SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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PNC BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

Index No. 653154/2012
Motion Date: 3/20/2013
Motion Seq. No.: 002

WILLIAM S. WALSH, MCGUGGAN L.L.C., DONALD K. GROSS, II, EUGENE MERLINO, and MG FORGE CONSTRUCTION LLC,

Defendants.

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The following papers, numbered 1 to 4, were read on this motion for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

Dated: July 29, 2013

Hon. Eileen Bransten, J.S.C.

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

1. CHECK ONE: .....☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT X REFERENCE

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BRANSTEN, J.

This matter comes before the Court on Plaintiff PNC Bank, National Association's ("PNC") motion for partial summary judgment as to two counts of its Complaint – the third and ninth causes of action asserted against Defendants William S. Walsh, McGuggan L.L.C. ("McGuggan"), and Donald K. Gross, II (collectively, the "Guarantors" or "Defendants"). Defendants oppose the motion, arguing, in part, that this pre-discovery motion is premature. For the reasons that follow, the Court grants Plaintiff's motion.

I. Background[1]

The instant litigation stems from an April 6, 2007 loan agreement entered into by PNC and MG Forge Construction, LLC ("MG Forge"). (PNC Rule 19-a Statement ¶ 1.)

[1] The facts described in this section are unopposed, unless otherwise noted.

Defendants Walsh, McGuggan, and Gross each provided PNC with a payment guaranty for MG Forge's obligations under the loan agreement. *Id.* ¶ 9. The guaranty provided that the Guarantors "hereby waive[] all suretyship defenses and any rights to interpose any defense, counterclaim or offset of any nature and description which [the Guarantors] may have or which may exist between and among [PNC and MG Forge] with respect to [the Guarantors'] obligations under this Guaranty, or which [MG Forge] may assert on the underlying debt ..." *Id.* ¶ 13.

Between October 2007 and May 2012, PNC and MG Forge entered into nineteen amendments to the loan agreement. (PNC Rule 19-a Statement ¶ 5.) In each of the nineteen amendments, MG Forge represented and warranted that it "has no defense, counterclaim or offset with respect to the Loan Agreement." *Id.* ¶ 6. Moreover, each of the nineteen amendments was "consented and agreed to" by the Guarantors. *Id.* ¶ 7.

The loan agreement, as amended by Amendment Nineteen, expired on May 31, 2012. *Id.* ¶ 3. Under the terms of the agreement, MG Forge was required to pay all amounts owed to PNC on that date. *Id.* When neither MG Forge nor the Guarantors made payment, *id.* ¶ 4, PNC filed the instant action.

II. Discussion

Pertinent to the instant motion, PNC brings a claim for breach of the guaranty against the Guarantors (count three) and likewise requests attorney's fees from each Defendant pursuant to the guaranty (count nine). PNC now seeks summary judgment on these claims.

A. *Summary Judgment Standard*

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Despite the sufficiency of the opposing papers, "the failure to make such a showing requires denial of the motion." *Winegrad v. New York Univ. Med. Ctr*, 64 N.Y.2d 851, 853 (1985).

Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary

judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

B. *Count Three – Breach of the Guaranty*

Count Three is a breach of contract claim, asserting that Defendants entered into the guaranty agreement and then failed to abide by the agreement once MG Forge defaulted. Plaintiff has demonstrated its prima facie entitlement to summary judgment by producing the guaranty and establishing the Guarantor's non-payment without opposition by Defendants. *See Poah One Acquisition Holdings V Ltd. v. Armenta*, 96 A.D.3d 560, 560 (1st Dep't 2012) ("Plaintiff demonstrated its entitlement to summary judgment as against Armenta by submitting the guaranty executed by him and an affidavit of nonpayment.").

The burden then shifts to the Guarantors to demonstrate the existence of material issues of fact requiring trial. Defendants focus their opposition on three arguments: (1) the waivers contained in the guaranty and the amendments do not bar the Guarantors' defenses asserting fraud; (2) PNC should be estopped from asserting breach because PNC brought about MG Forge's default; and, (3) PNC tortiously interfered with the Guarantors' economic relations. Each argument will be addressed in turn below.

1. Effect of the Waiver

The Guarantors first argue that the waivers executed in the guaranty and loan agreement amendments are inapplicable. While Defendants concede that they waived "any rights to interpose any defense, counterclaim or offset of any nature ... with respect to [their] obligations under this Guaranty," they nonetheless maintain that PNC's purportedly fraudulent conduct vitiates the waiver.

Defendants' allegations of fraud, however, distill down to a claim that they were fraudulently induced to enter into the guaranty and the amendments by PNC's misrepresentations regarding the role of Phoenix. Given the breadth of the waiver executed by the Guarantors, these allegations are clearly barred. In *Hotel 71 Mezz Lender LLC v. Mitchell*, 63 A.D.3d 447, 448 (1st Dep't 2009), the First Department held that "express waivers of any and all defenses to enforcement of the guaranty" were "sufficiently specific" to bar "asserted defenses of frustration of performance ... and fraudulent inducement." *See also Acadia Woods Partners, LLC v. Signal Lake Fund LP*, 102 A.D.3d 522, 523 (1st Dep't 2013) (holding that defendants failed to raise triable issue of fact as to the enforceability of a guaranty where the guaranty "explicitly disclaims defenses pertaining to the invalidity, irregularity or unenforceability" of the underlying agreement). The waiver here is similarly broad.

Moreover, the guaranty itself states that it is "absolute and unconditional" and "shall remain in full force and effect without regard to, and shall not be released, suspended, discharged, terminated or otherwise affected by any circumstance or occurrence whatsoever." (Compl. Ex. 1C at ¶2.) Therefore, again, the breadth of the waiver forecloses Defendants' attempt to vitiate the guaranty. *See Citibank v. Plapinger*, 66 N.Y.2d 90, 92 (1985) ("Fraud in the inducement of a guarantee by corporate officers of the corporation's indebtedness is not a defense to an action on the guarantee when the guarantee recites that it is absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee, or any other circumstance which might otherwise consititute a defense available to a guarantor in respect of the guarantee, those recitals being inconsistent with the guarantors' claim of reliance upon an oral representation that the lending banks were committed to extend to the corporation an additional line of credit.").

Thus, even taking all inferences in favor of the Guarantors with regard to their allegations of wrongdoing, their execution of the broad waiver provision in the guaranty and their endorsement of the loan agreement amendments dooms their argument. Defendants have waived these defenses.

2. Guarantors' Argument that PNC Caused MG Forge's Default

Defendants next contend that PNC caused MG Forge's default, and as a result, PNC cannot compel payment from them under the guaranty. As discussed above, the Guarantors waived this defense. However, even if Defendants could circumvent the guaranty, this argument nonetheless lacks merit.

Central to Defendants's argument is the allegation that PNC required Defendants to engage the services of Phoenix Management Services and Phoenix Capital Resources ("Phoenix") in June 2011 and that Phoenix caused injury to MG Forge. Specifically, the Guarantors contend that Phoenix directed MG Forge not to pay important vendors and customers, which led to MG Forge's default under the loan agreement, triggering the Guarantors' obligation to pay. (Affidavit of William Walsh ¶¶ 11-18; Affidavit of Dennis Gross ¶¶ 5-11.)

As an initial matter, this defense is premised on allegations of misconduct by Phoenix as to MG Forge. Accordingly, the defense can be asserted, if at all, by MG Forge, and not the Guarantors. *See Hotel 71 Mezz Lender LLC v. Mitchell*, 63 A.D.3d 447, 448 (1st Dep't 2009) (noting that guarantor's defenses are premised on allegations of misconduct by the lender vis-a-vis the borrower and therefore can be asserted by the borrower alone).

Further, even if the Guarantors could use Phoenix's alleged wrongdoing to circumvent the guaranty, they have not demonstrated material issues of fact regarding Phoenix's causation of MG Forge's default. Defendants cite one case in support of this argument – *Canterbury Realty & Equip. Corp. v. Poughkeepsie Sav. Bank*, 135 A.D.2d 102 (3d Dep't 1988). However, the facts of *Canterbury* render its holding inapplicable to the instant case.

In *Canterbury*, the defendant-bank extended a $2 million line of credit to plaintiff Canterbury as part of a loan transaction. As security for the loan, Canterbury's parent company and two of its corporate officers signed "unconditional" guaranties to pay the debt when it became due. Thereafter, Canterbury exceeded its $2.5 million line of credit, and, pending the outcome of negotiations to substantially expand the credit limit, the bank's board of directors authorized an additional $275,000 of credit. When Canterbury's credit balance subsequently exceeded $3 million, the bank informed one of Canterbury's officers that it would no longer honor Canterbury's checks and would retain its accounts receivable as collateral. Shortly after, Canterbury's business collapsed and it filed for bankruptcy.

On appeal, the Third Department affirmed denial of the bank's motion for summary judgment to enforce the guaranties, holding that a triable issue existed "as to whether the Bank unfairly brought about the occurrence of the very condition

(Canterbury's suspension of business) upon which it relied to accelerate the loan against the guarantors." *Id.* at 107.

Defendants use *Canterbury* to argue that they should be discharged from their repayment obligation since PNC through Phoenix "unfairly brought about the occurrence of the very condition precedent" to the obligations under the guaranty. (Defendant Walsh and McGuggan's Br. at 9; Defendant Gross's Br. at 8.) However, the facts of *Canterbury* render it distinguishable from the instant case. Here, MG Forge defaulted on its loans on three occasions before June 2011. *See* Gauch Aff. Ex. 2 Amendment 3 at ¶ 3, Amendment 4 at ¶ 3, Amendment 4 at ¶ 3. Then, as a condition of waiving MG Forge's fourth default and extending the loan agreement, PNC asked that MG Forge engage Phoenix. Unlike the borrower in *Canterbury*, MG Forge had demonstrated issues previously with repayment under the loan agreement, and at the time of Phoenix's alleged wrongful conduct, the debt owned by MG Forge had already been due and owing several times. *See Red Tulip, LLC v. Neiva*, 44 A.D.3d 204 (1st Dep't 2007) (distinguishing *Canterbury* where "at the time of the bank's alleged wrongful conduct, the mortgage debt had already become due and was in default ... and [the borrower] had been experiencing financial problems well before that point."); *U.S. Bank Nat'l Ass'n v. 653 Eleventh Ave LLC*, 23 Misc. 3d 1130(A), at *5 (Sup. Ct. N.Y. Cnty. May 19, 2009) (distinguishing *Canterbury* where borrower "defaulted on its loans *before* U.S. Bank agreed to lend 653

Eleventh Avenue additional funds to complete the project and 653 Eleventh Ave entered into the agreements fully aware of U.S. Bank's continued right to foreclose on the loans."). Defendants cannot shoehorn the facts of this case into *Canterbury*, using the Third Department's decision to argue that Plaintiff caused the default here and therefore is estopped from relying on the guaranty. Since the Guarantors cite only to *Canterbury* in support of this argument, their argument fails.

3. Tortious Interference with Prospective Economic Advantage

Finally, the Guarantors contend that their obligation under the guaranty should be discharged since PNC tortiously interfered with their prospective economic advantage. Again, Defendants have waived such a defense. However, even if Defendants had not waived this argument, it fails to defeat Plaintiff's summary judgment motion.

As a threshold matter, Defendants have not explained how these allegations serve to vitiate the guaranty. Instead, Defendants treat this as if it were a counterclaim asserted against PNC; however, Defendants have failed to assert any counterclaims.

Moreover, Defendants' argument is akin to an unclean hands defense, which is unavailing in an action at law. *See Manshion Joho Ctr. Co., Ltd. v. Manshion Joho Ctr., Inc.*, 24 A.D.3d 189, 190 (1st Dep't 2005) ("The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages.").

Accordingly, Defendants fail to demonstrate any triable issues of material fact as to whether this defense nullifies the guaranty.

4. Request for Additional Discovery

Defendants claim that the instant summary judgment motion is premature, since they have not had the opportunity to engage in depositions and document discovery. However, pursuant to CPLR 3212(f), the Court may deny a motion for summary judgment "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." "[I]t is well settled that the mere hope by the party opposing summary judgment that it will uncover evidence that will prove its case is insufficient under CPLR 3212(f) to postpone a decision on a summary judgment motion." *Casey v. Clemente*, 31 A.D.3d 361, 362 (2d Dep't 2006). Further, "CPLR 3212(f) should not be employed as a means of embarking on a fishing expedition to explore the possibility of fashioning a defense." *Oates v. Marino*, 106 A.D.2d 289, 292 (1st Dep't 1984). After review of the defenses asserted and the affidavits interposed by Defendants, it does not appear that facts essential to the opposition exist but cannot be stated. Thus, the Court concludes that Plaintiff's motion for summary judgment is not premature and can be granted at this time.

C. *Count Nine – Request for Attorney's Fees*

PNC next contends that it is entitled to attorney's fees pursuant to paragraph 8 of the guaranty. (Compl. Ex. 1C at ¶ 8.) Specifically, paragraph 8 provides for the payment of "all costs, fees and expenses (including expenses for legal services of every kind) relating to or incidental to the enforcement or protection of the rights of [PNC] hereunder or under any of the Obligations." *Id.*

Defendants present no arguments in opposition Plaintiff's motion for summary judgment as to this claim. Since the Court has been presented with no arguments in opposition, and sees no independent reasons why this contractual provision should not be enforced, Plaintiff's motion for summary judgment is granted.

III. Conclusion

Accordingly, for the foregoing reasons, it is

ORDERED that the motion for summary judgment is granted to the extent of granting partial summary judgment in favor Plaintiff and against Defendants William S. Walsh, McGuggan L.L.C., and Donald K. Gross, II as follows:

1. Plaintiff is granted judgment on the third cause of action in the amount of $2,500,000, jointly and severally, together with interest at the statutory rate of 9% per annum from the date of June 1, 2012 until the date of the decision

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the third cause of action is severed, and the Clerk is directed to enter judgment accordingly;

2. Defendants William S. Walsh, McGuggan L.L.C., and Donald K. Gross, II are found liable to Plaintiff on the ninth cause of action and the issue of the amount of a judgment to be entered thereon shall be severed and the issue of the amount of attorney's fees Plaintiff may recover against Defendants William S. Walsh, McGuggan L.L.C ("McGuggan"), and Donald K. Gross, II is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the Plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the action shall continue as to the first, second, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth and thirteenth causes of action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on September 24, 2013, at 10 a.m.

Dated: New York, New York
July 29 2013

ENTER:

Hon. Eileen Bransten, J.S.C.