Pentagon Fed. Credit Union v Bain
2022 NY Slip Op 31551(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 653963/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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PENTAGON FEDERAL CREDIT UNION, AS SUCCESSOR BY MERGER TO PROGRESSIVE CREDIT UNION,

Plaintiff,

- v -

MARIE BAIN, OMER TRANSIT INC.,

Defendants.

INDEX NO. 653963/2021

MOTION DATE 04/18/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43
were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

The plaintiff Pentagon Federal Credit Union, as Successor by Merger to Progressive Credit Union, commenced this action against the defendants to recover damages for breach of a promissory note and guaranty agreement and replevin of the taxi medallions pledged as collateral for the note. The plaintiff now moves pursuant to CPLR 3212 for summary judgment in the principal sum of $560,860.69, an award of immediate and permanent possession of the taxi medallions, and other related relief. The defendants oppose the motion. The motion is granted in part.

II. DISCUSSION

It is well settled that 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 eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of its motion, the plaintiff submits, *inter alia*, the pleadings, the affidavit of the plaintiff's Director of Loss Mitigation, Member Business Loans, Cathyann Frank, the subject promissory note and guaranty, the subject security agreement, UCC-1 financing statements, a loan modification and extension agreement, and a demand letter sent to the defendants.

The plaintiff's submissions establish that, in connection with a loan in the principal sum of $800,000.00 (the loan), on January 13, 2012, defendant Marie Bain (Bain) executed a promissory note (the note) in favor of the plaintiff in the principal sum of $800,000.00. The note provided that interest on the loan would accrue at an annual rate of 3.75%. Bain's obligations under the note were guaranteed by defendant Omer Transit, Inc. (Omer). Further, pursuant to a security agreement dated January 13, 2012, the defendants agreed to secure the loan under the note by interests in New York City Taxi Medallions Nos. 1H19 and 1H20 (the medallions). The plaintiff duly perfected its security interest in the medallions by filing UCC-1 financing statements with the Secretary of State. The note was subsequently modified and extended pursuant to an application for extension/modification dated February 13, 2015, and a loan modification and extension agreement dated June 15, 2018, the latter of which extended the maturity date until June 15, 2021, and provided that, in the event of default, interest was to be charged at 16% per annum on the unpaid principal. The second loan modification further provided that there was to be a late fee of 5% of the delinquent amount for each payment not

made within 15 days of it becoming due. The foregoing loan modifications, together with the note, guaranty, and security agreement comprise the loan documents (the loan documents).

The defendants defaulted on their obligations under the terms of the loan documents by failing to make monthly payments to the plaintiff when due. On June 3, 2021, the plaintiff sent the defendants a demand letter advising that they were in default under the loan documents and that the full amount due under the loan documents was immediately payable. The demand letter further advised that if payment was not made, the defendants were to immediately turn over the medallions to the plaintiff. The defendants have not cured their default or turned the medallions over to the plaintiff. As of November 23, 2021, the defendants owed $595,647.77, inclusive of interest at the contractual rate, under the note.

The plaintiff's submissions establish, *prima facie*, its entitlement to relief on the first and third causes of action sounding in breach of contract and breach of guaranty, respectively. Specifically, the plaintiff's proof demonstrates (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Where, as here, a contractual obligation is a promissory note, a plaintiff meets its burden by proving the existence of the subject note and nonpayment according to its terms. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008). Moreover, "where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012) (quoting National

Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 [1st Dept. 1991]). The terms of the subject guaranty, executed by Bain in her capacity as authorized signatory for Omer, are clear, unambiguous, absolute, and unconditional, and the plaintiff avers that the guaranty was duly and lawfully procured.

The plaintiff's second cause of action seeks to foreclose on the medallions securing the loan issued under the note. A plaintiff asserting a cause of action sounding in replevin must establish that the defendants are in possession of certain property to which the plaintiff claims a superior right. See Nissan Motor Acceptance Corp. v Scialpi, 94 AD3d 1067 (2nd Dept. 2012). The plaintiff makes a *prima facie* showing of its entitlement to the replevin of the collateral secured by the security agreement and UCC-1 statements, consisting of two New York City Taxi Medallions, numbers 1H19 and 1H20. The plaintiff establishes its right to judgment on its second cause of action by demonstrating that it now lawfully holds the loan documents and UCC-1 statements, the defendants defaulted thereunder by virtue of their nonpayment, the defendants are in possession of the collateral, and the plaintiff has a right to possession and delivery of the collateral under the terms of the security agreement and UCC-1 statements.

The defendants fail to raise a triable issue of fact in opposition to the plaintiff's showing. The plaintiff has demonstrated by the affidavit of Cathyann Frank that it is the successor by merger to Progressive Credit Union, the party named in the loan documents, and that as of January 1, 2019, the plaintiff took on all of its predecessor's assets. See NY Banking Law § 602(1). The defendants' claim that the plaintiff has not demonstrated privity on the loan documents is belied by the Banking Law, which requires "no formal assignment…to effect a transfer of assets of a merged corporation to a receiving corporation." Ladino v Bank of Am., 52 AD3d 571, 572-73 (2nd Dept. 2008) (internal quotation marks and citation omitted). In other

words, the plaintiff is not obligated to submit proof of a loan assignment to establish entitlement to summary judgment. See id. Additionally, having failed to raise lack of standing as an affirmative defense in their answer or on a pre-answer motion to dismiss, the defendants have waived their objections in this regard. CPLR 3211(e); see Weiss v Phillips, 157 AD3d 1, 9 (1st Dept. 2017).

Bain claims that she lacked a full understanding of what she was signing when she executed the note and guaranty due to her poor state of mind as her husband had passed away six months before. However, she provides no factual allegations to support her conclusory claim that the plaintiff "coerce[d]" her into signing the documents. Thus, the defendants fail to show any fraud, duress, or any other wrongful conduct by the plaintiff in regard to the note or guaranty.

The plaintiff also presents proof that, to the extent that the defendants had any cognizable claim or defense sounding in fraud or duress with respect to the note and guaranty, the defendants released such claims and defenses when they executed the June 15, 2018, loan modification agreement. New York courts have consistently held that broad releases such as the one included in the loan modification agreement are enforceable to foreclose all claims or defenses, known or unknown, at the time of execution. See e.g., Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V., 17 NY3d 269, 276 (2011) ("[A] release may encompass unknown claims, including fraud claims, if the parties so intend and the agreement is fairly and knowingly made." [internal quotation marks and citation omitted]); Friedman v Capital One Taxi Medallion Finance, 154 AD3d 498, 498-99 (1st Dept. 2017) (releases in loan extension agreement were enforceable against plaintiff taxi fleet operator); Graubard Mollen Dannet & Horowitz v Edelstein, 173 AD2d 230, 231 (1st Dept. 1991) (waiver of alleged fraud claim enforceable where defendants had "solicit[ed] and accept[ed] an extension of time to fulfill their

obligations" under a loan and guaranty). Since the defendants make no specific allegation of any misconduct on the plaintiff's part in procuring the release, which was given in exchange for the benefit of the plaintiff's forbearance and extension of time to repay the loan, there is no reason why the release should not be enforced to bar the defendants' fraud or duress defense.

Finally, the doctrine of impossibility is inapplicable to the facts at hand. Impossibility is a defense to a breach of contract action "only when … performance [is rendered] objectively impossible … by an unanticipated event that could not have been foreseen or guarded against in contract." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987); see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) ("[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law."). The impossibility defense to contract performance must be applied narrowly, "due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., supra at 902. "[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused." 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018); Urban Archaeology Ltd. v 2017 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009).

Notwithstanding that the inability of the defendants to generate sufficient profits from the medallions to repay the loan constitutes a difficulty outside of the defendants' control, such circumstance does not meet the standard for impossibility under New York law. The failure of an industry due to competition from new business models, as the defendants allege here, is not an

event that destroys the subject matter of contract to loan money or renders repayment on a loan "objectively impossible." Rather, it constitutes economic hardship, which is expressly excluded from the ambit of the impossibility doctrine. Accordingly, the defendants present no factual issue as to whether their performance under the loan documents should be excused.

There is no merit to the defendants' argument that the plaintiff's motion is premature due to outstanding discovery as they "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). It is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012); Kent v 534 East 11th Street, supra; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

For the foregoing reasons, the branch of the plaintiff's motion seeking summary judgment on the complaint is granted. The court notes that while the June 15, 2018, loan modification agreement provides for interest at a higher rate upon default, the plaintiff seeks only interest at the contractual rate of 3.75% on the outstanding balance due under the loan documents through November 23, 2021, and thereafter through the date of judgment.

As to the plaintiff's request for an award of contractual attorney's fees, the subject loan documents expressly provide for attorney's fees, and in his affirmation, Mitchell D. Cohen, Esq. details the legal work performed and billed, for a total of $5,690.00. Such amount is further supported by a billing summary attached to Cohen's affirmation and, the court finds, constitutes

a reasonable sum. See Matter of Freeman, 34 NY2d 1 (1974); Matter of Barich, 91 AD3d 769 (2nd Dept. 2012).

The branch of the plaintiff's motion seeking authorization for the Sheriff of any county within the state to search for and seize the medallions and deliver the same to the plaintiff is denied as premature. Denial is without prejudice to renewal upon proper papers should the defendants refuse to comply with the terms of this order.

III. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment on the complaint is granted to the extent that the court awards summary judgment on the first, second, and third causes of action, plus contractual attorneys' fees and costs and disbursements, and the motion is otherwise denied without prejudice; and it is further

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff and against the defendants, jointly and severally, in the principal sum of $560,860.69, with interest at the rate of 3.75% per annum from November 23, 2021, through the date of judgment, plus contractual interest through November 23, 2021, in the sum of $34,787.08, plus attorneys' fees in the sum of $5,690.00, and costs and disbursements; and it is further

ADJUDGED that the plaintiff has a right to possession of New York City Taxi Medallions, numbers 1H19 and 1H20, superior to that of the defendants; and it is further

ORDERED that within 20 days of service of a copy of this order and judgment with notice of its entry upon them, the defendants shall deliver to the plaintiff New York City Taxi Medallions, numbers 1H19 and 1H20, currently in their possession.

This constitutes the Decision, Order, and Judgment of the court.

DATED: May 10, 2022

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON