

Starship Holdings, LLC v Maxben Holdings, LLC

2024 NY Slip Op 33740(U)

October 15, 2024

Supreme Court, New York County

Docket Number: Index No. 651427/2024

Judge: Margaret A. Chan

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 49M

-----X

STARSHIP HOLDINGS, LLC and ROSHMIR, LLC
Plaintiffs,

INDEX NO. 651427/2024

MOTION DATE 06/25/2024

- v -

MAXBEN HOLDINGS, LLC, and IDIN DALPOUR,
Defendants.

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS001) 2, 13, 14, 15, 16, 17, 18

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

In this action stemming from a breach of a loan agreement and promissory note, both dated April 5, 2022, plaintiff lenders Starship Holdings, LLC and Roshimir, LLC (together, plaintiffs) seek to recover from defendants Maxben Holdings, LLC (Maxben) and Idin Dalpour (Dalpour) (together, defendants) the outstanding amounts of unpaid principal plus interest in the total amount of \$10,514,250.00. Plaintiffs now move, pursuant to CPLR 3213, for summary judgment in lieu of complaint based on defendants' alleged default on the Loan and a corresponding personal guaranty of the Loan by Dalpour. Defendants oppose the motion on the sole basis that this court lacks personal jurisdiction over them due to plaintiffs' violation of the notice requirement under CPLR 3213.

For the following reasons, plaintiffs' motion is denied.

Background

On April 5, 2022, plaintiffs, as lender, loaned Maxben, as borrower, \$4,970,000 pursuant to a Line of Credit Agreement (LOC Agreement) and promissory note executed contemporaneously therewith (the Note, and together with the LOC Agreement, the Loan) (NYSCEF # 3 – Patel aff ¶¶ 7-8, 11; NYSCEF # 4 – LOC Agreement; NYSCEF # 5 - Note). To further induce plaintiffs to issue the Loan, Dalpour executed a personal guaranty in favor of plaintiffs, dated April 5, 2022, pursuant to which Dalpour “absolutely and unconditionally” guaranteed prompt and unconditional payment of the Loan (Patel aff ¶¶ 15-19; NYSCEF # 6 - Guaranty).

The LOC Agreement required plaintiffs to provide Maxben with a \$5,000,000 line of credit, which “shall be due and payable” upon the earlier of an Event of Default on the Loan or upon the Loan’s maturity date of April 5, 2023 (Patel aff ¶¶ 10, 13-14; LOC Agreement §§ 2.1, 6.1[a]). After receipt of the Loan, Maxben was required to remit interest payments of 5% of the principal balance, which amounted to monthly interest payments of \$248,500 (Patel aff ¶ 12; LOC Agreement § 2.2). When accounting for accumulated interest and unpaid principal, the total amount due on the April 5, 2023, maturity date amounted to \$7,952,000 (Patel aff ¶ 13).

According to Milan Patel, Manager and Member of Starship, Maxben failed to repay the full portion of the Loan and accumulated interest payments that were due to plaintiffs on the maturity date (Patel aff ¶¶ 20, 22). Instead, Maxben only paid \$171,250 towards interest payments (*id.* ¶¶ 21). Plaintiffs accordingly wrote to defendants on February 22, 2024, demanding payment that was then due, but defendants failed to respond (*id.* ¶ 24; NYSCEF # 7). Plaintiffs calculate that, as of March 5, 2024, defendants owe a total amount of \$10,514,250 (Patel aff ¶ 23). This includes: (i) \$4,970,000 million in unpaid principal, (ii) \$2,810,750 in accrued interest from the date of the Loan’s issuance through the maturity date, less the \$171,250 payment, (iii) \$2,733,500 in accrued interest from the maturity date through March 5, 2024, (iv) accruing interest at a per diem rate of \$8,169.86; and (v) post-judgment interest and attorneys’ fees (*id.*).

To recover the unpaid amounts on the Loan, plaintiffs commenced this action by filing Summons with Notice on March 19, 2024 (NYSCEF # 1). Plaintiffs subsequently filed an “Amended Notice of Motion for Summary Judgment in Lieu of Complaint” on March 19, 2024, but dated March 20, 2024 (the Notice) (NYSCEF # 2 – Notice). The Notice set a return date of April 9, 2024 (*id.* at 1). The Summons and the Notice, along with related documents, were served on defendants on March 21, 2024 (NYSCEF #s 11-12 – Affs of Service).¹ As a result, the posted return date of April 9, 2024, was only 19 days after the date that service was effectuated on defendants (NYSCEF #s 11-12; NYSCEF # 14 – Thompson aff ¶ 9).

Plaintiffs’ counsel explains that April 9, 2024, was set as the return date because plaintiffs incorrectly assumed that service would be completed by March 20, 2024 (NYSCEF # 16 – Bhattacharya aff ¶ 5). Instead, plaintiffs’ process server could not personally serve defendants’ authorized agent until March 21, 2024 (*id.* ¶ 7). Plaintiffs also mailed the motion papers to defendants via certified mail on March 21, 2024, and emailed defendants’ counsel with the papers on March 27, 2024 (*id.* ¶¶ 8-9). Plaintiffs never filed a further amended Notice of Motion. Instead, plaintiffs’ counsel maintains that defendants’ counsel filed his affidavit in

¹ Copies of the Summons and the Motion Papers were mailed via first-class mail in a blank envelope stamped “Personal and Confidential” to Delpour on May 26, 2024 (NYSCEF # 13).

opposition to the motion before plaintiffs had an opportunity to set a later return date (*id.* ¶ 14).

Discussion

Defendants argue that the motion for summary judgment in lieu of complaint must be denied because plaintiffs failed to give defendants legally sufficient advance notice of the motion. The court agrees.

The minimum time for a motion for summary judgment in lieu of complaint to be noticed is the time provided by CPLR 320[a] for a defendant to make an appearance (see CPLR 3213). CPLR 320[a], in turn, provides that a defendant's appearance shall be made within 20 days after service of the summons unless service was made pursuant to a specifically enumerated CPLR provision (CPLR 320[a]). In the event that service is made pursuant to CPLR 308(3), then defendant's appearance shall be made within 30 days after service (*id.*). Here, service on Maxben, a limited liability company, was effectuated under CPLR 311-a, and the 20-day period for its appearance after notice as provided in CPLR 320[a] applies. Meanwhile, service on Dalpour, an individual, was effectuated under CPLR 308(3), and thus a 30-day period for his appearance after notice as provided in CPLR 320[a] applies.

A CPLR 3213 motion may not have a return date prior to when the defendant's time to appear elapses (*Vazquez v Fifth Ave. Men's Suits LLC*, 2023 NY Misc LEXIS 8274 [Sup Ct, NY County Oct. 10, 2023] [citing *Alpine Capital Bank v Estate of Shiah*, 2020 NY Slip Op 50587[U] at *3 [Sup Ct, NY County May 20, 2020]]). Making a motion returnable before the time to appear expires is a "fatal jurisdictional defect" (*Bhanti v Jha*, 140 AD3d 685, 686 [2d Dept 2016] [citing *Segway of NY, Inc. v Udit Group, Inc.*, 120 AD3d 789, 792 [2d Dept 2014]]). And courts "may not overlook" such defects (*id.* [quoting *Ruvvin v Lion Corp.*, 15 NY3d 578, 583 [2010]]).

In this case, service of the complaint was effectuated pursuant to CPLR 311(a) on Maxben, a limited liability company, and pursuant to CPLR 308(2) on Dalpour (see NYSCEF #s 11-13). As such, the time for defendants to make an appearance, and the minimum time that the present motion must be noticed, is 20 days for Maxben and 30 days for Dalpour (see CPLR 320[a]). There is no dispute that service of the motion papers on defendant occurred on March 21, 2024 (see NYSCEF #s 11-12; Bhattacharya aff ¶ 7). Yet, as noted above, the motion's return date of April 9, 2024, is only 19 days after service was complete. As a result, although plaintiffs contend that they would have filed an amended of notice of motion but for defendants' filing of their attorney's affidavit to contest the motion, it is nevertheless the case that plaintiffs made the motion returnable prior to the expiration of both defendants' time to appear. This clear and fatal jurisdictional defect plainly warrants dismissal for lack of jurisdiction.

To avoid this outcome, plaintiffs argues that an untimely return date is not a “fatal jurisdictional defect” (NYSCEF # 15 – Reply at 7-8). In support, plaintiffs argue that *Bhanti* has been superseded by *Blue Lagoon, LLC v Reisman* (214 AD3d 938 [2d Dept 2023]) (*id.* at 9). In *Blue Lagoon*, the Second Department found that although the return date on plaintiff’s original CPLR 3213 motion was defective, defendant had notice of the motion, and the motion was adjourned several times. Critically, plaintiff subsequently amended its notice of motion for summary judgment in lieu of complaint, which, the Second Department found, afforded defendant sufficient time under CPLR 320 and CPLR 3213 (*id.* at 941-942). Thus, in this case, plaintiffs’ contention that *Bhanti* was superseded by *Blue Lagoon* misses the mark. Unlike the plaintiff in *Blue Lagoon*, plaintiffs here only contemplated filing an amended notice of motion; they never effectuated that plan. All that was ever filed was plaintiffs’ defective notice.

Plaintiffs next contend that defendant is not prejudiced because defendant made a timely appearance, thus waiving its objection and allowing the court to disregard the present jurisdictional defect (Reply at 7-9). In furtherance of this point, plaintiffs quote from *ICICI Bank UK PLC Antwerp Branch v Manilal* (2020 NY Slip Op 31606[U] [Sup Ct, NY County 2020]) to assert that “where a defendant appears and opposes [a] motion . . . the court may disregard the fact that the return date did not satisfy the time requirements set forth in CPLR 3213” (*id.* at *9). Upon review of *ICICI Bank*, the ellipsis in plaintiffs’ quote omitted three critical words—“on the merits” (*id.*). Meanwhile, plaintiffs’ other cited cases in support of this proposition all involved an adjournment extending the previously noticed motion’s return date (*see e.g. Plaza 400 Owners Corp. v Resnicoff*, 168 Misc 2d 837 (Civ Ct, NY County, 1996) [observing that plaintiff received a two-week consent adjournment to oppose defendant’s cross motion, thereby affording both sides “adequate opportunity to litigate both motions on the merits”]; *Quartix Finance Inc. v KSH Brands LLC*, 2023 WL 4464105, at *5 [Sup Ct, NY County, July 10, 2023] [finding that despite the defective return date of the CPLR 3213 motion, the parties twice stipulated to adjourn plaintiff’s motion for defendant to oppose the motion on the merits).

Here, the parties did not stipulate to any adjournment, nor did defendants seek any extensions or adjournments, so this not an issue that need be addressed in resolving the present motion. And while it is true that defendants opposed this motion; defendants’ only challenge goes to the lack of personal jurisdiction (NYSCEF # 10). Significantly, defendants did not oppose the motion on the merits (*cf. Quartix Finance Inc.*, 2023 WL 4464104 at *5). What remains is a defective notice of motion that did not give defendants sufficient time pursuant to CPLR 3213, which is a fatal jurisdictional defect requiring dismissal (*Bhanti* 140 AD3d at 686; *see also Vazquez v Fifth Ave. Men’s Suits LLC*, 80 Misc 3d 1226(A), at *2 [Sup Ct, NY County 2023] [dismissing CPLR 3213 action for return date posted two days before deadline]; *Blue Line Drywall & Bldr., Inc. v SAM NJ 44 Stelton, LLC*, 78 Misc 3d 1238(A), at *2 [Sup Ct, NY County 2023] [same]). The defective notice of the

motion for summary judgment in lieu of complaint mandates denial of the motion and dismissal of the action.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is denied and this case is dismissed for lack of jurisdiction; and it is further

ORDERED that counsel for defendants shall serve a copy of this decision, along with notice of entry, on plaintiffs within ten days of this filing.

10/15/2024

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE