SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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NELRAY CORPORATION,

Plaintiff,

-against-

STEPHANE BOIVIN and
NORDICA INVESTMENTS LLC,

Defendants.

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DECISION AND ORDER

Index No. 652351/2016

HON. ANIL C. SINGH, J.:

Plaintiff Nelray Corporation moves pursuant to CPLR 3213 for summary judgment in lieu of complaint to recover on a promissory note and a personal guarantee. Defendants oppose the motion.

Defendant Nordica Investments LLC ("Nordica") issued a promissory note to plaintiff dated February 18, 2014. The note states that the principal amount is $500,000, and the maturity date is October 22, 2015. The terms of the note provide that interest on the principal amount accrued from April 4, 2013, until maturity at the rate of 10% per annum.

Co-defendant Stephane Boivin signed the note in his capacity as CEO of Nordica on February 25, 2014. However, he did not execute a guarantee when he

executed the note in 2014.

The note provides that a failure to pay the principal amount when due for a period of 15 consecutive days is an event of default; upon default, plaintiff, by notice to Nordica, may declare the principal amount and all other amounts payable under the note to be forthwith due and payable without presentment, demand, protest or notice; and interest would begin to accrue at a default rate of 12% per annum.

Nordica failed to make any payments.

Subsequently, Nordica issued a "Consolidated, Amended and Restated Promissory Note" dated December 9, 2015. The amended promissory note states:

> This note is intended to consolidate, amend and restate in its entirety that certain promissory note (the "Existing Note"), a copy of which is attached hereto as Schedule I, which Existing Note is now held by [Nelray]. This Note is not intended to create any new indebtedness or to constitute a novation as to [Nordica's] obligations under the Existing Note.
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> Under the heading "Conditions Precedent," the amended note states:
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> The effectiveness of this Note (such date, the "Effective Date") is conditioned upon:
>
> (i) [Nordica] having paid in full to [plaintiff] all the interest accrued but not paid until the day immediately preceding the effective date under the Existing Note in accordance with the applicable interest rate thereof (including the default rate as defined and set forth therein);

> (ii) [Nordica] having paid in full to [plaintiff's] counsel, Pavia & Harcourt, LLC, the attorneys' fees and expenses incurred under the Existing Note in accordance with the terms and conditions thereof (including, without limitation, all attorneys' fees and expenses in connection with creating this note, the guarantee ... and all related documents); and
>
> (iii) The execution and delivery to the [plaintiff] of guarantee, made by Stephane Boivin (the "guarantor") in favor of plaintiff (the "guarantee") substantially in a form attached hereto as Exhibit A.
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> The guarantee annexed to the amended note is dated December 9, 2015.

Defendant Stephane Boivin signed the guarantee. The guarantee states in pertinent part:

> In consideration of any and all loans, made by Nelray Corporation ... to Nordica Investments LLC ... under that certain consolidated, amended and restated promissory note (the "Note") date as of December 9, 2015, the undersigned (the "guarantor") hereby absolutely and unconditionally guarantees to [Nelray] the punctual payment in full of the principal, interest and other sums due and to become due from [Nordica] to [Nelray] under the Note....
>
> . . .
>
> In the event of the occurrence or existence of any "Event of Default" (as such term may be defined in the Note), the liability of the undersigned for the entire Indebtedness shall mature and become immediately due and payable, even if the liability of the Maker or any other obligor of the Indebtedness therefor does not.

Plaintiff moves for summary judgment against defendant Nordica based on the original promissory note dated February 8, 2014. Plaintiff moves for summary

judgment against defendant Stephane Boivin based upon the guarantee signed by Boivin in conjunction with the amended note.

Plaintiff exhibits the sworn affidavit of Orlando E. Sanchez, who states that he is the President of the plaintiff corporation. Sanchez states that Nordica defaulted on the original promissory note dated February 18, 2014. He states further that Nelray is not suing under the amended promissory note dated December 9, 2015, because not all of the conditions precedent to the amended note have been satisfied. Specifically, he asserts that Nordica has not paid to plaintiff all interest on the $500,000 due under the amended note and has not paid plaintiff's attorneys' fees. Finally, Sanchez asserts that Mr. Boivin "absolutely and unconditionally" guaranteed all of Nordica's "obligations, indebtedness and liability" to plaintiff by signing the guarantee on December 9, 2015.

Discussion

"When an action is based on an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of the complaint" (CPLR 3213). "A [promissory] note qualifies as such an instrument for this purpose, provided the plaintiff can establish a prima facie case via proof of the note and a failure to make the payments called for by its terms" (Bonds Financial, Inc. v. Kestrel

Technologies, LLC, 48 A.D.3d 230, 231 [1st Dept., 2008] (internal citation and quotation marks omitted)). "It does not qualify if outside proof is needed, other than simple proof of nonpayment or a similarly de minimis deviation from the face of the document" (id.).

An unconditional guarantee qualifies as an instrument for the payment of money only under CPLR 3213 (European American Bank & Trust Co. v. Schirripa, 108 A.D.2d 684 [1st Dept., 1985]). In an action on a personal guarantee, a prima facie case is established through proof of: 1) the executed guarantee; 2) a default on the underlying obligation secured by the gurantee; and 3) the defendant's failure to honor the guarantee (Valencia Sportswear, Inc. v. D.S.G. Enterprises, Inc., 237 A.D.2d 171 [1st Dept., 1997]).

Once plaintiff has set forth a prima facie case, the burden shifts to the defendants to come forward with proof of evidentiary facts by affidavit or otherwise rebutting these facts and demonstrating the existence of a genuine and substantial triable issue of fact (Zyskind v. FaceCake Marketing Technologies, Inc., 101 A.D.3d 550 [1st Dept., 2012]).

The Court finds that undisputed facts presented by plaintiff in the sworn affidavit of Orlando E. Sanchez establish a prima facie case for summary judgment in lieu of complaint only against defendant Nelray on the promissory note dated

February 18, 2014.

The defendants have not submitted any sworn affidavits in opposition to the motion. Instead, defendants rely on two cases in an effort to demonstrate that issues of fact exist regarding the note.

The first case cited by the defendants is Ian Woodner Family Collection v. Abaris Books, 284 A.D.2d 163 [1st Dept., 2001]). The First Department held that the motion court erred in granting plaintiff summary judgment pursuant to CPLR 3213 on the promissory note at issue, as plaintiff failed to present a prima facie case that the note, by its terms, was for payment of money only and that there was failure to make payment it required. The Court reasoned that the promissory note was for a principal sum to be repaid in quarterly installments according to an accelerated schedule of percentages of revenues received by defendant publishers from sales and any other source; there was no quarterly sum certain due and there was no specified date by which payment-in-full had to be made; and extrinsic evidence was required to determine the amount of each quarterly installment due, if any, and thus whether defendants defaulted according to the terms of the note.

The present case is clearly distinguishable, for no extrinsic evidence is necessary to determine the amount due or the maturity date of the note. The promissory note dated February 18, 2014, is clear and unambiguous.

The second case cited by defendants is Matas v. Alpargatas S.A.I.C., 274 A.D.2d 327 [1st Dept., 2000]). Plaintiffs purchased "custodial receipts" representing a beneficial interest in a portion of convertible bonds of the defendant. However, the certificates of ownership of these "custodial receipts" were not subscribed by defendant, and thus did not evince that plaintiffs were registered holders of any securities issued by defendant. The First Department held that it could not be ascertained from the face of the documents, without regard to extrinsic evidence, that plaintiffs had a right to repayment and, accordingly, they did not possess an "instrument for payment of money only". The Court concluded that the action was not eligible for CPLR 3213 treatment.

Matas is fundamentally distinguishable. Here, unlike in Matas, the promissory note dated February 18, 2014, is an unconditional promise for the payment of a sum certain. No proof outside the instrument is necessary to establish liability.

Accordingly, defendants have not rebutted plaintiff's prima facie case or shown the existence of any genuine issue of material fact with respect to the note.

Next, we turn to the guarantee.

"Under well-established principles of contract interpretation, agreements are generally construed in accord with the parties' intent ... and the best evidence of

the parties' intent is what they say in their writing" (Osprey Partners, LLC v. Bank of New York Mellon Corp., 115 A.D.3d 561, 561-62 [1st Dept., 2014]). Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used (Slatt v. Slatt, 64 N.Y.2d 966, 967 [1985]).

"A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation" (Midland Steel Warehous Corp. v. Godinger Silver Art, 276 A.D.2d 341, 343 [1st Dept., 2000]). Where a guarantee is drawn in broad language, such as where it guarantees the payment of all sums due under the terms of a promissory note, the guarantor is liable, upon the obligor's default, to the same extent as the obligor (Desiderio v. Devani, 24 A.D.3d 495, 497 [2nd Dept., 2005]).

"It is well established that a guaranty is to be interpreted in the strictest manner, particularly in favor of a private guarantor, and cannot be altered without the guarantor's consent" (Lo-Ho LLC v. Batista, 62 A.D.3d 558, 559-560 [1st Dept., 2009] (internal citations and quotation marks omitted)). "In this regard, a guarantor should not be bound beyond the express terms of his guarantee" (id.).

The Court finds that plaintiff has not made out a prima facie case to recover on the guarantee for three reasons.

First, the term "note" is defined in the guarantee as "that certain consolidated, amended and restated promissory note (the "Note") date[d] as of December 9th, 2015." On its face, the guarantee is restricted to the note dated December 9, 2015. The defined term does not explicitly include the note dated February 18, 2014, which is the note plaintiff is seeking to enforce.

Second, the guarantee states that the liability of the guarantor is triggered "[i]n the event of the occurrence or the existence of any 'Event of Default' (as such term may be defined in the Note)." In other words, the guarantee does not contain an independent definition of "Event of Default."

Third, the guarantee is not, as plaintiff contends, absolute and unconditional. On its face, the guarantee references, and was executed contemporaneously with, the Note dated December 9, 2015. The Note contains certain conditions precedent, and Mr. Sanchez stated in his sworn affidavit that not all of the conditions precedent to the Note were satisfied. Because extrinsic evidence is required to determine whether the conditions precedent were ever satisfied, extrinsic evidence is required to determine whether the guarantee is enforceable. For that reason, the Court finds that plaintiff has not made out a prima facie case for summary judgment on the guarantee.

Accordingly, it is

ORDERED that the motion for summary judgment on the complaint is granted only as to defendant Nordica Investments LLC, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Nordica Investments LLC in the amount of $500,000, together with interest at the rate of 10% from April 4, 2013, until October 22, 2015, as calculated by the Clerk, together with interest at the rate of 12% from the date of October 23, 2015, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the motion for summary judgment in lieu of complaint is denied as to defendant Stephane Boivin; and it is further

ORDERED that the plaintiff's moving papers are hereby deemed the complaint in this action, and defendant Stephane Boivin shall move against or serve an answer to the complaint within 20 days after service thereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, on January 24, 2017, at 10:00 AM.

Date: December 19, 2016
New York, New York

Anil C. Singh