

<b>Vision Biobanc Holdings, Inc. v Mushahwar</b>
2021 NY Slip Op 32596(U)
December 6, 2021
Supreme Court, New York County
Docket Number: Index No. 655459/2021
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<p><b>PRESENT:</b> <u>HON. MELISSA CRANE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>VISION BIOBANC HOLDINGS, INC.</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>STEPHEN MUSHAHWAR,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p><b>PART</b> <span style="float: right;"><b>60M</b></span></p> <p><b>INDEX NO.</b> <u>655459/2021</u></p> <p><b>MOTION DATE</b> <u>09/13/2021</u></p> <p><b>MOTION SEQ. NO.</b> <u>001</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 18, 19, 20, 21, 22, 26

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents, it is

This is an action to recover under a guaranty that defendant, the principal of Nahakama, LLC (Nahakama), executed as a security interest for a loan plaintiff issued to Nahakama. Plaintiff loaned Nahakama \$500,000 under a 12/03/2020 Supplemental Loan and Security Agreement (Supp. Agreement) (Doc 4).<sup>1</sup>

Plaintiff issued a Supplemental Note in the amount of \$500,000 in connection with the Supp. Agreement and the Guaranty (Supp. Note) (Doc 5). Nahakama agreed to pay interest on that amount at a rate of 13% per annum until the maturity date of 03/02/21 (subject to a discretionary rollover of additional one-month periods if the borrower [Nahakama] requested and

<sup>1</sup> There was a separate 9/2/2020 Loan and Security Agreement, which had been modified by a 10/29/2020 allonge (Original Agreement) (by which plaintiff loaned Nahakama \$1,875,000 in principal). The Original Agreement is not at issue here, nor are those parties and their related entities' numerous other agreements. The court notes that there is a related action, *Vision BioBanc Holdings, Inc. v NAHA Health, LLC*, Index No. 655433/2021, in which plaintiff seeks to recover under various other agreements.

lender-plaintiff agreed). Defendant Stephen Mushawar executed the personal guaranty (Guaranty) (Doc 6), agreeing to:

“unconditionally, absolutely and irrevocably guarantees to the Lender, the punctual payment and performance when due, whether at stated maturity or by acceleration or otherwise, of up to six hundred thousand dollars of the principal amount of the Note that remains unpaid from time to time, plus an amount equal to the Enforcement Costs (as hereinafter defined) and other out-of-pocket expenses (including reasonable and documented outside attorneys’ fees) incurred by Lender in enforcing the Note, whether by acceleration or otherwise, plus interest thereon, and all costs and expenses related thereto.” (Doc 6 § 1.1).

The enforcement costs the guaranty references are defined as attorneys’ fees and costs.

Defendant waived various defenses in the Guaranty, including validity or enforceability of the obligations (or the Supplemental Note, etc.), the terms of the Supp. Note, notice requirements, and so forth.

On 08/16/2021, plaintiff emailed a letter to defendant indicating that the Supp. Loan matured on 04/09/2021, but it had received no payments towards the outstanding principal. Defendant only paid one interest payment of \$15,671 on 03/02/2021. Plaintiff declared a default under the Supp. Agreement and Supp. Note (Doc 7 [plaintiff also declared a default with regard to the Original Note and Agreement in the same letter]). On 09/01/2021, plaintiff sent an email indicating Nahakama’s failure to cure the default (Doc 8). Once the default was declared, the rate of interest increased to 18% under the Supp. Agreement and Supp. Note.

In this action, plaintiff seeks summary judgment in lieu of complaint under the Guaranty against only Mushawar as guarantor.

### **Discussion**

“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” (*4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st

Dept 2014]). Preliminarily, the court finds that plaintiff has made its *prima facie* case “by establishing the existence of a guaranty and submitting an affidavit of nonpayment” of the Supp. Note (*Bank of Am., N.A. v Solow*, 59 AD3d 304 [1st Dept 2009]).

In opposition, defendant submits his own affidavit and a Third Amended and Restated Convertible Note Purchase Agreement (3d A&R Agreement), entered 03/31/2021, that amends and restates the 05/04/2020 convertible note purchase agreement. There is no reference to the Supp. Note or Supp. Agreement in the 3d A&R Agreement.

Defendant asserts that plaintiff entered the 3d A&R Agreement in bad faith, intending to gain leverage over the NAHA/Nahakama entities by withholding financial information and unrelated investment proceeds. He states that plaintiff and its principal, Mr. Taller, engineered defaults under this Supp. Agreement and other loan agreements by controlling an investment account into which NAHA entities transferred about \$2 million (which purportedly doubled as a result of cryptocurrency trading). Defendant says that Taller wrongfully refused to release those “Trading Funds” back to the NAHA/Nahakama entities, and that those funds would have gone towards the Supp. Note payments.

Defendant’s counsel argues that: (1) the waivers of defenses in the Supp. Note are not broad enough to permit enforcement of the Guaranty; (2) plaintiff’s claims are foreclosed by the Taller entities’ breaches of good faith and fair dealing; (3) defendant should be permitted to pursue a defense of fraudulent inducement; and (4) defendant should be permitted to interpose various counterclaims.

Defendant has failed to raise a triable issue of fact in opposition to the motion for summary judgment in lieu of complaint. Defendant does not dispute the legitimacy of the Guaranty, the debt, or the default. Further, defendant waived any defenses pertaining to “[a]ny

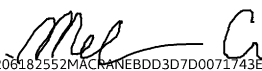
lack of validity or enforceability of the Obligations or any agreement or instrument relating thereto” (Doc 6). The Obligations are the payments required under the Supp. Note, and the Guaranty is an “agreement or instrument relating thereto” as it is the “Security Interest” that served as consideration for the loan under the contemporaneously executed Supp. Agreement (Doc 4 § 3). Defendant further waived “[a]ny other circumstance (including, without limitation, any statute of limitations) or manner of administering the Obligations or any existence of or reliance on any representation by the Lender that might vary the risk of the Guarantor or otherwise operate as a defense available to, or a legal or equitable discharge of, Borrower or any other guarantor or surety” (Doc 6 § 2.6). Accordingly, defendant waived the defenses that he now seeks to interpose. The waiver provisions plainly eliminate fraud defenses/counterclaims and defenses that could otherwise have been asserted on behalf of the primary obligor (e.g., breach of good faith and fair dealing) (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 493 [2015]).

Even if the waiver in the Guaranty was less broad, defendant does not have a viable defense for breach of good faith and fair dealing. The Supp. Note, Supp. Agreement, and Guaranty are unambiguous and have no relationship or reference to the 3d A&R Agreement. The Guaranty is not, on its face, part of the myriad other transactions (e.g., the 3d A&R Agreement) at issue in the related action. Defendant also does not raise an issue of fact as to a fraudulent inducement defense/counterclaim. He fails to identify any misrepresentation that pertains to the Supp. Note or Guaranty. Instead, the conclusory allegations concerning the fraudulent inducement seem to concern the separate 3d A&R Agreement and other agreements between the Taller-NAHA entities, not to the Supp. Agreement, Supp. Note, and Guaranty here.

In any event, those defenses and defendant’s proposed counterclaims are not “inseparable” from the claim at issue in this motion for summary judgment in lieu of complaint. Therefore, those potential counterclaims do not warrant denial of this motion (*Quadrant Mgmt. Inc. v Hecker*, 102 AD3d 410, 411 [1st Dept 2013] [“The claims asserted by defendant . . . are not “inseparable” from plaintiff’s right to payment on the note and therefore do not preclude summary judgment. . . . The allegations underlying defendant’s remaining claims are unrelated to the note and do not affect his obligations thereunder.”]).

Accordingly, it is

ORDERED that the plaintiff’s motion for summary judgment in lieu of complaint is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$ 530,826.45, together with interest at the rate of 18% per annum from the date of August 17, 2021 until the date of the decision 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.

  
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<u>12/6/2021</u> DATE		<u>MELISSA CRANE, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED <input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE