

Stewart Info. Servs. Corp. v Corporatair LLC

2012 NY Slip Op 33792(U)

August 24, 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
**STEWART INFORMATION SERVICES
CORPORATION,**

Plaintiff,

-against-

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

Defendants.

TRIAL/IAS PART: 16

NASSAU COUNTY

**Index No: 601423-11
Motion Seq. No: 2
Submission Date: 6/25/12**

-----X

The following papers have been read on this motion:

- Order to Show Cause, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion to reargue filed by Defendant James J. Conway, III (“Conway” or “Defendant”) on May 21, 2012 and submitted on June 25, 2012. For the reasons set forth below, the Court grants leave to reargue and renew and, upon reargument and renewal, modifies its decision dated April 16, 2012 (“Prior Decision”) and hereby grants Plaintiff judgment against Defendants but vacates that portion of the Prior Decision that awarded damages to Plaintiff and refers the entire determination of damages, interest, costs including attorney’s fees, and disbursements to the Special Referee. The Special Referee, in assessing the amount of the judgment to be awarded to Plaintiff against Defendants, shall consider evidence and testimony presented regarding the foreclosure sale of the jet that

served as collateral for the loan at issue, and whether an offset or reduction in the amount owed by Defendants to Plaintiff is appropriate in light of that sale, as well as any other relevant issues raised by the parties. The Court otherwise declines to modify its Prior Decision. The Court directs that the inquest, as directed in the Prior Decision and modified herein, shall take place before the Special Referee on September 19, 2012 at 9:30 a.m., or another mutually convenient date on or before October 12, 2012. The Court hereby vacates the temporary restraining order (“TRO”) issued by the Court on May 21, 2012 which stayed further proceedings in this action, including, without limitation, the reference to the Special Referee.

BACKGROUND

A. Relief Sought

Defendant Conway moves by Order to Show Cause for an Order, pursuant to CPLR §§ 2221 and 2201 and Uniform Commercial Code (“UCC”) § 9-625(a), granting reargument and renewal of the Plaintiff’s prior motion for summary judgment in lieu of complaint (“Prior Motion”) and, upon such reargument and renewal, 1) denying the Prior Motion and directing Plaintiff to serve and file a complaint; and 2) staying further proceedings pending further Order of the Court including, without limitation, the reference to Special Referee Frank N. Schellace (“Special Referee”), directed by the Court in its Prior Decision to hear and determine all issues regarding interest, costs including attorney’s fees, and disbursements.

Plaintiff Stewart Information Services Corporation (“Plaintiff”) opposes the motion.

B. The Parties’ History

The parties’ history, including the terms of the loan made by Plaintiff, the applicable commercial instruments, Defendants’ default thereunder, the affidavits and affirmations in support and opposition to the Prior Motion and the parties’ positions as to the Prior Motion, are set forth in the Prior Decision and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the commercial instruments/agreements at issue include the Corporatair Promissory Note, the TitleServ Guaranty, the Aircraft Security Agreement, the SISCO Guaranty, and the Conway Guaranty.

In the Prior Decision (Ex. A to Luskin Aff. in Supp.), the Court granted Plaintiff’s motion, holding as follows:

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 the Prior Decision, the Court granted Plaintiff's motion for judgment against the Defendants but further concluded that it had an insufficient basis on which to determine the appropriate counsel fee award, and referred that matter to an inquest before the Special Referee, as well as the determination of interest and disbursements.

On May 21, 2012, upon the filing of the instant Order to Show Cause ("Instant Motion"), the Court issued a temporary restraining order ("TRO") directing that, pending the hearing and determination of the Instant Motion, and entry of an order thereupon, further proceedings in this action, including, without limitation, the reference to the Special Referee, are hereby stayed.

In support of the Instant Motion, counsel for Conway ("Defendant's Counsel") submits that, in connection with the Prior Motion, Plaintiff failed to disclose that it foreclosed, or was about to foreclose, on collateral, specifically the Gulfstream III jet ("Jet") formerly owned by Verizon and used by its executives, which Defendant CorporatAir LLC ("CorporatAir") purchased for \$7 million in 2004 and used to secure the underlying obligation to the lender. In foreclosing on the Jet collateral, Plaintiff realized sale proceeds but allegedly did not credit Conway's indebtedness as Plaintiff was required to do under the UCC.

Defendant's Counsel notes that Plaintiff conceded, in its reply papers regarding the Prior Motion, that as a result of the sale of the Jet, Conway is entitled to a reduction in the amount of the judgment that will be entered against him. Defendant's Counsel argues that Plaintiff neglected to provide the details concerning its sale of the Jet or the foreclosure process generally, including the fact that the purchaser was an affiliate of Plaintiff. Notwithstanding this information, the Court, in the Prior Decision, assessed damages against Conway in the full principal amount sought by Plaintiff, without any offset or credit.

Defendant's Counsel provides a copy of an April 17, 2012 letter from Plaintiff's counsel (Ex. B to Lusk Aff. in Supp.) in response to the request of Defendant's Counsel for information regarding the disposition of the Jet. In the letter, Plaintiff's counsel advised Defendant's counsel that 1) an auction sale of the Jet was held on January 16, 2012; 2) all Defendants and Mr. Bass, an attorney who also received a copy of the letter, were provided with advanced notice of the auction; 2) the Jet was sold at the auction sale to SLJ Holdings, LLC, an affiliate of Plaintiff; 3) as reflected in Plaintiff's reply memorandum, the amount to be awarded may be offset by the auction sale price (referring to pages 8-9 of Plaintiff's reply memorandum with respect to the Prior Motion); 4) the sale price was \$350,000; and 5) should the Court grant judgment on the Prior Motion, Plaintiff would submit evidence of the sale price at a damages

hearing in accordance with the Court's direction.

Defendant's Counsel submits that it is significant that an affiliate of Plaintiff was the purchaser of the Jet because it alters the computation applicable to a deficiency judgment for the secured party in light of UCC § 9-615(f). Defendant's Counsel contends that it "strains credibility" (Luskin Aff. in Supp. at ¶ 13) to suggest that the amount realized by Plaintiff from the sale to an affiliate is comparable to what Plaintiff would have realized from the sale to an unrelated buyer, particularly in light of the fact that the Jet secured an original loan of \$7 million in 2004 and a refinanced loan of \$5.6 million in 2007. Thus, Conway is entitled to discovery regarding all aspects of the foreclosure sale of the Jet.

In opposition, Plaintiff's Counsel submits that, while the Prior Decision did not expressly refer to the Special Referee the calculation of an offset based on the repossession and disposition of the Jet that served as security for the underlying loan, the Decision and motion papers regarding the Prior Motion demonstrate, "contrary to Conway's eleventh-hour antics" (Nagin Aff. in Supp. at ¶ 5) that 1) the Jet had been repossessed by SISCO (Prior Order at p. 6); 2) SISCO had provided Defendants with a notification pursuant to UCC § 9-611 (*id.* at p. 7); and 3) the foreclosure of the Jet presented an issue that could be addressed at a hearing (*see* P's Reply Memo. of Law in Further Support of Prior Motion at p. 8; P's Memo. of Law in Support of P's Prior Motion, n. 3).

Plaintiff's Counsel submits that the commercial reasonableness and offset issues of the foreclosure sale of the Jet are not a basis for denial of summary judgment, but rather relate to the issue of damages. Notably, in the April 17, 2012 letter provided by Conway in support of the Instant Motion, Plaintiff stated that, should the Court grant judgment on the Prior Motion, Plaintiff would submit evidence of the sale price at a damages hearing in accordance with the Court's direction. Moreover, Conway elected not to attend the auction sale, despite receiving "myriad forms" of advance notice ("Nagin Aff. in Supp. at ¶ 6). Plaintiff's Counsel suggests that if Conway desired a clarification of the Prior Order on this issue, he could have made that request of the Court, which he did not do.

In reply, Conway reaffirms his position that there are issues precluding summary judgment, including the commercial reasonableness of Plaintiff's foreclosure of the Jet and the computation of a deficiency pursuant to UCC § 9-615(f) in light of the fact that the Jet was sold to an affiliate of Plaintiff.

C. The Parties' Positions

Conway submits that the Court should, upon reargument and/or renewal, deny Plaintiff's Prior Motion and direct Plaintiff to serve and file a Complaint, and stay further proceedings before the Referee. Conway argues, *inter alia*, that 1) in connection with the Prior Motion, Plaintiff failed to disclose that it foreclosed on the Jet collateral and realized sale proceeds that should be credited to Conway's indebtedness; 2) Plaintiff neglected to provide the details concerning its sale of the Jet or the foreclosure process generally, including the fact that the purchaser was an affiliate of Plaintiff, in connection with the Prior Motion; 3) the Court improperly assessed damages against Conway in the full principal amount sought by Plaintiff, without any offset or credit; and 4) Conway is entitled to discovery regarding all aspects of the foreclosure sale of the Jet.

Plaintiff opposes Conway's motion submitting, *inter alia*, that 1) the motion for reargument constitutes an improper effort by Conway to reargue his position that the defenses of the commercial reasonableness of the sale of the Jet, and adequacy of notice of the sale, should have precluded summary judgment; 2) renewal is not inappropriate in light of the fact that issues regarding the commercial reasonableness and notice raised by Conway are properly addressed at a damages hearing and do not bear on the underlying question of the Defendants' liability under the Loan Documents; 3) Plaintiff did not conceal facts regarding the sale of the Jet and associated issues and, in fact, made specific reference in the Prior Motion to the possibility of an offset which could be raised at the inquest on damages; 4) the Prior Motion papers establish that Conway received proper notice of the sale; and 5) Conway has failed to offer any evidence of the value of the Jet in support of his claim that the auction sale was not commercially reasonable, and Conway's claim in this regard is of little value in light of his failure to acknowledge that "in the wake of the FBI's raid of his company, TitleServ, CorporatAir (a TitleServ subsidiary) had ceased to pay for insurance and maintenance of the Aircraft" (P's Memo. of Law in Opp. at p. 11).

RULING OF THE COURT

A. Leave to Reargue

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 2012 N.Y. LEXIS 32 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

B. Leave to Renew

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008). The motion court may, in its discretion, grant renewal upon facts known to the movant at the time of the initial motion if the movant offers a reasonable excuse for the failure to present those facts on the initial motion. *Id.*, citing *Lawman v. Gap, Inc.*, 38 A.D.3d 852 (2d Dept. 2007) and *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dept. 2006).

C. Application of these Principles to the Instant Action

The Court grants leave to reargue and renew and, upon reargument and renewal, modifies its Prior Decision and hereby grants Plaintiff judgment against Defendants but vacates that portion of the Prior Decision that awarded damages to Plaintiff and refers the entire determination of damages, interest, costs including attorney's fees, and disbursements to the Special Referee. The Special Referee, in assessing the amount of the judgment to be awarded to Plaintiff against Defendants, shall consider evidence and testimony presented regarding the foreclosure sale of the jet that served as collateral for the loan at issue, and whether an offset or reduction in the amount owed by Defendants to Plaintiff is appropriate in light of that sale, as well as any other relevant issues raised by the parties. The Court otherwise declines to modify its Prior Decision. The Court concludes that the issues raised by Conway regarding the

foreclosure sale do not affect the liability of the Defendants to Plaintiff pursuant to the Loan Documents, but rather are relevant on the issue of damages. The Court also concludes that Plaintiff did not improperly withhold information regarding the foreclosure sale, as both the Prior Motion papers and the Prior Decision make reference to the sale.

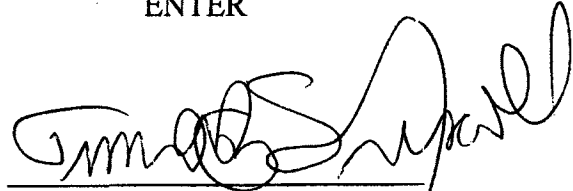
The Court directs that the inquest, as directed in the Prior Decision and modified herein, shall take place before the Special Referee on September 19, 2012 at 9:30 a.m., or another mutually convenient date on or before October 12, 2012. The Court hereby vacates the TRO.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
August 24, 2012



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

ENTERED
AUG 28 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE