SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BBM3, LLC

Plaintiff,

- v -

JAMES VOSOTAS,

Defendant.

INDEX NO. 652015/2021

MOTION DATE 02/03/2022, 02/24/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for TURNOVER PROCEEDING.

Upon the foregoing documents and for the reasons set forth on the record (8.17.22), the motion to renew or reargue must be denied because the defendant failed to raise issues of fact or law that the court overlooked or new facts that the defendant justifiably failed to provide on the prior motion (CPLR 2221[e][d]).

Reference is made to the Decision and Order (the **Prior Decision**; NYSCEF Doc. No. 80), dated January 4, 2022, pursuant to which the court granted summary judgment in lieu of complaint based on James Vosotas' default of his obligations under (i) a certain an Interest and Carry Guaranty (NYSCEF Doc. No. 6), dated as of December 22, 2017, by Mr. Vosotas and Branden Muhl jointly and severally as Guarantors and (ii) a certain Completion Guaranty (the

Completion Guaranty; NYSCEF Doc. No. 7), dated as of December 22, 2017, by Mr. Vosotas and Mr. Muhl jointly and severally as Guarantors.

Contrary to the defendant's arguments, the Completion Guaranty's definition of Guaranteed Obligations does not change the essential character of the Completion Guaranty from an instrument for the payment of money only (NYSCEF Doc. No. 7, § 1.2; *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]; *Arena Ltd. SPV, LLC v Goldstein,* 2021 NY Misc LEXIS 5812 *21 [Sup Ct NY County 2021]).

Significantly, Mr. Vosotas concedes that many of the arguments raised in this motion could have but were not made by his prior attorney by the prior motion. An attorney's errors and omissions are binding on their client (*Hudson City Sav. Bank v Bomba*, 149 AD3d 704, 705-06 [2d Dept 2017]) and that an attorney erred, without more, does not constitute a basis for a motion to renew or reargue pursuant to CPLR 2221[d] or [e].

As discussed in the Prior Decision, the amounts owed and the right to include the Turner Construction Delay claim in the guarantor's obligations are not in dispute (NYSCEF Doc. No. 80). Inasmuch as the plaintiff is relying on dated balances and no funding has occurred (NYSCEF Doc. Nos. 8, 10, 11 and 12), the plaintiff may well be entitled to more.

Mr. Vosotas' argument that there is an issue of fact as to the amounts due because Mr. Muhl agreed to reduce the interest fails. In support of this argument, Mr. Vosotas adduces a certain

email (NYSCEF Doc. No. 94), dated August 9, 2019, from Mr. Muhl to Mr. Vosotas. The problem with his argument is that the email merely indicates that the interest rate would go down from Libor+5 to the potential floor of Libor+2.5 upon the occurrence of certain de-risking events:

> It's looking to be $37M on the proceeds immediately (as early as this month--slightly more than Monian) and potentially up to $45M at Cert of Occupancy depending on how the new appraisal comes out.
>
> The rate starts at L+5 and steps down progressively as we hit de-risking events (CO is one of them) with a potential floor of L+2.5. So at today's rates it is 1%+ cheaper than the EB-5 loan.
>
> It's important to understand that this is all at term sheet and Letter of Intent stage right now. We are targeting doing the first closing on the pre-CO structure at the end of this month and a second closing on the post-CO structure 01/01/20. The plan is obviously subject to change as we get approvals from relevant third parties but we do have approval from US Bank & Morgan Stanley already
>
> (NYSCEF Doc. No. 94).

Thus, this does not reflect an agreement to reduce the interest rate in a manner inconsistent with the loan documents, no issue of fact exists and Mr. Vosotas has failed to demonstrate facts not considered or misapprehended by the court. Thus, the motion to renew or reargue must be denied.

The motion objecting to Mr. Vosotas' exemption designation of his four bank accounts, ending with (i) 6661, (ii) 1774, (iii) 3894, and (iv) 7759, is granted to the extent of denying the exemption designation as it relates to the bank accounts ending in 6661, 1774, and 3894. It is however denied with respect to the bank account ending in 7759 to the extent of the 90% exemption discussed below.

The burden to rebut the presumption that joint accounts are for convenience only rather than having an interest in the account that can be levied rests upon the defendant (*Viggiano v Viggiano*, 136 AD2d 630, 631 [2d Dept 1988]) In *Viggiano*, the Appellate Division held that in the context of a post-judgment enforcement proceeding against the husband, the husband and his mother met their burden of demonstrating that the account belonged solely to the mother and that the husband's name was on the account for convenience only. In support of their contention, they demonstrated that the mother alone collected interest, controlled the bankbook, paid all taxes and made all deposits and withdrawals and the husband's name was only on the account in the event of his mother's death or illness.

In their opposition papers, Mr. Vosotas' father, Daniel Vosotas, provided bank statements for the account ending in 6661 (NYSCEF Doc. No. 130) and an affidavit stating that Mr. Vosotas does not make deposits into this account (NYSCEF Doc. No. 133). The amounts deposited are for Mr. Vostas' benefit. It does not matter that Mr. Vostas' father is the depositor. This is not what is meant by for convenience. As such, it is not exempt.

As to the accounts ending 1774 and 3894, Carla Christina Vosotas, Mr. Vosotas' wife, adduced bank statements, a trace chart (NYSCEF Doc. No. 127), and an affidavit stating that except for a few instances, Mr. Vosotas does not make deposit into these accounts (NYSCEF Doc. No. 132). The provided exhibits and affidavits however fail to rebut the presumption that Mr. Vosotas does not have an interest in the money by failing to demonstrate that they were not used for Mr. Vosotas' personal benefit. Therefore, the funds in the bank accounts ending 1774, and 3894 are also not exempt from the Judgment dated January 13, 2022 (NYSCEF Doc. No. 85).

The account ending in 7759 is however 90% exempt for salary paid to Mr. Vosotas for work rendered prior to February 24, 2022. Pursuant to CPLR 5205(d)(2):

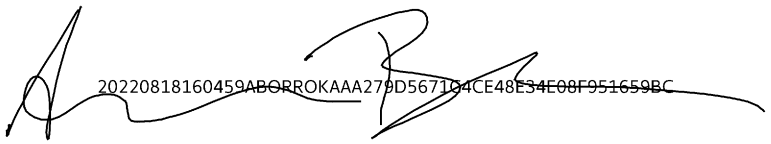
> **(d) Income Exemptions**. The following personal property is exempt from application to the satisfaction of a money judgment, except such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his dependents:
>
> . . .
>
> 2. ninety per cent of the earnings of the judgment debtor for his personal services rendered within sixty days before, and at any time after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment
>
> (CPLR 5205[d][2]).

Mr. Vosotas contends that the money in the account ending in 7759 constitutes funds earned from being a salaried employee of Trans Inns Management Inc. (**Trans Inns**). The money paid to Mr. Vosotas for work rendered within sixty days before the plaintiffs made the instant application on February 24, 2022 (NYSCEF Doc. No. 112) and any time after, is 90% exempt from the satisfaction of the judgment (CPLR 5205[d][2]). At oral argument counsel for Mr. Vosotas stated that Mr. Vosotas will upload his W-2 forms from Trans Inns to NYSCEF. This must be done by August 19, 2022 by 5:00 PM. In the event that Mr. Vosotas' counsel fails to upload the W-2 form, the plaintiff is given leave to renew his motion objecting to the 90% income exemption status for the accounting ending in 7759.

Accordingly, it is

ORDERED that the motion to renew or reargue (Mtn. Seq. No. 004) is denied; and it is further

ORDERED that the motion seeking to object to the defendant's designation of his four bank accounts (Mtn. Seq. No. 005) is granted to the extent of denying the exemption designation for the accounts ending in 6661, 1774, and 3894 but is otherwise denied as to the 90% salary exemption discussed above.



8/18/2022
DATE

ANDREW BORROK, J.S.C.

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