

Merchants Cachet Inv. Partners LLC v Roche

2021 NY Slip Op 32657(U)

December 14, 2021

Supreme Court, New York County

Docket Number: Index No. 156663/2020

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON PART 37

Justice

-----X

MERCHANTS CACHET INVESTOR PARTNERS LLC,

Plaintiff,

- v -

ROBERT ROCHE,

Defendant.

-----X

INDEX NO. 156663/2020

MOTION DATE 11/03/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

Background

In an instrument dated April 20, 2017, plaintiff, Merchants Cachet Investor Partners, LLC ("Merchants"), and non-party Cachet Hotel Group Limited Cayman L.P. ("Cachet") entered into an Equity and Warrant Subscription Agreement ("the ESA") through which Merchants agreed to acquire shares in Cachet in a deal including various entities and properties related to the Philippe Chow restaurant brand. NYSCEF Doc. No. 67.

In a letter agreement ("First Amendment") dated June 30, 2017, Cachet and Merchants modified the ESA to, inter alia, finalize its initial closing with a transfer of the remaining \$1,500,000 (of \$3,000,000), and to clarify their plans for the Philippe Chow brand. NYSCEF Doc. No. 68. The First Amendment was signed by Richard Cohn, an authorized signatory of Merchants, and Martin Key, the Chief Financial Officer of Cachet, and sent to defendant, Robert Roche, as Cachet's Chairman. Id.

In a second letter agreement ("Second Amendment") dated March 1, 2018, Cachet and Merchants again modified the ESA to, inter alia: acknowledge Merchants' existing \$3,000,000 investment in Cachet; nullify the First Amendment; delete all references to the Philippe Chow brand and acknowledge that Cachet "has never been a holder of any Philippe Interest, nor does it have any prospective rights to become a holder of any Philippe Interest;" and, significantly, to add various "put" options through which Merchants could redeem some or all of its shares in Cachet. NYSCEF Doc. No. 69.

The Second Amendment was signed by Mr. Cohn, an authorized signatory of Merchants, and Mr. Key, the Chief Financial Officer of Cachet, and was also signed by Mr. Roche specifically “as to paragraph 4 and exhibit A.” NYSCEF Doc. No. 69.

Paragraph 4 of the Second Amendment addresses the added “put” options, and paragraph 4(a)(iv) of the Second Amendment says: “[i]f the initial Exercise Notice shall be for 100% of Merchants Share AND the Exercise Notice is tendered AFTER June 30th, 2020, then in that event [Cachet] shall redeem 100% of Merchants Share for the sum of US \$4 Million Dollars within ten (10) from the date of the Exercise Notice.” NYSCEF Doc. No. 69.

Paragraph 4(d) of the Second Amendment states that, “Robert Roche hereby guarantees the full and timely performance and payment of [Cachet’s] obligations to Merchants hereunder and has simultaneously executed the guaranty in the form attached hereto as Exhibit A.” NYSCEF Doc. No. 69.

The aforementioned guaranty (“the Guaranty”), also dated March 1, 2018, and annexed to the Second Amendment as “Exhibit A,” is by its clear language, “absolute and unconditional” and states that Mr. Roche “guarantees to Merchants ... the prompt and complete payment, as and when due and payable, of all the Guaranteed Obligations now existing or hereafter incurred.” Guaranteed obligations are defined as “all obligations of [Cachet] pursuant to paragraph ‘4’ of the Second Amendment, together with all reasonable fees and expenses incurred in collecting same.” NYSCEF Doc. No. 106.

The Guaranty, a complete copy of which plaintiff’s counsel filed on October 18, 2021, was signed by Mr. Roche before a Consular Associate at the United States Embassy in Tokyo, Japan, on April 19, 2018. NYSCEF Doc. No. 106.

Pursuant to Section 3 of the Guaranty, Mr. Roche agreed that, upon demand by Merchants, he would pay all amounts due within 30 days of the demand, plus 9% interest per annum, compounded annually. NYSCEF Doc. No. 106. In Section 18 of the Guaranty, Mr. Roche “acknowledges and agrees that this Guaranty is an ‘instrument for the payment of money only’ within the meaning of” CPLR 3213. Id.

Section 3 of the Guaranty also states that, “[t]he amount of such payment shall not be reduced by any setoff, counterclaim or crossclaim whether such setoff or claim related to this Guaranty, the Guaranteed Obligations, or otherwise.” NYSCEF Doc. No. 106.

In a letter dated July 1, 2020, Merchants exercised its “put” option, pursuant to paragraph 4(a)(iv) of the Second Amendment, to sell 100% of its shares in Cachet in exchange for \$4,000,000. NYSCEF Doc. No. 71.

Cachet failed to pay.

In a letter dated July 14, 2020, Merchants demanded that Mr. Roche honor the Guaranty and pay the \$4,000,000 that Cachet had not. NYSCEF Doc. No. 72. That demand letter was sent, pursuant to Section 11 of the Guaranty, to Mr. Roche at a Shanghai, China, address he had

provided in the Guaranty, as well as via email. Id. It was also sent, pursuant to the Guaranty, to Mr. Roche's attorney. Id. Section 11 of the Guaranty says: "for the avoidance of doubt, lack of actual receipt or refusal to accept delivery shall not affect the effectiveness of any such notice or communication provided that Merchants has deposited with such courier such notice properly addressed ... and has provided the attorney for Guarantor with the designated tracking numbers from the courier." Id.

Mr. Roche failed to pay.

On August 21, 2020, Merchants moved, pursuant to CPLR 3213, for summary judgment in lieu of complaint against Mr. Roche. NYSCEF Doc. No. 2.

On October 7, 2020, Mr. Roche filed for an Order to Show Cause seeking time to respond to Merchants' motion. NYSCEF Doc. No. 15. On October 26, 2020, this Court issued that Order. NYSCEF Doc. No. 30.

In a Decision and Order dated November 11, 2020, this Court granted Mr. Roche's motion to extend time to respond to Merchants' CPLR 3213 motion. NYSCEF Doc. No. 37.

In a Decision and Order dated May 21, 2021, this Court denied Merchants' motion for summary judgment in lieu of complaint, finding that the Guaranty did not qualify as an "instrument for the payment of money only," despite its clear language identifying it as such, because it "goes beyond guaranteeing merely the payment of money" and requires performance as well. NYSCEF Doc. No. 57. Subsequently, pursuant to CPLR 3213, Merchants' moving papers were deemed the complaint and Mr. Roche's opposition papers were deemed the answer, unless Mr. Roche chose to interpose a formal answer with 30 days. Id. Mr. Roche did not interpose a formal answer and, as such, his affirmation pursuant to CPLR 2106(b) in opposition to the 3213 motion, NYSCEF Doc. No. 65, is deemed his answer.

In his deemed answer, Mr. Roche acknowledged that: he is the principal of Cachet Hotel Group Limited Cayman G.P., the general partner of Cachet; that Cachet's CFO, Mr. Key, "acknowledged and agreed" to the Second Amendment; that he also "acknowledged and agreed" to "paragraph 4" of the Second Amendment; and that he also "executed a payment guaranty." NYSCEF Doc. No. 65.

In the same deemed answer, Mr. Roche argued: that the Second Amendment was not executed pursuant to Cachet's partnership agreement; that he was barred from paying based on various correspondence from attorneys from non-party the Mailman Trust, a beneficial owner in part of Merchants, directing him to withhold payment; and that, because the payment provisions of the relevant instruments fail to provide a specific dollar amount, they were meaningless for a CPLR 3213 claim. NYSCEF Doc. No. 65.

On August 6, 2021, Merchants moved, pursuant to CPLR 3212, for summary judgement. NYSCEF Doc. No. 62. The thrust of Merchants' argument is the undisputed existence of the Guaranty, the undisputed failure of Mr. Roche to honor it, and the underlying debt.

In its papers, Merchants includes the affidavits of Adam Hochfelder and Michael Fruhling, the beneficiary and trustee of The Mailman Trust respectively, which each say that “any opposition on the part of the Mailman Trust to the payment of the \$4 million plus accrued interest by [Robert Roche] to [Merchants] is withdrawn with prejudice.” NYSCEF Doc. No. 73.

On September 20, 2021, Mr. Roche filed a cross-motion, pursuant to CPLR 3212, for summary judgment dismissing Merchants’ suit. NYSCEF Doc. No. 72.

Also on September 20, 2021, pursuant to CPLR 2106(b), Mr. Roche filed an affirmation in which he alleged: that he “was misled into ill-advisedly signing off on the [Second Amendment] and Guaranty;” that he only signed “as a gesture of good faith ... with the understanding that neither [the Second Amendment nor the Guaranty] will be called;” that the Mailman Trust still barred him from remitting payment; and that those portions of the Second Amendment that allegedly “violate the [Cachet] Directors Resolution are of no force and effect” because Mr. Roche “failed to realize that Board approval was necessary for Martin Key to sign the Second Amendment Letter on behalf of Cachet.” NYSCEF Doc. No. 78.

Put another way, Mr. Roche alleges:

“The Limited Partnership Agreement requires explicit Board Authorization to issue or acquire securities. The fact is that the Board never authorized Martin Key or me – not in 2017 and not in 2018 – to sign off on the Put Option Provision, nor to make an investment by purchasing securities from [Merchants], nor to acquire securities, nor to make any unauthorized expenditure or commitment” and therefore the Second Amendment underlying the Guaranty is invalid.

NYSCEF Doc. No. 78.

Because Mr. Roche believes neither he nor Mr. Key were actually authorized to execute the Second Amendment, he argues the agreement is subject to rescission or reformation based on the mutual mistake of the parties. NYSCEF Doc. No. 100.

Discussion

To obtain summary judgment a movant must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993); CPLR 3212(b). Once the movant’s initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444 (1st Dep’t 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

A prima facie showing to obtain a summary judgment on a guaranty requires that the moving party prove “the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty. 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.” Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” v Navarro, 25 NY3d 485, 492 (2015) (internal citations and quotations omitted).

Here, Merchants has shown, and Mr. Roche has not denied, the existence of the Guaranty and Mr. Roche’s failure to perform under it. Mr. Roche disputes the existence of the underlying debt.

Merchants has sufficiently proven the existence of the underlying debt and Mr. Roche has failed to establish the existence of a triable issue with the respect to a bona fide defense. “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. Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses.” Cooperatieve, 25 NY3d at 493 (internal quotations and citations omitted).

Mr. Roche, an attorney, is not a legal novice and went into the Guaranty with eyes wide open. Although he now claims his actions were ill-advised, that is no defense. There is no question that Mr. Roche signed the Second Amendment – specifically as to the “put” options existence and his guaranty of them – and the Guaranty itself. Mr. Roche had time between signing the Second Amendment and signing the Guaranty to ponder their meaning (although Mr. Roche’s signature on the Second Amendment is not dated, the instrument itself is dated March 1, 2018, and the signing of the Guaranty was witnessed on April 19, 2018) and he had the assistance of ample counsel, as evidenced by NYSCEF Doc. No. 105.

It undisputed that Mr. Roche signed an “absolute and unconditional” Guaranty to pay Merchants all the “Guaranteed Obligations” of Cachet, defined as obligations pursuant to paragraph 4 of the Second Amendment, in turn further defined as \$4,000,000 in exchange for all of Merchants’ Cachet shares conditioned upon Merchants tendered an exercise notice after June 30, 2020.

Merchants has performed, Cachet and Mr. Roche have not.

Mr. Roche’s arguments that he is not liable for a guaranty which he unquestionably signed, and absolutely and unconditionally guaranteed, the terms of which were clear at the time, merely because it was ill-advised, or he did not think it would be called, and/or because he and his lawyers did not understand the corporate structure of an organization that he chairs, are unavailing. As a matter of law, guarantors may not evade liability under the terms of an unequivocal guaranty.

This Court has considered Mr. Roche’s other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, Merchants’ motion for summary judgment should be granted.

Conclusion

Thus, the summary judgment motion by plaintiff, Merchants Cachet Investor Partners LLC, is granted and the cross-motion of defendant, Robert Roche, is denied. The Clerk is hereby ordered to enter judgment in favor of plaintiff and against defendant in the amount of \$4,000,000 plus, pursuant to Section 3 of the Guaranty, 9% interest from August 22, 2020, compounded annually until the date this judgment is entered and with statutory interest thereafter.



12/14/2021
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE