Cooperatieve Centrale Raifeisen-Boerenleenbank B.A. v Navarro
2012 NY Slip Op 33773(U)
December 11, 2012
Supreme Court, New York County
Docket Number: 651437/2012
Judge: Charles E. Ramos

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

PRESENT: RAMOS **PART** 53

Justice

COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., RABOBANK INTERNATIONAL, NEW YORK BRANCH,

Plaintiff,

- V -

FRANCISCO JAVIER HERRERA NAVARRO, THE ESTATE OF EDUARDO GUZMAN SOLIS,

Defendant

INDEX NO. 651437/2012

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) _____

Answering Affidavits - Exhibits ..... No(s) _____

Replying Affidavits ..... No(s) _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DATED: 12/11/12

CHARLES E. RAMOS J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., RABOBANK INTERNATIONAL, NEW YORK BRANCH,

Plaintiff,

Index No. 651437/2012

-against-

FRANCISCO JAVIER HERRERA NAVARRO, THE ESTATE OF EDUARDO GUZMAN SOLIS,

Defendants.

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Hon. Charles E. Ramos, J.S.C.

In motion sequence 001, plaintiff Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Rabobank International, New York Branch ("Rabobank") moves pursuant to CPLR 3213 for summary judgment against defendants Francisco Javier Herrera Navarro ("Herrera") and The Estate of Eduardo Guzman Solis ("Guzman")(together, the "Defendants").

Background

Rabobank is a Netherlands banking organization, operating through its New York branch, with a place of business located at 245 Park Avenue, New York, New York 10167.

Agra Services of Canada, Inc. ("Agra") was a Canadian company, now bankrupt, in the business of trading physical commodities between Mexico and Canada. Prior to his death in 2011, Guzman managed the company and was responsible for negotiating, executing, and overseeing all of Agra's business operations. During this time, Herrera was a director and

shareholder of Agra, but was largely uninvolved in the company's business operations.

On September 8, 2004, Rabobank entered into an agreement (the "Purchase Agreement") with Agra. Pursuant to the Purchase Agreement, Rabobank agreed to purchase certain of Agra's receivables in exchange for regularly scheduled payments between November 17, 2011 and April 1, 2012 (Fitzgerald Aff., Ex. A). The Purchase Agreement defines "receivable" as follows:

> "Receivable" means any indebtedness and other obligations owed to [Agra] (excluding Non-Assignable Taxes) or any right of [Agra] to payment from or on behalf of an Importer, whether constituting an account, general intangible or otherwise and originated by [Agra], arising in connection with the sale of Covered Products and the rendering of Services by [Agra].

"Covered Products" is defined as "all goods whatsoever sold by Agra from time to time to Importers." "Services" is defined as "all [labor] costs, employee costs, subcontractor costs and other work related charges used in, related to or incidental to the sale, storage, maintenance or utilization of Covered Products."

In September 2005, Guzman and Herrera each executed a personal guaranty in favor of Rabobank by which he guarantied the payment of obligations of Agra arising under and pursuant to Section 9.02(a)(iii) of the Purchase Agreement (the "Guaranty" or "Guaranties") (Fitzgerald Aff., Ex. B). The Guaranties are identical and state, in relevant part:

The Guarantor hereby unconditionally guarantees:

> (a) the obligations of Agra arising under and pursuant to Article 9.02(a)(iii) of the Receivables Purchase Agreement which provision, for the avoidance of doubt, mandates that [Rabobank] shall have recourse against [Agra] for, and [Agra] shall pay to [Rabobank], such amounts due on a Receivable that are not paid on the Payment Due Date and are not paid under the applicable Insurance Policy because:
>
> 1. [Agra] has failed to maintain the Insurance Policy in full force and effect;
>
> 2. Payment under the Insurance Policy is denied because such claim is determined to be the result of a loss or losses not covered under the applicable Insurance Policy;
>
> 3. [Agra] has failed to satisfy all or any of the representations, warranties, terms, conditions or other actions required of [Agra] under and pursuant to the Insurance Policy; or
>
> 4. [Agra] has failed to file a claim with the Insurer together with the documentation as called for under and pursuant to the Insurance Policy within the time stipulated under and pursuant to such Insurance Policy;...
>
> (b) the punctual payment when due, whether at stated maturity, by acceleration or otherwise, of all obligations and liabilities of the Company to [Rabobank] now or hereafter existing, including without limitation under the Repayment Agreement, whether for principal, interest, fees, expenses or otherwise (Fitzgerald Aff., Ex. B at 2).

The "Company," referenced in section (b), is defined by the Guaranty as Agra Services USA, Inc. (Agra USA), an American subsidiary of Agra. Prior to April 11, 2012, Herrera served as a director of Agra USA.

The Guaranty incorporates by reference the terms defined in the Purchase Agreement (Fitzgerald Aff., Ex. B at 1 ["Reference

is made to that certain Master Receivables Purchase Agreement dated as of September 8, 2004 among Agra Services of Canada...and (Rabobank)...the terms defined therein and otherwise defined herein being used herein as therein defined."]).

Finally, the Guaranty indicates that it is unconditional and absolute irrespective of validity, enforceability, a variety of other enumerated conditions, and "any other circumstance which might otherwise constitute a defense available to, or a discharge of, [Agra] or a guarantor."

In December 2011, Guzman died. Sometime thereafter, Rabobank informed Agra that payments due under the Purchase Agreement had not been made. Upon such notice, Herrera took control of Agra's operations and retained an independent accounting firm to examine the company's books and records. The accounting firm did not conduct a complete audit, but sought confirmation of balances and transactions from Agra's customers, suppliers, and banks. Of those who responded to the inquiries, many indicated that they were "completely unaware" of the balances indicated and stated that they did not have a relationship with Agra. In short, the accounting revealed strong evidence that some or all of the receivables in question were fraudulent. There is no evidence that Herrera had knowledge of or involvement with the fraud.

Upon learning of this information, Agra's insurers, Atradius

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Insurance N.V. and Chartis Insurance Company of Canada, disclaimed coverage and voided Agra's insurance policies.

On February 2, 2012, upon petition of Rabobank, a Canadian bankruptcy court issued an order instituting bankruptcy proceedings against Agra and appointing Deloitte & Touche as trustee of the bankruptcy estate.

On March 2, 2012, Rabobank commenced a federal action against Agra, Agra USA, Herrera, and Guzman's estate in the District Court in the Southern District of New York to recover approximately $42 million in receivables pursuant to the Purchase Agreement and the Guaranties.

On April 4, 2012, Rabobank filed a request in the District Court for the entry of default judgment against Agra USA.

On April 11, 2012, Agra, as sole shareholder of Agra USA, voted to remove all prior officers and directors of Agra USA, including Herrera, and elected a representative of Deloitte & Touche to serve as president and sole officer and director of Agra USA.

On April 16, 2012, Rabobank filed an order to show cause in the District Court requesting the entry of default judgment against Agra USA. On April 19, 2012, Rabobank voluntarily discontinued the action against Navarro and Guzman for jurisdictional reasons. On April 30, 2012, the federal court entered a default judgment against Agra USA and awarded Rabobank

$41,991,980.

On April 30, 2012, Rabobank commenced this action by filing a summons and motion for summary judgment in lieu of complaint pursuant to CPLR 3213.

Discussion

A. CPLR 3213

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." This procedure "provides a speedy and effective means for resolving presumptively meritorious claims" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004][internal quotations omitted]).

Citing *Hirsch v Rifkin* (166 AD2d 293, 294 [1st Dept 1990]) for the proposition that "an instrument is not for the payment of money only where the obligation is subject to terms and conditions in a separate document" (Opp. Mem. at 9 [internal quotations omitted]), Herrera contends that this action cannot be brought pursuant to CPLR 3213 because a determination of liability under the Guaranty requires reference to the Purchase Agreement.

New York courts have examined the requirement that the action be based on "an instrument for the payment of money only

or a judgment" at length and has denied treatment under CPLR 3213 where the instrument at issue "called for something in addition to the payment of money" (*Dresdner Bank AG. [N.Y. Branch] v Morse/Diesel, Inc.*, 115 A.D.2d 64, 68 [1st Dept 1986]) or where "reference beyond the four corners of the instrument was necessary in order to comprehend fully the nature of the obligation to be enforced" (*Shearson Lehman Hutton, Inc v Myerson & Kuhn*, 197 AD2d 410, 411 [1st Dept 1993]). Nonetheless, "where...the referenced matter is merely repetitive of terms already contained within the instrument and does not alter the purely monetary nature of the obligation, there is no reason to delay judgment in the plaintiff's favor" (*id.*) Furthermore, the Court of Appeals and the First Department have repeatedly held that a plaintiff may seek relief under CPLR 3213 for liability pursuant to a guaranty (*Weissman v Sinorm Deli, Inc.*, 88 N.Y.2d 437 [1996]; *Dresdner Bank AG. v Morse/Diesel, Inc.*, 115 A.D.2d 64 [1st Dept 1986]), particularly where the defendant has given an unconditional guaranty and waived all defenses (*Shearson Lehman Hutton*, 197 AD2d at 411).

In light of the Court of Appeals and First Department holdings on this matter, Herrera's argument that Rabobank should be foreclosed from bringing its claim pursuant to CPLR 3213 is without merit. Not only is the claim based on an unconditional guaranty, but the Guaranty incorporates by reference the terms

defined in the Purchase Agreement. Therefore, it is the determination of this Court that this action is appropriate for decision pursuant to CPLR 3213.

B. Summary Judgment

Summary judgment is appropriate where the Court determines that there are no material triable issues of fact (NY CPLR 3212[b]). The proponent of the motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. NYU Med Center*, 64 NY2d 851, 853 [1985]). To defeat the motion, the opposing party must then come forward with proof establishing the existence of triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270, 273 [1st Dept 2006]). A guaranty must be construed "in the strictest manner" (*id.*).

Rabobank argues that Herrera is liable, pursuant to Section 1(a) of the Guaranty, for monies owed pursuant to the Purchase Agreement, or, in the alternative, that Herrera is liable, pursuant to Section 1(b) of the Guaranty, for the default judgment levied against Agra USA in the District Court.

Section 1(a) of the Guaranty provides that Herrera

"unconditionally guarantees...such amounts due on a Receivable that are not paid on the Payment Due Date and are not paid under the applicable Insurance Policy." The language "due on a Receivable," where "Receivable" is a defined term that refers to debts "arising in connection with the sale of Covered Products and the rendering of Services by [Agra]," appears, on its face, to limit the scope of the Guaranty to only those amounts owed on actual receivables and not for the fraud. At this time, it is unclear whether any of the debts arising under the Purchase Agreement were on account of actual receivables. Therefore, there are outstanding triable questions of fact regarding the scope of the Guaranty and the nature of the debt that preclude summary judgment with respect to the debts arising under the Purchase Agreement.

In Section 1(b) of the Guaranty, Herrera guarantied "all obligations and liabilities" of Agra USA owed to Rabobank. Herrera argues that the default judgment is not a legitimate "obligation" covered by the Guaranty because Rabobank controlled Agra and Agra USA at the time of the District Court action and caused Agra USA to default. Therefore, concludes Herrera, the District Court action was collusive and the Guaranty would not include this obligation. Nonetheless, the record indicates that Herrera was a director of Agra USA and appeared individually in the District Court action until April 11, 2012, one week after

Rabobank filed a request in the District Court for the entry of a default judgment.

Given the facts available at this time, it is unclear who controlled Agra USA during the course of the District Court action, at the time of default, and when judgment was entered. These are material questions of fact that preclude summary judgment.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the plaintiff shall serve a formal complaint upon defendant's counsel within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service of the complaint.

Dated: December 11, 2012

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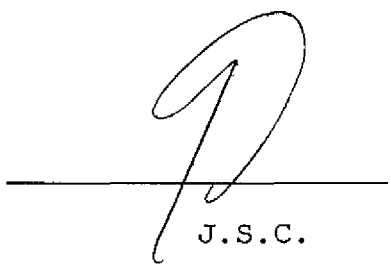

J.S.C.