SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **53**

Justice

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AMERRA CAPITAL MANAGEMENT, LLC,

Plaintiff,

- v -

TONY STRUYK, JEFFREY LAKE, LEXSCI LABS, INC.

Defendant.

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INDEX NO. 651630/2020

MOTION DATE 04/13/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons set forth on the record (12.15.21), Amerra Capital Management (the **Lender**)'s motion for summary judgment pursuant to CPLR 3212 against Tony Struyk (the **Guarantor**) must be granted.

Reference is made to (i) Credit Agreement, dated August 21, 2019, by and between the Lender and Elemental Processing LLC (the **Borrower**) pursuant to which the Borrower borrowed $8 million from the Lender, (ii) a case captioned *AMERRA Capital Management, LLC v Elemental Processing, LLC*, Case No. 20-CI00907 [Ky Cir Ct Fayette Cty 2020] (NYSCEF Doc. No. 62), pursuant to which the court (the **Kentucky Court**) granted summary judgment against the Borrower and appointed a receiver to conduct a sale of Borrower's assets and (iii) a Guaranty (the **Guaranty**, NYSCEF Doc. No. 51), dated as of August 21, 2019, by Lexsci Labs, Inc. a Kentucky corporation, Tony Struyk, and Jeffrey Lake (each a **Guarantor,** and collectively, hereinafter the **Guarantors**), pursuant to which the Guarantors (x) jointly and severally

absolutely and unconditionally guaranteed the full, prompt payment and performance when due on the Guaranteed Obligations (as such term is defined in the Guaranty; Section 2(i) and Section 4 of the Guaranty), (y) that the Guaranty was a guaranty of payment and performance and not merely of collection, and (z) otherwise agreed that the obligations of a Guarantor shall not be in any way affected by, among other things, the sale, transfer or conveyance of the Collateral (as such term is defined in the Guaranty) or any interest therein, whether now or hereafter having or acquiring an interest in the Collateral or any interest therein and whether or not pursuant to any foreclosure, trustee sale or similar proceeding against the Borrower or the Collateral or any interest therein (Section 4(iii) of the Guaranty) or the conveyance to the Lenders or their affiliates of the Collateral or any interest therein by a deed-in-lieu of foreclosure (Section 4(iv) of the Guaranty).

On December 1, 2020 (NYSCEF Doc. No. 46, ¶ 20), the Lender successfully credit bid on the assets, and on December 7, 2020, the Kentucky Court confirmed the sale of Elemental's assets as commercially reasonable under the Uniform Commercial Code: "[t]he Bid Procedures, the Receiver's sale process, the Auction, and the sale of the Purchased Assets to the Successful Bidder or its permitted assignee pursuant to the [asset purchase agreement] were commercially reasonable and consistent with the Court's orders" (NYSCEF Doc. No. 64). The attorneys' fees were part of the deficiency judgment that the Kentucky Court found to be commercially reasonable and approved (NYSCEF Doc. No. 65).

On February 14, 2020, the Lender served a Notice of Demand for Payment Under Guaranty letter (**Guaranty Demand Letter**; NYSCEF 54) and on March 11, 2020, the Lender brought this

action pursuant to the Guaranty against the Guarantors seeking the deficiency from the December 1, 2020 auction of the Collateral and for costs, expenses and attorneys' fees (NYSCEF Doc. No. 1). Subsequently, on April 1, 2021, the Kentucky Court ordered entry of deficiency judgment against Elemental in the amount of $6,225,844.68 (NYSCEF Doc. No. 65).

On a motion for summary judgment pursuant to CPLR § 3212, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324). The Lender adduces (i) a Credit Agreement, (ii) Guaranty, and (iii) Guaranty Demand Letter meeting its prima facie burden demonstrating its right to judgment. (*id.*). Mr. Strucyk fails to raise a material issue of fact in his opposition papers.

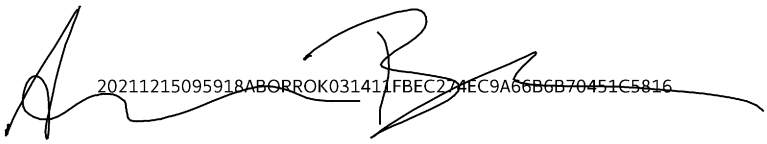
Under UCC 9-627, a disposition that has been approved by a court is presumed commercially reasonable (UCC 9-627; *Gannett Co. v Tesler*, 177 AD2d 353, 353 [1st Dept 1991] (finding a sale to be commercially reasonable despite higher and better offers because in accordance with UCC 9-507(2), predecessor to UCC 9-627, a sale approved by judicial proceedings is deemed commercially reasonable); *see also Owens v First Commonwealth Bank*, 706 SW2d 414, 416 [Ky Ct App 1985]). As discussed above, on December 7, 2020, the Kentucky Court found that the receiver's sale was commercially reasonable (NYSCEF Doc. No. 64). The issue is therefore res judicata.

It does not matter that Mr. Struyk was not a party to that proceeding because he was in privity with the Borrower who was a party (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]); *Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 537-538 [2017], *lv denied* 29 NY3d 919 [2017]). Mr. Struyk as principal of the Borrower and Guarantor of the loan is deemed in privity with the Borrower and undeniably already litigated the issues related to the Borrower's default and the sale of the collateral including the deficiency judgment including the attorneys' fees (NYSCEF Doc. Nos. 83 and 84). Moreover, contractually, the absolute and unconditional Guaranty is a guaranty of payment not performance pursuant to which Mr. Struyk agreed that his obligations would not be affected by the sale of the Collateral even if the Collateral was purchased by the Lender. For the avoidance of doubt, Mr. Struyk's argument that the burden today is on the Lender to demonstrate the collateral bid and subsequent sale by auction was commercially reasonable pursuant to UCC 9-610 fails because the foreclosure sale was conducted by and was in possession of the receiver and not the Lender as secured party. This fact is not changed because the Lender advanced certain funds to the receiver to windup the company, pay the employees, expenses, etc. (NYSCEF Doc. No. 82, ¶ 5). Lastly, the fact that Mr. Struyk and his company, the Borrower, are appealing the Kentucky Court's decision does not mean that they get a second bite at the apple here (*5512 OEAAJB Corp. v Hamilton Ins. Co.*, 189 AD3d 1136, 1139 [2d Dept 2020]).

Accordingly, it is

ORDERED that Amerra Capital Management LLC's motion for summary judgment is granted; and it is further

ORDERED that Amerra Capital Management LLC is direct to serve judgment on notice.



12/15/2021
DATE

ANDREW BORROK, 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		