

Round Table Partners 1 LP v Gianopoulos
2014 NY Slip Op 33215(U)
December 10, 2014
Supreme Court, New York County
Docket Number: 154204/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ROUND TABLE PARTNERS 1 LP,

Plaintiff,

Index No.
154204/2014

Decision and
Order

- against -

Mot. Seq. 001

CONSTANTINE (a/k/a GUS) GIANOPOULOS
and ANASTASIA (a/k/a STACEY) GIANOPOULOS,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Round Table Partners 1 LP (“Round Table” or “Plaintiff”) moves for summary judgment in lieu of complaint against defendants Constantine (a/k/a Gus) Gianopoulos (“Mr. Gianopoulos”) and Anastasia (a/k/a Stacey) Gianopoulos (“Mrs. Gianopoulos”) (collectively, “Defendants”) in the amount of \$42,015.51. Plaintiff claims that Defendants are in default of their obligations under a guaranty agreement (the “Guaranty”) dated November 13, 2007, whereby Defendants allegedly guaranteed a loan that Plaintiff claims to have made to non-parties, Benni’s II LLC, Sophie LLC, and 947 Hope Street Associates LLC (collectively, the “Borrower”), in the principal amount of \$20,000.00 and carrying an interest rate of twelve percent per annum, compounded monthly, as evidenced by a promissory note for the same.

Defendants oppose. Defendants cross-move for an Order, pursuant to 11 U.S.C. § 362(a)(1) staying proceedings in this action based on Mrs. Gianopoulos’s petition for bankruptcy filed in the Southern District of New York on October 10, 2008; and, pursuant to CPLR § 3211(a)(5), dismissing this action as untimely and on the basis of the statute of frauds.

Turning first to Defendants’ cross-motion, the filing of a bankruptcy petition automatically stays the commencement of any action or proceeding to recover a claim against the debtor that arose before the commencement of the bankruptcy

proceeding. (11 U.S.C. § 362 [a][1]; *Levant v. National Car Rental, Inc.*, 33 A.D.3d 367, 368 [1st Dep't 2006]). The stay is mandatory, applies in all state and federal courts, and takes effect immediately, "thus rendering any actions against a debtor void *ab initio*." (*Levant v. National Car Rental, Inc.*, 33 A.D.3d 367, 368 [1st Dep't 2006]). The litigation stay contained in 11 U.S.C. § 362(a)(1) may apply automatically—i.e., without the need to obtain a court order extending the stay—to stay actions against non-debtors, "but normally does so only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." (*Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 [2d Cir. 2003] [citation omitted]). The automatic stay generally does not extend to non-debtor guarantors. (*Empire Erectors v Unlimited Locations LLC*, 102 A.D.3d 419 [1st Dep't 2013]).

Here, Plaintiff does not dispute that Mrs. Gianopoulos's bankruptcy petition automatically stays the instant action as against Mrs. Gianopoulos. Indeed, Plaintiff argues that the automatic bankruptcy stay also may extend to Mr. Gianopoulos, because there is a strong identity of interests between Defendants, whom Plaintiff seeks to hold jointly liable for the debt at issue herein, and "who presumably intermingle assets which may or may not be subject to reach depending on the outcome of [Mrs. Gianopoulos's] bankruptcy proceeding." Plaintiff further argues that Mr. Gianopoulos is listed as a co-debtor in Mrs. Gianopoulos's amended bankruptcy petition filed on March 29, 2009. Defendants, in turn, argue that there is no legal basis to apply the bankruptcy stay to Mr. Gianopoulos. Defendants argue that Plaintiff fails to identify any such intermingled assets, and that the automatic stay does not automatically apply to non-filing spouses who may be jointly liable on a debt or have jointly held assets.

Neither Plaintiff nor Defendants submit a copy of an amended bankruptcy petition listing Mr. Gianopoulos as a co-debtor in Mrs. Gianopoulos's bankruptcy proceeding, and Defendants do not mention an amended bankruptcy petition in their affidavits. However, Defendants do submit evidence of a consolidated Chapter 11 bankruptcy proceeding involving Defendants, Borrower, and various other entities and members of Defendants' family. That proceeding resulted in a settlement agreement, dated July 25, 2007, by, between, and among Janice B. Grubin, not individually, but solely in her capacity as Chapter 11 trustee (the "Trustee") of Food Management Group, LLC ("FMG"), KMA I, Inc., KMA II, Inc., KMA III, Inc., and Bronx Donut Bakery, Inc. (collectively, the "Debtors"), and Anastasios (a/k/a Tom) Gianopoulos, Constantine (a/k/a Gus) Gianopoulos, Anastasia (a/k/a Anne) Gianopoulos, Anastasia (a/k/a Stacey) Gianopoulos, Nikolas Gianopoulos, Meletio Gianopoulos, Sophie Gianopoulos, Petula Y. Sikiotis, Argonne Enterprises, LLC,

Armstrong Development Corp., Food Systems, LLC, Eastchester Management Group, LLC, Benni's, LLC, Benni's I, LLC, Benni's II, LLC, Benni's III, LLC, Benni's II Restaurant, LLC, Sophie, LLC, Sunapee, LLC, Leonidas Enterprises, LLC, 2501 Third, LLC, and Nodine Realty Corp. (collectively, the "Gianopoulos Defendants").

Accordingly, the bankruptcy stay does not apply to Mr. Gianopoulos, as a non-debtor guarantor, (*Empire Erectors v Unlimited Locations LLC*, 102 A.D.3d 419 [1st Dep't 2013]; *Milliken & Co. v. Stewart*, 182 A.D.2d 385 [1st Dep't 1992]), and Plaintiff's motion for summary judgment in lieu of complaint and Defendants' cross-motion to dismiss will be addressed only as to Mr. Gianopoulos.

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." A document comes within CPLR § 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document. (*Id.*). The test "is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument is read in the first instance." (*Weissman*, 88 N.Y.2d at 445). An unconditional guaranty qualifies as an instrument for the payment of money only, for purposes of CPLR § 3213. (*Acadia Woods Partners, LLC v Signal Lake Fund LP*, 102 A.D.3d 522, 522-23 [1st Dep't 2013]).

To demonstrate entitlement to recover on a personal guaranty, a plaintiff must present evidence of the guaranty, the amount of the debt guaranteed, and the defendant's default. (*Carrera Casting Corp. v. Cord*, 106 A.D.3d 422 [1st Dep't 2013]). An action on a guaranty is subject to a six year statute of limitations. (CPLR 213[2]). The six-year Statute of Limitations applicable to a guaranty begins to run when the debtor defaults on the underlying debt. (*Haber v. Nasser*, 289 A.D.2d 199, 200 [2d Dep't 2001]; *Whittemore v. Yeo*, 112 A.D.3d 475 [1st Dep't 2013]).

Here, Plaintiff proffers an unconditional Guaranty dated November 13, 2007. The Guaranty provides: "This Guaranty is an absolute, independent and present guaranty of payment and performance not of collection . . . The Guarantors shall pay all of Guarantors' Liabilities to Lender in full immediately upon demand. One or more successive actions may be brought against the Guarantors, as often as Lender

deems advisable, until all of the Guarantors' Liabilities are paid and performed in full." The Guaranty further states that "the Guarantors agree to be personally liable for . . . the full and prompt payment when due, whether at stated maturity, upon acceleration, or otherwise, and at all times thereafter, of all of the Indebtedness." The Guaranty provides:

The obligations of the Guarantors hereunder are independent of the obligations of Borrower and each other guarantor. In the event of any default hereunder, Lender may institute a separate action against any or all of the Guarantors with or without joining or instituting a separate action against Borrower or against any other guarantor or obligor.

The Guaranty lists Constantine (a/k/a Gus) Gianopoulos as a Guarantor, and is executed by Nikolas Gianopoulos ("Niko"), in his capacity as attorney in fact, on Constantine (a/k/a Gus) Gianopoulos's behalf. The Guaranty further states: "Niko, as attorney in fact for Gus pursuant to that certain power of attorney dated April 12, 2006, has all requisite power and authority to execute the Loan Documents and this Guaranty on behalf of Gus." In addition, the Guaranty provides that the Guarantors expressly waive "any defense based on the incapacity, lack of authority . . . or the failure of Lender to file or enforce a claim against the estate of any other person or entity in any administrative, bankruptcy, or other proceeding." The Guaranty further provides: "The Guarantors shall be fully responsible for keeping informed of the financial condition of Borrower and of all other circumstances bearing on the risk of nonpayment or nonperformance of Guarantors' Liabilities."

In opposition, Mr. Gianopoulos avers that he did not execute the Note or the Guaranty, and that Niko lacked authority to execute the Note and the Guaranty on Mr. Gianopoulos's behalf. In addition, Mr. Gianopoulos argues that Plaintiff's action is time-barred. Mr. Gianopoulos avers, upon information and belief, that Borrower was "insolvent prior to March 2008 triggering an event of default under the Note and the accrual of an action on the Guaranty." Mr. Gianopoulos avers that the instant action is not timely brought, as Plaintiff commenced this action on April 29, 2014, more than six years later.

Annexed to Plaintiff's reply papers are copies of thirteen declarations (the "Declarations") filed on November 12, 2007 with the United States District Court, Southern District of New York in connection with the consolidated Chapter 11 bankruptcy proceeding. In the Declarations, Niko states under penalty of perjury

that he is Mr. Gianopoulos's attorney in fact. Plaintiff relies on the Declarations to demonstrate that Niko was authorized to bind Mr. Gianopoulos to the Guaranty. However, Plaintiff does not submit a copy of the April 12, 2006 Power of Attorney referenced in the Guaranty.

Here, Mr. Gianopoulos raises an issue of fact as to the scope of Niko's authority to act on Mr. Gianopoulos's behalf. Mr. Gianopoulos avers that Mr. Gianopoulos "had no knowledge of the Note or Guaranty nor did [he] ever give [his] consent to anyone to sign the Note or Guaranty on [his] behalf." Mr. Gianopoulos argues that the Declarations refer and relate to the bankruptcy proceeding and to Niko's authority to act in that context, and do not demonstrate that Niko was authorized to bind Mr. Gianopoulos to the Note or Guaranty. Accordingly, Mr. Gianopoulos raises an issue of fact as to whether Niko was authorized to execute the Guaranty on Mr. Gianopoulos's behalf.

Wherefore, it is hereby,

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

ORDERED that Defendants' cross-motion is granted only to the extent of staying further proceedings in this action as against Mrs. Gianopoulos, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the lifting of the automatic bankruptcy stay imposed in connection with Mrs. Gianopoulos's bankruptcy filing; and it is further

ORDERED that Movant is directed to serve a copy of this order with notice of entry upon the Trial Support Office (Room 158); and it is further

ORDERED Plaintiff's claim as against Mr. Gianopoulos is severed and shall proceed and the Plaintiff's moving papers, consisting of a notice of motion, the affirmation of Michael Sherman in support of Plaintiff's motion, and the reply affirmation of Michael Sherman in further support of Plaintiff's motion for summary judgment in lieu of complaint, are hereby deemed the complaint in this action and the Defendants' answering papers, consisting of the affidavits of Defendants, dated July 21, 2014 and September 25, 2014, are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 327, 80 Centre Street, on April 14, 2015, at 9:30 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: December 10, 2014



Eileen A. Rakover, J.S.C.