Stewart Info. Servs. Corp. v Corparatair LLC
2012 NY Slip Op 31107(U)
April 16, 2012
Supreme Court, Nassau County
Docket Number: 601423-11
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

--x **TRIAL/IAS PART: 16**

STEWART INFORMATION SERVICES CORPORATION,

NASSAU COUNTY

Plaintiff,

-against-

Index No: 601423-11
Motion Seq. No: 1
Submission Date: 2/27/12

CORPORATAIR LLC, TITLESERV, INC., and JAMES J. CONWAY III,

Defendants.

--x

The following papers have been read on this motion:

Notice of Motion...x
Affidavit in Support and Exhibits......................................x
Affidavit of Service...x
Memorandum of Law in Support.......................................x
Affirmation in Opposition and Exhibit..............................x
Conway Memorandum of Law in Opposition.....................x
Reply Memorandum of Law in Further Support................x

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Stewart Information Services Corporation ("Plaintiff") on December 16, 2011 and submitted on February 27, 2012. For the reasons set forth below, the Court grants the motion, and refers the determination of interest, costs, including attorney's fees, and disbursements to an inquest.

[* 2]

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, directing the entry of judgment against Defendants in the amount of $4,543,156.87, consisting of unpaid principal of the promissory note, accrued and unpaid interest thereon, and attorney's fees.

Defendant James J. Conway, III ("Conway") opposes Plaintiff's motion.

B. The Parties' History

David Stutts ("Stutts"), the Assistant Secretary and Senior Vice President for Finance of Stewart Title Guaranty Company, a subsidiary of Plaintiff Stewart Information Services Corporation ("SISCO") affirms that SISCO, through its subsidiaries, provides title insurance and related information services required for settlement by the real estate and mortgage industries throughout the United States and in international markets. As part of his responsibilities, Stutts oversees SISCO's treasury management, investment banking and credit relationships, risk management, budgeting and forecasting, as well as certain aspects of management reporting. Stutts affirms as follows with respect to the commercial instruments on which Plaintiff seeks judgment:

Corporatair Promissory Note

In 2004, Defendant CorporatAir LLC ("Borrower" or "Maker") executed a promissory note to borrow approximately $7 million from U.S. Bancorp Equipment Finance. Upon information and belief, Defendant TitleServ, Inc. ("TitleServ"), a national title insurance company, is Borrower's sole member and 100% owner, and sought the funding to purchase a particular jet ("Aircraft"). Upon information and belief, Conway is the sole stockholder of TitleServ.

In 2007, Borrower refinanced the Aircraft with a $5.6 million loan from Key Equipment Financial, Inc. ("Key Finance"). Specifically, on or about June 22, 2007, Borrower executed a promissory note ("Promissory Note") (Ex. A to Stutts Aff. in Supp.) in favor of Key Finance in the amount of $5,659,713.76, the then-outstanding balance of the loan. Pursuant to the Promissory Note, Borrower was required to make 84 consecutive monthly payments of $51,268.85, plus a final balloon payment of $3,426,000.00. The Promissory Note also provided,

inter alia, that 1) Borrower would pay a 5% late payment charge for untimely payments; 2) the Promissory Note was secured by the Collateral pledged under an Aircraft Security Agreement; 3) the failure to make required payments constituted an Event of Default; 4) upon an Event of Default, Lender was authorized to declare the entire outstanding balance of the Principal, together with accrued and unpaid interest, immediately due and payable, and was entitled to interest from the date of acceleration until payment at the Default Rate; and 5) Borrower and Guarantors waived "presentment for payment, demand, notice of non-payment or dishonor, notice of intention to accelerate the maturity, notice of protest and protest of this Note" (Promissory Note at ¶ 12) .

On or about June 21, 2007, Key Equipment assigned the Promissory Note and related loan documents to Winmark Equipment Finance, LLC (n/k/a MassMutual Asset Finance LLC). MassMutual Asset Finance LLC ("MassMutual") assigned all rights to the Promissory Note and related loan documents to SISCO on June 30, 2011. Plaintiff refers to Key Equipment, MassMutual (and, from and after June 30, 2011, SISCO) as "Lender."

TitleServ Guaranty

On or about June 21, 2007, TitleServe executed a Corporate Guaranty ("TitleServ Guaranty") (Ex. B to Stutts Aff. in Supp.) in which it guaranteed the Borrower's payments. The TitleServ Guaranty incorporates by reference defined terms from the Aircraft Security Agreement. Pursuant to its Guaranty, TitleServ also agreed that 1) it intended to guarantee the performance and prompt payment of all obligations under the loan documents; 2) it waived its right to assert numerous claims with respect to the Guarranty; 3) the Guaranty was assignable by Lender without notice, and TitleServ consented to assignment of the Guaranty; and 4) an assignor had all the rights of the Lender.

Aircraft Security Agreement

Borrower and Lender also entered into an Aircraft Security Agreement dated as of June 22, 2007 ("Aircraft Security Agreement") (Ex. C to Stutts Aff. in Supp.). Pursuant to the Aircraft Security Agreement, Borrower, as "Grantor," granted to the Lender, as "Secured Party," a security interest in the Aircraft to secure the payment and performance of Borrower's obligations under the loan documents. Events of Default under the Aircraft Security Agreement include 1) Borrower's failure to make required payments under the Promissory Note,

2) Borrower's failure to perform any other required condition, 3) the Guarantor's insolvency or failure to pay its debts, and 4) a material adverse change in Guarantor's financial condition, or the impairment of Guarantor's ability to make required payments. TitleServ, as a Guarantor of Borrower's obligations, falls within the definition of "Guarantor" under the Aircraft Security Agreement.

Upon an Event of Default, the Lender may declare all obligations immediately due and payable. In addition, the Lender may, *inter alia*, 1) cause Grantor to return the Aircraft to Lender; 2) take immediate possession of the Aircraft; and/or 3) sell or otherwise dispose of the Aircraft.

SISCO Guaranty

SISCO also guaranteed, to the Lender, Borrower's obligations under the loan documents ("SISCO Guaranty") (Ex. D to Stutt Aff. in Supp.). On June 21, 2007, Key Finance, as Lender, and SISCO also executed a Side Letter (*id.* at Ex. E). The Side Letter provided that 1) notwithstanding any provision to the contrary in the SISCO Guaranty or any of the related loan documents, Lender was obligated to give SISCO written notice of an Event of Default at least fifteen (15) days prior to making any demand on SISCO under the SISCO Guaranty; and 2) upon the payment in full by SISCO of the obligations under the SISCO Guaranty, Lender shall assign to SISCO, *inter alia*, the Promissory Note and all of the Lender's rights in the Aircraft.

Conway Guaranty

To induce SISCO to issue its Guaranty, Conway personally guaranteed the Borrower's payment and performance of its obligations to the Lender ("Conway Guaranty") (Ex. F to Stutt Aff. in Supp.). Under the Conway Guaranty, Conway 1) guaranteed to SISCO the complete payment and performance of any obligations of the Borrower; 2) agreed that if Borrower failed in its payment and performance obligations, Conway would immediately make such payments and perform such obligations; 3) waived any purported defenses to enforcement of the Conway Guaranty; and 4) agreed to pay to SISCO all reasonable costs and expenses, including attorney's fees, incurred by SISCO in collecting sums due.

On or about June 21, 2007, Borrower, Conway, TitleServ and Stewart Title Insurance Company ("STIC"), a SISCO-affiliate, also entered into an Escrow Agreement (Ex. G to Stutt

Aff. in Supp.). Under the Escrow Agreement, Conway deposited $752,023.26 with STIC, as escrow agent. In the event that Borrower failed to make a payment due under the Promissory Note, SISCO could direct STIC, as escrow agent, to disburse funds to remit to the Lender. In the event of a disbursement, the escrow agent would provide notice of the disbursement to Borrower, which was then required to replenish the escrow account within fifteen (15) days.

Stutt affirms, further, that in April of 2011, the Federal Bureau of Investigation ("FBI") raided TitleServ's offices in Woodbury, New York and TitleServ "apparently went out of business" (Stutt Aff. in Supp. at ¶ 36), as reflected by a newspaper article provided (*id.* at Ex. H). Borrower failed to make its April 2011 monthly payment due under the Promissory Note. SISCO subsequently notified the escrow agent, which made a disbursement in the amount of $51,268 from the escrow account to Lender on May 11, 2011. Pursuant to the Escrow Agreement, on May 12, 2011, STIC sent a letter to Borrower advising it of the escrow disbursement (*id.* at Ex. I) and making a demand for reimbursement of the escrow sum.

Borrower subsequently failed to make its May payment to Lender, at which time STIC, as escrow agent, disbursed another $51,268 from the escrow account to cover the additional missed payment. On June 7, 2011, Lender sent a notice of loan default and acceleration to Borrower ("June 7, 2011 Demand") (Ex. J to Stutt Aff. in Supp.). The June 7, 2011 Demand 1) declared the entire outstanding principal balance of the Promissory Note, together with interest and other obligations as defined in the Aircraft Security Agreement, immediately due and payable; 2) declared that interest on the outstanding obligations would accrue from the date of the letter at the Default Rate; and 3) stated that multiple events of default had occurred, including but not limited to Borrower's failure to make the payments due, and a material adverse change in TitleServ's business and ability to make payments. Stutt affirms that Borrower has failed to make payments due under the Promissory Note every month since April of 2011.

Stutt affirms that, pursuant to paragraph 7(a)(4) of the Promissory Note, the occurrence of an Event of Default under the Aircraft Security Agreement also constitutes an Event of Default under the Promissory Note. In addition, an Event of Default occurs under the Aircraft Security Agreement when the Secured Party determines, in its discretion, that there has been a material adverse change in the business or financial condition of any Guarantor since the date of the Aircraft Security Agreement, or a Guarantor's ability to make payments has been impaired.

[* 6]

Stutt submits that TitleServ's shutting down of its operations constituted an Event of Default under the Aircraft Security Agreement and, therefore, constitutes an Event of Default under the Promissory Note.

On June 13, 2011, STIC disbursed the remainder of the escrow account, comprised of funds in the amount of $700,838, to the Lender. Following Borrower's continued failure to cure its default, on June 28, 2011, Lender sent a letter to SISCO (Ex. K to Stutt Aff. in Supp.) in which Lender (MassMutual) demanded that, pursuant to the SISCO Guaranty, SISCO pay the Lender all principal, interest and fees then due. In response to the demand, on June 30, 2011, SISCO paid to Lender the sum of $3,927,701.12, consisting of 1) $3,919,690.00 in outstanding principal on the Promissory Note, 2) $5,511.12 for accrued and unpaid interest, and 3) $2,500 for unreimbursed attorney's fees. In addition, Lender and SISCO executed an Assignment Agreement dated June 30, 2011 (*id.* at Ex. L) under which Lender assigned to SISCO all of Lender's rights in 1) the loan, 2) the Aircraft, and 3) the loan documents ("Assigned Interests").

By letter dated July 14, 2011 (Ex. M to Stutt Aff. in Supp.), SISCO notified Borrower, TitleServ and Conway that SISCO paid the sum of $3,927,701.12 to the Lender under the SISCO Guaranty, and demanded that TitleServ and Conway pay that sum to SISCO, pursuant to the TitleServ and Conway Guarantees, as well as other amounts due under the Guarantees, Promissory Note and other loan documents. Defendants have failed to pay any of the sums demanded.

Stutt affirms, further, that SISCO has incurred $140,868.91 in attorney's fees and costs, as of August 30, 2011, in enforcing it rights under the Promissory Note and other loan documents. Stutt provides invoices and a summary reflecting those expenses (Ex. N to Stutt Aff. in Supp.).

In addition, the Aircraft has been stored in Ithaca, New York by Taughannock Aviation Corp. ("Taughannock"), an aircraft management and charter company. Borrower failed to pay Taughannock for expenses incurred with respect to the Aircraft. SISCO, which recently obtained possession of the Aircraft, paid Taughannock $133,307.84 for maintenance and other services, and $18,468 for storage and insurance.

In light of the foregoing, Stutt submits that the Defendants are jointly and severally liable for the total sum of $4,543,156.87, comprised of the following amounts:

a) $3,919,690.00 - the outstanding principal due under the Promissory Note as of the April 2011 date of default, and paid by SISCO to the Lender pursuant to the SISCO Guaranty

b) $5,511.12 - accrued and unpaid interest on the outstanding principal, paid by SISCO to the Lender pursuant to the SISCO Guaranty,

c) $2,500.00 - attorney's fees incurred by Lender in enforcing the Promissory Note, paid by SISCO to Lender pursuant to the SISCO Guaranty,

d) $322,811.00 - accrued and unpaid interest at the Default Rate of 18% per annum from July 1, 2011 until the date of filing of this action,

e) $18,468.00 - cost of storing the Aircraft between August and November of 2011, and insurance for the period September 1 through November 30, 2011,

f) $133,307.84 - amounts past due to Taughannock as of June 30, 2011 for maintenance and other services related to the Aircraft, and

g) $140,868.91 - for attorney's fees and other enforcement and collection costs and fees incurred by SISCO in enforcing its rights under the loan documents, through August 30, 2011.

In opposition, Conway submits that the Conway Guaranty is not an instrument for the payment of money only within the meaning of CPLR § 3213. Conway argues that the Court should deny the motion and direct plaintiff to serve and file a complaint. Conway relies in part on a letter dated December 22, 2011 from SITC to Defendants ("December 2011 Letter") (Ex. A to Luskin Aff. in Supp.) which is titled "Notification Pursuant to Section 9-611 of the Uniform Commercial Code of Disposition of Collateral.".

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment in lieu of complaint by 1) producing the Promissory Note, TitleServ Guaranty and Conway Guaranty, all of which are instruments for the payment of money only for purposes of CPLR § 3213;
2) demonstrating that Defendants breached their obligations pursuant to those instruments in light of a) Borrower's default under the Promissory Note by, *inter alia*, failing to make monthly payments, b) TitleServ's cessation of its operations, which constitutes an Event of Default under the Aircraft Security Agreement and Promissory Note, c) TitleServ's failure to honor its payment obligation to SISCO which, by virtue of the Assignment Agreement, stands in the shoes of the Lender with respect to the TitleServ Guaranty, and d) Conway's breach of the Conway

Guaranty by virtue of his failure to make payments of the amounts due under the Promissory Note upon Borrower's default; and 3) establishing that Borrower has no defense to non-payment in light of a) Borrower's failure to respond to the June 7, 2011 Demand or make any overdue payments, and b) Borrower's waiver of any protest or challenge to the enforceability of the Promissory Note, and TitleServ and Conway's waiver of defenses under their Guarantees. In addition, Plaintiff submits that it has demonstrated its entitlement to recover its costs and expenses, including attorney's fees, incurred in enforcing its rights under the Promissory Note and Guarantees, pursuant to the express provisions in those instruments, which expenses include the sums paid to Taughannock for maintenance and other services related to the Aircraft.

Conway opposes Plaintiff's motion, submitting that the Conway Guaranty is not an instrument for the payment of money only under CPLR § 3213 in light of the fact that it "expressly purports" to impose on Conway obligations other than the payment of money only (Conway Memo. of Law in Opp. at p. 4). Conway notes, *inter alia*, that 1) the Aircraft Security Agreement involves certain non-monetary performance obligations of Borrower; and 2) the Conway Guaranty refers to both monetary and non-monetary obligations.

Conway also argues that the Conway Guaranty is not properly the subject of CPLR § 3213 treatment because it 1) refers to obligations contained in extraneous agreements and instruments; and 2) creates a condition that requires the plaintiff's performance before a defendant's obligation is triggered. Conway notes that the Conway Guaranty is not triggered unless and until the plaintiff were to suffer a loss by paying on its own guaranty to the lender, and argues that the Conway Guaranty is more like an agreement to indemnify than a guaranty.

In reply, Plaintiff argues that 1) in light of the fact that Borrower and TitleServ have not opposed the motion, the Court should grant Plaintiff the requested relief against those Defendants; 2) the fact that the Conway Guaranty makes reference to non-payment obligations does not affect its status as an instrument for the payment of money only under CPLR § 3213; and 3) the Court should reject Defendant's argument that there is an implicit condition in the Conway Guaranty that precludes the application of CPLR § 3213 in light of the fact that Conway's obligations under the Guaranty are "unquestionably primary and unconditional" (P's Reply Memo. of Law at p. 5).

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

> When 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 summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001). Relief pursuant to CPLR § 3213 is available where a right to payment can be ascertained from the face of a document. *Boland v. Indah Kiat Finance*, 291 A.D.2d 342, 343 (1st Dept. 2002), quoting *Matas v. Alpargatas* S.A.I.C., 274 A.D.2d 327, 328 (1st Dept. 2000).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept.2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). To establish a *prima facie* case on a promissory

note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

C. Guaranty

A personal guarantee qualifies as an instrument for the payment of money only pursuant to CPLR § 3213. *Council Commerce Corp. v. Paschalides*, 92 A.D.2d 579 (2d Dept. 1983). To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.,* 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dism.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of*

Westchester v. Pisani, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its entitlement to summary judgment in lieu of complaint by providing the Promissory Note, Conway Guaranty, TitleServ Guaranty and other loan documents, and establishing the defaults thereunder. The Conway Guaranty contains Conway's agreement to "absolutely, unconditionally and irrevocably" guarantee the complete payment and performance under the applicable loan documents, and to pay all expenses, including attorney's fees, incurred by SISCO in enforcing its rights under the loan documents. The Court is not persuaded by Conway's argument that the Conway Guaranty is not properly the subject of CPLR § 3213 treatment because it refers to obligations contained in extraneous agreements and instruments. In *Craven v. Rigas*, 71 A.D.3d 1220 (3d Dept. 2010), *lv. app. den.*, 14 N.Y.3d 713 (2010), the Third Department rejected defendant's argument that a promissory note was not an instrument for the payment of money only, pursuant to CPLR § 3213, because it made reference to an underlying stock purchase agreement. *Id.* at 1222. Noting that the promissory note contained an "unambiguous and unconditional promise to pay a specified sum," and concluding that the reference to the stock purchase agreement served only to describe the security interest, "does not constitute a situation where proof beyond the note is necessary," and did not qualify the debt owed to plaintiff under the note, the Third Department concluded that the note satisfied the prerequisites of CPLR § 3213. *Id.* at 1222-1223. In the matter at bar, the Court concludes that the Conway Guaranty and Promissory Note, notwithstanding their reference to other agreements and instruments, reflect the Borrower's

obligation to make payments under the Promissory Note and Conway's clear intention to guarantee performance under the loan documents, and are properly the subject of CPLR § 3213 treatment.

The Court also rejects Conway's argument that the Conway Guaranty is not properly the subject of CPLR § 3213 treatment because it creates a condition that requires the plaintiff's performance before a defendant's obligation is triggered, *i.e.*, because the Conway Guaranty is not triggered unless and until the Plaintiff were to suffer a loss by paying on its own guaranty to the lender, and is more akin to an agreement to indemnify than a guaranty. In *Borg v. Belair Ridge Development Corp.*, 270 A.D.2d 377 (2d Dept. 2000), the Second Department reversed the trial court's order denying plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR § 3213, rejecting defendant's argument that the promissory note's reference to other conditions and terms affected plaintiff's right to judgment. *Id.* at 378. In so ruling, the Second Department noted that none of the references placed additional requirements on the "absolute and unconditional" obligation to pay on the note. *Id.* In the matter *sub judice*, the Court concludes that any reference to other conditions in the Promissory Note, Conway Guaranty and other loan documents does not affect the absolute and unconditional nature of the assurances provided by the Borrower and Conway in those agreements. Thus, relief pursuant to CPLR § 3213 is appropriate. The Court is further persuaded that summary judgment is appropriate in light of Defendants' failure to raise a meritorious defense, and in consideration of the Waiver of Defenses set forth at Section 5 of the Conway Guaranty. *See Lloyds Bank PLC v. McCormick & Pryor*, 235 A.D.2d 292 (1st Dept. 1997) (summary judgment in lieu of complaint properly awarded where unconditional guarantees contained specific disclaimer of defenses available to guarantors).

In light of the foregoing, the Court grants Plaintiff's motion for judgment against the Defendants. The Court further concludes, however, that it has an insufficient basis on which to determine the appropriate counsel fee award, and refers that matter to an inquest. The Court also refers the determination of interest owed to an inquest. In light of the foregoing, it is hereby

ORDERED, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is granted, and Plaintiff is awarded judgment, jointly and severally, against Defendants Corporatair, LLC, TitleServ, Inc. and James J. Conway III in the sum of a) $3,919,690.00,

representing the outstanding principal, b) $18,468.00, for storage and insurance related to the Aircraft, c) $133,307.84, representing amounts past due to Taughannock for maintenance and other services related to the Aircraft, and d) interest, costs, including attorney's fees, and disbursements as determined at an inquest; and it is further

ORDERED, that the action is respectfully referred to Special Referee Frank N. Schellace on May 22, 2012 at 9:30 a.m. to hear and determine all issues regarding interest, costs, including attorney's fees, and disbursements; and it is further

ORDERED, that Plaintiff's counsel shall serve upon Defendants, or counsel where applicable, by regular mail, a copy of this Order with Notice of Entry, a Note of Issue or Notice of Inquest and shall pay the appropriate filing fees on or before May 11, 2012; and it is further

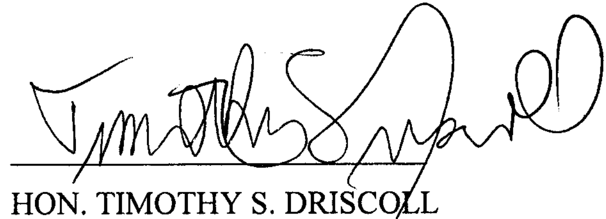
ORDERED, that the County Clerk is directed to enter a judgment in favor of Plaintiff and against Defendants Corporatair, LLC, TitleServ, Inc. and James J. Conway III in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
April 16, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
APR 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE