# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. MELISSA A. CRANE** **PART** **60M**

*Justice*

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DB AURARIA LLC,

Plaintiff,

- v -

PATRICK NELSON, NELSON PARTNERS, LLC

Defendant.

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**INDEX NO.** 653436/2022

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 49

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

In Motion Seq. No. 01, plaintiff DB Auraria LLC moves for summary judgment in lieu of complaint against defendants under a Guaranty of Recourse Obligations (Guaranty) (Doc 10 [Guaranty]).

In November 2019, nonparty Cantor Commercial Real Estate Lending, L.P. (Lender) loaned $46,500,000 to 5280 Auraria, LLC (Borrower) in connection with a residential high-rise building in Denver, Colorado (Doc 6 [Loan Agreement]; *see* Docs 7-8 [Promissory Notes in the amounts of $24 million and $22.5 million]). The Loan's maturity date was December 9, 2021.

In connection with the Loan, defendants executed the Guaranty in November 2019. Defendants, jointly and severally as the Guarantor, "irrevocably and unconditionally guarantees to Lender and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise" (Doc 10, Section 1.1). In Section 1.1, defendants-guarantors also "irrevocably and unconditionally covenant[] and agree[] that it is liable for the Guaranteed Obligations as a primary obligor" (*id.*). Section 1.2 of the Guaranty defines

Guaranteed Obligations as "all obligations and liabilities of Borrower pursuant to Section 3.1 of the Loan Agreement" (*id.*). Section 1.3 states that "[t]his Guaranty is an irrevocable, absolute, continuing guaranty of payment and performance and not a guaranty of collection" (*id.*).

Section 3.1 (c) of the Loan Agreement provides:

> "Notwithstanding anything to the contrary in this Agreement, the Note or any of the Loan Documents, (i) Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the U.S. Bankruptcy Code to file a claim for the full amount of the Debt secured by the Security Instrument or to require that all collateral shall continue to secure all of the Obligations in accordance with the Loan Documents, and (ii) **Borrower shall be personally liable for the payment of the Debt in the event that one or more of the following occurs (each a "*Springing Recourse Event*"): (A) Borrower, Principal or Guarantor filing a voluntary petition under the Bankruptcy Code or any other federal or state bankruptcy or insolvency law** . . ."

(Doc 6).

Through a series of assignments, plaintiff obtained the Loan Documents, including the two Notes, the Loan Agreement, and the Guaranty, for $46 million in November 2021 (*see* Doc 9 [assignment documents] at 22-57).

The Loan matured on December 9, 2021, and Borrower failed to repay the outstanding debt. Failure to pay the "Debt" upon maturity is an event of default under Section 8.1 (a) (i) of the Loan Agreement (Doc 6). The Loan Agreement defines "Debt" as the "Outstanding Principal Balance together with all interest accrued and unpaid thereon and all other sums (including any Spread Maintenance Premium) due to Lender in respect of the Loan under the Note, this Agreement, the Security Instrument or any other Loan Document" (*id.* at 9). Subsequently, on June 9, 2022, Borrower filed a voluntary chapter 11 bankruptcy petition. Borrower's voluntary bankruptcy filing was an event of default under Section 8.1 (a) (vii) of the Loan Agreement as well as a Springing Recourse Event under Section 3.1 (c) (*id.*). Borrower

became "personally liable for the payment of the Debt" when the Springing Recourse Event occurred (*id.*). Under Sections 1.1 and 1.2 of the Guaranty, defendants also became liable for the payment of the Debt when the Springing Recourse Event occurred (Doc 10).

Plaintiff now moves for summary judgment in lieu of complaint against defendants under the Guaranty. Plaintiff seeks a judgment in the amount of $53,085,438.39, comprised of the following:

- Outstanding Principal on the Loan (including $400,000 advance): $46,900,000.00
- Non-Default Rate Interest Accrued Through 9/8/22: $1,356,836.54
- Default Rate Interest Accrued Through 9/8/22: $3,727,279.06
- Exit Fee: $465,000,00
- Interest Accrued on Exit Fee: $34,230.38
- Property Cash Flow Holdback Credit: (-$108,675.03)
- "Other Expenses Owed": $710,767.43

(Doc 4 [Schlief Aff.] at 5-6).

**DISCUSSION**

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *see Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, New York County 2021], *affd* 2022 NY Slip Op. 00806 [1st Dept 2022]). Generally, an action on a guaranty is an action for payment of money only (*see e.g. Cooperative Centrale Raiffesisen-Boerenleenbank, B.A., "Rabobank Intl.," N. Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]) ("*Cooperative Centrale*"). The same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. Movant must make a prima facie case by submitting the instrument and evidence of the defendant's failure to make

payments in accordance with the instrument's terms (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]). "A guaranty may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, and the need to consult the underlying documents to establish the amount of liability does not affect the availability of CPLR 3213" (*Bank of Am., N.A. v Solow*, 19 Misc 3d 1123(A) [Sup Ct, NY County 2008]).

Plaintiff's Prima Facie Entitlement to Summary Judgment in Lieu of Complaint

Plaintiff has established its prima facie entitlement to summary judgment in lieu of complaint with regard to the outstanding principal balance on the notes, the $400,000 advance, the amount of interest accrued at the regular and default rates, and the exit fee and exit fee interest. Plaintiff submits the Notes, the Loan Agreement, the Guaranty, and the affidavit of J. Eric Schleif with exhibits. Schleif is the Senior Asset Manager of plaintiff's affiliate entity, FIG LLC. Plaintiff also submits evidence of Borrower's defaults under the Loan Agreement (*see e.g.* Docs 14 [chapter 11 petition], 17 [nonparty mechanic's lien against the property]). Plaintiff demonstrates that it demanded payment under the guaranty (*see* Docs 11, 15, 16), and submits proof of defendants' nonpayment (*see* Doc 4 [Schleif Aff.]). Exhibit 8 to Schleif's affidavit adequately establishes that defendants are liable for the following sums as of 9/8/22: the Principal Balance on the Notes of $46,500,000.00; the Protective Advance of $400,000.00; the Accrued Non-Default Rate Interest Through 9/8/22 of $1,356,836.54; the Accrued Default Rate Interest Through 9/8/22 of $3,727,279.06; the Exit Fee of $465,000,00; and the Exit Fee Accrued Interest of $34,230.38. Schleif's Exhibit 8 also demonstrates that defendants are credited $108,675.03 for Property Cash Flow Holdback for Security Deposits (Doc 12 at 1-3, 5-12).

While plaintiff is entitled to recover attorneys' fees from the defendants-guarantors under Section 3.1 (b) of the Loan Agreement for "Borrower's Recourse Liabilities," plaintiff has not established its prima facie case for the amount of "other expenses owed." Plaintiff seeks $710,767.43 for "other expenses" that it purports are enforcement-related expenses. Plaintiff's submissions do not establish that the attorneys' fees and costs are reasonable and only submits a bare spreadsheet indicating total expenses invoiced as "Legal Fees" and "Appraiser Fees" (*see* Doc 12 [Ex. 8 to Schleif Aff.]).

Defendants' Opposition

Defendants make several arguments in opposition to the motion. First, defendants assert that the Guaranty is not an instrument for the payment of money only because it requires defendants to perform "*all* of the 'Guaranteed Obligations' " under the Loan Agreement, including non-monetary "Other Obligations" under Article V. The court disagrees.

Although the Guaranty states, in Section 1.1, that it is a "Guaranty of Guaranteed Obligations," it clearly defines "Guaranteed Obligations" as "all obligations and liabilities of Borrower pursuant to Section 3.1 of the Loan Agreement" (Doc 10). Section 3.1 (b) concerns Borrower's liability for attorneys' fees and expenses for "Borrower's Recourse Liabilities" and Section 3.1 (c) concerns Borrower's liability for "Springing Recourse Events" (Doc 6). Borrower's bankruptcy filing constitutes a Springing Recourse Event under the Loan Agreement.

Further, the language of the Guaranty makes clear that the guarantors "irrevocably and unconditionally guarantee[] . . . **the payment** and performance of the Guaranteed Obligations as and when the same **shall be due and payable**" (Doc 10). Thus, the Guaranty qualifies as an instrument for the payment of money only, regardless of the word "performance" in Section 1.1 (*see 27 W. 72nd St. Note Buyer LLC v Terzi*, 194 AD3d 630, 631-632 [1st Dept 2021], *lv to*

*appeal denied* 37 NY3d 913 [2021]). In *27 W. 72nd St. Note Buyer LLC v Terzi*, the Appellate Division, First Department explained:

> "The guaranty at issue in *31 E. 28th St.* also qualifies as an instrument for the payment of money only. Although it says, "Guarantor . . . guarantees the payment and performance of the Guaranteed Obligations as and when due and payable," the mere addition of the words "and performance" does not necessarily remove the guaranty from the category of instruments for the payment of money only, particularly when the sentence ends with 'as and when due and payable.' In addition, the definition of "Guaranteed Obligations" shows that the obligations are to pay money"

(*id.*).

In *27 W. 72nd St. Note Buyer LLC,* the court distinguished the guaranty provisions in *PDL Biopharma, Inc. v Wohlstadter* (147 AD3d 494 [1st Dept 2017]). In *PDL Biopharma*, "the guarantors guaranteed both payment and performance of the borrower's 'obligations,' but '[t]he term 'obligations' [wa]s not defined in either of the guaranties.' The term was defined in the Credit Agreement; it included the provision of certain information. In other words, the obligations were not limited to paying money" (*27 W. 72nd St. Note Buyer LLC*, 194 AD3d at 631-632, quoting *PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494 [1st Dept 2017]).

Unavailingly, defendants next argue that the court should deny this CPLR 3213 motion and require plaintiff to first seek repayment from Borrower. As defendants concede, Section 1.3 of the Guaranty provides that "[t]his Guaranty is an irrevocable, absolute, continuing guaranty of payment and performance and not a guaranty of collection" (Doc 10). If plaintiff recovers the outstanding amounts owed from the Borrower through the bankruptcy proceeding, any judgment against the defendants arising under the Guaranty will be reduced in that amount. There is no risk of "inconsistent rulings," as defendants assert (*see* Doc 24 [opposition mem.] at 19-20).

The court also rejects defendants' contention that the default interest rate should not date back to the date of the uncured mechanic's lien. Section 8.1 (x) provides that an uncured breach

of Section 5.2.2 [stating that Borrower may not permit liens against the property] is an event of default. Section 2.2.3 of the Loan Agreement states: "In the event that, and for so long as, any Event of Default shall have occurred and be continuing, the Outstanding Principal Balance and, to the extent permitted by law, all accrued and unpaid interest in respect thereof and any other amounts due pursuant to the Loan Documents, shall accrue interest at the Default Rate, calculated from the date such payment was due without regard to any grace or cure periods contained herein" (*id.*).

Defendants also argue that plaintiff breached the duty of good faith and fair dealing, precluding summary judgment in lieu of complaint under the Guaranty. Specifically, they argue that plaintiff's affiliate, Fortress Credit Corp. (Fortress), breached the implied covenant of good faith and fair dealing in connection with a scrapped loan transaction with Borrower. Defendants contend that Fortress tendered a term sheet to Borrower in contemplation of a loan, learned sensitive information about Borrower and the property, and then refused to lend Borrower money. They argue that Fortress "weaponized" the non-public information and exclusive negotiation agreement with Borrower, then purchased the Notes and declared the events of default.

The court agrees with plaintiff that defendants' good faith and fair dealing defense is inapplicable here. The contracts that defendants rely on for this argument are not part of the Loan Agreement, Notes, or Guaranty. One is a non-binding term sheet that Fortress entered with Borrower (Doc 26). The other is a pre-negotiation agreement between plaintiff, Borrower, and defendants from January 2022, after the events of default occurred (Doc 31). Neither of these agreements bear on whether the Guaranty is enforceable, whether defendants and Borrower owe

plaintiff outstanding amounts under the Loan Documents, or whether defendants failed to tender payment.

Moreover, defendants waived their right to raise this defense or counterclaim in the Guaranty. Section 2.11 of the Guaranty provides that the guarantors' obligations "shall not be reduced, discharged, or released by reason of any existing or future right of offset, claim or defense of Borrower against Lender, or any other person . . ." (Doc 10). Under Section 1.7 (IV) of the Guaranty, defendants also waived "the right to assert a counterclaim, other than a mandatory or compulsive counterclaim, in any action or proceeding brought against or by Guarantor" (*id.*). Defendants' good faith and fair dealing claim is not a compulsory counterclaim in this CPLR 3213 action.

Finally, defendants dispute the amounts that plaintiff claims are owed for attorneys' fees and retroactive default interest. As discussed above, plaintiff has not made a prima facie case for an award of more than $700,000 in attorneys' fees. However, the Loan Documents permit plaintiff to charge default interest for Events of Default, and the uncured mechanic's lien against the property was an event of default under the Loan Agreement. The Loan Agreement also does not provide that Borrower must be given notice of the event of default where the default is a lien against the property. As discussed, Section 2.2.3 of the Loan Agreement states interest accrues at the default rate "for so long as[] any Event of Default shall have occurred and be continuing" (Doc 6).

Conclusion

Plaintiff has established its prima facie entitlement to summary judgment in lieu of complaint with regard to the outstanding principal balance on the notes, the $400,000 advance, the amount of interest accrued at the regular and default rates, and the exit fee and exit fee

interest. Defendants fail to raise a triable issue of fact with respect to those debts and amounts. Plaintiff did not meet its prima facie burden to establish the amount owed for "other [enforcement-related] expenses." However, plaintiff's submissions establish its prima facie entitlement to recover attorneys' fees from the defendants-guarantors under Section 3.1 (b) of the Guaranty. Thus, the court enters judgment in the amount of $52,374,670.96 [$53,085,438.39 - $710,767.43]. The motion is denied with respect to enforcement-related expenses and attorneys' fees. This denial is without prejudice to a new motion upon proper papers.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

**ORDERED** that the motion for summary judgment in lieu of complaint is granted in part, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $52,374,670.96, together with interest at the contractual default rate of 11.64% per annum from September 8, 2022 until the date of this decision and order, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

**ORDERED** that that part of the motion seeking enforcement-related expenses and attorneys' fees is denied without prejudice to a new motion upon proper papers; and it is further

**ORDERED** that there shall be no motions to renew or reargue without a pre-motion conference pursuant to Part Rule 10 (a).

5/8/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

653436/2022 DB AURARIA LLC vs. NELSON, PATRICK ET AL
Motion No. 001

Page 9 of 9