

Bank of Baroda, N.Y. Branch v Katalyst Tech., Inc.
2022 NY Slip Op 33636(U)
October 20, 2022
Supreme Court, New York County
Docket Number: Index No. 655128/2021
Judge: Andrew S. Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BANK OF BARODA, NEW YORK BRANCH,	INDEX NO.	655128/2021
Plaintiff,	MOTION DATE	N/A, 09/19/2022
- v -	MOTION SEQ. NO.	001 002
KATALYST TECHNOLOGIES, INC., RAHUL SHAH		
Defendant.	DECISION + ORDER ON MOTION	

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HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39

were read on this motion to/for ATTORNEY -
DISQUALIFY/RELIEVE/SUBSTITUTE/WITHDRAW.

Upon the foregoing documents, Bank of Baroda, New York Branch's (the **Lender**) motion for summary judgment in lieu of complaint is granted. It is undisputed that payments due under the Credit Agreement (hereinafter defined) and the Promissory Note (hereinafter defined) have not been paid by Katalyst Technologies, Inc. (the **Borrower**) or Rahul Shah (the **Guarantor**). It also is not disputed that the Credit Agreement and the Promissory Note are instruments for the payment of money only. This is prima facie evidence of entitlement to summary judgment in lieu of complaint pursuant to CPLR 3213 (*DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]).

Reference is made to (i) a Credit Agreement (the **Credit Agreement**; NYSCEF Doc. No. 5)

dated as of October 10, 2018 between the Lender and Katalyst Technologies, Inc. (the

Borrower) pursuant to which the Lender agreed that, upon request of the Borrower, it would loan up to \$10 million to the Borrower, (ii) a Promissory Note (the **Promissory Note**; NYSCEF Doc. No. 6) dated October 10, 2018 between the Lender and the Borrower pursuant to which the Lender loaned \$10 million to the Borrower, and (iii) a Guaranty Agreement (the **Guaranty**; NYSCEF Doc. No. 9) dated as of October 10, 2018 by and between the Lender and Rahul Shah (the **Guarantor**) pursuant to which the Guarantor guaranteed the Borrower's payment and performance obligations under the Credit Agreement.

The Borrower agreed to repay its loans to the Lender in thirty equal installments on the first day of every month following the Moratorium Period (six months from the first disbursement date) (NYSCEF Doc. No. 5, § 2.03[b]). Interest was to be paid at the applicable interest rate (six month's LIBOR plus 235 basis points) and was due on the first day of every month for interest accrued on outstanding loans for the previous month (*id.*, § 2.04). The Borrower was responsible for various other fees, including a processing fee of 1.75% of the outstanding amount of the loans on an annual basis (*id.*, § 3.05) and the cost of the Lender's semi-annual inspection of certain collateral on which the Lender had a lien pursuant to the Credit Agreement and other credit documents (*id.*, § 6.04). If the Borrower failed to make payments when due, the Lender could accelerate the Loan and make all amounts due and payable (*id.*, § 8.01).

The first disbursement payment was made on October 24, 2018 (NYSCEF Doc. No. 35). The first payment by the Borrower was therefore due after the Moratorium Period ended on May 24, 2019. The Borrower made this payment in two parts on June 11, 2019 and June 12, 2019 (*id.*). The Borrower made a subsequent payment on September 20, 2019 (*id.*). It is not disputed that

no subsequent payments were made. The Lender notified the Borrower and the Guarantor by letter dated March 18, 2020, that the Borrower was in default for failure to (i) make monthly payments beginning in October 2019, (ii) make monthly interest payments beginning in October 2019, (iii) pay the Lender's annual processing fee, and (iv) pay the Lender's inspection charge (NYSCEF Doc. No. 10). By letter dated August 16, 2021, the Lender informed the Borrower that it remained in default and that the Lender was accelerating the debt due under the Credit Agreement (NYSCEF Doc. No. 11). To be clear, it is not disputed that the Borrower has been in default since October 2019 and remains in default under the Credit Agreement.

The Borrower's argument that the Credit Agreement and the Promissory Note are not instruments for the payment of money only is unavailing. It does not matter that the Credit Agreement was part of series of other agreements or that entering into certain other agreements was a condition precedent under the Credit Agreement. The obligations to pay are strictly contained within the Credit Agreement and are not impacted by any of the other documents. Nor does it matter that the parties entered into a security agreement pursuant to which the Borrower pledged certain collateral to the Lender to induce the Lender to enter into the Credit Agreement. The Credit Agreement provides that the Lender may foreclose on the collateral under the Credit Agreement but is not required to. The Lender is not doing so here and that does not alter the Lender's right to accelerate the Borrower's loan under the Credit Agreement.

The Borrower's argument that issues of fact exist to preclude summary judgment also fails. The Borrower asserts that the Lender is liable for breach of contract, negligent misrepresentation, and breach of fiduciary duty in connection with negotiations between the parties to allow the

Borrower to refinance and repay its debt to the Lender. As the Borrower acknowledges, its efforts to refinance included several banks over many months, one of whom withdrew and another of whom went bankrupt. The Borrower's argument that this attempt to refinance and the Lender's assistance in that process somehow rewrote the Credit Agreement is unavailing, particularly because the Credit Agreement required any modification to be in writing (NYSCEF Doc. No. 5, § 9.01). The Borrower's argument that the Lender owed it a fiduciary duty by virtue of the Credit Agreement and Promissory Note or by virtue of an Intercreditor Agreement to which the Borrower is not a party is similarly unavailing. Nor do the Credit Agreement, Promissory Note, or any efforts to assist the Borrower in refinancing establish a special relationship to give rise to a negligent misrepresentation claim. The Borrower further argues that the Lender breached other contracts between the parties that are sufficiently intertwined, such that summary judgment is inappropriate. The Borrower does not, however, identify any specific contract which the Lender allegedly breached. The Borrower asserts that monthly payments were made from January 2019 through August 2019 and that these payments should offset any amount awarded to the Lender. This claim is unsupported by anything other than the naked assertion set forth in Mr. Shah's affidavit and is insufficient to create an issue of fact. The Borrower has failed to raise any issue of fact to warrant denial of the Lender's motion for summary judgment in lieu of complaint.

The Court has considered the Borrower's remaining contentions and finds them unavailing.

Michael A Orozco, Esq.'s motion (Mtn. Seq. No. 002) to withdraw as counsel for the Borrower and the Guarantor is granted as unopposed.

It is hereby ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that the plaintiff shall submit judgment on notice; and it is further

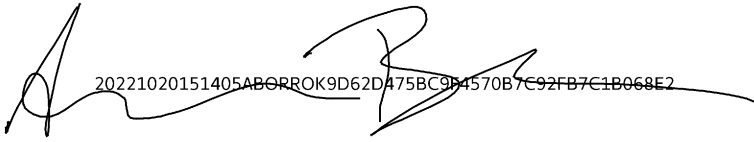
ORDERED that, if the defendants wish to file a proposed counter-judgment, they shall do so within 10 days of the date of the plaintiff's submission of judgment; and it is further

ORDERED that Michael A Orozco, Esq.'s motion to withdraw as counsel is granted without opposition upon filing proof of filing with the following conditions; and it is further

ORDERED that Mr. Orozco shall serve a copy of this order with notice of entry upon the former clients at their last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by filing on NYSCEF; and it is further

ORDERED that, together with the copy of this order with notice of entry served upon the former client, moving counsel shall forward a notice directing the former client to appoint a substitute attorney within 30 days from the date of the mailing of the notice and the client shall comply therewith, except that, in the event Mr. Shah intends instead to represent himself, he shall notify the Clerk of the Part of this decision in writing within said 30-day period; and it is further

ORDERED that any new attorney retained by the defendants shall file a notice of appearance with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Part within 40 days from the date the notice to retain new counsel is mailed.

<u>10/20/2022</u> DATE	 <small>20221020151405ABORROK9D62D475BC9D4570B7C92FB7C1B068E2</small> ANDREW S. BORROK, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE
APPLICATION:		
CHECK IF APPROPRIATE:		