Valley Natl. Bancorp v Spar Bus. Servs., Inc.
2024 NY Slip Op 35267(U)
March 26, 2024
Supreme Court, Westchester County
Docket Number: Index No. 66581/2023
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a Copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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VALLEY NATIONAL BANCORP d/b/a VALLEY NATIONAL BANK as Successor by Merger to THE WESTCHESTER BANK HOLDING CORPORATION, d/b/a THE WESTCHESTER BANK,

Plaintiff,

-against-

SPAR BUSINESS SERVICES, INC., WILLIAM BARTELS, and ROBERT G. BROWN,

Defendants.

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DECISION AND ORDER
Index No. 66581/2023
Seq. Nos. 1 and 2

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 2-13 and 25-62 were read in connection with plaintiff's motion for an order, pursuant to CPLR 3213, granting plaintiff summary judgment in lieu of complaint (Seq. # 1), and the cross-motion of defendant William Bartels, seeking, among other things, judgment dismissing plaintiff's claims against Bartels and declaring that the indebtedness at issue in this action is the sole obligation of the co-defendants (Seq. # 2).

Plaintiff, Valley National Bancorp d/b/a Valley National Bank is the successor by merger to The Westchester Bank Holding Corporation d/b/a The Westchester Bank. Plaintiff commenced this action on September 8, 2023 by the filing of a summons and notice of motion for summary judgment in lieu of complaint on grounds that this is an action based upon a written instrument for the payment of money only. The action arises out of a promissory note executed in favor of plaintiff by defendant SPAR Business Services, Inc. ("SBS") and personally guaranteed by the individual co-defendants William Bartels and Robert G. Brown.

1. **Plaintiff's Argument in Support of the Motion**

In support of the motion, plaintiff submits the affidavit of Tony Zelesko, First Vice President of plaintiff's Special Assets Department, and the business records upon which the affidavit relies (NYSCEF Doc. Nos. 4-12). In his affidavit, Zelesko attests that on October 24, 2013, defendant SPAR Business Services, Inc. ("SBS") executed and delivered a promissory note to Westchester Bank in the principal amount of $1,000,000, at an interest rate of 4.25%, that was governed by a commercial loan agreement executed by SBS on the same date detailing that the loan was a revolving line of credit (NYSCEF Doc. Nos. 7-8). To secure the obligations contained within the note and loan agreement, defendants Bartels and Brown each executed and delivered to Westchester Bank a personal guaranty for the note (NYSCEF Doc. # 9). In or around 2019, defendants went into default under the note and guarantees. On July 26, 2019, Bartels and Brown entered into a guarantor payment agreement which provided that, beginning on August 1, 2019, Bartels and Brown would pay Westchester Bank the monthly sum of $8,646.31 at an interest rate of 5.5% that would increase to 7.5% upon a further default in payments. In turn, the bank would "standstill" from enforcing and pursuing any legal action against defendants until July 26, 2024 (NYSCEF Doc. # 10). Defendants made payments for a period of time but eventually defaulted again. On February 2, 2023, Westchester Bank, which had merged into plaintiff by that time, entered into a forbearance agreement with defendants (NYSCEF Doc. # 11). That agreement deferred payment of principal and interest through June 2023, with payments scheduled to resume on July 1, 2023. Defendants failed to make the required payment on July 1, 2023, and thereafter, plaintiff served defendants with a formal notice of default (NYSCEF Doc. # 12). Pursuant to the notice, plaintiff elected to accelerate and call due the entire principal balance of $264,151.83, plus interest from July 1, 2023 at the default rate of 7.5%, accumulated late fees, and plaintiff's costs of collection, including attorney's fees.

2. <u>Bartels' Argument in Opposition and Support of the Cross-Motion</u>

In opposition and support of his cross-motion, Bartels argues that SBS has sufficient assets to satisfy the loan because it holds 1,270,538 common shares of stock of SPAR Group, Inc., the value of which far exceeds the indebtedness to plaintiff. He further contends that plaintiff should be required to first pursue payment of the debt from SBS directly, before seeking to enforce the personal guarantees. Bartels also argues that he should not be required to pay the debt because SBS has been in the exclusive control of co-defendant Brown since Bartels sold him his 39% ownership in November 2018. In addition, Bartels claims that despite their 60-year business relationship, Brown misled Bartels in their dealings by improperly co-mingling of funds between SBS and SPAR Information Technologies, Inc. ("SIT"), a company controlled by Brown since in 2012, diverting the loan proceeds to Brown's other companies, and failing to repay the loan.

3. <u>Brown and SBS' Opposition to the Motion and Cross-Motion</u>

In opposition to plaintiff's motion, Brown and SBS rely on *PDL Biopharma, Inc. v Wohlstadter*, (147 AD3d 494 [1st Dept 2017]) and *Assocs. Capital Services Corp. of New Jersey v Lichtenstein*, (96 AD2d 1089 [2d Dept 1983]) to argue that the guarantees are not qualifying instruments under CPLR 3213 because they: (1) call for something more than the payment of money only, and (2) require consultation of extrinsic documents to ascertain their exact terms. To support this contention, Brown and SBS point to the language of the guarantees, and their inclusion of non-monetary obligations like those set forth in the related commercial loan agreement which include supplying financial information, allowing inspection of books and records, maintaining the business in good standing, complying with applicable laws, and obtaining insurance. Brown and SBS also point to the fact that, in order to decide plaintiff's motion, the court must consult more than just the note, the guarantees, and the proof of nonpayment. The court must also examine the commercial loan agreement, 2019 guarantor payment agreement, and the 2023 forbearance agreement. These agreements fixed new payment amounts, new payment schedules and new default interest rates, none of which were set forth in the original note. As such, Brown and SBS argue that summary adjudication pursuant to CPLR 3213 is not appropriate here. Finally, Brown and SBS contend that Bartels' arguments regarding apportionment of liability and plaintiff's obligation to first seek collection from the primary borrower, raise issues of fact that warrant denial of plaintiff's motion.

In opposition to the cross-motion, Brown submits an affidavit in which he attests that Bartels' claims are entirely false. According to Brown, defendants obtained a loan from plaintiff in order to fund $965,023 in security deposits required by the workmen's compensation insurer of SPAR Administrative Services, Inc. ("SAS"), a company that was controlled and managed by Bartels at the time. Brown claims that he and Bartels agreed that when the workmen's compensation insurer returned the deposits to SAS, they would be used to repay the loan from plaintiff. However, when the deposits were returned, Bartels breached their agreement by failing to use the funds to repay the bank loan. Brown further contends that plaintiff sent defendants a new forbearance agreement in July 2023 that would have extended the forbearance period under certain terms and conditions; however, Bartels refused to sign and as a result, the loan went into default.

Brown and SBS also argue that Bartels cannot seek affirmative relief against his co-defendants by means of a cross-motion in a CPLR 3213 proceeding. As such, Brown and SBS urge the court do deny the cross-motion as procedurally improper. They further contend that Bartels' cross-motion raises numerous issues of fact that would preclude the relief he seeks against them, and, in any event, the claims are barred by the statute of limitations and the doctrines of ratification and estoppel.

Analysis

CPLR 3213 provides that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." The statute was enacted "to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 491-92 [2015] [citation omitted]). An absolute and unconditional guaranty is "an instrument for the payment of money only" within the meaning of CPLR 3213 (*id.* at 492).

A party moving for summary judgment pursuant to CPLR 3213 makes a prima facie showing of entitlement to judgment as a matter of law by establishing "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Navarro*, 25 NY3d at 492). Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact with respect to a bona fide defense (*id.*)

As an initial matter, the court is aware that there has been "a split in authority between the Appellate Divisions over whether a guarantee qualifies as an instrument for the payment of money only if it promises not just payment, but performance of the underlying obligation" (Hon. Mark C.

Dillon, 2023 Supplementary Practice Commentaries [McKinney's Cons Laws of NY, Book 7B

CPLR 3213:4). The Second Department, which this court is bound to follow, holds that a guarantee qualifies as "an instrument for the payment of money only," regardless of collateral promises independent of the money guarantee, as long the collateral promises do not require any "additional performance by the lender as a condition precedent to repayment, or otherwise alter the insured's promise of repayment" (*Afco Credit Corp. v Boropark Twelfth Ave. Realty Corp.*, 187 AD2d 634, 634 [2d Dept 1992]*; see Premium Assignment Corp. v Utopia Home Care, Inc.*, 58 AD3d 709 [2d Dept 2009]). Brown and SBS' reliance on *Wohlstadter* and *Lichtenstein* is unpersuasive in light of the above and other more recent Appellate Division case law (*see, e.g., 45-47-49 Eighth Ave. LLC v Conti*, 220 AD3d 473, 473 [1st Dept 2023] ["Although defendant guaranteed both payment and certain performance obligations, this does not preclude summary judgment in lieu of complaint where, as here, performance is not a condition precedent to payment."]; *Counsel Fin. Holdings LLC v Sullivan Law, L.L.C.*, 208 AD3d 1028, 1030 [4th Dept 2022]).

In addition, while subsequent agreements exist between the parties, the court's need to consult such extrinsic evidence is de minimus and does not exceed the limited permissible reference to outside sources allowable under CPLR 3213 (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996] [an instrument will not qualify as one for the payment of money only if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document"]). The only "outside proof" needed is the late charge percentage rate contained in the commercial loan agreement and the default interest rate contained in the 2019 guarantor payment agreement. This does not preclude recovery under CPLR 3213 (*Bank Leumi Tr. Co. of New York v Rattet & Liebman*, 182 AD2d 541, 542 [1st Dept 1992] ["The fact that the interest rate is not set forth specifically in the note but is tied to the Bank's reference rate, and the fact that a different rate of interest applies after maturity, do not preclude recovery under CPLR

3213."]). As such, the court finds that plaintiff's action is one based on "an instrument for the payment of money only" within the meaning of CPLR 3213.

As to the merits of the relief sought, plaintiff has demonstrated its prima facie entitlement to summary judgment in lieu of complaint by establishing the existence of the underlying debt, the unconditional guarantees of the note, and defendants' failure to make the payments called for by its terms, a fact that defendants do not dispute. Defendants have failed to raise any triable issues of fact in opposition. Contrary to Bartels' contention, both the law and plain language of the guaranty permit plaintiff to seek payment of the debt from any of the obligors, and plaintiff is not required to first collect from SBS before seeking recovery from the guarantors *(European American Bank & Trust Co. v Boyd*, 131 AD2d 629, 630 [2d Dept 1987]; *Federal Deposit Ins. Corp. v Schwartz*, 78 AD2d 867 [2d Dept 1980]). In addition, the guaranty did not automatically terminate upon Bartels' sale of his ownership interest in SBS (*Chem. Bank v Sepler*, 60 NY2d 289, 294 [1983]; *Franklin Nat. Bank of Long Island v S. & L. Const. Corp.*, 16 AD2d 682 [2d Dept 1962]). Even if Bartels had revoked his guaranty in writing as required by the terms of the guarantee, Bartels would still be responsible for the principal amount owed at the time of revocation (NYSCEF Doc. # 9 at 2, ¶ 2). The terms of the guaranty also do not require plaintiff to accept shares of stock as payment of the debt. And, in any event, as Bartels acknowledges, the shares have been frozen since 2022 and are presently non-transferable.

Bartels and Brown's remaining contentions regarding the alleged mismanagement and co-mingling of funds and any alleged breach in their business agreements solely relate to potential claims they may have against each other. They are not a defense to this action which is based upon an instrument for the payment of money only.

Accordingly, it is hereby

ORDERED that plaintiff's motion (Seq. # 1) for summary judgment in lieu of complaint is **granted**; and it is further

ORDERED that **within 20 days** after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall submit a proposed judgment properly supported with an affirmation of legal fees, including a statement as to the reasonableness of those fees, with notice of settlement; and it is further

ORDERED that defendant William Bartels' cross-motion (Seq. # 2) is **denied**; and it is further

ORDERED that **within 20 days** after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties, and file proof of service on NYSCEF; and it is further

This constitutes the decision and order of the court.

Dated: White Plains, New York
March 26, 2024

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF