

TBG Funding LLC v Birkla

2023 NY Slip Op 32721(U)

August 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 503360/2023

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
-----X
TBG FUNDING LLC,

Plaintiff,

Decision and order

- against -

Index No. 503360/2023

ANTHONY BIRKLA, BIRKLA INVESTMENT GROUP,
LLC, AND CINCINNATI DEVELOPMENT III LLC,
-----X
Defendants,

August 1, 2023

PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 that there are no questions of fact the defendants owe the money sought in the complaint. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint, on August 1, 2018 the plaintiff TBG loaned funds to non-party Cincinnati Terrace Associates LLC. The loan was secured by a mortgage on property located at 15 W. Sixth Street, Cincinnati, Ohio. On June 9, 2021 Cincinnati Terrace declared bankruptcy and pursuant to that bankruptcy an auction of the property was conducted and the plaintiff was entitled to credit bid the amount of its debt. The plaintiff assigned its rights to the credit bid to an entity called Hamilton Land Reutilization Corporation [hereinafter HLRC] pursuant to an agreement dated August 8, 2022. Pursuant to that agreement, as relevant here, HLRC was required to pay one million

dollars within forty-five days of September 22, 2022. That payment was guaranteed by the defendants pursuant to a guaranty executed August 8, 2022. The complaint alleges the payment was never made and instituted this action seeking recovery of that payment. The complaint alleges breach of contract causes of action against Birkla Investment Group LLC and Anthony Birkla individually. The plaintiff has now moved seeking summary judgment arguing there are no questions of fact the defendants owe the money pursuant to the guaranty. As noted, the motion is opposed.

Conclusions of Law

Summary judgment may be granted where the movant establishes sufficient evidence which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary Judgment would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is well settled that a motion for summary judgment should not generally be granted before any discovery has taken place (Fazio v. Brandywine Realty Trust, 29 AD3d 939, 815 NYS2d 470, [2d Dept., 2006]). This is especially true where discovery is necessary to ascertain whether the plaintiff can establish the contentions found in the complaint and whether the defendant can

establish any valid defenses. (See, generally, Manufacturer's and Trader's Trust Company v. Norfolk Bank, 16 Ad3d 467, 791 NYS2d 599 [2d Dept., 2005]). Thus a summary judgment motion filed prior to any discovery should be denied as premature (Amico v. Melville Volunteer Fire Company Inc., 39 AD3d 784, 832 NYS2d 813 [2d Dept., 2007]) with leave to renew following the completion of all discovery (Zafarani v. Salton/Maxim Housewares, Inc., 18 AD3d 651, 795 NYS2d 633 [2d Dept., 2005]).

In this case, however, the defendants do not deny the existence of the debt. Rather, they argue that there are questions of fact that foreclose summary judgement without any discovery. Specifically, they assert Paragraph 8(b) of the assignment agreement is ambiguous and thus summary judgement is inappropriate. Paragraph 8(b) states that the assignee (HLRC) must pay one million dollars "in immediately available funds by wire transfer in accordance with the Wire Instructions on the earlier of (i) the date that Assignee submits a subsequent deed from the one it received out of the Bankruptcy Litigation pursuant to its rights to close on the Credit Bid and transferring title to the Property to CDIII or its designee; and (ii) forty-five days after the Assignment Date" (see, Assignment of Bid Agreement, ¶8(b) [NYSCEF Doc. No. 2]).

The defendants argue the phrase "immediately available funds" is not defined and is therefore ambiguous. Defendants

assert that "defendants understood that Plaintiff's compliance with ¶ 8(b) of the Assignment Agreement hinged on the funds resulting from the disposition of the related Bankruptcy Litigation being immediately available... However, through no fault of Defendants, there was an unforeseen delay in the Bankruptcy Litigation, which forestalled the availability of necessary funds from both private financing and a City of Cincinnati Tax Increment Financing package tied to this distressed property" (see, Memorandum in Opposition, page 5 [NYSCEF Doc. No. 29]).

Thus, the true basis for the opposition is not rooted in any ambiguity in the clearly unambiguous phrase 'immediately available funds'. Rather, the defendants argue the funds were not immediately available because a delay in the bankruptcy proceeding delayed their access to the necessary funds. The defendants fail to explain how the inability to pay the amount when due is any different than any failure to pay a debt when due because of insufficient funds. The failure to maintain the necessary funds, whatever the reason, does not raise any questions of fact the money is due. Further, the mere fact the delay happened in the very bankruptcy proceeding that was intended to be the source of funds does not mean there are questions of fact. The defendants agreed to pay one million dollars pursuant to the terms of the assignment agreement and

they failed to so. There are no issues presented which can raise any questions of fact regarding the money owed. Therefore, a prima facie showing sufficient for summary judgment is made by submitting proof of an underlying agreement, the personal guaranty of the obligations under that agreement, and the failure to make payment in accordance with the terms of the agreement (HSBC Bank USA, N.A. v. Laniado, 72 AD3d 645, 897 NYS2d 514 [2d Dept 2010]). Therefore, there is no discovery necessary which could possibly raise any questions of fact. Consequently, based on the foregoing, the motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: August 1, 2023
Brooklyn, NY



Hon. Leon Ruchelsman
JSC

