

HCC Ins. Holdings, Inc. v Athenium Analytics LLC

2023 NY Slip Op 30943(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 652834/2022

Judge: Margaret A. 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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HCC Insurance Holdings, Inc.

Plaintiff,

- v -

Athenium Analytics LLC f/k/a Weather Analytics, LLC

Defendant.

INDEX NO. 652834/2022

MOTION DATE 08/10/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for Summary Judgment in Lieu of Complaint

Upon the foregoing documents, plaintiff's motion is granted.

Plaintiff HCC Insurance Holdings, Inc., a lender, extended a loan in the principal amount of \$10,000,000 to non-party Merger Sub WA, Inc. (Borrower) – a wholly owned subsidiary of defendant Athenium Analytics LLC f/k/a Weather Analytics, LLC's. Defendant is the guarantor on the note. Borrower failed to pay on the note as required. Thus, plaintiff moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint to enforce a guaranty against defendant. Defendant opposes the motion.

In support of its motion, plaintiff presents a term loan note (the Note) and credit agreement (the Credit Agreement), both dated May 1, 2018, between plaintiff and Borrower (NYSCEF #'s 5, 6). The Note obligated Borrower to pay plaintiff the outstanding principal balance with 8% interest, compounded annually, in one lump sum due at maturity on May 1, 2022. The principal balance of the Note would increase annually in the amount of the accrued compound interest.

Plaintiff also presents the guaranty on this note (the Guaranty) signed by Willard W. Pardue, Jr., as Chairman and Chief Executive Officer (CEO) for defendant (NYSCEF # 4). The Guaranty contains language that the guarantor "unconditionally and absolutely guarantees the punctual and full performance of all Obligations . . . of Borrower" (*id.*, preamble) "Obligations" is defined in the Guaranty as being "every liability, now or hereafter owing to Lender by Borrower, arising out of that certain Credit Agreement and Term Loan Note . . . and all costs and

expenses, including attorney's fees, incurred by Lender in connection with the collection of any portion of the indebtedness" (*id.*).

When the Note matured on May 1, 2022, plaintiff, on May 2, 2022, sent a letter to Borrower, with a copy to defendant, notifying both parties that on May 1, 2022, the entire principal balance and all accrued interest of the Note became due (NYSCEF # 7). The letter stated that the aggregate amount due and payable was \$13,604,889.60, which consisted of \$12,597,120.00 in unpaid principal and \$1,007,769.06 in accrued unpaid interest (*id.*). As of August 10, 2022, the aggregate balance of the loan remains \$13,604,889.60 (NYSCEF # 8 – MOL at 8).

Plaintiff requests summary judgment in the amount of \$13,604,889.60, pre-judgment interest at the statutory rate of 9% per annum on aggregate balance from the date of maturity through entry of judgment, post-judgment interest at the statutory rate of 9% per annum, and recovery of all costs and expenses, including attorney's fees, incurred in connection with this action.

In opposition, defendant argues that plaintiff's motion should be denied because the Guaranty does not qualify as an instrument for the payment of money only pursuant to CPLR 3213 because it has a performance component to it (NYSCEF # 16 – Deft's MOL at 3-4). Defendant points to the Guaranty's preamble, which defines defendant's obligations as "every liability, now or hereafter owing to Lender by Borrower" under the Credit Agreement and the Note (NYSCEF #'s 6 and 4, respectively), and the indemnification provision in Section 4.1 (H) of the Credit Agreement which incorporates a performance obligation, in addition to the payment obligation, into the Guaranty (NYSCEF # 6 at 6-7).

In addition, defendant argues it has a bona fide defense because plaintiff has violated a fiduciary duty to defendant in that plaintiff owns 23% of defendant's outstanding stock and two of plaintiff's executives served on defendant's Board of Managers (Board) for more than seven years resigning the day plaintiff filed this motion (NYSCEF # 15, Pardue aff ¶¶ 7-10). Defendant claims that plaintiff was "likely motivated" to loan Borrower the funds as a tool to gain control of defendant and its subsidiaries (*id.*, ¶ 19; NYSCEF # 16 at 6). And by calling a default and filing this motion, defendant claims that plaintiff used its representation on the Board to take over defendant for its own self-interest to the detriment of defendant and defendant's other members notwithstanding its duty of loyalty. Thus, defendant concludes that plaintiff has unclean hands barring summary judgment (*id.* at 6-8).

In reply, plaintiff reiterates that the Guaranty is an instrument for payment of money only because the operative language of the Guaranty focuses on Guarantor's payment obligations (NYSCEF # 24). Plaintiff disputes that the Credit Agreement's indemnification obligation applies to the Guaranty, but argues that even if it did apply, relief under CPLR 3213 would not be barred because that provision does not require additional performance as a condition precedent to repayment.

As for defendant's breach of fiduciary duty and unclean hands defenses, plaintiff asserts that plaintiff is not a fiduciary and that there is a lack of evidence for any breach of a fiduciary duty. Furthermore, plaintiff argues that defendant expressly waived such defenses (NYSCEF # 4, § 3 [d]).

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. 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]). In addition, a plaintiff must show that the accounts stated, on which the action is based, "are instruments for the payment of money only" (*Interman Indus.*, 37 NY2d at 154). An instrument sued upon is for the payment of money only when it contains the defendant's explicit acknowledgement of a debt and suffices to prove the debt by itself (*see Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). Proof of nonpayment or a similar de minimis deviation from a guaranty may be offered to establish a prima facie case under CPLR 3212 (*see 27 W. 72nd St. Note Buyer LLC v Terzi*, 194 AD3d 630, 632 [1st Dept 2021]).

Here, plaintiff establishes its prima facie case for entitlement to summary judgment under CPLR 3213 by supplying proof of a note that that has matured and defendant's failure to make payment under the Guaranty Agreement. Defendant does not dispute that it failed to pay the amount owed under the Guaranty.

The burden now shifts to the party opposing the motion to produce evidentiary proof in admissible form which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

Defendant claims that CPLR 3213 is not applicable to this Guaranty Agreement because it has a performance component to it in that the word "performance" appears in the Obligations part of the preamble and because of the indemnification provision in the Credit Agreement (NYSCEF # 16 at 3). Further, defendant argues that the Guaranty should be read by including what is being guaranteed and points to the Obligations section: "Obligations mean every liability, now or hereafter, owing to Lender by Borrower, arising out of that certain Credit Agreement and Term Loan Note dated of even date herewith between Lender and Borrower" (tr. at 16 quoting the Guaranty's preamble). To defendant, this language shows that the guaranty is not just a guaranty of the Note as it guarantees "future unliquidated obligations under the Credit Agreement" (NYSCEF # 16 at 4).

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]). And the mere presence of the indemnification provision in the Obligations provision does not make the Guaranty an instrument for payment and performance, thus barring CPLR 3213 relief (*see Weissman*, 88 NY2d at 446). This is especially true when no additional performance is required before defendant may begin to repay the loan or otherwise alter defendant's promise of repayment (*see Stevens v PHLO Corp.*, 288 AD2d 56, 56 [1st Dept 2001]). And defendant does not assert that the indemnification provision of the Credit Agreement requires additional performance before defendant is obligated to repay the loan.

Defendant's reliance on *JFURTI, LLC v First Cap. Real Est. Advisors, L.P.* (165 AD3d 419 [1st Dept 2018]) is unavailing. *JFURTI* involved a settlement agreement and guaranty agreement where the defendant guarantor in that case agreed to be joint and severally liable for a \$1.3 million judgment entered against *JFURTI* in a separate action, indemnify and repay *JFURTI* for any amount collected, paid, or seized related to the \$1.3 million judgment, and assume responsibility for all reasonable costs incurred in connection with the action (*id.* at 419-420). *JFRUTI* posted a cash bond in the amount of the \$1.3 million action to stay a pending appeal, which First Capital refused to pay (*id.* at 420). *JFRUTI*'s relief pursuant to CPLR 3213 was denied because of the numerous other obligations under the settlement agreement and the difficulty in identifying the required payment amounts (*id.* at 421).

Here, in contrast to *JFRUTI*, defendant points only to the indemnification provision as evidence of performance under the Guaranty (NYSCEF # 15 at 3). In addition, the amount owed in *JFRUTI* was unknown until the expenses occurred, but in this case the principal and interest were calculable at the execution of the Note (NYSCEF # 6 at 1.1-1.2). Here, defendant does not allege that there are additional obligations beyond the indemnification provision or repayment obligation and does not contend that the amount owed under the Guaranty was unknown.

Defendant's claim that plaintiff owes a fiduciary duty because plaintiff owns 23% of defendant's outstanding stock and had two of its executives on defendant's Board are unavailing. Plaintiff's loan was made in accordance with Delaware LLC law permitting LLC members to lend money to a limited liability company (6 Del.C. § 18-107) and the Operation Agreement of Athenium Analytics LLC (NYSCEF # 18 at 14 § 3.5). And defendant's surmise about plaintiff's underlying intent in making the loan as essentially a plot to take control of defendant and its subsidiaries is unsupported. Similarly, defendant's argument on plaintiff's unclean hand also fails since it is based on the same surmise as the breach of fiduciary argument.

In any event, the Guaranty states "Guarantor's liabilities and other obligations under [the] Guaranty shall be absolute and unconditional irrespective of any lack of validity or enforceability of any agreement, instrument or document evidencing the Obligations, or any other defense available to Guarantor in respect of this Guaranty" (NYSCEF # 4, § 3 [d]). Absolute and unconditional guaranties that contain language obligating the guarantor to pay without recourse to any

defenses or counterclaims have been upheld by New York courts, even to claims of fraudulent inducement in the execution of the guaranty (*Cooperative Centrale*, 25 NY3d at 494 citing *Citibank, N. A. v Plapinger*, 66 NY2d 90, 92 (1985)).

Finally, CPLR 5001 (a) and (b) permit a creditor to recover prejudgment interest for breach of performance of a contract from the date the cause of action existed to the date the verdict was rendered. CPLR 5003 (a) permits a creditor to recover post-judgment interest from the entry of judgment to the date of payment. CPLR 5004 (a) sets the rate of pre-judgment and post-judgment interest at 9% per annum.

The prejudgment and post-judgment interest here are calculated as simple interest (*Spodek v Park Prop. Dev. Assocs.*, 96 NY2d 577, 580 [2001]; *Berenblit v Aetna Cas. & Sur. Co.*, 114 NYS3d 564 [2d Dept 2019]). Under paragraph 1 of the Term Loan Note, the principal is treated as the principal sum of \$10 million plus the accrued interest of \$3,604,889.60, totaling \$13,604,889.60 (NYSCEF # 5, ¶ 1). Thus, the money judgment amount \$13,604,889.60.

Plaintiff also seeks attorney’s fees as provided by the Guaranty (NYSCEF # 4, preamble). An award of attorney’s fees under a contract will be awarded as long as it is reasonable and warranted for the services actually rendered. Since this case was commenced only in August of 2022, and there is only this one motion, the attorney’s fees should be relatively straightforward. The parties are to work out the attorney’s fees and notify the court.

Conclusion

Based on the foregoing, it is

ORDERED that plaintiff HCC Insurance Holdings, Inc’s, motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that plaintiff HCC Insurance Holdings, Inc., is awarded a judgment in the amount of \$13,604, 889.60 with interest; and it is further

ORDERED that plaintiff HCC Insurance Holdings, Inc., is awarded attorney’s fees, in an amount to be worked out by the parties; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of plaintiff HCC Insurance Holdings, Inc.

3/27/2023

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: