

ATX Braker LLC v Paul
2022 NY Slip Op 34427(U)
December 29, 2022
Supreme Court, New York County
Docket Number: Index No. 656922/2022
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ATX BRAKER LLC

Plaintiff,

- v -

NATIN PAUL,

Defendant.

INDEX NO. 656922/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOINDER).

Upon the foregoing documents, it is

Plaintiff ATX Braker LLC moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendant Natin Paul, the guarantor of the borrower's loan. Plaintiff seeks judgment against defendant in the amount of \$30,587,815.21, representing the amount due as of June 22, 2022, together with interest, which continues to accrue, attorneys' fees, and other costs pursuant to the loan documents and guaranty. Defendant cross-moves pursuant to CPLR 3211(a)(4) to dismiss this action in favor of a bankruptcy action pending in Texas¹ that, according to defendant, could moot this action, or pursuant to CPLR 2201, to stay this action. However, this case is about the guaranty and not any of the other cases or loans involving the parties

¹ Mortgage borrower WC Braker Portfolio, LLC filed for bankruptcy. (*In re WC Braker Portfolio, LLC*, No. 22-10293-tmd [Bankr WD Tex May 2, 2022].) Borrower WC Braker Portfolio B, LLC also filed for bankruptcy, which automatically stayed the foreclosure. (*In Re WC Braker Portfolio B, LLC*, No. 22-10628-tmd [Bankr WD Tex Sept. 29, 2022].)

in bankruptcy.² (See *Marcus Dairy Inc. v Jacene Realty Corp.*, 225 AD2d 528, 528-29 [2d Dept 1996].)

On February 28, 2019, WC Braker Portfolio B, LLC (Borrower) borrowed \$29,000,000 from plaintiff's predecessor-in-interest, JP Morgan Chase Bank, National Association. (NYSCEF 6, Mezzanine Promissory Note at 1; NYSCEF 5, Loan Agreement at 21; NYSCEF 26, Paul Aff ¶3.) Defendant, the beneficial owner of the Borrower, guaranteed the loan (Guaranty). (NYSCEF 9, Guaranty.) Borrower defaulted when it failed to pay the amount due upon the loan's maturity on March 9, 2022. (NYSCEF 10, Default Notice.) When the borrower's related entity, WC Braker Portfolio, LLC, filed for Chapter 11 bankruptcy, defendant's obligation was triggered under the Guaranty. (NYSCEF 4, Moshtaghi³ Aff ¶6.)

In the Guaranty, defendant "irrevocably and unconditionally guarantee[d] to Lender and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable" (NYSCEF 9, Guaranty § 1.1.) The Guaranteed Obligations under the Guaranty are defined as "(i) Borrower's Recourse Liabilities and (ii) from and after the date that any Springing Recourse Event occurs, payment of the entire Debt." (*Id.* § 1.2.) Under the loan agreement, a "Springing Recourse Event" makes "the Debt [] fully recourse to Borrower" and is triggered by a number of events, including "Borrower, Principal, Mortgage Borrower or Mortgage Borrower Principal filing a voluntary petition under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law."

² See *WC Braker Portfolio, LLC v ATX Braker, LLC*, Index No. 651792/2022 (Sup Ct, NY County); *ATX Braker SR, LLC v Paul*, Index No. 656921/2022 (Sup Ct, NY County).

³ Moshtaghi is the principal of M Capital Partners which services the loan.

(NYSCEF 5, Loan Agreement § 9.3[c][ii][a].) The loan agreement defines “Debt” to mean the “outstanding principal amounts set forth in, and evidenced by, this Agreement and the Note together with all interest accrued and unpaid thereon and all other sums . . . due to Lender in respect of the Loan under the Note, this Agreement, the Pledge Agreement.” (*Id.*)

CPLR 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.”

“CPLR 3213 affords a speedy and efficient remedy to secure a judgment in certain cases where service of formal papers would be unnecessary for the expeditious resolution of the dispute between the parties. This accelerated procedure applies solely to an action based upon a judgment or an instrument for the payment of money only. In order to succeed on the motion, the cause of action must be proven by the instrument itself and a failure to make payments according to its term.”

(*Tech. Tape, Inc. v Spray Tuck, Inc.*, 131 AD2d 404, 405-406 [1st Dept 1987] [citations omitted].) It must be a written unconditional instrument. (*Id.* at 406.) “The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document.” (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996] [citation omitted].)

As stated on the record on December 23, 2022, plaintiff has satisfied its burden. The allonge establishes plaintiff’s standing (NYSCEF 7, Allonge to Mezzanine Promissory Note), and the Guaranty constitutes an unconditional instrument for the

payment of money. (*Deutsche Bank Tr. Co. Americas v Codio*, 94 AD3d 1040, 1041 [2d Dept 2012].) It is undisputed that the debt is unpaid.

Defendant's defenses are no defense at all. "Defenses based on facts extrinsic to an instrument for the payment of money do not preclude CPLR 3213 consideration." (*Allard, LLC v Weiss*, 1 AD3d 131, 131 [1st Dept 2003].) For example, the court rejects defendant's effort to import plaintiff's mistakes in other related cases as defenses to this action. Further, defendant ineffectively argues that plaintiff's exercise of its rights under the Guaranty constitutes a scheme to deprive defendant of the cash it needs to bid at the Bankruptcy Court's sale scheduled for February 2023. Plaintiff denies such a scheme and to prove it, at argument, offered to defer serving restraining notices on banks until the day after the scheduled sale date or March 1, 2023. Parties are not required to bring 3213 motions in lieu of complaint together with an action on the underlying loan defaults and defendant fails to cite any authority otherwise. Defendant's reliance on RPAPL §1301 for the proposition that plaintiff has elected its remedy by participating in the bankruptcy is incorrect as a matter of law since this action is about membership interests in a company, not properties secured as collateral. (*Nebari Nat. Res. Credit Fund I, LP v Speyside Holdings LLC*, 2022 WL 610334 *2 [Sup Ct, Suffolk County Feb. 28, 2022].) Further, defendant agreed that plaintiff is not subject to election of remedies defense. (NYSCEF 5, Guaranty §8.2.) Finally, in the Guaranty, defendant waived defenses which is enforceable. (NYSCEF 9, Guaranty §5.3; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 [1st Dept 2010].) The waiver here is operable in this case, which is distinguished from *ATX Debt Fund 2, LLC v Paul*,

206 AD3d 465, 466 (1st Dept 2022) because the guaranty here has no waiver carve out.

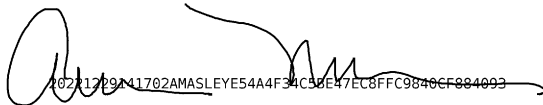
Defendant's cross motion to dismiss or stay this action in favor of the Texas bankruptcy is denied as the bankruptcy proceedings of the corporate debtor does not involve the guaranty. Moreover, defendant's requested dismissal or stay would be contrary to "the specific purpose of a guarantee [which] is to give the beneficiary recourse separate from any action against the principal debtor." (*Congress Factors Corp. v Meinhard Com. Corp.*, 129 Misc 2d 726, 728 [Sup Ct, NY County 1985].)

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the complaint herein is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$30,587,815.21, representing the amount due as of June 22, 2022, together with interest until the date of the decision and order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs. Within 10 days, plaintiff shall submit an affirmation delineating the calculation separating principal from the calculation of interest for the preparation of a judgment; and it is further

ORDERED that plaintiff shall submit an affirmation of services with firm bios or resumes within 30 days of the date of this decision, otherwise waived. Defendant may respond within 10 days of service after which the court will determine if a hearing is needed; otherwise waived; and it is further

ORDERED that defendant's cross motion is denied.



12/29/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SETTLE ORDER
- SUBMIT ORDER
- INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: