SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 48

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LFR COLLECTIONS LLC, as Acquirer of Certain Receivables of THE STILLWATER ASSET-BACKED FUND, LP,

Plaintiff,

-against-

YEHUDA SMOLAR, P.C. and YEHUDA SMOLAR,

Defendants.

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Index No.: 653311/2011

Mtn Seq. Nos. 003 & 004

DECISION AND ORDER

JEFFREY K. OING, J.:

Mtn seq. nos. 003 and 004 are consolidated for disposition.

Plaintiff LFR Collections LLC, as the acquirer of certain receivables of the Stillwater Asset-Backed Fund, LP ("LFR"), commenced this action to recover amounts due on an amended revolving credit note and an amended revolving credit agreement that were executed by defendant Yehuda Smolar, P.C. (the "Smolar Firm"), and on an unconditional personal guaranty that was executed by defendant Yehuda Smolar, individually ("Smolar").

The Smolar Firm and Smolar (collectively, "defendants") move, pursuant to CPLR 3212, for summary judgment to dismiss all of LFR's claims (mtn seq. no. 003).

LFR moves, pursuant to CPLR 3212, for summary judgment in its favor on all of its claims, and, pursuant to CPLR 3211(b), to strike all of defendants' affirmative defenses (mtn seq. no. 004).

Factual Background

On November 9, 2004, the Smolar Firm, a Georgia personal injury law firm, entered into a $1.5 million revolving credit note (the "Note") that was issued by the entity then known as The Stillwater Asset Backed Fund LP d/b/a The Stillwater Asset-Backed Fund LP ("SABF/Lender" or "Lender"),[1] an investment business that extended financing to law firms to help fund their working capital needs (the "Smolar Load") (see Lawrence M. Barnes Aff. (mtn seq. no. 004), Ex. 1; Kathleen M. Servidea Affirm., Ex. A). In conjunction with the execution of the Note, the Smolar Firm and SABF/Lender entered into a revolving credit agreement dated November 9, 2004 (the "Credit Agreement"), and a security agreement dated October 28, 2004 (the "Security Agreement") (Id., Exs. B and C). The Note and Credit Agreement each set the initial interest rate for the revolving credit facility at 23% per annum, simple interest (Id., Ex. A, § A [1], Ex. B, ¶ 2.3.2).

Smolar, individually, executed a guaranty agreement dated November 9, 2004 ("Guaranty"), in which he "absolutely, unconditionally and irrevocably guarantee[d] to Lender, the full and prompt payment when due ... [of] principal owing by the [the

[1]In January 2010, SABF/Lender was acquired by Gerova Financial Group, Ltd. ("Gerova"), and after being merged, with two other funds, to form a new entity, Stillwater Asset Backed Holdings LP, was renamed Gerova Asset Backed Holdings LP ("GABH").

Smolar Firm] to the Lender on the Revolving Loans ..., and all fees, costs and expenses under the Credit Agreement or any other Financing Agreements" (Id., Ex. D, ¶ 2.01 [a]).[2] Smolar additionally agreed to pay all costs and expenses, "including without limitation, all court costs and reasonable attorneys' fees and expenses," that Lender incurred in attempting to collect the guaranteed obligations, in prosecuting any action against the guarantor, or "in endeavoring to realize upon ... any collateral" securing the guarantor's liability (Id., ¶ 2.01 [b]). Smolar also agreed that, if "Guarantor fails to pay any amount when due pursuant to Section 2.01 hereof, such Guarantor agrees to pay interest on the amount of such payment not so paid from said due date until such payment shall be paid in full at a rate per annum equal to the rate set forth in Section 2.2.2 [sic] of the Credit Agreement, payable on demand of the Lender" (Id., ¶ 2.07).

Between 2004 and mid-2009, as the Smolar Firm drew on its line of credit, it and Lender executed a series of amendments to both the Note and the Credit Agreement, which, among other things, increased the size of defendants' commitment and extended the maturity date of the Smolar loan (Id., Exs E, F, I, J, K, L,

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[2]The Credit Agreement defined "Financing Agreements" to include, inter alia, the Credit Agreement, the Security Agreement, the Revolving Credit Note, the Guaranty Agreement, and "any other collateral documents now or hereafter delivered to the Lender" (Id., Ex. B at 3).

M, N, O, P). A final amendment to the Note was executed on or about June 10, 2009, when the Smolar Firm entered into a Ninth Amended and Restated Revolving Credit Note (the "Amended Note"), in the maximum principal sum of $9,843,080.59, with interest at the rate provided in the Credit Agreement (Id., Ex. H). The Amended Note further provided that upon occurrence or continuance of an "Event of Default" as defined in the Credit Agreement, "the Borrower shall on demand pay interest ... on the unpaid Obligations ... at a rate per annum equal to twenty four (24%) percent" (Id., § A). Final amendments to the Credit Agreement were made (1) on or about March 4, 2009, when the Smolar Firm executed an Amendment No. 9 to the Credit Agreement, which extended the maturity date of the Smolar loan until December 31, 2009 (Id., Ex. Q), and (2) on or about June 10, 2009, when the Smolar Firm executed an Amendment No. 10 to the Credit Agreement (the "Amended Credit Agreement"), in which the Smolar Firm acknowledged and agreed that, as of that date, its "aggregate outstanding Obligations under the Credit Agreement and the Financing Agreements was $8,843,080.59" (Id., Ex. R, ¶ 2 [a]). The Smolar Firm additionally acknowledged and agreed, with respect to these obligations, that:

> it has no claim, counterclaim, cause of action or defense of any kind by way of set-offs or otherwise to the payment and satisfaction in full of the Obligations . . . [and], to the extent that any such a claim or

> defense may or does exist, the Borrower hereby fully and forever waives and releases any and all such claims, causes of action and defenses

(Id., ¶ 2 [c]).

As part of the Amended Credit Agreement, the Smolar Firm and Smolar, as guarantor, also acknowledged and agreed to liability attributable to certain other rights assigned to Lender, in the amount of $1 million, and expressly "waive[d] and release[d] any and all defenses, offsets, claims, and/or counterclaims of any kind or nature whatsoever" with respect to those assigned rights (Id., ¶ 3 [a] and [b]).

In conjunction with the various amendments to the Note and the Credit Agreement, Smolar executed various confirmations of his individual Guaranty (Id., Exs. S, T, U, V). In a final Confirmation of Guaranty, dated June 10, 2009, Smolar confirmed that he was fully informed of the extensions of credit made under each of the ten amendments to the Credit Agreement; that the Guaranty remained in full force and effect; and, that he,

> unconditionally guaranteed to the Lender payment when due, whether by acceleration or otherwise of any and all Obligations of the Borrower to the Lender (other than the payment of interest), including attorneys' fees, costs, and expenses of collection incurred by the Lender in enforcing any of the Obligations

(Id., Ex. R).

The Smolar Firm failed to pay the Note in full upon its December 31, 2009 maturity date, triggering an Event of Default

under the Credit Agreement. LFR, as the current holder of the Lender's rights, title and interest to these assets under the Amended Note, the Amended Credit Agreement, and the Guaranty, commenced this action to recover the amounts due, plus interest.

Since the execution of the original Note, Credit Agreement, Security Agreement, and Guaranty, the Lender's rights, title and interest in the Smolar loan assets were transferred through multiple entities before being acquired by LFR. First, between 2004 and 2009, the Lender sold 70% of the participation interests in the Smolar loan to an affiliated entity, the Stillwater Asset Backed Offshore Fund, Ltd. ("SABF Offshore"), one of two affiliated funds that purchased participation interests in Lender's law firm loan portfolio (Barnes Aff., Ex. 5). Next, through a series of agreements dated July 27, 2009, the Lender and each of the two affiliated funds transferred all of their interests in these assets to Stillwater Funding LLC ("Stillwater Funding"), a separate, special purpose vehicle that was formed to effect a securitization of the Lender's "payment intangibles" (Servidea Affirm., Exs. X, Z, AA; Barnes Aff., Ex. 2). To accomplish these transfers, the Lender entered into a Receivables Purchase Agreement ("RPA") with Stillwater Funding, dated July 27, 2009, in which the Lender transferred and assigned to Stillwater Funding all of its "rights, title and interest in, to

and under the Receivables in each Account and all Collateral Security" (Servidea Affirm., Ex. X, § 2.1).[3] On July 27, 2009, SABF Offshore transferred all of its "participation interests in [the] payments and collateral in connection with financing to law firms and the payment obligations generated thereby" to another entity, Stillwater AB Offshore Funding, Ltd (Id., Ex. AA). Stillwater AB Offshore Funding, Ltd. simultaneously executed another purchase agreement, the Stillwater Offshore Purchase Agreement, selling and transferring these interests to Stillwater Funding (Barnes Aff., Ex. 2).

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[3]As used in the RPA, the term "Account" is defined to mean "each financing account or line of credit established by any [Lender] with a Law Firm ... which was identified in ... [the] written list ... attached to [the] Receivables Purchase Agreement as Schedule I" (Servidea Affirm., Ex. Y, Indenture Agreement, § 1.1).

The term "Receivables" is defined to mean "with respect to an Account, all amounts payable by the applicable Law Firm from time to time in respect of advances made by any [Lender] to such Law Firm, together with the group of writings evidencing such amounts and the security interest created in connection therewith" (Id.).

The term "Collateral Security" is defined to mean "with respect to any Receivable, (I) the security interest granted by or on behalf of the applicable Law Firm or any other Person to secure payment of such Receivable, (ii) all other security interests or Liens and property subject thereto from time to time purporting to secure payment of such Receivable or otherwise, together with all financing statements filed against a Law Firm describing any collateral securing such Receivable, and (iii) any personal or corporate guaranty covering all or any portion of such Receivable" (Id.).

Immediately upon acquiring these assets, Stillwater Funding transferred the assets to Wilmington Trust Company, in its capacity as indenture trustee (the "Indenture Trustee"), pursuant to an Indenture Agreement, also dated July 27, 2009 (Servidea Affirm., Ex. Y). The transfer was made to secure payment of an "asset backed variable funding note" that was to be issued by Stillwater Funding (the "Stillwater Note"), and purchased by Partner Reinsurance Company Ltd. ("PartnerRe"), pursuant to a Note Purchase Agreement also dated July 27, 2009 (Servidea Affirm., Ex. BB).

In conjunction with these purchase and transfer agreements, Stillwater Funding, SABF/Lender, and the Indenture Trustee also executed a Servicing Agreement, dated as of July 27, 2009 (the "Servicing Agreement") (Mtn. Seq. 003, Jarred I. Kassenoff Affirm., Ex. I). Pursuant to this agreement, SABF/Lender was appointed Servicer, to act "as [Stillwater Funding's] agent to service the Conveyed Assets and enforce its rights and interests in and under the Conveyed Assets" (Id., § 2.01).[4]

Stillwater Funding subsequently defaulted on the Stillwater Note, whereupon PartnerRe instructed the Indenture Trustee to foreclose on the Stillwater Funding assets. Thereafter, a

[4]"Conveyed Assets" is defined to mean all of the assets conveyed by Lender and the two affiliated funds, pursuant to their respective purchase agreements.

Consent to Foreclosure and Sale Agreement dated June 17, 2011 (the "Foreclosure Agreement") was executed by and among the various interested parties to these transactions (Servidea Affirm., Ex. CC). Pursuant to the Foreclosure Agreement, Stillwater Funding agreed to "sell, surrender, convey, transfer and assign all of its right, title and interest in and to the Collateral (the 'Sale Assets')" to PartnerRe,[5] which committed both to purchase the Sale Assets and, simultaneously, to contribute the assets to the "Acquirer," which the agreement identified as LFR (Id., §§ 1.2, 2.1).[6] The Foreclosure Agreement also terminated the Servicing Agreement (Id., § 2.1).

By written resolution of PartnerRe's board of directors, effective June 23, 2011, PartnerRe resolved to accept and contribute all of the assets acquired from Stillwater Funding to LFR, by contributing them first to its wholly owned subsidiary, PartnerRe Capital Investment Corp. ("PCIC") (Servidea Affirm., Ex. EE). PCIC, in turn, resolved to contribute and transfer the assets to LFR, a newly formed wholly owned subsidiary, pursuant

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[5]"Collateral" is defined in the Foreclosure Agreement to mean all of the assets pledged by Stillwater Funding to the Indenture Trustee, pursuant to the Indenture Agreement (Id., Recitals).

[6]Funding and PartnerRe thereafter executed a General Warranty Bill of Sale, dated as of July 12, 2011, to implement the provisions of the Foreclosure Agreement (Id., Ex. DD).

to a written resolution adopted by PCIC's board on June 27, 2011 (Id.; Ex. FF). Pursuant to a written resolution adopted by LFR's board of directors on June 30, 2011, LFR accepted the contribution and transfer of these assets (Id., Ex. GG).

On or about November 30, 2011, LFR commenced this action against defendants by motion for summary judgment in lieu of complaint pursuant to CPLR 3213. Defendants opposed the motion and cross-moved to dismiss the action.

At oral argument, held on July 31, 2013, defendants challenged LFR's standing and the adequacy/completeness of the transfer documentation. Defendants also argued that LFR's claims were barred by res judicata, based on a judgment that the Smolar Firm and Smolar had obtained against the Lender/SABF in an action that they had commenced against the Lender/SABF, amongst others, in Georgia, in April of 2010.[7] Defendants argued that because

[7]In the Georgia action, the Smolar Firm had asserted claims against Lender and another law firm, the Weiss firm, with which the Smolar Firm had entered into an agreement to jointly practice law and share legal fees. The Georgia complaint alleged that the Weiss firm had misappropriated and diverted certain of these shared legal fees to Lender, and that Lender had conspired with and assisted the Weiss firm in this diversion of fees (Barnes Aff., Ex. 100). Although Lender had not been correctly named in the caption, Lender and Stillwater Capital Partners LLC, Lender's general partner, sought leave to intervene in the Georgia action in May 2010, and filed an answer asserting counterclaims against the Smolar Firm and Smolar for breach of the Amended Credit Agreement, Amended Note, and Guaranty (Barnes Aff., Ex. 10). In October 2012, Lender voluntarily withdrew and dismissed the counterclaims, without prejudice, shortly after the Smolar

the Lender had appeared in the Georgia action, and had asserted "compulsory" counterclaims against the Smolar Firm and Smolar to recover on the Amended Note, the Amended Credit Agreement, and Guaranty, the Georgia judgment against the Lender necessarily terminated all of defendants' payment obligations to the Lender under these loan documents. Defendants argued that because LFR had not acquired the Receivables and Collateral with respect to the Smolar Loan until June of 2011, i.e., after the commencement of the Georgia action against SABF/Lender, LFR was also barred, under the doctrine of res judicata, from seeking payment from defendants pursuant to any of these loan documents.

Following oral argument on the motions, this Court denied both LFR's motion for summary judgment in lieu of complaint and defendants' cross motion to dismiss, finding that there were factual issues which precluded summary judgment at that stage of the proceedings. The action was converted to a plenary action.

Defendants thereafter submitted an answer to the Servidea affirmation in support of summary judgment in lieu of complaint, which had been deemed the complaint in this action. Defendants

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plaintiffs moved for summary judgment (Id., Ex. 22). The Georgia action was subsequently resolved in February 2013, when the Smolar Firm and Smolar were granted summary judgment on the conspiracy cause of action against the Lender. In its decision, the Georgia court noted that the Lender had filed no response to the Smolar plaintiffs' summary judgment motion (Id.).

asserted, as affirmative defenses, that LFR's claims are barred: (1) by failing to state a cause of action; (2) by the doctrine of res judicata; (3) by the doctrine of collateral estoppel; (4) because LFR is not the holder in due course of the underlying loan documents; (5) because LFR is not a proper party to this dispute; (6) because LFR lacks standing to institute the instant action; (7) by the doctrines of laches, waiver, estoppel and/or unclean hands; (8) because LFR lacks privity with defendants; (9) because the amount owed was incorrectly computed; (10) because LFR cannot collect interest from Smolar pursuant to his Guaranty; (11) by documentary evidence; and (12) by the doctrine of champerty (Barnes Aff., Ex. 30).

Defendants now move for summary judgment to dismiss all of LFR's claims. Plaintiff moves for summary judgment in its favor, and to strike all of defendants' affirmative defenses.

Discussion

The principle is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant's burden is met, the burden shifts to the party opposing the motion to "present evidentiary facts in admissible

form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue, or such an issue is even arguable, summary judgment will be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

Defendants' Motion for Summary Judgment (Motion Sequence 003)

The Parties' Contentions

Defendants argue that summary judgment dismissing LFR's claims is warranted because LFR lacks standing to maintain this action as it has failed to produce a written assignment agreement to prove that the Smolar Receivables were validly transferred to it from PartnerRe. Defendants further argue that even if LFR could prove that it validly acquired the Smolar Loan receivables LFR's claims are barred by res judicata based on the Lender/SABF's prior attempt to enforce the loan documents through its assertion of the counterclaims in the Georgia action. Defendants argue that only the Lender had the right to enforce the Smolar loan documents under the terms of the Servicing Agreement, and through Lender's continued ownership of the Amended Note, which was neither listed nor included as one of the Receivables that was transferred to Stillwater Funding pursuant to the RPA. In that regard, defendants argue that Lender's

counterclaims, although voluntarily withdrawn prior to the determination of their summary judgment motion in the Georgia action, were compulsory counterclaims, and, therefore, were necessarily decided by the judgment that was awarded against the Lender in the Georgia action.

Finally, defendants argue that even if LFR had acquired the Smolar Receivables and the right to enforce the Smolar loan documents LFR would only have a right to recover on the 30% of the Smolar Receivables that SABF/Lender had transferred to Stillwater Funding pursuant to the RPA. Defendants argue that the transfer to Stillwater Funding of the remaining 70% interest in the Smolar Receivables, which had originated with SABF Offshore, was never effected, because the Stillwater Offshore Purchase Agreement, between Stillwater AB Offshore Funding, Ltd. and Stillwater Funding (Barnes Aff., Ex. 2), had been cancelled pursuant to the RPA § 2.1 (I).[8]

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[8] RPA § 2.1 (i) provides:

"The Seller and Buyer hereby agree that upon effectiveness of this Agreement, the Stillwater Fund II Purchase Agreement and the Stillwater Offshore Purchase Agreement, portion of the Receivables Interests conveyed to the Buyer pursuant to the Stillwater Fund II Purchase Agreement that constitute purchaser interests and the Stillwater Offshore Purchase Agreement shall be cancelled."

Plaintiff argues that defendants' summary judgment motion must be denied because defendants' standing and res judicata defenses were waived by the blanket waivers of all defenses to nonpayment contained in the loan documents. In any event, plaintiff argues that defendant's standing defense fails because the record establishes that LFR, through valid intra-corporate transfers, acquired all of the Smolar assets that had been transferred to its corporate parent, PartnerRe, pursuant to the terms of the Foreclosure Agreement. Plaintiff maintains that defendants' res judicata defense fails because SABF/Lender and its affiliates already had sold and transferred all of their interests in the Smolar assets to Stillwater Funding, a separate corporate entity, well before the commencement of the Georgia action. Moreover, by the time the Georgia action was commenced, SABF/Lender, with its remaining assets, had itself been acquired by Gerova Financial Group, Ltd. ("Gerova"), a competitor of PartnerRe, and had ceased to exist as a corporate entity. Plaintiff presents evidence that, in January 2010, when SABF was acquired by Gerova, Gerova then merged SABF with two other funds to form a new entity, Stillwater Asset Backed Holdings LP, which it renamed Gerova Asset Backed Holdings LP ("GABH") (Barnes Aff., Exs. 7, 8, 9; Servidea Affirm., Ex. CC). The general partner of SABF, Stillwater Capital Partners, Inc., was also replaced by a

new general partner, ASSAC General Partner, Inc., whose sole director was the Chief Operating Officer of Gerova.

Finally, plaintiff argues that defendants' contention, that the sale and transfer of SABF Offshore's 70% interest in the Smolar assets pursuant to the Stillwater Offshore Purchase Agreement was somehow cancelled by the RPA, is based on a flawed reading of the operative agreements.

Standing

The case law is not entirely clear whether a defense of standing can be waived (see Stark v Goldberg, 297 AD2d 203, 204 [1st Dept 2002] [holding that, "[s]tanding goes to the jurisdictional basis of a court's authority to adjudicate a dispute"], but see CDR Creances S.A.S. v Cohen, 77 AD3d 489, 491 [1st Dept 2010] [holding that lack of standing defense "do[es] not implicate subject matter jurisdiction" and is subject to waiver]). Nevertheless, dismissal of plaintiff's complaint for lack of standing here is not warranted, as the documentary evidence sufficiently establishes that LFR has standing to bring this action.

Our courts have held that, "'[n]o special form or language is necessary to effect an assignment as long as the language shows the intention of the owner of a right to transfer it'" (Suraleb, Inc. v International Trade Club, Inc., 13 AD3d 612, 612

[2d Dept 2004], quoting Tawil v. Finkelstein Bruckman Wohl Most & Rothman, 223 AD2d 52, 55 [1st Dept 1996]; see also Leon v Martinez, 84 NY2d 83, 88 [1994] ["[n]o particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned"]).

The parties do not dispute that PartnerRe, as the holder of the Stillwater Note, obtained assignment of all of the Stillwater Fund assets pursuant to the Foreclosure Agreement. PartnerRe's intent to transfer and assign those assets to LFR, a wholly owned subsidiary, was made clear not only in the written corporate resolutions effecting the transfer, but in the Foreclosure Agreement, itself, which provides that, upon obtaining the Stillwater Fund assets, PartnerRe "shall simultaneously contribute such assets to the Acquirer," identified as LFR (Servidea Affirm., Ex. CC, Foreclosure Agreement, § 2.1). The intent to transfer the Stillwater Fund assets to LFR is also reflected in various other provisions of the Foreclosure Agreement, pursuant to which the Issuer Parties (which are defined to include Stillwater Funding and GABH f/k/a The Stillwater Asset Backed Fund LP d/b/a The Stillwater Asset-Backed

Fund LP, among others), agreed that, after the effective date of the transaction:

> the Acquirer (including any designee, nominee or assignee of Acquirer) may at any time sell, transfer, ... encumber, lease, assign, permit to lapse, or abandon the Sale Assets or any portion thereof and may take or omit to take any action which the Acquirer (and its designees, nominees and assignees) may deem to be in its own best interest with regard to the Sale Assets

(Id., § 8.1) and that

> each Issuer Party shall cooperate with the Foreclosing Parties to facilitate and effectuate the orderly transition of ownership, servicing, management and operation of the Sale Assets including delivering to the Acquirer all books, records, documents and instruments directly and exclusively pertaining to the Sale Assets or directly and exclusively affecting the Foreclosing Parties

(Id., § 10.2). The Foreclosure Agreement defined the Foreclosing Parties to include the Indenture Trustee, the Noteholder (PartnerRe), and the Acquirer (LFR).

LFR's receipt of the transferred assets, from and through its parent companies, is evidenced by the corporate resolutions accepting the contribution and intra-corporate transfer of these assets (Servidea Affirm., Exs. DD, EE, FF), and a journal entry transferring the loans to LFR (Barnes Aff., Exhibit 12). Moreover, this Court takes note that, since acquiring these assets, LFR has commenced a number of actions to recover payments due on various other of the law firm loans in the portfolio, and has been awarded judgments to recover such payments based on loan

documentation that it acquired pursuant to the very same series of purchase, assignment, and transfer agreements that have been submitted in this action (e.g., LFR Collections LLC, as Acquirer of Certain Receivables of The Stillwater Asset-Backed Fund LP v Tate Law Group, LLC, Sup Ct, NY County, Oct. 16, 2012, Kornreich, J., Index No. 652544/2011; LFR Collections LLC, as Acquirer of Certain Receivables of The Stillwater Asset-Backed Fund LP v Weiss & Assoc., LLC, Sup Ct, NY County, Feb 10, 2012, Sherwood, J., Index No. 652586/2011; LFR Collections LLC, as Acquirer of Certain Receivables of The Stillwater Asset-Backed Fund LP v The Law Offices of Robert H. Weiss, PLLC, Sup Ct, NY County, Feb. 8, 2012, Schweitzer, J., Index No. 652597/2011). In awarding judgment in each case, the Court necessarily determined that LFR held the rights, title and interest in the proffered loan documentation, and, thus, had standing to assert its claims.

Res Judicata

As for defendants' contention that this action is barred by res judicata, at least with respect to Smolar's obligations under the Guaranty, such defense is waived by the express terms of the Guaranty. Courts have held that, "[b]y explicitly agreeing in the guaranty that, notwithstanding any other occurrence whatsoever, the only defense to their obligations thereunder would be the full and final payment and satisfaction of their

guaranteed obligations," a defendant waives the defense of res judicata (Nexbank, SSB v Soffer, 129 AD3d 485, 486 [1st Dept 2015]). Here, Smolar agreed in paragraph 2.02 of the Guaranty, that:

> The obligations of the Guarantor under Section 2.01 hereof are absolute and unconditional, irrespective of the value, genuineness, validity, regularity or enforceability of the Credit Agreement, the Revolving Credit Note or any other agreement or instrument (including, without limitation, any other Financing Agreements) referred to herein or therein, ... and to the fullest extent permitted by applicable law, irrespective of any other circumstance whatsoever which might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor, it being the intent of this Section 2.02 that the obligations of the Guarantor hereunder shall be absolute and unconditional , under any and all circumstances

(Servidea Affirm., Ex. D, Guaranty, ¶ 2.02).

In any event, defendants' contention that res judicata bars this action because SABF/Lender had the sole authority to enforce the loan documentation and properly asserted the counterclaims in the Georgia action, is belied by the documentary evidence. There is no dispute that SABF/Lender had already transferred its rights and interest in the Smolar assets to Stillwater Funding well before commencement of the Georgia action. To the extent that it had authority, under the Servicing Agreement, to commence actions to enforce the loan documentation, that authority arose solely from the fact that it was an agent of Stillwater Funding, to "enforce its rights and interests in and under the Conveyed

Assets" (Kassenoff Affirm., Ex. I, Servicing Agreement, § 2.1). There, however, is no indication that SABF/Lender, which was being sued solely for conspiring with the Weiss firm to divert their shared legal fees (see fn 7, supra), was asserting the counterclaims as Servicer and agent on behalf of Stillwater Funding, which was not named and did not appear in the Georgia action. Moreover, plaintiff has produced evidence that SABF/Lender, and all of its remaining assets, had itself been acquired, merged into a new entity, renamed GABH, and received a new general partner, well prior to the commencement of the Georgia action. The successor entity GABH, and its new general partner, were also neither named, nor appeared, in the Georgia action. Additionally, the record reflects that the Servicing Agreement itself was terminated by the Foreclosure Agreement in June 2011, before the Smolar plaintiffs in the Georgia action either sought or obtained summary judgment against SABF/Lender and its former general partner on the conspiracy claim, and that SABF/Lender, which was no longer represented in the Georgia action, also had "voluntarily" withdrawn the counterclaims before such judgment was rendered.

Counterclaim

Defendants' contention that SABF/Lender had authority to assert the Georgia counterclaims as the owner and holder of the

Note/Amended Note, is also inconsistent with the documentary evidence. The Note/Amended Note is not defined as a Receivable to be transferred under the terms of the RPA. Nevertheless, a perusal of the RPA, along with the other agreements that were executed by the parties on that same date, reveals that SABF/Lender, as seller, was required to "deliver to, and deposit with the Indenture Trustee, as custodian, not later than 10 days after the Closing Date, the Receivables File with respect to each Account" (Servidea Affirm., Ex. X, RPA § 2.1 [f]; Ex. Y, Indenture Agreement, § 6.19[a] [providing that Lender, as a Seller, "shall deliver the Receivables File with respect to each Account to the Indenture Trustee in accordance with the terms of the [RPA]"]). The term "Receivables File" is defined, in section 1.1 of the Indenture Agreement, to mean:

> with respect to an Account, the following documents: (I) the original promissory note and security agreement executed by the applicable Law Firm endorsed to "Wilmington Trust Company, not in its individual capacity but solely as Indenture Trustee for the Stillwater Funding LLC Asset Backed Notes", (ii) each original guaranty executed by the majority controlling owners of the applicable Law Firm in favor of the applicable Seller and (iii) the original of each other document, agreement or certificate executed or delivered in connection therewith

(Id., Ex. Y, Indenture Agreement, § 1.1). Thus, in accordance with these agreements, SABF/Lender would no longer have been

owner or holder of the Note/Amended Note following the sale and transfer of the Smolar loan assets to Stillwater Funding.

30% Interest

Defendants' final contention that LFR obtained only the 30% interest in the Smolar Receivables transferred from Lender to Stillwater Funding pursuant to the RPA provides an insufficient ground for dismissal of the complaint and, in any event, is still unavailing. The Stillwater Offshore Purchase Agreement, between Stillwater AB Offshore Funding, Ltd. and Stillwater Funding, expressly provides that:

> [a]t any time following the conveyance of the Stillwater Offshore Conveyed Assets, the Buyer [Stillwater Funding] may, at its discretion (with the consent of the Majority Noteholders) terminate or cancel any Stillwater Offshore Receivables Interest included in the Stillwater Offshore Conveyed Assets with respect to which the Buyer has also acquired a direct interest in the underlying Receivables pursuant to the [RPA]

(Barnes Aff., Ex. 2, Stillwater Offshore Purchase Agreement, § 2.1[h]).

Clearly, when this provision of the Stillwater Offshore Purchase Agreement is read together with section 2.1(I) of the RPA that only those receivables interests conveyed to Stillwater Funding pursuant to the Stillwater Offshore Purchase Agreement, to which Stillwater Funding also had acquired a direct interest, were cancelled by the RPA, not the entire purchase agreement by

which such receivables were conveyed. Indeed, RPA § 2.1(I) itself provides that such cancellation would occur only, "upon [the] effectiveness of this Agreement ... and the Stillwater Offshore Purchase Agreement." These provisions, along with the recitals included in the subsequent Foreclosure Agreement, are sufficient to establish that 100% of the Smolar assets were conveyed to Stillwater Funding, and thereafter, through PartnerRe, to LFR.

Accordingly, for all the foregoing reasons, defendants' motion for summary judgment to dismiss LFR's claims is denied.

Plaintiff's Motion for Summary Judgment (Motion Sequence 004)

To establish prima facie entitlement to summary judgment on its claims to recover against the Smolar Firm on the Amended Note and Amended Credit Agreement, plaintiff must prove the existence of the instruments for payment of the money in question, and the failure to pay in accordance with their terms (Wachovia Bank, N.A. v Silverman, 84 AD3d 611, 612 [1st Dept 2011]). To establish prima facie entitlement to summary judgment against Smolar on his Guaranty, plaintiff "must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl," N.Y. Branch v Navarro, 25 NY3d 485, 492 [2015] [citation and quotation omitted]).

LFR has met its prima facie burden of establishing entitlement to judgment on the issue of liability against the Smolar Firm with respect to the Amended Note and Amended Credit Agreement, and against Smolar on his Guaranty .

Plaintiff proffers the affirmation of Kathleen Servidea, the Associate General Counsel and Secretary of LFR, which annexes copies of the Amended Note, the Amended Credit Agreement, and the Guaranty, along with the original loan documents and various of the amendments thereto. The Amended Note, dated June 10, 2009, contains a promise to pay the maximum principal amount of $9,843,089.59 or, if less, the aggregate unpaid principal sum of all loans made to Smolar Firm pursuant to the Credit Agreement, as amended from time to time, together with interest at the rates provided in the Credit Agreement. The Amended Credit Agreement, dated June 10, 2009, contains an acknowledgment by the Smolar Firm that as of June 10, 2009, the aggregate outstanding balance under the Credit Agreement and Financing Agreements was $8,843,080.59; that such amounts were valid and binding obligations enforceable against borrower; and, that borrower waived and released any claim, counterclaim, cause of action, or defense of any kind to the payment and satisfaction of the obligation. The Smolar Firm further acknowledged an additional obligation to pay another $1 million in liability attributable to

certain assigned rights, and waived and released any defenses, offsets, claim, and or counterclaims with respect to that obligation.

In the Guaranty, dated November 9, 2004, Smolar unconditionally and irrevocably agreed to full and prompt payment when due of principal owing by the borrower to the Lender on the revolving loans, and all fees, costs and expenses under the Credit Agreement or any other Financing Agreement. Smolar further agreed that should the obligations of the borrower under the Credit Agreement and Note be declared or become due and payable, such obligations would become due and payable by the Guarantor. In his confirmation of Guaranty, dated June 10, 2009, Smolar affirmed his unconditional guaranty to pay Lender payment when due "of any and all Obligations of the Borrower to the Lender (other than payment of interest), including attorneys' fees, costs and expenses of collection incurred by the Lender in enforcing any of the Obligations" (Servidea Affirm., Ex. R).

The Smolar Firm did not repay the principal and unpaid interest, fees, and expenses owed under the Amended Note and Amended Credit Agreement upon the December 31, 2009 maturity date, and Smolar did not repay the principal and unpaid interest, fees and expenses owed under the Smolar Guaranty upon the

December 31, 2009 maturity date (Servidea Affirm., ¶¶ 9-10; Ex. W).

In opposition, defendants do not dispute that they have failed to make the payments called for by the instruments' terms. Instead, in their affirmation in opposition and memorandum of law, defendants reiterate their defenses that LFR's claims are barred by res judicata, that LFR failed to establish that it acquired the Smolar Receivables, that the right to enforce the Smolar Receivables remained with Lender, and that the transfer of the 70% of Smolar Receivables from Stillwater AB Offshore Funding, Ltd. to Stillwater Funding had been cancelled by the RPA. To the extent that these defenses were not waived by the broad waivers and releases in the operative agreements, they are insufficient to raise a triable issue of fact as to liability for the reasons stated above with respect to defendants' motion for summary judgment dismissal.

Defendants also proffer, in opposition to this motion, an affidavit from Yehuda Smolar, dated February 9, 2012, who disputes the accuracy of LFR's loan balance and interest calculations and avers that, under the terms of the Guaranty, LFR cannot hold him personally responsible for any interest charges. Smolar contends that LFR's own evidentiary submissions contain internal inconsistencies as to the amount of the outstanding loan

balance, and argues that issues of fact also exist as to the applicable interest rate to be applied to the outstanding balances under the terms of the Amended Note and Amended Credit Agreement. Smolar notes that, according to the documentation provided by LFR (Servideaa Affirm., Ex. W), LFR appears to have applied the 24% interest rate, applicable upon the occurrence and continuance of an event of default, to loan balances prior to such default, and may improperly have charged compounded rather than simple interest. Smolar additionally notes that, pursuant to paragraph 2.07 of his November 9, 2004 Guaranty, the Guarantor only agreed to pay interest at "the rate set forth in Section 2.2.2 of the Credit Agreement." Smolar asserts that, because the Credit Agreement contains no such section, there is no specified interest applicable to the Guaranty. Smolar further contends that the statement contained in his June 10, 2009 Confirmation of Guaranty, that the Guaranty unconditionally guaranteed to Lender payment of any and all obligations of the borrower "other than the payment of interest," is an express acknowledgment that he never agreed to guaranty any interest charges. Smolar argues that, at a minimum, the Confirmation of Guaranty is sufficient to raise a triable issue of fact in this regard.

Based on the foregoing, plaintiff's motion for summary judgment on its claims to recover amounts due under the Amended

Note, the Amended Credit Agreement, and the Guaranty, is granted as to liability, as defendants have failed proffer evidence sufficient to rebut LFR's prima facie showing by proffering evidence sufficient to raise a triable issue of fact with respect to a bona fide defense.

With respect to the issue of the balance owed by defendants, plaintiff proffers, as exhibit W to the Servidea affirmation, a computer printout of the Smolar Loan history. According to the Servidea affirmation, as of December 1, 2011, the outstanding amount of the loan was $12,579,236, consisting of principal advances of $4,082,487, and accrued interest and fees of $10,250,424, less payments in the amount of $1,753,674 (Id., ¶ 11; Ex. W). The printout indicates that interest and fees consisted of $9,193,793.78 in interest, and $1,056,630.72 in fees and expenses, including $437,306.16 in legal expenses. The printout also indicates that interest was calculated at a rate of 24% for the entire loan period. Plaintiff also proffers a second, more recent computer printout of the Smolar loan balance calculations for the period between June 10, 2009 and March 27, 2015 (Barnes Aff., Ex. 31). This printout states that, on the obligation of $9,843,080.59, as of June 10, 2009, a total balance was due from Smolar Firm in the amount of $54,358,439.28, and a total balance was due from Smolar on his Guaranty in the amount

of $47,439,490.10 (Id.). The printout indicates calculation at an ordinary interest rate of 24% and at a default interest rate of 30%, but does not indicate when each rate was applied. This second printout also indicates that the balance due from the Smolar firm as of December 1, 2011 totaled $20,032,203.35, and that the balance due from Smolar on his Guaranty, as of that date, totaled $17,482,428.21, significantly higher than the balance that plaintiff claimed was due as of this date in the earlier printout. Such documentation does not clearly indicate how the amounts on each of the printouts were calculated, and how or what interest rates were applied. Moreover, plaintiff has not accounted for the apparent inconsistencies in the outstanding balances between the first and second printouts. Under these circumstances, the calculation of the outstanding debt, including calculation of the appropriate interest rate, costs and fees, however, is respectfully referred to a Special Referee or Judicial Hearing Officer.

Plaintiff's motion to strike defendants' affirmative defenses is granted to the extent of dismissing all, but the ninth affirmative defense, alleging that the amounts sought were improperly calculated under the terms of the agreements, and the tenth affirmative defense, challenging the calculation and/or collection of interest pursuant to the terms of the Guaranty.

Other than the affirmative defenses of res judicata and lack of standing, which this Court has now determined fail to raise a triable issue of fact, defendants have set forth no facts to support the remaining affirmative defenses asserted in their opposition papers.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss the complaint (mtn seq. no. 003) is denied; and it is further

ORDERED that the branch of plaintiff's motion (mtn seq. no. 004) that seeks to strike and dismiss defendants' affirmative defenses is granted to the extent of striking and dismissing all but the ninth and tenth affirmative defenses; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment against defendant Yehuda Smolar, P.C., on its claims to recover on the Ninth Amended and Restated Revolving Credit Note ("Amended Note"), and the Amendment No. 10 to the Credit Agreement ("Amended Credit Agreement"), and against Yehuda Smolar, on its claim to recover against his Guaranty, is granted as to liability, and it is further

ORDERED that the issue of damages, including the calculation of the amounts due and owing as of the date of entry of this order, and including the determination and calculation of the

applicable rate of interest, costs and fees, is hereby respectfully referred to a Special Referee or Judicial Hearing Officer; and it is further

ORDERED that the above-noted reference to the Special Referee or Judicial Hearing Officer is to hear and report with recommendations, or if the parties so-agree, to hear and determine; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at th earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "references" link under "Courthouse Procedures") shall assign this matter to an available Special Referee or Judicial Hearing Officer to hear and report or hear and determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall

advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that any motion to confirm or reject the Report of the Special Referee shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/6/17

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.