SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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RSS MSC2019-L2-TX NHD, LLC

Plaintiff,

- v -

NADIR BADRUDDIN,

Defendant.

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INDEX NO. 652547/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In Motion Seq. No. 02, plaintiff RSS MSC2019-L2-TX NHD, LLC moves for summary judgment in lieu of complaint against defendant under a Guaranty of Recourse Obligations of Borrower (Guaranty) (Doc 24 [Guaranty]).

In February 2019, nonparty Morgan Stanley Bank, N.A. (Lender) loaned $42,840,000 (the Loan) to nonparty NB Hotels Dallas LLC (Borrower) (Doc 22 [Loan Agreement]; *see* Doc 23 [Promissory Note in the amount of $42,840,000]). In consideration of the Loan, defendant entered into the Guaranty and "absolutely and unconditionally guarantees to Lender the prompt and unconditional payment of the Guaranteed Recourse Obligations of Borrower" (Doc 24 at 1). The "Guaranteed Recourse Obligations of Borrower" are defined as "all obligations and liabilities of Borrower for which Borrower shall be personally liable pursuant to Section 11.22 of the Loan Agreement" (*id.*, § 4). Section 11.22 of the Loan Agreement provides, as relevant, that "the Debt shall be fully recourse to Borrower in the event that: . . . (v) Borrower or any [of Borrower's general partners or managing members] files a voluntary petition under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law" (Doc 22, § 11.22).

Section 11.22 of the Loan Agreement also provides that Lender may obtain a money judgment for

> "any Losses incurred by Lender (including attorneys' fees and costs reasonably incurred) arising out of or in connection with . . . any litigation or other legal proceeding related to the Debt filed by Borrower . . . that delays, opposes, impedes, obstructs, hinders, enjoins or otherwise interferes with or frustrates the efforts of Lender to exercise any rights and remedies available to Lender . . . "

(*id.*, § 11.22 [xv]; *see also id.*, § 11.13.2 [defining "Losses"]).

"Debt" is defined in the Loan Agreement as

> "the outstanding principal amount of the Loan together with all interest accrued and unpaid thereon and all other sums (including the Yield Maintenance Premium and the Default Yield Maintenance Premium) due to Lender in respect of the Loan under the Note, this Agreement, the Security Instrument, the Environmental Indemnity or any other Loan Document, including, without limitation, costs, fees and expenses (including, without limitation, reasonable attorneys' fees) payable to Lender to the extent specifically provided under the terms of the Loan Documents"

(*id.*, § 1.1).

Additionally, in Section 9 of the Guaranty, defendant agreed that:

> "the validity of this Guaranty and the obligations of Guarantor hereunder shall in no way be terminated, affected or impaired by reason of . . . the commencement of a case under the Bankruptcy Code by or against any Person obligated under the Note, the Security Instrument or the other Loan Documents . . . . It is further understood, that if Borrower shall have taken advantage of, or be subject to the protection of, any provision in the Bankruptcy Code, the effect of which is to prevent or delay Lender from taking any remedial action against Borrower, including the exercise of any option Lender has to declare the Debt due and payable on the happening of any default or event by which under the terms of the Note, the Loan Agreement, the Security Instrument or the other Loan Documents, the Debt shall become due and payable, Lender may, as against Guarantor, nevertheless, declare the Debt due and payable and enforce any or all of its rights and remedies against Guarantor provided for herein"

(Doc 24, § 9).

Through a series of assignments, plaintiff purchased the Loan Agreement, the Note, the Guaranty, and other loan documents for $42,840,000 in April 2022 (Doc 25 [Assignment Documents]).

On April 18, 2022, Borrower filed a voluntary petition for chapter 11 bankruptcy in Texas (Doc 26 [Borrower's Petition, United States Bankruptcy Court, Northern District of Texas, Dallas Division, Case No. 22-30681-hdh11]). Borrower's voluntary petition for chapter 11 bankruptcy constitutes an event of default under the Loan Agreement (Doc 22, § 10.1 [a] [vii]). Upon an Event of Default, plaintiff is entitled to declare the Debt "immediately due and payable" (*id.* § 10.1 [b]).

Plaintiff now moves for summary judgment in lieu of complaint against defendant under the Guaranty. Plaintiff seeks a judgment in the amount of $58,175,972.06, comprised of the following:

- Outstanding Principal Balance: $41,811,218.04
- Accrued and Unpaid Interest at Interest Rate calculated from February 1, 2021 through August 1, 2022 (per diem $6,480.74 x 546 days): $3,538,483.38
- Accrued and Unpaid Interest at Default Rate calculated from April 1, 2020 through July 20, 2022 (per diem $7,005.26x from 8/1/2022 to 9/1/2022): $5,567,872.65
- Accrued and Unpaid Interest at Yield Maintenance Rate: $6,479,690.17
- Legal Fees & Costs: $135,000.00
- Non-Sufficient Funds: $60.00
- Accrued and Unpaid Late Fees: $460,985.20
- Interest on Advances: $265,899.20
- Special Servicing Fees: $224,282.21
- Liquidation Fee: $523,211.33
- Payoff Processing: $1,500.00
- Sub-Total $59,008.202.18
- (Credit) Lockbox Balances: (-$444,988.42), (-$216,463.89)
- (Credit) Outstanding Reserve Funds: (-$8,032.12)

- (Credit) Escrow Tax: (-$120,000.00)
- (Credit) Escrow/Insurance: (-$42,745.67)
- Total Owed: $58,175,972.06

DISCUSSION

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *see Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *affd* 2022 NY Slip Op. 00806 [1st Dept 2022]). Generally, an action on a guaranty is an action for payment of money only (*see e.g. Cooperative Centrale Raiffesisen-Boerenleenbank, B.A., "Rabobank Intl.," N. Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]) ("*Cooperative Centrale*"). The same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. Movant must make a prima facie case by submitting the instrument and evidence of the defendant's failure to make payments in accordance with the instrument's terms (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]). "A guaranty may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, and the need to consult the underlying documents to establish the amount of liability does not affect the availability of CPLR 3213" (*Bank of Am., N.A. v Solow*, 19 Misc 3d 1123(A) [Sup Ct, NY County 2008]).

Plaintiff's Prima Facie Entitlement to Summary Judgment in Lieu of Complaint

The Guaranty is an instrument for the repayment of money only and qualifies for CPLR 3213 relief. Further, plaintiff has established its prima facie entitlement to

summary judgment in lieu of complaint with regard to the outstanding principal balance, and accrued regular and default interest. Plaintiff submits the Loan Agreement, the Guaranty, the Note, and the affidavit of Michael Strickland, the Asset Manager of plaintiff's special servicer, nonparty Rialto Capital Adivsors LLC (Doc 21 [Strickland Aff]). Strickland sets forth the basis for those amounts owed and defendant's nonpayment (*see id.* ¶¶ 10-21).

While plaintiff is entitled to recover certain servicing-related expenses and enforcement-related expenses under the Loan Agreement and Guaranty (*see e.g.* Doc 22 [Loan Agreement], §§ 1.1, 11.13.1, 11.13.2, 11.22, 11.24; *see also* Doc 24, § 6), plaintiff does not establish prima facie entitlement to recover the yield maintenance rate interest, legal fees and costs, "non-sufficient funds," late fees, interest on advances, special servicing fees, a liquidation fee, or a payoff processing fee. Specifically, plaintiff's submissions contain no invoices for attorneys' fees and costs, so the court cannot determine whether the amount sought [$135,000.00] is reasonable. Further, Strickland's assertion that yield maintenance rate interest rely on calculations contained in a missing "Schedule A" to his affidavit (*see* Doc 21, ¶ 20 [itemizing "Accrued and Unpaid Interest at Yield Maintenance Rate (calculated as set forth in Schedule A hereto," but failing to append any Schedule]). Additionally, Strickland's itemization for "non-sufficient funds," late fees, special servicing fees, the liquidation fee, and the payoff processing fee seem to rely on a servicing agreement that is not in the record. Finally, plaintiff's submissions do not establish that advances were made, so plaintiff has not met its burden to demonstrate that it is entitled to interest on advances.

Defendant's Opposition

Defendant makes several arguments in opposition to the motion. First, defendant argues that the motion must be denied because Strickland's affidavit, signed in Alabama, is defective because there is no certificate of conformity. This argument is unavailing. Plaintiff's counsel attaches a certificate of conformity for Strickland's affidavit to counsel's reply affirmation (*see* Docs 38-39). In any event, "the absence of a certificate of conformity 'is a mere irregularity, and not a fatal defect' and "[a]s long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary" (*Wager Estate of Cordaro v Rao*, 178 AD3d 434, 435 [1st Dept 2019], quoting *Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]).

Next, the court rejects defendant's argument that the motion must be denied because the Guaranty is not an instrument for the payment of money and that plaintiff has not established that Borrower owes plaintiff money under the relevant documents. The Guaranty here is an instrument for the payment of money that qualifies for a CPLR 3213 motion (*see e.g. Cooperative Centrale Raiffesisen-Boerenleenbank, B.A., "Rabobank Intl.," N. Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). As discussed, the Guaranty provides that defendant "absolutely and unconditionally guarantees to Lender the prompt and unconditional payment of the Guaranteed Recourse Obligations of Borrower" (Doc 24 at 1). The "Guaranteed Recourse Obligations of Borrower" are defined as "all obligations and liabilities of Borrower for which Borrower shall be personally liable pursuant to Section 11.22 of the Loan Agreement" (*id.*, § 4). Section 11.22 of the Loan Agreement provides, as relevant, that "the Debt shall be fully recourse to Borrower" if Borrower files for bankruptcy (Doc 22, § 11.22; *see also* Doc 24, § 9 [stating, in

the Guaranty, that "the Debt shall become due and payable" against defendant if Borrower files for bankruptcy]).

Defendant fails to raise a triable issue of fact as to the outstanding principal balance, regular interest, and default interest owed. As discussed above, plaintiff did not make its prima facie case for yield maintenance interest, servicing-related fees, or legal fees.

The court also rejects defendant's argument that the motion is premature because discovery is needed. It is true that Section 9 of the Guaranty states:

> "It is further understood that if Borrower shall have taken advantage of or be subject to the protection of any provision in the Bankruptcy Code, *the effect of which is to prevent or delay Lender from taking any remedial action against the Borrower*, including the exercise of any option Lender has to declare the Debt due and payable on the happening of any default or event by which under the terms of the Note, the Loan Agreement, the Security Instrument or other Loan Documents, the Debt shall become due and payable, Lender may as against Guarantor, nevertheless declare the Debt due and payable and enforce any or all of its rights and remedies against Guarantor provided for herein"

(Doc 24, § 9).

Nevertheless, the Loan Agreement and Guaranty are clear that Borrower's filing for bankruptcy is an Event of Default, that plaintiff may declare the Debt due and payable upon and Event of Default, and that defendant "absolutely and unconditionally" guaranteed the "Guaranteed Recourse Obligations of Borrower." Section 11.22 of the Loan Agreement provides that "the Debt shall be fully recourse to Borrower in the event that: . . . (v) Borrower or any [of Borrower's general partners or managing members] files a voluntary petition under the Bankruptcy Code" (Doc 22, § 11.22). Moreover, the natural result of Borrower's bankruptcy petition is to "prevent or delay Lender from taking any remedial action against the Borrower."

The court also rejects defendant's argument that there are issues of fact because Borrower's bankruptcy proceeding may be settled (*see* Doc 29 at 9-9 [mem in opp]). First, if this contention is speculative since the bankruptcy proceeding has not, as of yet, been settled (*see* Doc 31 [Borrower's 1/20/23 motion to approve a proposed bankruptcy settlement]). Second, if plaintiff recovers the outstanding amounts owed from the Borrower through the bankruptcy proceeding, any judgment against defendant arising under the Guaranty will be reduced in that amount.

Finally, defendant argues that the motion must be denied because the Pandemic made Borrower's performance under the Loan Agreement impossible. This argument is without merit. In *Valentino U.S.A., Inc. v 693 Fifth Owner LLC* (203 AD3d 480 [1st Dept 2022]), the Appellate Division, First Department explained:

> "The doctrine of impossibility is also inapplicable here. Impossibility "excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Here, the pandemic, while continuing to be 'disruptive for many businesses,' did not render plaintiff's performance impossible, even if its ability to provide a luxury experience was rendered more difficult, because the leased premises were not destroyed"

(*id.* [internal quotation marks and citations omitted]).

Likewise, defendant's frustration of purpose argument fails. "[T]he 'narrow' doctrine of frustration of purpose is inapplicable here, where the purpose of the contract has not been completely thwarted. . . . [F]rustration of purpose is not implicated by temporary governmental restrictions on in-person operations" (*id.*). Defendant has failed to raise a triable issue of fact because the purpose of the Guaranty was to secure Lender against Borrower's default under the Loan Agreement and Note. Further, "the pandemic

cannot serve to excuse a party's lease obligations on the grounds of frustration of purpose or impossibility" (*Fives 160th, LLC v Zhao*, 204 AD3d 439, 440 [1st Dept 2022]).

Conclusion

Plaintiff has made its prima facie burden to entitlement to recover the outstanding principal, regular interest, and default interest against defendant under the Guaranty. Although plaintiff has demonstrated that it may be entitled to recover attorneys' fees, servicing-related expenses, and yield maintenance interest, it failed to meet its prima facie burden for those items. Thus, plaintiff is entitled to judgment in the amount of $50,085,343.95 ($58,175,972.06 21 [total sought] - $6,479,690.17 [yield maintenance interest] - $135,000.00 [legal fees] - $60 [non-sufficient funds] - $460,985.20 [late fees] - $265,899.20 [interest on advances] - $224,282.21 [special servicing fees] - $523,211.33 [liquidation fee] - $1,500.00 [payoff fee]). The part of the motion to recover yield maintenance interest, legal fees, servicing fees, and other expenses is denied without prejudice to a new motion on proper papers.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted in part, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $50,085,343.95, together with interest at the contractual default rate of 10.58% per annum from July 20, 2022 until the date of this 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; and it is further

ORDERED that that part of the motion seeking yield maintenance interest, legal fees, servicing fees, and other expenses is denied without prejudice to a new motion upon proper papers; and it is further

ORDERED that there shall be no motions to renew or reargue without a pre-motion conference pursuant to Part Rule 10 (a).

5/9/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE