

**WPC Billboard Lender LLC v Bartkowski**

2024 NY Slip Op 32526(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 653700/2023

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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WPC BILLBOARD LENDER LLC,

Plaintiff,

- v -

THADDEUS J. BARTKOWSKI, CATALYST OUTDOOR DEVELOPMENT, LLC,307(L) FLEMINGTON LAND HOLDINGS, LLC,FLEMINGTON OUTDOOR, LLC,479 RARITAN EXPERIENTIAL, LLC,RARITAN OUTDOOR, LLC,CATALYST OUTDOOR DEVELOPMENT, LLC,MT. LAUREL LAND HOLDINGS, LLC,MT. LAUREL 73 OUTDOOR, LLC,MT. LAUREL 73 LAND HOLDINGS, LLC,WASHINGTON TOWNSHIP LAND HOLDINGS, LLC,WASHINGTON TOWNSHIP OUTDOOR, LLC,MT. LAUREL 295 LAND HOLDINGS, LLC,MT. LAUREL 295 OUTDOOR, LLC,CATALYST OUTDOOR 7, LLC,BRIDGEWAY TRACT LAND HOLDINGS, LLC,BRIDGEWAY TRACT OUTDOOR, LLC,CATALYST OUTDOOR 8, LLC,5324 ROUTE 38 PENNSAUKEN LAND HOLDINGS, LLC,5324 ROUTE 38 PENNSAUKEN OUTDOOR, LLC,5407 RT 70 PENNSAUKEN LAND HOLDINGS, LLC,5407 RT 70 PENNSAUKEN OUTDOOR, LLC,147 DUNWOODY (L) WEST WHITELAND LH, LLC,DUNWOODY DRIVE OUTDOOR, LLC,CATALYST OUTDOOR DEVELOPMENT, LLC,CATALYST OUTDOOR DEVELOPMENT 2, LLC

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

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

In Motion Sequence No. 001, plaintiff WPC Billboard Lender LLC (“WPC”) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint as against all defendants in the amount of \$28,891,137.79, claiming that defendant Thaddeus J. Bartkowski, III (“Bartkowski”) is personally liable for \$26,212,814.71 of that amount under various guaranties.

Plaintiff WPC also admits that the amount owed is subject to set off by any amounts it recovers from foreclosures of the real property underlying the relevant loans.

WPC entered into a Master Loan Agreement and Security contract (the “MLA”) with defendant Catalyst Outdoor Development, LLC (“Catalyst”) whereby WPC agreed to make one or more construction and term loans to Catalyst and Catalyst related entities (the “Borrowers”) for the purpose of constructing electronic billboard structures in the States of New Jersey and Pennsylvania. Thus, the relevant properties are all located outside the State of New York.

The remaining defendants executed Promissory Notes, for various amounts, and agreed to complete the billboard projects. The Pennsylvania Promissory Note contains cross-default provisions where “any default in the payment or performance of any one obligation of [any] borrower to the lender shall constitute a default under all obligations of the borrower[s] to the lender.”

In the event of default, the Pennsylvania Promissory Note and loan documents allow plaintiff WPC to accelerate and “declare the entire unpaid principal balance of this Note together with interest accrued thereon and all other sums due or owed by Borrower[s] hereunder, or under any of the other Loan Documents, to be due and payable immediately.” There is no question that there has been a default under the Pennsylvania Promissory Note.

Thus, the court grants the 3213 motion as to the corporate borrowers. Defendants’ opposition relies on RPAPL 1301(3). Defendant argues that because there are foreclosure actions pending, plaintiff WPC is precluded from bringing this action. This is incorrect. The strictures of RPAPL 1301 (3) do not apply when the property sought to be foreclosed upon is located outside of the state of New York (*Wells Fargo Bank Minnesota, N.A. v Cohn*, 4 AD3d 189 [1st Dept 2004]; *Wells Fargo Bank, N.A. v Bajana*, 211 NYS3d 384 [1st Dept 2024]).

Defendants' reliance on *Wells Fargo Bank, N.A. v Pena*, 51 Misc 3d 241 [NY Sup 2016] is unavailing. First, the *Pena* case is not controlling, as it is a trial court decision from Supreme Court, Kings County. Controlling law in the Appellate Division, First Department contradicts *Pena* (see *Wells Fargo Bank, N.A. v Bajana*, 211 NYS3d 384 [1st Dept 2024] [confirming that *Cohn* is good law and holding that "(t)he subject properties are located in Florida, thus defendants' reliance on New York law with respect to RPAPL 1301(3) and 1371 is unavailing"]).

Next, defendants argue that Bartkowski was released from his personal guaranties by providing the CO7 and CO8 joinder agreements. Bartkowski contends that he substantially complied with his obligations by delivering the joinder agreements late. The guaranties required Bartkowski to deliver the joinders by 9/30/22 (EDOC 26 [individual guaranties]). However, the joinders were not executed until 12/15/22. Defendants assert that the late performance is excusable because the guaranties did not contain "time of the essence" clauses. This is incorrect.

The delivery of the joinder agreements was a condition precedent to any release. The guaranties state:

**"Provided that i) the fully executed CO7 Joinder Agreement (as defined in the Note) is delivered to Lender within nine (9) months of the date hereof (the "Delivery Date"), together with any other related documents reasonably required by Lender, ii) an Event of Default has not occurred as of the Delivery Date, iii) any judgments against CO7 have been satisfied and released as of the Delivery Date, and iv) the representations and warranties set forth in the Loan Agreement as applicable to CO7 are true and correct in all material respects as of the Delivery Date, then the Guarantor shall be released and this Guaranty shall be terminated."**

(e.g. EDOC 26, Guaranties at Section 1).

In addition, the guaranties include "no waiver" provisions. Thus, plaintiff's "acceptance" of the late joinders does not constitute a waiver of the unambiguous condition precedent.

Plaintiff has established its prima facie entitlement to summary judgment in lieu of complaint against the entity defendants as follows (*see* Sabatini aff., EDOC 4):

1. The total amount available to be loaned pursuant to the MLA Promissory Notes was a maximum principal amount of \$24,109,839.06, and as of July 20, 2023, the outstanding principal balance of the MLA Promissory Notes is \$21,543,626.25, together with accrued and unpaid interest of \$2,303,861.09 as follows:
  - a. Flemington Note
    - i. Outstanding Principal Balance: \$3,894,664.60 PLUS
    - ii. Accrued and unpaid Interest: \$651,188.22
  - b. ML EMS Note
    - i. Outstanding Principal Balance: \$4,921,378.76 PLUS
    - ii. Accrued and Unpaid Interest: \$701,495.21
  - c. Washington 5581 Note
    - i. Outstanding Principal Balance: \$2,323,457.70 PLUS
    - ii. Accrued and Unpaid Interest: \$232,828.95
  - d. Washington 3441 Note
    - i. Outstanding Principal Balance: \$2,951,536.89 PLUS
    - ii. Accrued and Unpaid Interest: \$297,561.57
  - e. Raritan Note
    - i. Outstanding Principal Balance: \$832,188.89 PLUS
    - ii. Accrued and Unpaid Interest: \$5,836.72
  - f. Mt Laurel 295 Note
    - i. Outstanding Principal Balance: \$4,537,577.18 PLUS
    - ii. Accrued and Unpaid Interest: \$284,404.22
  - g. Mt Laurel 38 Note
    - i. Outstanding Principal Balance: \$2,082,822.23 PLUS
    - ii. Accrued and Unpaid Interest: \$130,546.19
  
2. The total amount loaned pursuant to the promissory notes executed in connection with the Additional Promissory Notes (the Dunwoody Drive Loan, Route 38 Loan, and Route 70 Loan) was \$4,211,461.56, and as of July 20, 2023, the outstanding principal balance is \$4,211,461.56, together with accrued and unpaid interest of \$29,537.92, as follows:
  - a. Dunwoody Drive Note
    - i. Outstanding Principal Balance: \$1,862,608.33 PLUS
    - ii. Accrued and Unpaid Interest: \$13,063.77
  - b. Route 38 Note
    - i. Outstanding Principal Balance: \$1,132,456.67 PLUS
    - ii. Accrued and Unpaid Interest: \$7,942.71
  - c. Route 70 Note
    - i. Outstanding Principal Balance: \$1,216,396.56 PLUS
    - ii. Accrued and Unpaid Interest of \$8,531.44

3. In addition, plaintiff established that Bartkowski is personally liable for \$26,212,814.71 under the individual guaranties (EDOC 4).

Plaintiff further established that it is entitled to pre-judgment interest at the contractual default rates of 13% per annum from July 20, 2023 until the date of this decision and order. Interest shall accrue at the statutory rate hereafter.

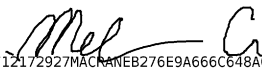
However, plaintiff did not carry its burden of establishing its entitlement to attorneys' fees. While plaintiff may be entitled to attorneys' fees or other enforcement costs under the relevant agreements, there is no support in the record for any amount of incurred fees or costs. Thus, plaintiff's motion is denied to the extent that it seeks an award of attorneys' fees.

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

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted in part as set forth in this decision and order. Plaintiff shall submit a proposed judgment within 7 days of the date of this decision and order; and it is further

ORDERED that the Clerk is directed to mark this case disposed.

  
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<u>7/12/2024</u> DATE					<u>MELISSA A. CRANE, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	
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