

BBM3, LLC v Vosotas
2022 NY Slip Op 30068(U)
January 4, 2022
Supreme Court, New York County
Docket Number: Index No. 652015/2021
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART 53

Justice

-----X

BBM3, LLC

Plaintiff,

- v -

JAMES VOSOTAS,

Defendant.

-----X

INDEX NO. 652015/2021

MOTION DATE

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 23, 36, 41, 42, 57, 58, 59, 60, 61, 62, 63, 64, 69

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 70, 71, 72, 73, 74, 75

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 43, 65, 66

were read on this motion to/for DISMISSAL.

BBM3, LLC (the Lender)'s motion for summary judgment in lieu of complaint (Mot. Seq. No. 001) must be granted. The Lender has established James Vosotas (the Guarantor) executed both the I&C Guaranty (hereinafter defined) and the Completion Guaranty (hereinafter defined; the I&C Guaranty and the Completion Guaranty, hereinafter, collectively, the Guarantees) pursuant to which he guaranteed the payment and not the collection (NYSCEF Doc. No. 6, §§1.1-1.4; NYSCEF Doc. No. 7, §§1.1-1.8) of the Loan (hereinafter defined), there was a payment Deficiency (hereinafter defined) default under the Loan Agreement for which the Lender demanded the deposit of Deficiency Collateral (hereinafter defined), and the Guarantor's failure to perform (see Davimos v Halle, 35 AD3d 270, 272 [1st Dept 2006]). It does not matter that the Lender has not sued the other guarantors in connection with this lawsuit because the

Guarantees provide that liability of the guarantors under the Guarantees is joint and several. (NYSCEF Doc. No. 6, §6.7; NYSCEF Doc. No. 7, §6.7). The Guarantor's motion to dismiss for lack of personal jurisdiction (Mot. Seq. No 003) is denied because pursuant to Section 20.3 of the Loan Agreement (NYSCEF Doc. No. 5), Section 6.14 of the I&C Guaranty (NYSCEF doc. No. 6) and Section 6.14 of the Completion Guaranty (NYSCEF Doc. No. 7), the Guarantor explicitly consented to jurisdiction in New York. For completeness, the Lender's motion for an attachment (Mot. Seq. No. 002) is withdrawn (NYSCEF Doc. No. 75) because the Lender sought to attach the Guarantor's membership interest in VOS CRE I LLC and VOS CRE I LLC filed for bankruptcy on November 22, 2021.

The Relevant Facts and Circumstances

Reference is made herein to (i) a certain Loan Agreement (the **Loan Agreement**; NYSCEF Doc. No. 5), dated as of December 22, 2017, by and between Santa Barbara 230, LLC (**Santa Barbara 230**) and Greystone Tenant, LLC (**Greystone Tenant**; Santa Barbara 230 and Greystone Tenant, hereinafter, collectively, the **Borrowers**) collectively as Borrower and 1920 Collins Ave ML Funding LLC (the Original Lender) as Lender for \$36,800,000, (ii) an Interest and Carry Guaranty (the **I&C Guaranty**; NYSCEF Doc. No. 6), dated as of December 22, 2017, by the Guarantor and Branden Muhl jointly and severally as Guarantors (the **I&C Guarantors**) in favor of the Original Lender, (iii) a Completion Guaranty (the **Completion Guaranty**; NYSCEF Doc. No. 7), dated as of December 22, 2017, by and between the Guarantor and Branden Muhl jointly and severally as Guarantors (the **Completion Guarantors**) in favor of the Original Lender, (iv) a notice of deficiency (the **Deficiency Notice**; NYSCEF Doc. No. 8), dated November 1, 2018, sent by the Original Lender to the Borrowers, claiming a Deficiency of at

least \$3,281,759.74, (v) a General Assignment and Assumption Agreement (the **Assignment Agreement**; NYSCEF Doc. No. 9) dated as of October 11, 2019, by and between the Original Lender as Assignor and the Lender as Assignee, (vi), a notice of default (the **Default Notice**; NYSCEF Doc. No. 10), dated June 24, 2020, sent by the Lender to the Guarantor and Mr. Muhl, stating that events of default had occurred under the Loan Agreement and demanding repayment of the Loan or payment of \$8,561,410.60, and (vii) a notice pursuant to the I&C Guaranty and the Completion Guaranty (the **Guaranty Notice**; NYSCEF Doc. No. 11), dated June 24, 2020, sent by the Lender to the Guarantor, stating that he owed \$1,180,446.16 in interest pursuant to the I&C Guaranty and \$8,750,522.57 pursuant to the Completion Guaranty, and demanding payment by July 1, 2020.

Pursuant to the Loan Agreement, the Original Lender loaned \$36,000,000 (the **Loan**) to the Borrower to fund construction of a hotel in Miami Beach, Florida (the **Property**). The Loan was evidenced by a promissory note and secured by, among other things, a first priority mortgage lien on the Property.

Pursuant to the Loan Agreement, if the Original Lender reasonably determines that there was a **Deficiency**, defined as a shortfall between the estimated cost of completion and the portion of the Loan not yet advanced and the funds in the collateral account, then the Original Lender could deliver written notice (NYSCEF Doc. No. 5, §4.7) demanding that the Borrower deposit sufficient collateral to cover the amount of the Deficiency (the **Deficiency Collateral**) within ten days. Failure to make such a deposit of Deficiency Collateral constitutes an event of default (*id.*).

Pursuant to the I&C Guaranty, the I&C Guarantors “unconditionally and absolutely” guaranteed payment and performance of the guaranteed obligations, including accrued and unpaid interest on the Loan and late payment charges (NYSCEF Doc. No. 6, §§1.1-1.2). The I&C Guarantors were to make such payments “immediately upon demand” without protest or notice (*id.*, §1.4). Pursuant to the Completion Guaranty, the Completion Guarantors “unconditionally and absolutely” guaranteed payment and performance of the guaranteed obligations, including the Borrower’s obligation under the Loan to deposit Deficiency Collateral with respect to the Loan (NYSCEF Doc. No. 8, §§1.1-1.2). The Completion Guarantors were to make such payments “immediately upon demand” without protest or notice (*id.*, §1.8).

The Deficiency Notice was sent pursuant to Section 4.7 of the Loan Agreement, stating that the Original Lender determined that there was a Deficiency of at least \$3,281,759.74 (NYSCEF Doc. No. 8). When the Guaranty Notice was sent a year and a half later, the Deficiency was \$8,750,522.57 and the interest due was \$1,180,446.16 (NYSCEF Doc. No. 11). The Lender claims now that, as of March 10, 2021, the amount owed under the I&C Guaranty is \$14,804,571.89 (Aff. of Branden Muhl; NYSCEF Doc. No. 4, ¶28), consisting of (i) interest on the Loan (*see* the Lender’s Mortgage Statement; NYSCEF Doc. No. 12), (ii) funding due to the interest reserve for an interest shortfall arising from the guaranteed obligations (*see* Greystone Hotel Interest Reserve Account, Confirmation of Wire; NYSCEF Doc. No. 13), and (iii) insurance premiums (*see* Property Insurance Invoices; NYSCEF Doc. Nos. 14-15). The amount the Lender seeks on this motion under the Completion Guaranty as of March 10, 2021 is \$4,181,759.74 (NYSCEF Doc. No. 4, ¶29), consisting of the Deficiency demanded in the

Deficiency Notice (NYSCEF Doc. No. 8) and a settlement of a change order for Turner Construction for a delay claim on the hotel construction (*see* Change Order Settlement; NYSCEF Doc. No. 17). The amounts are not in dispute.

The Lender commenced this action against the Guarantor pursuant to CPLR 3213 by summons and notice of motion dated March 26, 2021 (NYSCEF Doc. Nos. 1-2). The Guarantor subsequently filed his motion to dismiss for lack of personal jurisdiction (NYSCEF Doc. No. 37).

Discussion

Pursuant to CPLR 3213, a plaintiff may bring a motion for summary judgment in lieu of complaint when an action is based upon an instrument for the payment of money only. A plaintiff makes a *prima facie* showing on such a motion when it proves (1) the existence of a guaranty, (2) the underlying debt, and (3) the guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d at 272). Once a *prima facie* showing is made, a defendant must present admissible evidence to raise a triable issue of fact to preclude liability (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The Lender has established its *prima facie* entitlement to summary judgment. The Lender adduces evidence that the Guarantees are valid and in effect, that it is owed \$14,804,571.89 under the I&C Guaranty and \$4,181,759.74 under the Completion Guaranty, and that the Guarantor has failed to perform under the Guarantees.

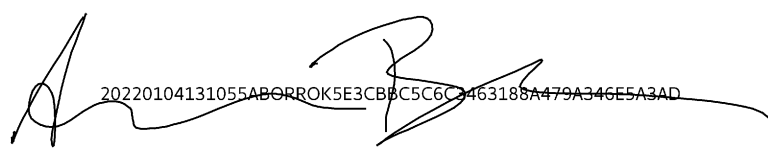
The Guarantor's claim that this case must be dismissed pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is without merit. The Guarantor acknowledges that the Loan Agreement and the Guarantees all contain forum selection clauses for New York pursuant to which he agreed to submit to the jurisdiction of New York (NYSCEF Doc. No. 5, §20.3; NYSCEF Doc. No. 6, §6.14; NYSCEF Doc. No. 7, §6.14). It is well accepted that forum selection clauses are *prima facie* valid (*British West Indies Guar. Trust Co., Ltd. v Banque International a Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]). To set aside a forum selection clause party must show that enforcement "would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court" (*id.*). Mr. Vosotas has made no such showing. That he resides in Florida and the property is located in Florida simply does not approach the level of difficulty that would deprive him of his day in court. He agreed to come to New York to litigate this dispute if necessary and the agreement is valid.

It is accordingly hereby ORDERED that the Lender's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the Lender's motion for an attachment is withdrawn; and it is further

ORDERED that the Guarantor's motion to dismiss is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of BBM3 and against Mr. Vosotas in the amount of \$18,986,331.63, together with interest on \$8,625,90.62 at the rate of 5% per annum from the date of March 10, 2021 until the date of the decision and order on this motion, and thereafter at the statutory rate on the total amount, 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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1/4/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE		