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| Feenix Venture Partners, LLC v TBS, Inc. |
| 2022 NY Slip Op 32980(U) |
| September 6, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 651574/2020 |
| Judge: Margaret Chan |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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| FEENIX VENTURE PARTNERS, LLC, | INDEX NO. | <u>651574/2020</u> |
| Plaintiff, | MOTION DATE | <u>12/03/2021</u> |
| - v - | MOTION SEQ. NO. | <u>001</u> |
| TBS, INC., MATTHEW CICCONE, RABIH HELOU | DECISION + ORDER ON MOTION | |
| Defendants. | | |

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39, 47, 49 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT

Plaintiff moves pursuant to CPLR 3213 for an order granting it summary judgment in lieu of complaint against defendants TBS, Inc. (TBS), Matthew Ciccone, and Rabih Helou, jointly and severally, in an amount of no less than \$507,321.86. Ciccone and Helou (together, the individual defendants), oppose the motion. After the motion was made, TBS filed for bankruptcy and invoked the automatic stay under the bankruptcy code (NYSCEF # 48). Accordingly, the motion is decided as to the individual defendants only.

Background

Plaintiff purports to be the administrative agent for non-party Feenix Venture Partners Opportunity Fund, LP (Feenix), the owner and holder of a term loan note in the principal amount of \$650,000 (Note) dated November 9, 2018, evidencing a loan made by Feenix, as Lender, to TBS (Loan) (NYSCEF # 3-Note). Ciccone is TBS's president; Helou is TBS's chief executive officer. Together the individual defendants hold a majority of TBS's shares (NYSCEF #22-Ciccone Aff, ¶1; NYSCEF # 32, ¶1). In connection with the Note, a loan agreement (Loan Agreement) was executed by representatives of Feenix and TBS on November 9, 2018 (NYSCEF # 4-Loan Agreement).

Section 2.1(b) of the Loan Agreement provides that that the "Note will be due and payable in full on the Maturity Date," of May 9, 2019 (NYSCEF # 4, § 2.1[b]; § 1.1). The Loan Agreement's original Maturity Date was extended through amendments to the agreement (NYSCEF #'s 5-7). The final amendment to the Loan

Agreement defines the Maturity Date as January 30, 2020 (NYSCEF # 9-Amendment 5 to Loan Agreement, § 1[a][ii]). Section 2.2 of the Loan Agreement states that “[o]n each Payment Date until the Maturity Date, Borrower shall make a payment of interest on the Loans. Payments of the principal balance on the Loan, together with all accrued and unpaid interest thereon, shall be due and payable by Borrower to the Lenders on the Maturity Date, unless sooner accelerated in accordance with the terms hereof” (NYSCEF # 4, § 2.2 [a]). The Loan Agreement lists several “Events of Default,” including when TBS fails to pay (i) any principal amount of the Loans when due, or (ii) interest or any other amount when due and such failure continues for five calendar days (*id.*, § 7.1[a]). The Loan Agreement provides that TBS shall pay Feenix’s fees, costs, expenses, and disbursements, including reasonable attorneys’ fees incurred to enforce and protect Feenix’s rights with respect to the Loan (*id.*, § 11.1).

On September 17, 2019, the individual defendants executed separate Guaranties (NYSCEF # 10 -Ciccone Guaranty; NYSCEF # 11-Helou Guaranty). Under the terms of the Guaranties, each of the individual defendants “unconditionally and absolutely guarantees the full and prompt payment and performance of any and all of Borrower’s Obligations (as hereinafter defined) when due, whether at stated maturity, upon demand, by acceleration or otherwise in accordance with the terms thereof” (NYSCEF #s 10, 11, § 1.1). Each Guaranty is joint and several among the individual defendants, as guarantors (NYSCEF #s 10-11, § 10). The Guaranties provide that each of the individual defendants “agrees to reimburse Administrative Agent and Lenders on demand for all Administrative Agent and Lenders’ expenses, damages and losses of any kind or nature, including without limitation costs of collection and reasonable attorneys’ fees and disbursements actually incurred in attempting to enforce this Guaranty [or] collect any of the Obligations . . .” (NYSCEF #s 10, 11, § 5).

Plaintiff asserts that while TBS made payments towards the Loan’s principal and accrued interest, as of the Loan’s January 30, 2020 Maturity Date, TBS owed \$478,577.78 in principal and \$3,908.39 in interest under the terms of the Loan Agreement and Note, and did not make any payments on the Maturity Date (NYSCEF # 2-Lee Aff., ¶30).

By letter dated February 7, 2020, plaintiff gave notice to TBS and the individual defendants that the Loan was in default based on the failure to pay by the Maturity Date and declared the amounts due and owing, including accrued interest and applicable late fees and other costs and expense incurred immediately due and payable (NYSCEF # 12 -Notice of Default). Since the default was declared, neither TBS nor the individual defendants have made any payments towards the outstanding amounts allegedly due and owing (NYSCEF # 2, ¶ 30).

Plaintiff argues that it has made a prima facie showing of its entitlement summary judgment in lieu of complaint based on its submission of the Note, Loan Agreement and unconditional Guaranties, which qualify as instruments for payment of money only under CPLR 3213; evidence of defendants' default under the terms of the instruments; and plaintiff's provision of notice of such default.

In opposition, the individual defendants argue that questions of fact exist as to whether plaintiff is the real party in interest, including because the documents submitted in support of the motion do not clearly identify the entity to which the money is owed. The individual defendants next argue that the Guaranties do not constitute instruments for payment of money only based on their language requiring not only payment but performance of various obligations, and because the Guaranties require that outside documents be consulted. Based on their affidavits and various documents, the individual defendants also argue that there are issues of fact as to whether plaintiff, its affiliated entities and principals breached the covenant of good faith and fair dealing and whether the individuals have a defense based on economic duress (NYSCEF #22-Ciccone Aff; NYSCEF # 32-Helou Aff; NYSCEF #'s 23-29; 33-34).

In reply, plaintiff asserts there can be no dispute it is the real party interest and has standing to bring this action under the terms of the Loan Agreement and its amendments, and that the Guaranties qualify for instruments of payment of money only. In addition, plaintiff argues that affidavits and documentary evidence relied on by the individual defendants are insufficient to raise issues of fact precluding summary judgment.

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]). The accelerated procedure applies to an instrument for the payment of money only and to qualify for CPLR 3213 treatment, a plaintiff "must prove a prima facie case by the instrument and a failure to make the payments called for by its terms" (*Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19, 21 [1st Dept 1983]; see also *PDL Biopharma, v Wohlstadter*, 147 AD3d 494, 494-495 [1st Dept 2017]). Once a plaintiff has established a prima facie case, "it is incumbent on defendant to establish, by admissible evidence, that a triable issue of fact exists" (*SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996] [internal citations omitted]).

At the outset, contrary to individual defendants' position, plaintiff is a real party in interest and has standing to bring this action. Specifically, the Loan Agreement authorizes the "Administrative Agent [to]...exercise on behalf of itself and the Lenders all rights and remedies available to it and the Lenders under the

Loan Documents... and [to] exercise any or all of its rights and powers under Applicable Law (NYSCEF # 4, § 1[a][i]). Moreover, by Amendment to the Loan Agreement dated May 8, 2019, plaintiff was designated as the Administrative Agent, and TBS agreed to the appointment (NYSCEF # 5 -Amendment no. 1; § 1 [a][i][designating Feenix Venture Partners, LLC as Administrative Agent]).¹ As for the individual defendants' argument that the identity of the Lender is ambiguous under the Loan Agreement and subsequent documents, such argument does not raise an issue of fact since, as indicated above, under the relevant documents, plaintiff is authorized to bring this action. Moreover, the Loan Agreement defines "Lenders" as "Feenix (together with its successors and assigns) and any other entity subsequently added hereto as a Lender hereunder, or any successor, assignee or other transferee thereof" (NYSCEF # 4 at 2).

The next issue is whether the Guaranties qualify as instruments for payment of money only. Courts have held that "an unconditional guaranty is an instrument for the payment of 'money only' within the meaning of CPLR 3213" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015][internal citations omitted]; see also *Dresdner Bank AG. (New York Branch) v Morse/Diesel, Inc.*, 115 AD2d 64, 67 [1st Dept 1986] [stating that "an unconditional guarantee of payment has been held to be an instrument for the payment of money only within the meaning of CPLR_3213"] [internal citations omitted]).

The individual defendants argue that the Guaranties do not qualify as instruments for payment of money only since they guarantee not only payment but performance (*Punch Fashion, LLC v Merchant Factors, Corp.*, 180 AD3d 520, 521 [1st Dept] *lv dismissed* 35 NY3d 1124 [2020], citing *PDL Biopharma, Inc.*, 147 AD3d at 495; *Dresdner Bank AG.*, 115 AD2d at 67-68). Specifically, under section 1.1 of the Guaranties, each of the individual defendants agreed to "unconditionally and absolutely guarantee the full and prompt payment *and performance* of any and all of Borrower's Obligations (as hereinafter defined) when due, whether at stated maturity, upon demand, by acceleration or otherwise in accordance with the terms thereof" (NYSCEF # 10, §1.1; NYSCEF # 11, §1.1 [emphasis added]). The term "Obligations" is defined under the Guaranties to "mean any and all obligations, indebtedness and other liabilities of Borrower to the Administrative Agent and Lenders now or hereafter existing, of every kind and nature..." (*id.*). Hence, the performance goes beyond the payment of money only (*cf iPayment, Inc. v Silverman*, 192 AD2d 586, 587 [1st Dept], *lv dismissed* 37 NY3d 1020 [2021][plaintiff established entitlement to summary judgment in lieu of complaint where only performance required under guaranty was the payment of all rent and additional rent under sublease]).

¹ Non-party Feenix Payment Systems LLC was originally designated as the Administrative Agent under the Loan Agreement (NYSCEF # 4 at 27).

As the Guaranties do not qualify as instruments for the payment of money only, summary judgment in lieu of complaint must be denied (*see e.g. Bank of Am., N.A. v Filho*, 203 AD3d 594, 594 [1st Dept 2022])[summary judgment in lieu of complaint appropriately denied where “[e]ach of the guaranties at issue stated that it is a ‘guaranty of payment and performance’”]; Accordingly, the court need not reach the individual defendants’ remaining arguments.

Conclusion

In view of the above, it is

ORDERED that summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon the individual defendants attorney within 15 days of service on plaintiff’s counsel of a copy of this order with notice of entry and defendant shall answer or otherwise respond to the complaint within 20 days after service thereof.

This constitutes the Decision and Order of the court.

9/6/2022
DATE


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: