

Gamma Pa W. Girard LLC v Rahn
2020 NY Slip Op 34247(U)
December 21, 2020
Supreme Court, New York County
Docket Number: 654265/2020
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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GAMMA PA WEST GIRARD LLC,	INDEX NO. 654265/2020
Plaintiff,	MOTION DATE
- v -	MOTION SEQ. NO. 001
CHRISTOPHER RAHN, and CHRISTINE PASIEKA,	
Defendants.	DECISION + ORDER ON MOTION

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HON. BARRY R. OSTRAGER

Before the Court is the motion by plaintiff Gamma PA West Girard LLC (“Gamma”) for summary judgment in lieu of complaint, pursuant to CPLR § 3213, seeking a multi-million dollar judgment based on a written guaranty executed by defendants Christopher Rahn and Christine Pasioka (“the Guarantors”). The Guarantors were served with the papers in this case and conferred with Gamma’s counsel in an attempt to resolve the matter (NYSCEF Doc. No. 12). However, settlement efforts failed, the Guarantors did not submit any papers in opposition to the motion by the deadline set, and Gamma thereafter requested that the Court grant the motion on default (NYSCEF Doc. No. 14). Based on the papers submitted, the motion is granted to the extent provided below.

In support of the motion, plaintiff has submitted the affidavit of Jonathan Kalikow, the President of plaintiff’s affiliate Gamma Real Estate, based on personal knowledge and a review of the relevant documents (NYSCEF Doc. No. 2). Kalikow explains the factual background of the case and authenticates the documents. The documents establish that, on or about April 25, 2019, Gamma, as Lender, entered into a Construction Loan Agreement with West Girard Holdings, LLC (“WGH”), as Borrower, in the principal sum of \$19,150,000.00 for the

improvement of a fee simple of certain land located in Philadelphia, Pennsylvania, with three (3) structures containing forty (40) one-bedroom residential units. (NYSCEF Doc. No. 4, Ex. 1, "the Loan Agreement"). At that same time, WGH executed a Promissory Note in favor of Gamma for the maximum principal sum of \$19,150,000.00. (NYSCEF Doc. No. 4, Ex. 2, "the Note"). Also on April 25, 2019, the Guarantors provided a written guaranty pursuant to which the Guarantors, for the benefit of Gamma, jointly and severally guaranteed the full and punctual payment and performance of all of WGH's obligations under the Loan Agreement (NYSCEF Doc. No. 4, Ex. 3, the "Guaranty").

Kalikow asserts in his affidavit in conclusory fashion, with no supporting documentation, that "WGH defaulted on its payment obligations on or around September 1, 2019 ." (NYSCEF Doc. No. 2, ¶13). Thereafter, by letter dated April 20, 2020, Gamma notified WGH and the Guarantors that an Event of Default had occurred under the Terms of the Loan Agreement and that Gamma intended to pursue its remedies against both the Borrower and the Guarantors. (NYSCEF Doc. No. 4, Ex. 4, "the Default Notice"). The Default Notice does not specify the date of the alleged default or a specific amount due. In his September 4, 2020 affidavit, Kalikow asserts the outstanding amount of principal due is \$18,927,437.90, and he requests on behalf of Gamma a judgment against the Guarantors for that amount plus additional substantial sums for accrued per diem interest, interest reserves, exit fees, and late fees for a total of s \$23,995,934.13 after applying a credit of Tax and Insurance Reserve Remaining in the amount of \$31,891.73. (*Id.* at ¶19). Gamma also requests reasonable attorney's fees in an unspecified amount pursuant to paragraph 7(o) of the Guaranty.

As Gamma's counsel correctly notes in his memorandum of law, it is well settled in New York that an unconditional and irrevocable guarantee constitutes an "instrument for the payment

of money only" within the meaning of CPLR § 3213. *Poah One Acquisition Holdings V Ltd. v. Armenta*, 96 AD3d 560 (1st Dep't 2012) (stating that an absolute and unconditional guaranty, which expressly waived demand or presentment is an "instrument for the payment of money only" within the meaning of CPLR § 3213). The Guaranty executed in this case is an unconditional Guaranty that qualifies for 3213 treatment. And the Kalikow affidavit is sufficient to establish the Guarantors' default. The Court therefore turns to the amount of the judgment to which Gamma is entitled.

Through the Kalikow affidavit and the documentary evidence, Gamma has established its right to summary judgment in lieu of complaint against the Guarantors based on Gamma's default in making the payments due pursuant to the Loan Agreement. However, Gamma is not entitled to the full amount demanded, as the proof is insufficient with respect to some of the categories claimed.

The Court accepts Gamma's assertion that the outstanding principal on the Note was \$18,927,437.90 when the motion was made. Contractual interest runs from the date of the default, which Gamma has established to be April 20, 2020 based on the above-referenced Notice of Default. Kalikow's conclusory assertion of a default "on or about September 1, 2019" is unsupported by a ledger sheet or any other documentation and is too vague to trigger the accrual of interest on such a substantial sum. The Court therefore rejects the claim that Gamma is entitled to \$24,110.81 in accrued interest through September 3, 2020 at a per diem rate of \$8,036.94 and instead finds Gamma is entitled to interest at the contractual rate of 15.25% per annum from the April 20,2020 default through the date of entry of this decision in an amount to be calculated by the Clerk of the Court. The rate of 15.25% has been calculated by counsel pursuant to paragraphs 3.4(a) and (b) of the Loan Agreement. (NYSCEF Doc. No. 17).

The Court rejects Gamma's demand for additional interest based on the claim of "Interest Reserve Remaining Deficient: \$2,939,991.74." That charge is not adequately documented or even explained in any way. Nor has Gamma adequately documented or explained its entitlement to an "Exit Fee" in the amount of \$948,621.89.

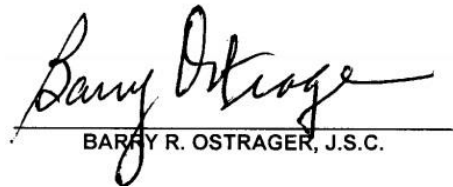
Gamma also requests Late Fees in the sum of \$1,142,663.53 pursuant to Paragraph 3.4(c) of the Loan Agreement. That provision states that: "In the event that any payment due under the terms hereunder is not received by Lender within five (5) days of the date such payment is due (inclusive of the date when due) for regularly scheduled principal and interest payments or within fifteen (15) days of notice for any other payments, Borrower shall pay to Lender a late charge equal to five percent (5%) of such payment. Such fee shall be payable on the earlier of (i) the date of demand by Lender and (ii) the date that Borrower makes the late payment. For the avoidance of confusion, no late fee shall apply to the payment of principal due on the Maturity Date." However, as with the other charges, Gamma has failed to allege with sufficient specificity or documentation how the amount was calculated. Therefore, that claim is denied.

For the sake of consistency, the Court cannot credit the conclusory and undocumented claim that the Guarantors are entitled to a credit for "Tax and Insurance Reserve Remaining" in the amount of \$31,891.73. However, Gamma has established its right to "reasonable attorney's fees" pursuant to paragraph 7(o) of the Loan Agreement. Although Gamma's counsel has not provided an affirmation of services rendered, the Court finds that an award of \$5,000.00 constitutes a reasonable amount for this motion.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent provided herein, and the Clerk is directed to enter judgment in favor of plaintiff Gamma PA West Girard LLC against defendants Christopher Rahn and Christine Pasieka jointly and severally in the principal sum of \$18,927,437.90 plus interest at the contractual rate of 15.25% per annum from April 20, 2020 through the entry of this decision and at the statutory rate of 9% per annum thereafter in an amount calculated by the Clerk of the Court, upon plaintiff's e-filing of a Proposed Judgment directed to the County Clerk.

Dated: December 21, 2020


 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: