

**ATX Braker LLC v Paul**

2024 NY Slip Op 32716(U)

July 11, 2024

Supreme Court, New York County

Docket Number: Index No. 656922/2022

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

|                 |            |                 |                    |
|-----------------|------------|-----------------|--------------------|
| ATX BRAKER LLC, |            | INDEX NO.       | <u>656922/2022</u> |
|                 | Plaintiff, | MOTION DATE     | <u>--</u>          |
|                 | - v -      | MOTION SEQ. NO. | <u>002</u>         |
| NATIN PAUL,     |            |                 |                    |
|                 | Defendant. |                 |                    |

**DECISION + ORDER ON MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 75, 76, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read<sup>1</sup> on this motion to/for REARGUMENT/RECONSIDERATION.

This is an action by plaintiff ATX Braker LLC, against defendant Natin Paul, a guarantor under an unconditional guarantee. The court granted<sup>2</sup> plaintiff's motion for summary judgment in lieu of complaint (seq. 001) and denied defendant's cross-motion to dismiss this action in favor of a bankruptcy action pending in Texas or to stay this action.<sup>3</sup>

<sup>1</sup> The court has considered the nine letters and attached exhibits filed after briefing closed only to the extent they contain "citation[s] of post-submission court decision[s] that [are] relevant to the pending issues." (Rules of Commercial Div of Sup Ct [22 NYCRR 202.70 (g)] rule 18; see NYSCEF Doc. No. [NYSCEF] 75, 84, 93, 105, 106, 112, 119, 120, 125, Letters.)

<sup>2</sup> The court made its decision on the record (NYSCEF 50, tr at 38:21-39:12, 40:3-9), which was supplemented by a written decision. (NYSCEF 41, Decision and Order.)

<sup>3</sup> The borrower whose loan defendant guaranteed is WC Braker Portfolio B, LLC; the borrower's related entity WC Braker Portfolio, LLC filed for Chapter 11 bankruptcy in Texas. (See NYSCEF 41, Decision and Order at 2.) The borrower likewise filed for bankruptcy. (See NYSCEF 40, Dec. 21, 2022 Bankruptcy Court Order at 27 [NYSCEF pagination].)

In motion sequence 002, defendant<sup>4</sup> moves (i) pursuant to CPLR 2221 (d) (2), for leave to reargue the court's decision on motion sequence 001 and the cross-motion, and upon reargument, for an order

“either (i) deny[ing] Plaintiff's motion and granting Defendant's Cross Motion ... or, in the alternative, granting relief under CPLR § 2201 to stay this action in the interests of justice and the preservation of judicial resources ... or [ii] modifying the [decision] or granting a supplemental order consistent with the Court's verbal rulings on [the record] ... in which the Court had confirmed that any enforcement of any judgment would be stayed until at least March 1, 2023 (the day after the closing of a foreclosure sale scheduled by the Bankruptcy Court) (the 'Stay Period'), and providing further that entry of the judgment and any further proceedings herein or related to the judgment shall be stayed until after the Stay Period, and further providing that Defendant Paul may informally request an extension of the Stay Period via email to Part 48 (without need to file a notice of motion or order to show cause) if there are any delays in the schedule for the foreclosure sale bidding or closing due to no fault of Defendant” (NYSCEF 55, Notice of Motion at 1-2)

or (ii) pursuant to CPLR 5015, for an order

“modifying the [decision] or granting a supplemental order consistent with the Court's verbal rulings [the record] in which the Court confirmed that any enforcement of any judgment would be stayed until at least March 1, 2023 ... and further providing that entry of the judgment and any further proceedings herein or related to the judgment shall be stayed until after the Stay Period, and further providing that Defendant Paul may informally request an extension of the Stay Period via email to Part 48 (without need to file a notice of motion or order to show cause) if there are any delays in the schedule for the foreclosure sale bidding or closing due to no fault of Defendant.” (*Id.* at 2-3.)

---

<sup>4</sup> Defendant's counsel, whose affirmation includes arguments (NYSCEF 57), is reminded that affidavits “are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belong in a brief (i.e., a memorandum of law).” (*Tripp & Co., Inc. v Bank of NY (Del), Inc.*, 28 Misc 3d 1211[A], 2010 NY Slip Op 51274[U], \*6 [Sup Ct, NY County 2010], citing 22 NYCRR 202.8 [c].)

## Discussion

### *Leave to Reargue*

A motion for leave to reargue pursuant to CPLR 2221 (d) “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion.” (CPLR 2221 [d] [2].) However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted.” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [citations omitted].) The movant bears the initial burden on a motion to reargue a prior decision pursuant to CPLR 2221. (*See id.*)

“To meet its prima facie burden on its [CPLR 3213] summary judgment motion, [plaintiff] must prove the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty .... Thereafter, the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense.” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” NY Branch v Navarro*, 25 NY3d 485, 492 [2015] [internal quotation marks and citations omitted].)

Defendant maintains that, in his opposition to plaintiff’s 3213 motion, defendant raised defenses grounded in post-closing acts of fraud or gross negligence in the disposition of collateral which defendant could not have waived in his guarantee. Defendant argues that considering his defenses, summary judgment was inappropriate.

A waiver “will be enforced in the absence of fraud or negligence in the disposition of collateral.” (*N. Fork Bank v Computerized Quality Separation Corp.*, 62 AD3d 973, 974 [2d Dept 2009].) Here, the court considered defendants’ submitted evidence and ultimately rejected his attempt to raise an issue of fact as to any such fraud or gross

negligence defenses. (See NYSCEF 41, Decision and Order at 4.) No law or facts have been overlooked or misapprehended in the decision.

On March 28, 2023, one day before oral argument on this motion, defendant submitted a letter with exhibits not previously submitted.<sup>5</sup> The court has considered the submission only to the extent in included “citation of post-submission court decision[s] that [are] relevant to the pending issues” (Rules of Commercial Div of Sup Ct [22 NYCRR 202.70 (g)] Rule 18) and finds that the submission does not affect the outcome of this motion.<sup>6</sup>

Next, the court rejects defendant’s argument that the court failed to address, and thus, misapprehended the authority that defendant cited supporting the proposition that the defenses available to the borrower are also available to defendant as the guarantor. The court considered defendant’s briefs filed in connection with motion sequence 001 and the cross-motion, including the cases cited therein. (NYSCEF 34, Opp MOL; NYSCEF 36, Reply MOL.) “A case is not ‘overlooked or misapprehended’ simply because it is not mentioned in a court’s decision – there is no rule that a court compare, distinguish, or even refer to, every case that is provided by a litigant in support of its

---

<sup>5</sup> The exhibits are March 10, 2023 Order Confirming Joint Plan of Liquidation of WC Braker Portfolio, LLC and WC Braker Portfolio B, LLC (NYSCEF 76); March 9, 2023 transcript of a bankruptcy court proceeding (NYSCEF 77); March 8, 2023 trustee declaration (NYSCEF 78); trustee’s lender claim reconciliation chart (NYSCEF 79); Joint Plan of Liquidation for WC Braker Portfolio, LLC and WC Braker Portfolio B, LLC (NYSCEF 80), and December 21, 2022 Bankruptcy Court Order (NYSCEF 81, previously filed as NYSCEF 40).

<sup>6</sup> To the extent defendant argues that the March 9, 2023 transcript of the bankruptcy court proceeding evidences that plaintiff rejected payment for the underlying debt in the bankruptcy action (NYSCEF 92, tr at 14:17-21 [mot. seq. no. 002]), this issue is moot. It is undisputed that a large portion of the debt has now been satisfied. (See below at 6-7.)

arguments.” (*Kolanu Partners, LLC v Perry*, 48 Misc 3d 1231[A], 2015 NY Slip Op 51335[U], \*7 [Civ Ct, NY County 2015].) In any event, as the court stated, the defendant waived its defenses in the unconditional guarantee. (NYSCEF 41, Decision and Order at 4; see NYSCEF 9, Guarantee Art. II.)

Defendant’s continued reliance on *ATX Debt Fund 2, LLC, 206 AD3d v Paul*, 206 AD3d 465, 466 (1st Dept 2022) is misplaced because in that case the guarantee included an outcome-determinative waiver carveout:

“While defendant waived his affirmative defenses pursuant to the broad waiver provisions in the guaranties, he is entitled to serve the amended answer to the extent it asserts affirmative defenses based on fraudulent conduct that occurred after the execution of the guaranties. The guaranties include a waiver carveout provision that negates the broad waiver with respect to postclosing claims or defenses that sound in fraud .... The allegations in the amended answer are sufficient to state the fraud-based affirmative defenses as well as the counterclaim for a declaration that this action is fraudulent, within the scope of the waiver carveout.” (*Id.* [citation omitted].)

Here, “the guarantee has no such waiver carve out,” and thus, *ATX Debt Fund 2, LLC* is inapposite. (NYSCEF 41, Decision and Order at 5; see NYSCEF 9, Guarantee Art. II.)

### *Stay*

The court stands by its decision to deny the stay of this action. (NYSCEF 50, tr at 40:3-9 [mot. seq. no. 001]; NYSCEF 41, Decision and Order at 5.) Upon review, no law or facts have been overlooked or misapprehended in denying the stay.

Contrary to defendant’s contention that the court granted the stay of the enforcement of the judgment on the record, the court only stated that it “will go along with [plaintiff counsel’s] offer to defer [serving restraining notices]” (NYSCEF 50, tr at 39:13-14 [mot. seq. no. 001]) and consistently noted in its written decision that at argument, plaintiff “offered to defer serving restraining notices on banks until the day

after the scheduled [in the bankruptcy action] sale date or March 1, 2023.” (NYSCEF 41, Decision and Order at 4.) The court’s denial of any stay, however, was unequivocal. (NYSCEF 50, tr at 40:3-9 [mot. seq. no. 001]; NYSCEF 41, Decision and Order at 5.)

Defendant’s motion pursuant to CPLR 5015 to stay the enforcement of the judgment is denied for the reasons articulated in this court’s previous decision. (NYSCEF 50, tr at 40:3-9 [mot. seq. no. 001]; NYSCEF 41, Decision and Order at 5.)

*Partial Payment of Borrower’s Debt*

The court has been informed that around April 10, 2023, the borrower made partial payment in satisfaction of the underlying debt. Defendant’s counsel contends that the amount paid was approximately \$24 million (NYSCEF 85, emails at 3<sup>7</sup> [Apr. 12, 2023 Jantzi email]); plaintiff’s attorney contends that the precise payment amount was \$24,244,260. (NYSCEF 84, Apr. 18, 2023 Shapiro letter at 1.) The partial payment of the underlying debt affects the court’s previous decision, insofar as the court directed the Clerk of Court to enter the judgment against defendant in the amount of \$30,587,815.21, together with interest, costs and disbursements. (NYSCEF 41, Decision and Order at 6.) The record has no indication that the judgment has been entered by the Clerk of the Court. Accordingly, plaintiff shall submit a proposed judgment reflecting the remaining unsatisfied debt. In the interest of justice and to avoid the possibility of double recovery, the court stays its December 29, 2022 decision to the extent it directed the entry of the judgment until such time as the court receives a proposed amended judgment.

Accordingly, it is

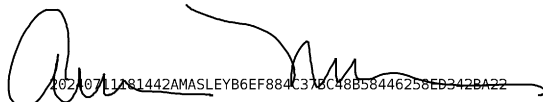
---

<sup>7</sup> NYSCEF pagination.

ORDERED that defendant’s motion is denied; and it is further

ORDERED that the order of this court dated December 29, 2023 is stayed, in part, to the extent that the order directed the Clerk of the Court 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; and it if further

ORDERED that plaintiff shall submit an amended judgment reflecting the remaining unsatisfied debt within five days of this decision.



20240711081442AMASLEYB6EF884C376C48B58446258ED3428A22

7/11/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

|                                     |               |  |
|-------------------------------------|---------------|--|
| <input checked="" type="checkbox"/> | CASE DISPOSED |  |
| <input type="checkbox"/>            | GRANTED       | <input checked="" type="checkbox"/> DENIED |

|                          |                       |                                |
|--------------------------|-----------------------|--------------------------------|
| <input type="checkbox"/> | NON-FINAL DISPOSITION |                                |
| <input type="checkbox"/> | GRANTED IN PART       | <input type="checkbox"/> OTHER |

APPLICATION:

|                          |              |
|--------------------------|--------------|
| <input type="checkbox"/> | SETTLE ORDER |
|--------------------------|--------------|

|                          |              |
|--------------------------|--------------|
| <input type="checkbox"/> | SUBMIT ORDER |
|--------------------------|--------------|

CHECK IF APPROPRIATE:

|                          |                            |
|--------------------------|----------------------------|
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN |
|--------------------------|----------------------------|

|                          |                       |                                    |
|--------------------------|-----------------------|------------------------------------|
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |
|--------------------------|-----------------------|------------------------------------|