FCRE REL, LLC v Christopher
2018 NY Slip Op 31737(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 652489/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39
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FCRE REL, LLC,

Plaintiff, Index No.: 652489/2017

-against- **DECISION AND ORDER**

KETTLES, L. CHRISTOPHER,

Defendant.
---x
Saliann Scarpulla, J.

In this motion for summary judgment in lieu of complaint, plaintiff FCRE REL, LLC ("FCRE") seeks a judgment directing defendant L. Christopher Kettles ("Kettles") to pay FCRE the sum of $3,801,548.15 in outstanding principal and accrued interest owed as of February 2, 2017. Kettles cross moves to dismiss the action or in the alternative, to stay the action, or in the alternative, to proceed based on a formal complaint.

On April 15, 2015, FCRE issued a mortgage loan in the amount of $3.9 million to non-party A&B Associates, L.P. ("borrower"), primarily owned and operated by Kettles. The mortgaged property was a 96-unit residential apartment development located in South Carolina, owned by the borrower. Kettles executed a Guaranty of Recourse Obligations and Environmental Indemnity Agreement in connection with the loan.

The Guaranty provided, in relevant part, "Guarantor hereby irrevocably and unconditionally guarantees to [FCRE] and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and

payable, whether by lapse of time, by acceleration of maturity or otherwise." The Guaranteed Obligations included "the obligations or liabilities of Borrower to [FCRE] for which [FCRE] has recourse against Borrower, or with respect to which Borrower is personally liable to [FCRE], pursuant to Section 11.22 of the Loan Agreement." Section 11.22 of the Loan Agreement included the following statement: "the Debt shall be fully recourse to Borrower and Borrower shall be personally liable therefor in the event that: . . . Borrower files a voluntary petition under the Bankruptcy Code or any other federal or state bankruptcy or insolvency law . . ."

The Guaranty further provided that "Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor" and "this Agreement is an irrevocable, absolute, continuing guaranty of payment and performance and not a guaranty of collection." Finally, the Guaranty stated that "the Guaranteed Obligations and the liabilities and obligations of Guarantor to [FCRE] hereunder shall not be reduced, discharged or released because or by reason of any existing or future offset, claim or defense of Borrower or any other party against [FCRE] or against payment of the Guaranteed Obligations, whether such offset, claim or defense arises in connection with the Guaranteed Obligations (or the transactions creating the Guaranteed Obligations) or otherwise" and "FCRE has no obligation to exhaust any other rights of recovery before seeking to enforce its rights under the Guaranty."

From the date of closing through July 18, 2016, the borrower made its monthly principal and interest payments to FCRE. On July 18, 2016, FCRE declared that the borrower was in default because, among other things, it failed to maintain the subject

property in good condition, it allowed material impairment of the value of the property, and it committed waste to the property.

On July 20, 2016, FCRE appeared at the property accompanied by a police officer and forced the borrower from the property. In addition, FCRE seized the borrower's bank accounts, receivables, leases, contracts and personal property, and installed a new property manager for the property. Allegedly, none of the money seized from the borrower was applied to its indebtedness. To avoid a monetary default that would have been caused by FCRE's refusal to apply the money seized to the payment of the debt, Kettles advanced a sum of money to FCRE that was more than the amount due under the mortgage. FCRE allegedly refused to return the excess to Kettles.

On August 15, 2016, the borrower filed an action in South Carolina alleging that FCRE falsely declared a non-monetary default and forcibly removed the borrower from the property. Borrower asserted claims, *inter alia*, for breach of contract and breach of the covenant of good faith and fair dealing. It also sought a temporary restraining order, which the Court granted, ordering FCRE to restore the borrower to the possession of the property. The Court also ordered FCRE to return to the borrower its money, including "all money received from rents" and "all money removed from [its] bank accounts, including reserve accounts." FCRE has appealed the South Carolina Court's decision.

Thereafter, on September 6, 2016, FCRE filed a third-party complaint against Kettles in the South Carolina action, seeking payment from Kettles on the Guaranty.

On September 23, 2016, the South Carolina Court found FCRE in willful contempt, due to FCRE's failure to return rental money it collected while in possession of

the property, failure to return the reserve accounts taken from borrower, failure to return the overpayment funds paid to FCRE, charging of default interest against the borrower, and changing the sweeping instructions on the borrower's Wells Fargo bank account such that the money in the account would sweep into an account owned and controlled by FCRE.

On February 3, 2017, the borrower filed a Voluntary Petition for Bankruptcy Court protection under Chapter 11 of the United States Bankruptcy Code.

FCRE now moves for summary judgment in lieu of complaint on the guarantee here in New York, arguing that the borrower's filing of the bankruptcy petition triggered Kettles' liability for the full amount of the debt pursuant to the guaranty.[1]

Kettles cross-moves to dismiss the action pursuant to CPLR 3211(a)(4) or, in the alternative, to stay the action, or in the alternative, to require FCRE to proceed based on a formal complaint. Kettles first argues that summary judgment in lieu of complaint was not the appropriate procedure in this case because there is not straightforward evidence of an instrument and proof of nonpayment sufficient to make out a *prima facie* case. Rather, this case involves reciprocal obligations pursuant to the underlying agreement, out of which the guaranty arose, and the evidence suggests that FCRE breached the underlying agreement by falsely declaring an event of default, and then improperly seizing possession of the borrower's property and money for its own use. In fact, FCRE

[1] After this action was commenced, borrower moved before the South Carolina Bankruptcy Court to enjoin this action pursuant to 11 U.S.C. Section 105. The motion was denied.

was held in willful contempt in the South Carolina action for its refusal to return certain monies it improperly took from the borrower.

Further, Kettles argues, issues of fact exist here as to whether FCRE brought about the occurrence of the condition precedent (the borrower's bankruptcy filing) upon which it relied to allege that the loan must be accelerated against the guarantor. Finally, Kettles maintains that this action should be dismissed or stayed because of the action pending in South Carolina in which FCRE is also seeking to impose liability against Kettles under the guaranty.

In opposition to Kettles' cross-motion, FCRE argues that it has produced uncontradicted evidence that Kettles executed the guaranty, Kettles' liability was triggered when the borrower filed for bankruptcy, and Kettles has failed to pay FCRE any portion of the debt owed. Further, the guaranty was absolute and unconditional and as such, Kettles waived any right to assert any defense, counterclaim or setoff.

FCRE also maintains that the action cannot be dismissed or stayed because the claims asserted herein are distinct from the claims asserted in the South Carolina action. Although FCRE asserted a "counterclaim" against Kettles in the South Carolina action arising from the borrower's breach of the agreement, the alleged liability here arises from the bankruptcy petition filed by the borrower in February 2017, which occurred long after the claims were asserted in the South Carolina action. In addition, deferring this action for the bankruptcy proceeding would undermine the purpose of the guaranty, which is to prevent bankrupt parties from avoiding liability.

<u>Discussion</u>

Pursuant to CPLR 3211(a)(4) a Court has broad discretion in determining whether an action should be dismissed where there is another action pending between the same parties for the same cause of action in a court of any state or the United States. *See Whitney v. Whitney*, 57 N.Y.2d 731 (1982). An action warrants dismissal as the result of a prior action where the court determines that there is a substantial identity of the parties and causes of action and that the relief sought is the same or substantially the same. *Matter of Willnus*, 101 A.D.3d 1036 (2nd Dept. 2012). "Proceedings begun in another State should not be interfered with unless there is some necessity clearly shown .... Generally, the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." *White Light Prods. v. On the Scene Prods.*, 231 A.D.2d 90, 96 (1st Dept. 1997) (internal quotations omitted).

Even if the action sought to be dismissed was commenced first-in-time in favor of a substantially similar action commenced later, it would not be an abuse of the Court's discretion to dismiss the first-in-time action in favor of the second-in-time action, if they were commenced reasonably close in time to one another and the second action "offers more" than the first action commenced. *Continental Ins. Co. v. Polaris Indus. Partners*, 199 A.D.2d 222, 223 (1st Dept. 1993). Further, even if the precise legal theories in the two actions differ, the fact that the pleadings in both cases are based upon the same actionable wrong, seek the same or substantially similar relief, and have substantial identity of parties, dismissal of one action pursuant to CPLR 3211(a)(4) may be appropriate. *See Shah v. RBC Capital Mkts. LLC,* 115 A.D.3d 444 (1st Dept. 2014);

Schaller v. Vacco, 241 A.D.2d 663 (3rd Dept. 1997). The critical element is that both suits arise out of the same subject matter or series of alleged wrongs. *See Cherico, Cherico & Assoc. v Midollo*, 67 A.D.3d 622 (2nd Dept. 2009).

Here, the issues raised and relief sought in the motion for summary judgment in lieu of complaint in this action are substantially the same as the issues raised and relief sought in the third-party claims in the pending South Carolina action. Specifically, in both, FCRE is seeking a determination that Kettles is liable under the guaranty. While FCRE refers to its claim under the guaranty in the South Carolina action as a mere "counterclaim," in fact, FCRE commenced a third-party action against Kettles in the South Carolina action seeking recovery under the guaranty.

Given that all issues raised under the underlying loan agreement and under the guaranty are already to be resolved in South Carolina, it would be inefficient to have this action continue here. The South Carolina action "offers more" than the action commenced here, in that it deals with all issues surrounding the underlying agreement, the borrower's alleged default, FCRE's alleged breach, and Kettles' guaranty. *See generally Continental Ins. Co. v. Polaris Indus. Partners*, 199 A.D.2d 222, 223 (1st Dept. 1993).

FCRE argues that this action materially differs from the South Carolina action and cannot be dismissed because it was the borrower's bankruptcy filing that is alleged to have triggered liability under the guaranty here, as opposed to the borrower's non-monetary default, which was alleged to have triggered liability under the guaranty in the South Carolina action. However, as discussed above, the precise legal theories in the two

cases do not have to be identical to permit dismissal of one case. In addition, FCRE can seek to amend its third-party complaint in the South Carolina action to add the other ground under which it is seeking recovery pursuant to the guaranty in this action.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff FCRE REL, LLC's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that defendant Christopher L. Kettles' cross-motion to dismiss the action, or in the alternative, to stay the action, or in the alternative, to proceed based upon a formal complaint is granted to the extent that the action is dismissed because of a prior action pending, and the Clerk of the Court is directed to enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: March 27 2018
New York, New York

J.S.C.
HON. SALIANN SCARPULLA