

Flagstar Bank, N.A. v Olive Tree Asset Mgt. LLC

2025 NY Slip Op 31158(U)

March 25, 2025

Supreme Court, New York County

Docket Number: Index No. 653863/2024

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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FLAGSTAR BANK, N.A.,

Plaintiff,

- v -

OLIVE TREE ASSET MANAGEMENT LLC, IAN MICHAEL BEL, YURIY GELFMAN, MICHAEL ROSENFELD, ALAN SHVETZ, OLIVE BEL HOLDINGS LLC, SIMBA B HOLDINGS LLC, NORTHWAY CAPITAL PARTNERS LLC, SHVETZ HOLDINGS LLC, OLIVE BEL AM HOLDINGS LLC, SIMBA B AM HOLDINGS LLC, NORTHWAY CAPITAL PARTNERS AM LLC, SHVETZ AM HOLDINGS LLC, OLIVE TREE MULTIFAMILY HOLDINGS LLC, OLIVE TREE MULTIFAMILY HOLDINGS II LLC, OLIVE TREE MULTIFAMILY HOLDINGS III LLC, OLIVE TREE ASSET MANAGEMENT II LLC, OLIVE TREE ASSET HOLDINGS LLC, OLIVE TREE PROPERTY MANAGEMENT LLC, OLIVE TREE PROPERTY HOLDINGS LLC, THE LIFE PROPERTY MANAGEMENT LLC, OLIVE TREE INVESTMENT HOLDINGS LLC, OLIVE TREE VENTURE CAPITAL LLC, OLIVE TREE AFFORDABLE DEVELOPMENT LLC, OLIVE TREE AFFORDABLE HOLDINGS LLC, TRUE RATE SERVICES LLC, THE LIFE AT DESOTO DEVELOPMENT LLC, THE LIFE AT PARKVIEW DEVELOPMENT LLC, THE LIFE AT WESTPARK DEVELOPMENT LLC, OLIVE TREE AFFORDABLE HOUSING MANAGER LLC, OLIVE TREE MULTIFAMILY MANAGER LLC, OLIVE TREE MULTIFAMILY MANAGER II LLC, OLIVE TREE DIGITAL LLC, OLIVE TREE VENTURE CAPITAL II LLC, OLIVE TREE INVESTMENT HOLDINGS II LLC, OT PREFCO LLC, OLIVE TREE AFFORDABLE HOLDINGS III LLC, BNW HOLDINGS LLC, OLIVE TREE AFFORDABLE HOUSING MANAGER II LLC, OLIVE TREE ASSET HOLDINGS II LLC, NORTHWAY CAPITAL PARTNERS II LLC, OLIVE BEL HOLDINGS II LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND)

In this action, plaintiff moves under CPLR 3123 for summary judgment in lieu of complaint against all defendants. Plaintiff seeks to recover under certain notes and guaranties

that the defendants entered into with plaintiff and plaintiff's predecessor in interest, nonparty Signature Bank. The notes and guaranties, as amended and restated, flow from a \$10 million line of credit that Signature Bank issued to Olive Tree Asset Management, LLC ("Olive Tree" or "borrower"). Defendants oppose the motion.

BACKGROUND

August 2022 Loan Agreement and Note

On or about August 31, 2022, defendant Olive Tree and Signature Bank, plaintiff's predecessor in interest, entered into an Amended and Restated Line of Credit Agreement (EDOC 4 [the "August 2022 Loan Agreement"]) and an Amended and Restated Interest Only Promissory Note in the original principal sum of \$10,000,000.00 (EDOC 5 [the "August 31, 2022 Note"]). Under the August 2022 Loan Agreement, Signature Bank provided a revolving line of credit to Olive Tree. The August 2022 loan agreement included a guarantee provision with twenty four (24) guarantors (*id.*) Further, the August 2022 Interest Only Promissory Note provides that all amounts owed will become due and payable on the Maturity Date, defined in the August 31, 2022 Note as June 30, 2023 (EDOC 5).

August 2022 Continuing Guaranties

In accordance with the guarantee provision in the Loan Agreement, on August 31, 2022, defendants Ian Michael Bel, Yuriy Gelfman, Michael Rosenfeld and Alan Shvets (the "Individual Guarantors") and Signature Bank entered into an Amended and Restated Continuing Guaranty (EDOC 6 [the "August 2022 Individual Guaranty"]).

Also on August 31, 2022, defendants Olive Bel Holdings LLC, Simba B Holdings LLC, Northway Capital Partners LLC, Shvets Holdings LLC, Olive Bel AM Holdings LLC, Simba B AM Holdings LLC, Northway Capital Partners AM LLC, Shvets AM Holdings LLC, Olive Tree

Multifamily Holdings LLC, Olive Tree Multifamily Holdings II LLC, Olive Tree Multifamily Holdings III LLC, Olive Tree Asset Management II LLC, Olive Tree Asset Holdings LLC, Olive Tree Property Management LLC, Olive Tree Property Holdings LLC, The Life Property Management LLC, Olive Tree Investment Holdings LLC, Olive Tree Venture Capital LLC, Olive Tree Affordable Development LLC and Olive Tree Affordable Holdings LLC (“August 2022 Company Guarantors”) and Signature Bank entered into an Amended and Restated Continuing Guaranty (EDOC 7 [“August 2022 Company Guaranty”]).

Under both of these guaranties, the guarantors agreed:

“Guarantor hereby irrevocably and unconditionally guarantees to Lender the due and punctual payment in full of all obligations of Borrower to Lender, including without limitation, to repay all Loans and interest accrued thereon and any other obligations accruing in connection therewith, and to repay the principal of and interest on and all other sums payable with respect to any and all advances, debts, obligations and liabilities of Borrower to Lender, irrespective of when made, incurred, created or arising, whether originally contracted with Lender or with another and transferred to Lender or otherwise acquired by Lender, direct or indirect, absolute or contingent, voluntary or involuntary, when the same shall become due, whether at stated maturity, by required prepayment, declaration, acceleration, demand or otherwise (including amounts that would become due but for the operation of the automatic stay under Section 362(a) of the Bankruptcy Code, 11 U.S.C. §362(a) or any equivalent provision in any applicable jurisdiction)”

(*id.*, section 1).

In addition, the guaranties both state:

“Liability of Guarantor Absolute. Guarantor agrees that its obligations hereunder are irrevocable, absolute, independent and unconditional and shall not be affected by any circumstance which constitutes a legal or equitable discharge of a guarantor or surety other than payment in full of the applicable Guaranteed Obligations. In furtherance of the foregoing and without limiting the generality thereof, Guarantor agrees as follows: (a) this Guaranty is a guaranty of payment when due and not of collectability; (b) this Guaranty is a primary obligation of Guarantor and not merely a contract of surety; (c) Lender may enforce this Guaranty upon the occurrence of an Event of Default notwithstanding the existence of any dispute between Borrower and Lender with respect to the existence of such Event of Default; (d) the obligations of Guarantor hereunder are independent of the obligations of Borrower and the obligations of any other guarantor (including any other Guarantor) of the obligations of Borrower, and a

separate action or actions may be brought and prosecuted against such Guarantor, whether or not any action is brought against Borrower or any of such other guarantors and whether or not Borrower is joined in any such action or actions; (e) payment by Guarantor of a portion, but not all, of the applicable Guaranteed Obligations shall in no way limit, affect, modify or abridge Guarantor's liability for any portion of the applicable Guaranteed Obligations which has not been paid (without limiting the generality of the foregoing, if Lender is awarded a judgment in any suit brought to enforce Guarantor's covenant to pay a portion of the applicable Guaranteed Obligations, such judgment shall not be deemed to release such Guarantor from its covenant to pay the portion of the applicable Guaranteed Obligations that is not the subject of such suit, and to the extent there are additional Guarantors, such judgment shall not, except to the extent satisfied by such Guarantor, limit, affect, modify or abridge any other Guarantor's liability hereunder in respect of the applicable Guaranteed Obligations)"

(*id.*, section 3).

Moreover, the guaranties are "continuing . . . and shall remain in effect until all of the applicable Guaranteed Obligations . . . have indefeasibly been paid in full. Guarantor hereby irrevocably waives any right to revoke this Guaranty as to future transactions giving rise to any applicable Guaranteed Obligations" (*id.*, section 7).

December 6, 2022 Amended Note and June 2023 Modification and Extension Agreement

On December 6, 2022, Olive Tree executed and delivered to Signature an Amended and Restated Promissory Note in the original principal sum of \$10,000,000.00 (EDOC 8 [the "December 2022 Note"]). On June 30, 2023, Olive Tree and plaintiff entered into a Modification and Extension Agreement (EDOC 9 [the "June 2023 Modification"]). The June 2023 Modification extended the \$10 million line of credit and the maturity date for the August 2022 Loan Agreement and corresponding Note. The maturity date was extended to September 28, 2023.

December 5, 2023 Note, Modification Agreement and Continuing Guaranty

On December 5, 2023, Olive Tree and plaintiff entered into another Modification and Extension Agreement (EDOC 12 [the “December 2023 Modification”]). In this agreement, the parties extended the note’s Maturity Date to January 5, 2024.

In connection with the December 2023 Modification, Olive Tree executed and delivered to plaintiff an Amended and Restated Promissory Note in the original principal sum of \$10,000,000.00 (EDOC 11 [the “December 2023 Note”]). The December 2023 replaced and superseded the prior Notes, and matured on January 5, 2024.

On that same date, defendants The Life at DeSoto Development LLC, The Life at Parkview Development LLC, The Life at Westpark Development LLC, Olive Tree Affordable Housing Manager LLC, Olive Tree Multifamily Manager LLC, Olive Tree Multifamily Manager II LLC, Olive Tree Digital LLC, Olive Tree Venture Capital II LLC, Olive Tree Investment Holdings II LLC, OT Prefco LLC; Olive Tree Affordable Holdings III LLC, BNW Holdings LLC, Olive Tree Affordable Housing Manager II LLC, Olive Tree Asset Holdings II LLC, Northway Capital Partners II LLC, and Olive Bel Holdings II LLC and plaintiff entered into a Continuing Guaranty (EDOC 13 [the “December 2023 Guaranty”]). The December 2023 Guaranty states, in Section 23, that

“[t]he parties hereto hereby agree that this Guaranty is in addition to (a) the [August 2022 Company Guaranty], as amended, restated and otherwise modified from time to time, (b) the [August 2022 Individual Guaranty], as amended, restated and otherwise modified from time to time, and (c) the [August 2023 Guaranty] executed by True Rate Services, LLC, as amended, restated and otherwise modified from time to time”

(*id.*, section 23).

The December 2023 Guaranty states:

“Guarantor hereby irrevocably and unconditionally guarantees to Lender the due and punctual payment in full of all obligations of Borrower to Lender, including without limitation, to repay all Loans and interest accrued thereon and any other

obligations accruing in connection therewith, and to repay the principal of and interest on and all other sums payable with respect to any and all advances, debts, obligations and liabilities of Borrower to Lender, irrespective of when made, incurred, created or arising, whether originally contracted with Lender or with another transferred to Lender or otherwise acquired by Lender, direct or indirect, absolute or contingent, voluntary or involuntary, when the same shall become due, whether at stated maturity, by required prepayment, declaration, acceleration, demand or otherwise (including amounts that would become due but for the operation of the automatic stay under Section 362(a) of the Bankruptcy Code, 11 U.S.C. 362(a) or any equivalent provision in any applicable jurisdiction) (each, a "Guaranteed Obligation" and, collectively, the "Guaranteed Obligations")

(*id.*, section 1).

Loan Default

Olive Tree failed to repay the outstanding \$10 million principal amounts on the January 5, 2024 Maturity Date, as well as \$82,638.89 in non-default interest that was due. Thus, plaintiff seeks those amounts plus default interest under the the December 5, 2023 Note. Plaintiff also seeks to recover a 5% late fee, as well as its reasonable attorneys' fees.

DISCUSSION

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; see *Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *aff'd* 202 AD3d 464 [1st Dept 2022]). Generally, an action on a guaranty is an action for payment of money only (see e.g. *Cooperative Centrale Raiffesisen-Boerenleenbank, B.A.*, 25 NY3d 485, 492 [2015]). The same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. Movant must make a *prima facie* case by submitting the instrument and evidence of the defendant's failure to

make payments in accordance with the instrument's terms (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dep't 2000]). "A guaranty may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, and the need to consult the underlying documents to establish the amount of liability does not affect the availability of CPLR 3213" (*Bank of Am., N.A. v. Solow*, 59 AD3d 304 [1st Dep't 2009]).

1. Plaintiff's *Prima Facie* Entitlement to Summary Judgment in Lieu of Complaint

Plaintiff establishes its *prima facie* entitlement to summary judgment in lieu of complaint. Plaintiff submits the Loan Agreements, the Guaranties, the Notes, and Martine Lamarre's affidavit. Lamarre is Flagstar's Manager of the Small Business Loan Collections Department (EDOC 3 [Lamarre aff.]).

Plaintiff establishes that Olive Tree failed to repay the Note on the January 6, 2024 Maturity Date. In fact, Olive Tree made no payments after December 8, 2023 (EDOC 5, paras 21-26). Thus, plaintiff establishes that it is entitled to the outstanding principal (\$10 million), \$82,638.89 in regular, pre-default interest, as well as default interest and a 5% late fee. Under the notes and guaranties, the defendants are jointly and severally liable for all amounts owed.

Specifically, plaintiff establishes that defendants are liable for the amounts: \$10 million in unpaid principal; \$82,638.89 in pre-default ordinary interest; default interest at the per anum rate of 14.5% (the 1/5/24 prime rate [8.5% + 6% = 14.5%] from January 6, 2024 until the date of this decision and order; and late fees for the unpaid principal amount [5% of \$10 million = \$500,000] and unpaid ordinary interest [5% of \$82,638.89 = \$4,131.94] (*see* EDOC 3, paras 20-22; *see also* EDOC 16 [interest calculation exhibit]). However, although plaintiff may be entitled to its reasonable attorneys' fees under the relevant agreements, plaintiff has not satisfied

its burden with respect to attorneys' fees because it has not submitted support for any attorneys' fees amounts. Thus, the court denies the part of plaintiff's motion seeking an award of reasonable attorneys' fees.

2. Defendants do not raise a triable issue of material fact

i. *The Gelfman Defendants*

Defendants Gelfman, Simba B Holdings LLC, and Simba B AM Holdings LLC ("Gelfman Defendants") argue that the August 2022 Guaranties are not instruments for the payment of money only, because the guarantee refers to "other obligations." This claim is unavailing. The "obligations" are all financial in nature that is, there is no obligation to perform anything other than tendering payment for borrowers' debts (*see Oxford Finance LLC v. Makesh*, 2024 WL 4100987 [N.Y. Sup. Ct. Sep. 06, 2024]).

Moreover, the Gelfman Defendants argue plaintiff should be estopped from enforcing the guaranties because Mr. Gelfman did not understand the Guaranties that he signed. Gelfman is an individual guarantor and the principal of company guarantors Simba B and Simba B AM. This argument is also unavailing. These defendants waived their rights to pursue these types of affirmative defenses (EDOC 6, section 4; EDOC 7, section 4). In any event, Gelfman states that he relied on Olive Tree's counsel when he signed the guaranties (EDOC 34 [Gelfman aff]), and his failure to understand the guaranties does not create a triable issue of fact.

ii. *The Olive Tree Defendants*

The remaining defendants¹ ("Olive Tree Defendants") argue that the court should deny the motion because (a) defendants need discovery, (b) plaintiff made it impossible for Olive Tree

¹ Olive Tree Asset Management LLC; Ian Michael Bel; Michael Rosenfeld; Alan Shvetz; Olive Bel Holdings LLC; Northway Capital Partners LLC; Shvetz Holdings LLC; Olive Bel Am Holdings LLC; Northway Capital Partners Am LLC; Shvetz Am Holdings LLC; Olive Tree Multifamily Holdings LLC; Olive Tree Multifamily Holdings II LLC; Olive Tree Multifamily Holdings III LLC; Olive Tree Asset Management II LLC; Olive Tree Asset Holdings

to repay its loan obligations, and (c) the defense waiver in the agreements is unenforceable.

These arguments are unavailing.

The Olive Tree Defendants essentially argue that “Plaintiff’s workout specialist” led them to believe “that the workout specialist would be recommending a restructuring or modification and that Plaintiff would work collaboratively with Defendants to reach an amicable resolution” (Rosenfeld aff, para 5). This contention, like Mr. Rosenfeld’s (Olive Tree’s COO) other arguments regarding the parties’ failed post-default negotiations, does not raise a triable issue of material fact (*id.*, paras 5-11).

In addition, discovery is not needed where, as here, plaintiff has established its prima facie entitlement to summary judgment in lieu of complaint, and defendants have failed to raise a triable issue of material fact. The court also rejects the Olive Tree defendants’ contention that the defenses waiver in the agreements is unenforceable. Defendants’ arguments concerning plaintiff’s post-default behavior are irrelevant. Defendants do not contest that they signed the agreements or that they defaulted by failing to pay the principal outstanding on the maturity date.

CONCLUSION

For the reasons stated above, the court grants the motion in part. The Court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

LLC; Olive Tree Property Management LLC; Olive Tree Property Holdings LLC; The Life Property Management LLC; Olive Tree Investment Holdings LLC; Olive Tree Venture Capital LLC; Olive Tree Affordable Development LLC; Olive Tree Affordable Holdings LLC; True Rate Services LLC; The Life At Desoto Development LLC; The Life At Parkview Development LLC; The Life At Westpark Development LLC; Olive Tree Affordable Housing Manager LLC; Olive Tree Multifamily Manager LLC; Olive Tree Multifamily Manager II LLC; Olive Tree Digital LLC; Olive Tree Venture Capital II LLC; Olive Tree Investment Holdings II LLC; OT Prefco LLC; Olive Tree Affordable Holdings III LLC; BNW Holdings LLC; Olive Tree Affordable Housing Manager II LLC; Olive Tree Asset Holdings II LLC; Northway Capital Partners II LLC; and Olive Bel Holdings II LLC.

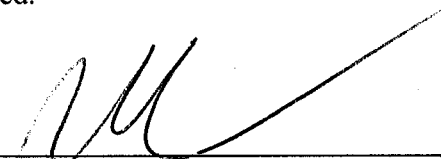
ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted in part, as set forth above; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff, Flagstar Bank, and against all defendants, jointly and severally, in the amount of \$10,586,770.83, together with prejudgment interest at the contractual default rate of 14.5% per annum from January 6, 2024 until the date of this decision and order, and thereafter at the statutory rate, as calculated the Clerk, together with costs and disbursements upon submission of an appropriate bill of costs; and it is further

ORDERED that the part of plaintiff's motion seeking attorneys' fees is denied without prejudice to a new motion, to be made upon proper papers; and it is further

ORDERED that the Clerk shall mark this case disposed.

3/25/2025
DATE


MELISSA A. CRANE, 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