Bridge Loan Venture V Trust 2017-1 v Gomes
2020 NY Slip Op 31414(U)
May 6, 2020
Supreme Court, New York County
Docket Number: Index No. 653191/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM
Justice

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BRIDGE LOAN VENTURE V TRUST 2017-1,

Plaintiff,

- v -

TAMMY GOMES, DAVID GOMES

Defendant.

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INDEX NO. 653191/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In motion sequence number 001, plaintiff Bridge Loan Venture V Trust 2017-1 (Bridge Loan) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants Tammy Gomes and David Gomes. Defendants' cross-move, pursuant to CPLR 3211, for dismissal. In the alternative, defendants cross-move, pursuant to CPLR 325(a), for removal of the action, or pursuant to CPLR 511(b) and CPLR 602(b), to change place of trial upon ground of improper venue and consolidate this action with an existing Florida foreclosure action.

Background

Defendants Tammy Gomes and David Gomes are the two principals and only employees of nonparty Flip Side Equity Partners LLC (Flip Side). (NYSCEF Doc. No. [NYSCEF] 28, D. Gomes aff at ¶ 10[b].) Flip Side received a $688,091 loan (the October 13 Loan) from nonparty First Rehab Lending, LLC (First Rehab) pursuant to a promissory note dated October 13, 2017 (the October 13 Note). (NYSCEF 3, Tessitore

aff at ¶ 3.)[1] "The October 13 Note is secured by a mortgage on a property located at 1137 Island Road, Rivera Beach, Florida 33404 (the October 13 Mortgage) and by a Collateral Assignment of Leases and Rents in connection with the same property (the October 13 Lease Assignment) made by Flip Side in favor of First Rehab." (*Id.* at ¶ 5.) The October 13 Note and October 13 Loan were guaranteed by Tammy and David Gomes pursuant to two Commercial Guaranties also executed on October 13, 2017 (the October 13 Guaranties). (*Id.* at ¶ 8.) The October 13 Guaranties contain a New York choice of law clause and a New York forum selection clause. (NYSCEF 7 and 8, October 13 Guaranties at §16.) The October 13 Guaranties provide that they will "inure to the benefit of [First Rehab], and its successors and assigns." (*Id.* at § 15.) They also state that

> "[t]he liabilities and obligations of [Tammy and David Gomes] shall be absolute and unconditional irrespective of (i) any lack of vitality or enforceability of the Note ... or (iii) any other circumstance or claim which otherwise might constitute a defense available to, or a discharge of, [Flip Side] with respect to its liabilities ... under the Loan Documents, or of [Tammy and David Gomes] with respect to [the October 13 Guaranties]."

(*Id.* at § 10.)

On October 19, 2017, Flip Side received a second loan from First Rehab in the amount of $664,321 (the October 19 Loan) pursuant to a promissory (the October 19 Note). (NYSCEF 3, Tessitore aff at ¶ 15.) The October 19 Note is secured by a mortgage on a property located at 118 Cascade Lane, Palm Beach Shores, Florida 33404 (the October 19 Mortgage) and by a Collateral Assignment of Leases and Rents

[1] Michael Tessitore is Senior Vice President of Smith, Graham & Co. Investment Advisors, L.P., which is the manager of SGIA Residential Bridge Loan Venture V GP (general partner of Plaintiff's administrator).

in connection with the same property made by Flip Side in favor of First Rehab (the October 19 Lease Assignment). (*Id.* at ¶ 17.) The October 19 Note was also guaranteed by Tammy and David Gomes pursuant to Commercial Guaranties executed on October 19, 2017 (the October 19 Guaranties). (*Id.* at ¶ 20.) Like October 13 Guaranties, the October 19 Guaranties contain a New York choice of law and forum selection clauses. (NYSCEF 14 & 15, October 19 Guaranties at § 16.) They also provide that they will "inure to the benefit of [First Rehab], and its successors and assigns" (*id.* at § 15) and state that

> "[t]he liabilities and obligations of [Tammy and David Gomes] shall be absolute and unconditional irrespective of (i) any lack of vitality or enforceability of the Note ... or (iii) any other circumstance or claim which otherwise might constitute a defense available to, or a discharge of, [Flip Side] with respect to its liabilities ... under the Loan Documents, or of [Tammy and David Gomes] with respect to [the October 13 Guaranties]."

(*Id.* at § 10.)

Under the October 13 and October 19 Notes, interest payments were due on the first day of each month from December 1, 2017 through November 1, 2018. (NYSCEF 3, Tessitore aff at ¶ 27.) The entire balance of both notes, including the unpaid principal and accrued unpaid interest, was due on November 1, 2018. (*Id.* at ¶ 27.) Flip Side failed to make interest payments on the October 13 and October 19 Loans on September 1, 2018 and October 1, 2018. (*Id.*) Flip Side also failed to repay all amounts due under those loans when they both matured on November 1, 2018. Following Flip Side's defaults, the Gomes failed to pay the guaranteed amounts. (*Id.* at ¶ 28.)

Prior to this alleged default, on November 15, 2017, First Rehab assigned the October 13 and October 19 Mortgages to plaintiff Bridge Loan (Mortgage Assignments). (*Id.* at ¶¶ 11, 23.) First Rehab executed allonges to the October 13 and October 19 Notes (Note Allonges) and delivered both notes to Bridge Loan. (*Id.* at ¶¶ 13, 25.)

To recover the principal and interest due (approximately $1,157,463.16 plus accruing interest), Bridge Loan commenced this action for summary judgment in lieu of complaint against Tammy and David Gomes. (*Id.* at ¶¶ 32.)

Discussion

CPLR 3213 provides, "[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." CPLR 3213 is generally used to enforce commercial paper "in which the party to be charged has formally and explicitly acknowledged an indebtedness, so that a prima facie case would be made out by the instrument" and a failure to make the promised payments. (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dep't 2017] [internal quotation marks and citations omitted].) With respect to judgment on a guaranty, a plaintiff meets its prima facie burden by proving "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [internal quotation marks and citation omitted].) Then, "the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense." (*Id.* [internal quotation marks and citation omitted].)

Bridge Loan meets its prima facie burden by proving the existence of the October 13 and 19 Guaranties, the underlying debts in the form of the October 13 and 19 Notes, and the defendants' failure to perform under the guaranties as outlined in Michael Tessitore's[2] affidavit and attached exhibits, including the Guaranties (NYSCEF 7, 8, 14, 15), the Notes (NYSCEF 4, 11), and the demand letters for immediate payment (NYSCEF 18, 19).

Defendants fail to raise a triable issue with respect to a bona fide defense. Defendants assert that Bridge Loan filed two complaints in the Florida Circuit Court of the 15th Judicial Circuit, Palm Beach County, to foreclose on the October 13 and 19 Mortgages (collectively, the Florida Foreclosure Actions). Because of the Florida Foreclosure Actions, defendants argue that this action in New York should be dismissed pursuant to RPAPL 1301 (3), which "prohibits a party from commencing an action at law to recover any part of the mortgage debt while a foreclosure proceeding is pending or has not reached final judgment without leave of the court in which the foreclosure action was brought" (*VNB N.Y. Corp. v Paskesz*, 131 AD3d 1235, 1236 [2d Dep't 2015] [internal quotations marks and citation omitted].)

However, "[a]lthough RPAPL 1301 (3) prohibits a mortgage lender seeking repayment of a loan from simultaneously prosecuting an action at law to recover upon a promissory note and an action in equity to foreclose the mortgage, the prohibition does not apply where, as here, the property securing the loan is located outside of New York State." (*Wells Fargo Bank Minn. v Cohn*, 4 AD3d 189, 189 [1st Dep't 2004] [citation

[2] Tessitore is "Senior Vice President of Smith, Graham & Co. Investment Advisors, L.P., which is the manager of SGIA Residential Bridge Loan Venture V GP (general partner of Plaintiff's administrator)." (NYSCEF 3, Tessitore aff at ¶1.)

omitted].) Accordingly, this action is not barred by RPAPL 1301 (3) because the mortgaged properties are located in Florida.

Defendants additionally argue that: (1) Bridge Loan failed to provide the principal loan amount promised in the loan; (2) Bridge Loan made fraudulent statements such as the full principal amount would be available to the defendants and that draw requests would be funded on a timely basis; (3) Bridge Loan's action were fraudulent because the plaintiff was not loaning its own funds; and (4) defendants did not default on the loans due to the extra interest being calculated on the principal held back by the plaintiff.

However, these arguments are unavailing because of the sweeping language in the October 13 Guaranties and October 19 Guaranties.

> "Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are 'absolute and unconditional,' have been consistently upheld by New York Courts. Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses ... Th[e] [Court of Appeals] has acknowledged the application of these absolute guaranties even to claims of fraudulent inducement in the execution of the guaranty ... "

(*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.*, 25 NY3d at 493 [internal quotations and citations omitted].) Here, the "plain terms, in broad, sweeping and unequivocal language" foreclose any challenge to the enforceability of the October 13 and October 19 Notes while foreclosing any defense otherwise available to Tammy and David Gomes in the performance of the October 13 and October 19 Guaranties. (*Id.* at 494.)

Nevertheless, defendants fail to submit "evidentiary proof sufficient to raise a triable issue with respect to the asserted defenses." (*Bronsnick v Brisman*, 30 AD3d 224, 224 [1st Dep't 2006] [internal quotation marks and citation omitted).] Their conclusory and unsubstantiated allegations are not enough to defeat this motion for summary judgment. (*Id.*) Further, while defendants allege fraud, as they did not receive the full loan amounts, Bridge Venture only seeks the principle and interest on the amounts drawn by defendants and not the full amount of the Loans. Defendants do not dispute that they received those amounts.

Defendants cross-move to dismiss pursuant to CPLR3211 (a)(4) on the ground that the Florida Foreclosure Actions involve the same debt. CPLR 3211 (a)(4) provides that

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that 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; the court need not dismiss upon this ground but may make such order as justice requires."

CPLR 3211 (a)(4) empowers the court to use its discretion and make such order as justice requires, but the court is not required to dismiss a claim on these grounds. Although the Florida Foreclosure Actions name Tammy and David Gomes as defendants, those actions are to foreclose the mortgages on properties owned by nonparty Flip Side whereas this action is for recovery under the October 13 and October 19 Guaranties.

Additionally, it is undisputed that the October 13 and October 19 Guaranties expressly designate New York as the exclusive forum to resolve matters arising from the guaranties. "Forum selection clauses are enforced because they provide certainty

and predictability in the resolution of disputes." (*Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006].) Because the causes of action here and in Florida are different, and because the parties to this action specifically agreed that New York courts have exclusive jurisdiction for the litigation of matters arising out of the guaranties, justice requires that this action concerning the Guaranties remain in New York.

For largely the same reasons, the defendants' assertion that the first-in-time rule requires dismissal in favor of the Florida Foreclosure Actions fails. "New York courts generally follow the first-in time rule, which instructs that 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." (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 7 [1st Dep't 2007] [internal quotation marks and citations omitted].) To reach the first-in-time question, "it is necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions." (*White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93 [1st Dep't 1997] [citation omitted].) With respect to the latter inquiry concerning the subject of the actions, the criterion is lacking where the purposes of the two actions are different. (*Id.* at 94.) As discussed earlier, the purposes of these actions are entirely different because the Florida Foreclosure Actions concern the foreclosure of mortgages on properties owned by Flip Side whereas this action is for recovery under the guaranties executed by the guarantors Tammy and David Gomes.

Defendants' explicit and implicit arguments concerning CPLR 325 (a), CPLR 511 (b), and CPLR 602 (b) are either inapplicable or unavailing. The court has reviewed the

balance of the defendants' arguments, and to the extent properly before the court, they do not yield an alternative result.

Accordingly,

ORDERED that plaintiff Bridge Loan Venture V Trust 2017-1's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that defendant Tammy and David Gomes' cross motion is denied in its entirety; and it is further

ORDERED that plaintiff Bridge Loan Venture V Trust 2017-1 is directed to submit a proposed judgment within 14 days of entry of this decision onto NYSCEF by the court. Defendants will have 7 days from the date of submission of plaintiff's proposed judgment to submit an objection to plaintiff's calculations in its proposed judgment.

5/6/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE