

BSP Agency, LLC v Katzoff
2021 NY Slip Op 32888(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 653472/2020
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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BSP AGENCY, LLC,

Plaintiff,

- v -

GERALD KATZOFF,

Defendant.

INDEX NO. 653472/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 65, 67, 69

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

Plaintiff, BSP Agency, LLC (“BSP”), moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint to enforce three personal guarantees against defendant Gerald Katzoff, who opposes the motion.

BACKGROUND

This action arises from the default of certain loans made to GFB Restaurant Corp. (“GFB”) by BSP, Providence Debt Fund III, L.P., Benefit Street Partners SMA LM L.P., Benefit Street Partners SMA-C L.P., Providence Debt Fund III Master (Non-US) Fund L.P., and Benefit Street Partners SMA-C SPV L.P (collectively, the “Lenders”) to benefit the Il Mulino group of restaurants (NYSCEF # 4-Jiang Aff.). BSP seeks judgment in the amount of \$11,345,666.70 plus interest, fees, and costs against Katzoff, who personally guaranteed the loans (NYSCEF # 1- Motion for Summary Judgment in Lieu of Complaint).

The following facts are derived from the parties’ submission. Katzoff is Chairman of the Il Mulino group of restaurants (NYSCEF # 67-Tr). On June 15, 2015, Katzoff, as Guarantor, and BSP, as Agent for the Lenders, entered into a Guarantee Agreement (the “June 2015 Guarantee”) (NYSCEF # 5) referencing a June 15, 2015 Credit Agreement, as amended, among Il Mulino USA, LLC, as Borrower; KGIM, LLC, as Guarantor; and IM LLC-III, as Corporate Guarantor (NYSCEF # 10 - Fourth Amendment to the June 2015 Credit Agreement). The

initial June 15, 2015 Credit Agreement is a \$21,000,000 multi-draw term loan facility (NYSCEF # 6). The First Amendment to the June 15, 2015 Credit Agreement memorializes the acknowledgement among the Borrower, Guarantors, Lenders, and Agent that certain Events of Default have occurred, and the Lender's consent to fund an additional loan of \$315,700 (NYSCEF # 7). In the Second Amendment to the June 15, 2015 Credit Agreement, the parties acknowledge that certain Events of Default have occurred, and the Lender agrees to provide an additional \$160,000 (NYSCEF # 8). In the Third Amendment to the June 15, 2015 Credit Agreement, the parties acknowledge the occurrence of Events of Default, and the Lenders consent to the Borrower obtaining "paycheck protection program ("PPP") loans under the Coronavirus Aide, Relief, and Economic Security ("CARES") Act (H.R. 748) (NYSCEF # 9). The Fourth Amendment to the June 15, 2015 Credit Agreement memorializes the acknowledgement among the parties of the occurrence of Events of Default, and the Lenders' agreement to make additional term loans of up to \$1,000,000 (NYSCEF #10).

The June 15, 2015 Guarantee states, in part:

"[I]n consideration of the premises and to induce Lenders to enter into the Credit Agreement and to make the Loans, and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Guarantor hereby agrees as follows:

Section 1. Guarantee: Fraudulent Transfer, etc.; Contribution

- (a) The Guarantor absolutely, unconditionally and irrevocably guarantees as a primary obligor and not merely as a surety, the full and punctual payment and performance to the Agent and the Lenders of all present and future indebtedness and liabilities of the Borrower to the Agent and the Lenders, of whatever type and however arising under the Credit Agreement and the other Loan Documents, whether no existing or hereafter arising, created, assumed, incurred or acquired, whether direct, indirect, fixed or contingent, whether incurred as primary obligor or otherwise, whether secured or unsecured, and whether on open account, including, without limitation, (i) all principal of the Loans and interest thereon (whether such obligations and liabilities arose or accrued during the pendency of any bankruptcy, insolvency, receivership or other similar proceeding, and regardless of whether allowed or allowable in such proceeding), (ii) all other obligations, including fees commissions, costs, expenses

and indemnities, whether primary, secondary, direct, contingent, fixed or otherwise (including obligations incurred during the pendency of any bankruptcy, insolvency, receivership or other similar proceeding, regardless of whether allowed or allowable in such proceeding) of the Borrower to the Agent and the Lenders under the Credit Agreement and the other Loan Documents, (iii) all costs and expenses of the Agent and the Lenders in enforcing, preserving and protecting any and all of its interests under the Credit Agreement or any other Loan Documents, whether or not suit is instituted, to the extent provided in any Loan Document ...”

(NYSCEF # 5).

On April 23, 2018, Katzoff, as Guarantor, and BSP, as Agent for the Lenders, executed a similar Guarantee Agreement (the “April 23, 2018 Guarantee”) (NYSCEF # 15), which referenced a Loan and Security Agreement, dated April 2018 (the “April 23, 2018 Loan Agreement”), as amended, between IMNY AC, LLC, as Borrower; the Lenders; and BSP (NYSCEF # 16). Likewise, on April 27, 2018, Katzoff, as Guarantor, and BSP, as Agent for the Lenders, executed another Guarantee Agreement (the “April 27, 2018 Guarantee”) (NYSCEF # 20) referencing a Loan and Security Agreement, dated April 27, 2018 (the “April 27, 2018 Loan Agreement”), among IMNY Hamptons, LLC, as Borrower, the Lenders, and BSP (NYSCEF # 21).

On June 2, 2020, BSP sent Katzoff a Notice of Default (NYSCEF # 12) and Notice of Acceleration regarding the June 15, 2015 Credit Agreement (NYSCEF # 13); a Notice of Default (NYSCEF # 17) and Notice of Acceleration of the April 23, 2018 Loan Agreement (NYSCEF # 18); and a Notice of Events of Default of the April 27, 2018 Loan Agreement (NYSCEF # 22). By written Notice of Enforcement of the June 15, 2015 Guaranty, the April 23, 2018 Guaranty, and the April 27, 2018 Guaranty, sent to Katzoff by BSP, states, in part:

“As of July 22, 2020, the total amount outstanding under the 2015 Credit Agreement is \$35,854,943.91, exclusive of costs and fees. However, because the Katzoff June 2015 Guarantee is subject to the Guarantee Cap, You owe Agent \$10,000,000.00 under the Katzoff June 2015 Guarantee
[T]he total amount outstanding under the [April 23, 2018] Loan and Security Agreement and due and payable by You to the Agent is \$671,366.67 exclusive of costs and fees
[T]he total amount outstanding under the [April 27, 2018] Loan Agreement and due and payable by You is \$671,366.67,

exclusive of costs and fees”

(NYSCEF # 25). The Notice of Enforcement includes a written history of disbursements and payments for the three Loan Agreements (*id.*). The submissions also include schedules of outstanding debts under the three Loan Agreements (NYSCEF #'s 26, 27, 28).

On July 28, 2018, Il Mulino USA, LLC (NYSCEF # 14), IMNY AC, LLC, also known as Il Mulino New York and Trattoria Il Mulino (NYSCEF # 19), and IMNY Hamptons, LLC, also known as Il Mulino New York (NYSCEF # 24), filed voluntary Petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (NYSCEF #'s 14, 19, 24). At oral argument on this motion, the court was informed that BSP acquired the assets of Il Mulino for \$20,000,000 through a Bankruptcy sale (NYSCEF # 67-Tr. at 32-33).

On July 29, 2020, BSP commenced this action by motion for summary judgment in lieu of complaint, seeking to recover \$11,345,666.70 from Katzoff under the three Guarantees. (Katzoff withdraws a cross motion for an order staying this action pending the resolution of the Bankruptcy proceedings (NYSCEF # 65).)

DISCUSSION

“CPLR 3213 is intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious” (*Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]). “When an action is based upon a judgment or instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint” (*Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968]). In order to qualify for CPLR 3213 treatment, a plaintiff must show that the accounts stated, on which the action is based, “are instruments for the payment of money only” (*Interman Indus. Prods., Ltd.*, 37 NY2d at 154). An instrument sued upon is for the payment of money only when it contains the defendant’s explicit acknowledgement of a debt and suffices to prove the debt by itself (*see Weisman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

The proponent of a motion for summary judgment 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 (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, on a motion for summary judgment in lieu of complaint, the plaintiff must establish a prima facie case by sufficient proof of the instrument for the payment of a sum of money only, and the failure of the defendant to make payment called for by its terms (*see Seaman-Andwall Corp.*, 31 Ad2d at 137).

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*). For example, “[w]here the instrument requires something in addition to defendant’s explicit promise to pay a sum of money, CPLR 3213 is unavailable” (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]).

However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

Here, BSP establishes entitlement to summary judgment by proof of Katzoff’s failure to make payment under the three unconditional Guarantees, upon default of the Loan Agreements. “The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time” (*Weissman*, 88 NY2d at 444). It is well-settled that an unconditional guarantee is an instrument for the payment of money only within the meaning of CPLR 3213 (*see Rhodia, Inc. v Steel*, 32 AD2d 753 [1st Dept 1969]). In addition, Katzoff does not dispute that he failed to pay the Guarantees.

Nor does Katzoff come forward with any evidentiary proof to establish a triable issue as to the defenses. The Guarantees state that they are absolute, unconditional, and irrevocable guarantees of the full and punctual payment of the liabilities of the Borrower under the loan agreements, and Katzoff expressly waived the defenses of the Borrower (NYSCEF #’s 5, 15, 20).

Katzoff asserts that BSP must rely on the Loan Agreements to establish the scope of his obligations under the Guarantees. Specifically, Katzoff asserts that the definition of Katzoff’s obligations under the Guarantees are identical, and each includes numerous capitalized terms that are only defined in the Loan Agreements. Katzoff also argues that June 2015 Guarantee is subject to a guarantee cap of \$10,000,000, which is reduced to \$7,500,000 under certain specified circumstances, and that the court must refer to the June 2015 Loan Agreement to determine whether the guarantee cap applies.

Katzoff’s assertions that the Guarantees are not instruments for the payment of money only, because they require proof outside of the Guarantees and impose obligations in addition to the payment of money, or that BSP fails to submit prima facie evidence of the amount owed, are simply unavailing. It is well-established that a Guaranty may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, and the need to consult the underlying documents to establish the amount of liability does not affect the

availability of CPLR 3213 (*see European Am. Bank v Cohen*, 183 AD2d 453 [1st Dept 1992]).

Katzoff next argues that the Guarantees require payment and performance of nonpayment obligations, including the payment of fees, commissions, costs, expenses, and indemnities, as well as the performance of all covenants, agreements, obligations, and liabilities of the loan parties. However, the mere presence of additional provisions in the Guarantees does not constitute a bar to CPLR 3213 relief, provided that the provisions do not require additional performance as a condition precedent to repayment, or otherwise alter the defendant's promise of payment (*see Juste v Niewdach*, 26 AD3d 416, 417 [2d Dept 2006]). Here, as stated, Katzoff's promise to pay is absolute, unconditional, and irrevocable. Katzoff's assertion that the Guarantees require more than the payment of money only is insufficient to defeat summary judgment.

Katzoff then argues that BSP falsely promised to loan Il Mulino more than \$30,000,000, of which \$21,000,000 would have been used to pay off existing loans and other debts, and \$9,000,000 would have been used to open new Il Mulino restaurants and expand the brand. Katzoff asserts that BSP structured the Loan Agreements as an initial term loan of \$21,000,000 and additional term loans of \$9,000,000, while assuring him that it would loan the entire \$30,000,000 for the expansion of the Il Mulino restaurants. Katzoff adds that the Loan Agreements expressly provide that the \$9,000,000 additional term loan must be used to "fund build-on costs and start-up costs for newly-owned restaurants," and that BSP never intended to fulfill the \$30,000,000 commitment for the Il Mulino restaurant expansion. Instead, Katzoff asserts that BSP intended to replace Il Mulino's existing lenders and keep Il Mulino in a perpetual state of default through financial covenants and required principal payments that BSP knew that Il Mulino could never satisfy without opening new restaurants. However, the Guarantees, which state that they are absolute and unconditional, and that the guarantor waives the right to interpose any defenses, effectively waived the defense of fraud in the inducement (*see Citibank v Papinger*, 66 NY2d 90, 92 [1985]), and thus insufficient to defeat summary judgment.

In light of the Bankruptcy sale, and after a review of the submissions, the Court cannot determine as a matter of law the amount owed on the three Guarantees. Thus, the court grants the motion for summary judgment in lieu of complaint as to liability and, unless the parties stipulate as to the amount owed, the Court will appoint a Special Referee to hear and report the principal amount and interest due and owing, as well as costs and reasonable attorney's fees.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted as to liability; and it is further

ORDERED that unless the parties stipulate as to the amount due and owing in principal and interests under the guarantees, a Special Referee will be appointed to hear and report as to the principal amount and interest due and owing, as well as costs and reasonable attorney's fees; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's office (room 119), who is directed to place the matter on the calendar of the Special Referee's Part for the earliest convenient date.

12/23/2021
DATE


MARGARET CHAN, J.S.C.
MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: