

ATX Debt Fund 2, LLC v Paul
2022 NY Slip Op 30726(U)
March 2, 2022
Supreme Court, New York County
Docket Number: Index No. 650728/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ATX DEBT FUND 2, LLC	INDEX NO.	<u>650728/2020</u>
Plaintiff,		05/14/2021, 08/19/2021, 11/12/2021
- v -	MOTION DATE	<u>11/12/2021</u>
NATIN PAUL,		
Defendant.	MOTION SEQ. NO.	<u>003 005 008</u>

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 129, 130, 131, 132, 133, 134 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 225, 226, 227, 228, 229, 230, 231, 232 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 008) 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285 were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Upon the foregoing documents, the Lender (hereinafter defined)'s motion (Motion Seq. No. 003) to dismiss the affirmative defenses asserted in the answer is granted because Natin Paul (the **Guarantor**) waived claiming lack of personal jurisdiction, failure to mitigate damages, accord and satisfaction, unclean hands, breach of the covenant of good faith and fair dealing, and equitable estoppel as defenses in the Guaranties (hereinafter defined). Even if they had not been waived, which they were, the defenses asserted are wholly without merit as to the Guarantor, and

as alleged, would be available only to the Borrowers (hereinafter defined) who are not parties to this action (*Lewis v U.S. Bank N.A.*, 186 AD3d 694 [2nd Dept 2020]). For the same reasons, the Guarantor's cross-motion for leave to amend the answer must be denied.

The Lender's motion (Motion Seq. No. 005) for summary judgment is granted because the Lender has adduced (i) a Promissory Note, (ii) a default which remains uncured, and (iii) the Guarantor's guaranty of the obligations set forth in the loan documents, and (iv) the Guarantor has failed to raise any material issues of fact in its opposition papers (*IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.*, 83 AD3d 573 [1st Dept 2011]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The Guarantor's motion (Motion Seq. No. 008) to strike the note of issue is denied because he fails to show that the certificate of readiness was inaccurate or that additional discovery was needed (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1003, 1004-1005 [2nd Dept 2019]).

The Relevant Facts and Circumstances

Ladder Capital Finance (the **Original Lender**) made several mortgage loans to separate LLC entities (the **Borrowers**) for various parcels of real property in Austin, Texas, in the total principal amount of \$47,614,000 (the **Loan**). In connection with the Loan, the Original Lender and the Borrower signed a Loan Agreement (NYSCEF Doc. No. 25), dated July 9, 2018 and the Borrower gave a Promissory Note (the **Note**), also dated July 9, 2018 in the original principal amount of \$47,614,000 in favor of the Original Lender. As security for the Loan, the Guarantor signed a Guaranty of Recourse Obligations (NYSCEF Doc. No. 27) and separate Guaranties of

Payment for each parcel of real estate (NYSCEF Docs. No. 44-50) (collectively, the **Guaranties**).

As relevant, pursuant to Section 6.3 of the Guaranties, the Guarantor waived any objection it has based on venue, or forum non-conveniens and otherwise irrevocably agreed that actions arising out of relating to the Guaranty may be brought in New York:

ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR GUARANTOR ARISING OUT OF OR RELATING TO THIS GUARANTY MAY, AT LENDER'S OPTION, BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE STATE OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW AND GUARANTOR WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND GUARANTOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT ACTION OR PROCEEDING...

Pursuant to Article 2 of the Guaranties, the Guarantor agreed that its obligations under the Guaranty would not be affected by common law, equitable, statutory or other rights:

Guarantor hereby consents and agrees to each of the following and agrees that Guarantor's obligations under this Guaranty shall not be released, diminished, impaired, reduced or adversely affected by any of the following and waives any common law, equitable, statutory or other rights (including without limitation rights to notice, other than notices expressly required to be provided to Guarantor pursuant to the Loan Documents) which Guarantor might otherwise have as a result of or in connection with any of the following:

Section 2.1 Modifications/Sales. Any renewal, extension, increase, modification, alteration or rearrangement of all or any part of the Guaranteed Obligations, the Note, the Mortgage, the Loan Agreement, the other Loan Documents, the Master Lease...

Section 2.2 Adjustment. Any adjustment, indulgence, forbearance or compromise that might be granted or given by Lender to Borrower or Guarantor...

Section 2.3 Condition of Borrower or Guarantor. The insolvency, bankruptcy, arrangement, adjustment, composition, liquidation, disability, dissolution or lack of power of Borrower, Guarantor, Master Tenant or any other Person at any time liable for the payment of all or part of the Guaranteed Obligations...

Section 2.4 Invalidity of Guaranteed Obligations. The invalidity, illegality or unenforceability of all or any part of the Guaranteed Obligations or any document or agreement executed in connection with the Guaranteed Obligations for any reason whatsoever...

Section 2.5 Release of Obligors. Any full or partial release of the liability of Borrower or Master Tenant for the Guaranteed Obligations or any party thereof...

Section 2.6 Other Collateral. The taking or accepting of any other security, collateral or guaranty, or other assurance of payment, for all or any part of the Guaranteed Obligations.

Section 2.7 Release of Collateral. Any release, surrender, exchange, subordination, deterioration, waste, loss or impairment (including, without limitation, negligent, willful, unreasonable or unjustifiable impairment) of any collateral, property or security at any time existing in connection with, or assuring or securing payment of, all or any party of the Guaranteed Obligations.

...

Section 2.9 Unenforceability. The fact that any collateral, security, security interest or lien contemplated or intended to be given, created or granted as security for the repayment of the Guaranteed Obligations, or any part thereof, shall not be properly perfected or created, or shall prove to be unenforceable or subordinate to any other security interest or lien, it being recognized and agreed by Guarantor that Guarantor is not entering into this Guaranty in reliance on, or in contemplation of the benefits of, the validity, enforceability, collectability or value of any of the collateral for the Guaranteed Obligations.

Section 2.10 Representation. The accuracy or inaccuracy of the representations and warranties made by Guarantor herein or by Borrower or Master Tenant in the Master Lease and/or any of the Loan Documents.

Section 2.11 Offset. The Note, the Guaranteed Obligations and the liabilities and obligations of the Guarantor to Lender hereunder shall not be reduced, discharged or released because of or by reason of any existing or future right of offset, claim or defense of Master Tenant against Borrower, or any other party, or against payment of the Guaranteed Obligations, whether such right of offset, claim or defense arises in connection with the Guaranteed Obligations (or the transactions creating the Guaranteed Obligations) or otherwise.

...

Section 2.14 Other Actions Taken or Omitted. Any other action taken or omitted to be taken with respect to the Master Lease, the Loan Documents, the Guaranteed Obligations, or the security and collateral therefor, whether or not such action or omission prejudices Guarantor or increases the likelihood that Guarantor will be required to pay the Guaranteed Obligations pursuant to the terms hereof, except any act or omission constituting gross negligence or willful misconduct on the part of Lender and/or its agents. It is the unambiguous and unequivocal intention of Guarantor that Guarantor shall be obligated to pay the Guaranteed Obligations when due, notwithstanding any occurrence, circumstance, event, action or omission whatsoever, whether contemplated or un contemplated, and whether or not otherwise or particularly described herein, which obligation shall be deemed satisfied only upon the full and final payment and satisfaction of the Guaranteed Obligations.

By letter, dated January 7, 2020 (the **Default Notice**; NYSCEF Doc. No. 28), from the Lender to the Borrowers c/o the Guarantor, notifying them of both their monetary and non-monetary defaults under the terms of the loan documents (*i.e.*, failing to make monthly payments when due and failing to provide financial reports when required) and accelerating the debt owed under the Loan as a result of their defaults. On January 31, 2020, the Original Lender commenced the instant action solely against the Guarantor to collect the debt owed.

On February 3, 2020, the Borrowers filed petitions in the United States Bankruptcy Court for the District of Delaware (the **Bankruptcy Proceedings**; NYSCEF Doc. No. 29). The Guarantor was not a party to the Bankruptcy Proceedings.

On March 10, 2021, the Court granted the Lender's motion to substitute ATX Debt Fund 2, LLC (the **Lender**) as plaintiff in the action for the Original Lender because the Original Lender had assigned the Loan to the Lender (NYSCEF Doc. No. 95).

On April 9, 2021, the Guarantor filed an answer asserting lack of personal jurisdiction, failure to mitigate damages, accord and satisfaction, unclean hands, breach of the covenant of good faith and fair dealing, and equitable estoppel as affirmative defenses. The Guarantor's defenses of the Lender's failure to mitigate damages, accord and satisfaction and unclean hands all stemmed from the Lender's alleged actions in the Bankruptcy proceedings, including alleged misrepresentations and its failure to accept a settlement offer that would have satisfied the indebtedness of the Borrowers.

Motion 003: Dismissal of Affirmative Defenses and Cross-Motion to Amend

Pursuant to CPLR § 3211(b), the Court may dismiss a defendant's affirmative defense if it lacks merit. A defense is without merit where it either "do[es] not apply under the factual circumstances of the case, or fails to state a defense." (*Lewis v U.S. Bank N.A.*, 186 AD3d 694 [2nd Dept 2020]). A party seeking to amend pleadings need not establish the merit of the proposed new allegations, but rather show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

The Lender's motion to dismiss the Guarantor's affirmative defenses must be granted and the Guarantor's cross motion to amend the answer must be denied. The Guarantor waived the defense of lack of personal jurisdiction in Section 6.3 of the Guaranties and waived the remaining asserted defenses in Article 2 of the Guaranties. The facts alleged by the Guarantor do not allege fraud committed against the Guarantor, but rather against the Borrowers. Indeed, according to the Guarantor the alleged fraudulent, bad faith, oppressive intentional conduct that

occurred after the Guarantees were signed and the loans closed (NYSCEF Doc. No. 106, p. 6). Thus, the proffered amendments that the Guarantor proposes fail to establish, even if true, that the Original Lender or the Lender fraudulently induced the Guarantor to sign the Guaranties or fraudulently seek to collect their debt under the terms of the Guaranties.

Motion 005: Summary Judgment

As discussed above, the Lender adduces the (i) the affidavit of Liz Boydston on behalf of Original Lender and she attests to the Borrowers' default under the Loan Documents, (ii) the Default Notice, and (iii) the Guarantor's obligations pursuant to the Guaranties. In their opposition papers, the Guarantor fails to raise a material issue of fact requiring the denial of summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, summary judgment must be granted.

Motion 008: Vacate/Strike Note of Issue

Pursuant to 22 NYCRR § 202.21(e), the Court may vacate a note of issue where a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of section 202.21 in some material respect. "Where a party's motion to vacate the note of issue is timely, the party is 'required only to demonstrate why the case [is] not ready for trial'" (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1003, 1004 [2nd Dept 2019]).

The Guarantor's motion to strike the note of issue must be denied. Filing a cross-motion to amend the pleadings does not *ipso facto* invalidate note of issue. Nor do appraisals need to be exchanged in this case. The Guaranties are guaranties of payment not collection. The balance of

the Guarantor’s arguments have already been considered and rejected by the Court in its Decisions and Orders dated July 16, 2021 (NYSCEF Doc. No. 161) and October 4, 2021 (NYSCEF Doc. No. 263) or are otherwise unavailing.

Accordingly, it is

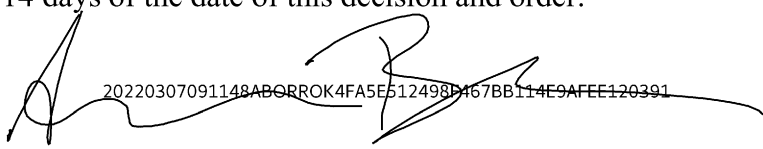
ORDERED that the Lender’s motion (Motion Seq. No. 003) to dismiss the Guarantor’s affirmative defenses is granted, and the Guarantor’s cross-motion to amend his answer is denied; and it is further

ORDERED that the Lender’s motion (Motion Seq. No. 005) for summary judgment is granted; and it is further

ORDERED that the Guarantor’s motion (Motion Seq. No. 008) to strike the Note of Issue is denied; and it is further

ORDERED that the Lender submit a proposed judgment, on notice to the Guarantor, in accordance with this decision and order within 14 days of the date of this decision and order.

3/2/2022
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: