003), Macquarie moves to dismiss the Guarantors' four counterclaims pursuant to CPLR 3211(a)(1),(3),(5), and (7) based on documentary evidence, lack of standing, a release signed by the Co-Borrowers in Bankruptcy Court, and failure to state a cause of action. The four counterclaims sound in breach of fiduciary duty, fraud, negligence, and unjust enrichment. The motion is granted and the counterclaims are dismissed in accordance with the proceedings on the record and for the reasons that follow.

On the standing issue, Macquarie asserts that the claims are really derivative in nature, and not direct, because any injury was incurred by the Co-Borrower entities. The Guarantors, as non-members of the entities, cannot assert those claims, particularly because the Co-Borrower entities are debtors in bankruptcy whose legal and equitable interests have been transferred to the Bankruptcy Trustee. The Court agrees, notwithstanding that the Guarantors may have used some of their personal assets to help fund the entities.

Further, pursuant to the referenced release entered in the bankruptcy proceedings, the Co-Borrowers "release[d]" and "forever discharge[d]" and "covenant[ed] not to sue" Macquarie for

“any and all acts and omissions” and for “any and all claims, causes of action counterclaims, . . . damages, [and] obligations” which they may “have or may come to have” whether “known or unknown.” (See NYSCEF Doc. Nos. 109 and 110). For reasons similar to those explained above in the analysis of the summary judgment motion, the Court is not persuaded by the Guarantors’ claim that the Release was fraudulently induced and cannot be enforced.

Nor have the Guarantors alleged facts sufficient to support a fiduciary duty extending from Macquarie to the Guarantors or a legal duty outside the scope of the Guaranty to support a negligence claim. And the unjust enrichment claim is barred by the existence of a written contract; i.e., the Guaranty and lending documents. ” *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). Thus, the claims fail to state a cause of action.

In sum, while the Court is mindful of the harsh result here for the individual defendants, the documents and case law have persuaded the Court that this determination is the correct one. Counsel shall exchange documents as necessary and meet and confer in accordance with the terms of this decision. A conference is scheduled for June 30, 2021 at 10:00 a.m. via a dial-in number to be provided by plaintiff’s counsel in a letter efiled at least ten days in advance to discuss a resolution of the remaining issues identified by the Court, unless the parties reach agreement on their own.

Dated: May 5, 2021


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
	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