International Union of Bricklayers & Allied Craftworkers v Bank of New York Mellon
2014 NY Slip Op 30177(U)
January 17, 2014
Supreme Court, New York County
Docket Number: 653441/2012
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS,

Plaintiff,

-against-

BANK OF NEW YORK MELLON,

Defendant.

INDEX NO. 653441/2012

MOTION DATE _____

MOTION SEQ. NOs. 001

The following papers, numbered 1 to _____ were read on these motions to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☐ Yes ☒ No

Defendant's motion to dismiss is denied in accordance with the attached decision/order, dated January 17, 2014.

Dated: 1-17-14
J.S.C.

MARCY S. FRIEDMAN, J.S.C.

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

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS,

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DECISION/ORDER

This action on a guaranty is brought by plaintiff guarantor, International Union of Bricklayers and Allied Craftworkers (Bricklayers), against defendant trustee, The Bank of New York Mellon (Mellon), to recover the pledged security, a $2,000,000 certificate of deposit (the "CD"), which was drawn down by defendant after a default by third-party borrower, Cumberland Trustone LP (Borrower). Defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that

are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

The parties entered into a Guaranty and Pledge Agreement, dated March 1, 2004. (Complaint, ¶1.) This Guaranty Agreement relates to an Indenture Trust, also dated March 1, 2004, between defendant as trustee and the New Jersey Economic Development Authority (Issuer). (Id.) Pursuant to the Indenture, the Issuer issued a series of bonds. The proceeds of the bond sale were used to make a $5,600,000 loan to Borrower for the acquisition and development of a concrete manufacturing facility in Vineland, New Jersey. (Id., ¶ 2.) As security for the loan, Borrower delivered a mortgage on the New Jersey property to the Issuer. (Id.) Defendant, as trustee, foreclosed on the New Jersey property following Borrower's default, and it was sold at a foreclosure sale for approximately $158,000. (Id., ¶ 3.)

Under the terms of the Guaranty, plaintiff agreed to guarantee payment by Borrower of its loan obligations, limited to the amount of $2,000,000. In accordance with the Guaranty, plaintiff delivered to defendant a CD in the amount of $2,000,000, which was later replaced with a replacement CD in the same amount. (Id., ¶¶ 4, 12.) It is undisputed that an "Event of Default," as defined by the Indenture, occurred when the Borrower failed to make due and punctual payment of its loan obligations. (Indenture § 8.1.) The Guaranty incorporated the Indenture's

definition of "Event of Default," and required that written notice of the default be provided to plaintiff simultaneously with written notice to the Borrower and Issuer. (Guaranty § 4.) The Guaranty also explicitly set forth the "Draw Conditions," to be met before defendant could cash-out the CD, including the foreclosure of the property, the full realization on a guaranty made by the Issuer, and diligent pursuit of collection actions on any other guaranties or reimbursement obligations. (Guaranty § 1[c].)

Plaintiff asserts a cause of action for breach of contract based on the allegation that defendant breached the Guaranty Agreement when it drew down the CD without first complying with New York Real Property Actions and Proceedings Law (RPAPL) 1371. Plaintiff claims that this statute is incorporated into the contract through the Guaranty's choice of law clause, which provides that "[t]his Agreement shall be construed in accordance with and governed by the laws of the State of New York, without reference to the conflicts of laws provisions of any jurisdiction." (Guaranty § 12[f].) Plaintiff further contends that because defendant did not seek a deficiency judgment prior to drawing down on the CD, it is precluded from recovering under the Guaranty.

In moving to dismiss, defendant contends, and plaintiff does not dispute, that an Event of Default has occurred within the meaning of the Guaranty and that all of the enumerated Draw Conditions have been met. (D.'s Memo. In Support at 8-10.) Defendant also cites a provision of the Guaranty which states that defendant "undertakes to perform only such duties as are expressly and specifically set forth . . . and no implied duties or obligations shall be read into the Agreement against the [defendant]." (Guaranty § 10[b].) Defendant argues that to impose the additional requirement that defendant comply with RPAPL 1371 prior to draw down of the CD

would in effect rewrite the contract to add a term to which the parties did not agree. (D.'s Memo. In Support at 12-13.)

RPAPL 1371 requires that a motion for a deficiency judgment be made within ninety days after the consummation of a foreclosure sale. The statute, which applies to "a person who is liable to the plaintiff for the payment of the debt secured by the mortgage," further provides that the court "shall determine . . . the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction . . . ." (RPAPL 1371[1],[2].) If the fair market value is greater than the foreclosure sale price, the deficiency calculation will be based on the fair market value, providing substantive protection from a below value sale to the mortgagor or guarantor. If no motion for a deficiency judgment is made, "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." (RPAPL 1371[3].)

The issue therefore is whether the choice of law provision of the Guaranty renders RPAPL 1371 applicable. It is well-settled that where the parties have selected New York law to govern their contractual relationship under a choice of law provision, and the provision is enforceable, "New York substantive law applies . . . ." (IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A., 20 NY3d 310, 315 [2012], cert denied, 133 S Ct 2396 [2013] [choice of law clause providing that a guaranty "shall be governed by, and construed in accordance with, the laws of the State of New York" held enforceable under GOL 5-1401 to determine validity of contract under New York law, without requiring a conflicts-of-law interest analysis].) Here, although defendant disputes the impact of the choice of law provision, it is undisputed that the clause is enforceable. Thus, under the similarly worded clause in the Guaranty at issue, the substantive

law of New York will apply to the contract. Contrary to defendant's contention, the choice of law provision is not merely a "procedural" provision "with regard to how the contract is to be interpreted." (See D.'s Reply Memo. at 10; D.'s Supp. Memo. In Support at 4-6.) The cases that defendant cites considered whether choice of law clauses with wording similar to that at issue were broad enough to render New York law applicable to tort or other claims between the parties, and not merely to disputes concerning their agreement itself or its interpretation. (See e.g. Williams v Deutsche Bank Secs., Inc., 2005 WL 1414435, *4-5 [SD NY, June 13, 2005, No. 04-CV-7588(GEL)].) These cases are not inconsistent with the authority, cited above, that the wording of the choice of law provision makes New York substantive law applicable to the contract.

Even in the absence of a contractual choice of law provision, RPAPL 1371 has been held applicable under a conflicts-of-law interest analysis to a guaranty made in connection with a mortgage on real property located in New Jersey. (Union Realty Partners v Menicucci, 270 AD2d 339 [2d Dept 2000].) The case for applicability of RPAPL 1371 to the Guaranty at issue is even more compelling, given the parties' express choice of New York law.

In so holding, the court rejects defendant's contention that the New York statute cannot apply to a New Jersey foreclosure, because any foreclosure must be in conformity with the laws of the state where the real property is located. All matters affecting title were conducted in accordance with local law, as the foreclosure was conducted in New Jersey. A New Jersey appellate court has in fact applied RPAPL 1371 in a proceeding brought in New Jersey for a deficiency judgment. In Citibank v Errico (251 NJ Super 236, 243 [2010]), the Court expressly held that application of the New York statute did not violate public policy, notwithstanding that

New Jersey had a deficiency statute, similar in purpose to RPAPL 1371, which exempted the mortgage at issue. The Court reasoned that as the foreclosure had been conducted according to New Jersey law, non-title matters could be governed by the parties' choice of law provision under which they agreed that the mortgage note and security agreement "shall be construed in accordance with and governed by the laws of New York." (Id. at 239-40; see also Bergman on New York Mortgage Foreclosures § 34.02[2][a] [as "a general rule, RPAPL § 1371 finds application only when the real property foreclosed upon is situate in New York State. Nevertheless, New York deficiency provisions can control where the mortgage documents specify that New York law shall govern"].)

The Errico Court also held that "[RPAPL] 1371 deals with the extent of a debtor's liability, a substantive right, rather than how a creditor is to proceed in enforcing liability, the procedural aspect." (251 NJ Super at 243 [and authorities cited therein].) This court concurs with this conclusion.

Further, the court rejects defendant's argument that the New York statute is not applicable because it was not specifically referred to in the Guaranty. The authorities on which defendant relies do not stand for this proposition. They instead involved choice of law provisions that contained conflicting terms as to whether New York state or federal law governed the issue in question, and did not hold that in a case where a choice of law provision clearly makes New York law the governing law, it must also specifically identify applicable statutes by name. (See Flagg v Yonkers Sav. and Loan Ass'n, FA, 396 F3d 178 [2d Cir 2005]; Shaw Group Inc. v. Triplefine Intl. Corp., 322 F3d 115, 123 [2d Cir 2003].)

The court is unpersuaded by defendant's contention that the imposition of the

requirements of RPAPL 1371 would effectively rewrite the guaranty. A court "may not by construction add or excise terms . . . and thereby make a new contract for the parties . . . . " (Bailey v Fish & Neave, 8 NY3d 523, 528 [2007].) However, it is well settled that "the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law." (Ronnen v Ajax Elec. Motor Corp., 88 NY2d 582, 589 [1996].) This court's holding that RPAPL 1371 applies to the Guaranty does not rewrite the contract to add a new provision, but instead gives effect to the parties' own agreement providing for the Guaranty to be governed by New York law.

This court does not find, on this inadequately briefed record, that the provisions of the Indenture and Guaranty which defendant characterizes as waiver provisions (see D.'s Memo. In Support at 11-12) are effective to bar plaintiff's claim that defendant was obligated to seek a deficiency judgment before drawing down on the CD. A number of these provisions (e.g., that the Trustee shall not be liable excepts for acts resulting from gross negligence or willful misconduct) are commonly included in indenture agreements. However, defendant fails to cite any authority interpreting such provisions or their applicability to the duties at issue.

It is accordingly ORDERED that the motion of defendant Bank of New York Mellon to dismiss the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 17, 2014

MARCY FRIEDMAN, J.S.C.