

Fidelity & Deposit Co. of Maryland v Boymelgreen
2018 NY Slip Op 33266(U)
December 17, 2018
Supreme Court, New York County
Docket Number: 654309/2015
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. BARBARA JAFFE</u>	PART	IAS MOTION 12EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>654309/2015</u>
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,		MOTION DATE	_____
Plaintiff,		MOTION SEQ. NO.	<u>003</u>

- v -

JESHAYAHU BOYMELGREEN a/k/a SHAYA BOYMELGREEN a/k/a SAM BOYMELGREEN and SARA BOYMELGREEN a/k/a SARAH BOYMELGREEN,

Defendants.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 106, 107, 108, 131, 132, 133, 134, 135, 136, 137, 138 were read on this motion for _____ summary judgment _____.

Plaintiff moves for an order granting it summary judgment against defendants, jointly and severally, in connection with the settlements of three lien foreclosure actions as set forth in a general agreement of indemnity (GAI), by which defendants agreed to repay plaintiff for amounts it had paid to lienors. It seeks the balance due under the GAI, attorney fees, costs, and expenses incurred in defending the lien actions and enforcing the terms of the GAI herein, and attorney fees incurred in prosecuting this action. (NYSCEF 62-102, 135-136).

Defendants oppose and Sara Boymelgreen cross-moves for an order granting her summary judgment, claiming that absent her signature on repayment agreements with plaintiff entered into by defendant Jeshayahu Boymelgreen upon their default under the GAI, she cannot be held liable and that the repayment agreements constitute novations which extinguish the GAI. (NYSCEF 132-134).

Although no affirmative defense based on novation is advanced in defendants' answer, plaintiff addresses it in its papers and claims no prejudice. Thus, defendants are not deemed to have waived it. (*See DCA Advertising, Inc. v The Fox Group*, 2 AD3d 172, 173-175 [1st Dept 2003] [defendants' failure to include novation as defense in answer did not result in waiver, as they argued it extensively in summary judgment motion, and plaintiff addressed it on merits without claiming surprise or prejudice], citing *Rogoff v San Juan Racing Ass'n*, 54 NY2d 883, 885 [1981]).

A novation results when parties :

clearly express their intention that a subsequent agreement be substituted for an existing valid contract. That intention is clearly expressed when one agreement states that it supersedes another because words that supersede or supplant have been defined to mean "set aside," "annul," "displace" and "make void."

(Novation, 28 NY Prac, Contract Law § 8:41).

Defendants point to no clear expression in any of the repayment agreements indicating that the GAI was thereby superseded. (*See Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952 [2d Dept 1985 [settlement documents could not create novation inasmuch as original contract had already been breached by defendant's failure to pay on promissory note when first installment became due]). Rather, they advance the baseless argument that the repayment agreements constitute novations solely by virtue of their existence, and fail to acknowledge that having breached the GAI by defaulting on it, they could not have extinguished it absent a clear expression to that effect. To credit their argument would permit them, as debtors, to avoid their obligations under the GAI by simply defaulting on it and accepting the generosity of plaintiff in agreeing to permit repayment notwithstanding the default. They do not otherwise address their liability for defaulting on the GAI. That Sara did not sign the repayment agreements does not relieve her of liability on the GAI.

Having demonstrated, *prima facie*, its entitlement to summary judgment, and absent any triable issue of fact raised by either defendant, it is hereby

ORDERED, that plaintiff's motion for summary judgment is granted; it is further

ORDERED, that defendant Sara Boymelgreen's cross motion for summary judgment is denied; and it is further

ORDERED, that the clerk is directed to enter judgment in favor of plaintiff, Fidelity and Deposit company of Maryland, against defendants Jeshayahu Boymelgreen a/k/a Shaya Boymelgreen a/k/a Sam Boymelgreen and Sara Boymelgreen a/k/a Sarah Boymelgreen, jointly and severally, as follows:

- (1) on plaintiff's first cause of action, the sum of \$370,000.00, with interest thereon from October 4, 2012 at the statutory rate, as calculated by the clerk, in the sum of \$_____, for a total of \$_____;
- (2) on plaintiff's second cause of action, the sum of \$59,457.68;
- (3) on plaintiff's third cause of action, the sum of \$100,000.00, with interest thereon from March 20, 2014 at the statutory rate, as calculated by the clerk, in the sum of \$_____, for a total of \$_____;
- (4) on plaintiff's fourth cause of action, the sum of \$90,871.00;
- (5) on plaintiff's fifth cause of action, the sum of \$204,000.00, with interest thereon from December 17, 2014 at the statutory rate, as calculated by the clerk, in the sum of \$_____, for a total of \$_____;
- (6) on plaintiff's sixth cause of action, the sum of \$45,880.33;
- (7) on plaintiff's seventh cause of action, the sum of \$37,333.00, with interest thereon from March 20, 2014 at the statutory rate, as calculated by the clerk, in the sum of

\$ _____, for a total of \$ _____; and

(8) on plaintiff's eighth cause of action, the sum of \$17,842.76; and

(9) the total sum due is \$ _____;

it is further

ORDERED, that plaintiff's is entitled to recover its costs and disbursements, as taxed by the clerk upon submission of an appropriate bill of costs; it is further

ORDERED, that plaintiff's claim for attorney fees and expenses incurred in the prosecution of this action is hereby severed and is referred to a special referee for determination; it is further

ORDERED, that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) the amount of costs and expenses, including reasonable attorney's fees, that plaintiff incurred in prosecuting the instant action;

it is further

ORDERED, that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated below; it is further

ORDERED, that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (SRP), which, in accordance with the Rules of the Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; it is further

ORDERED, that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible 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 Referees Part; it is further

ORDERED, that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referee Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that part; it is further

ORDERED, that except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specific above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; it is further

ORDERED, that counsel shall file memoranda or other documents directed to the assigned Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED, that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

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12/17/2018

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE