

TD Bank, N.A. v Wise Elec. Servs., Inc.

2023 NY Slip Op 31696(U)

May 18, 2023

Supreme Court, New York County

Docket Number: Index No. 650061/2021

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 14

-----X

TD BANK, N.A.,	INDEX NO.	<u>650061/2021</u>
Plaintiff,	MOTION DATE	<u>04/20/2023</u>
- v -	MOTION SEQ. NO.	<u>002</u>
WISE ELECTRICAL SERVICES, INC., ROCCO PROGRAMO III		
Defendant.	DECISION + ORDER ON MOTION	

-----X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 50, 51, 52, 53, 54, 55 were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted and defendants' cross-motion for summary judgment is denied.

Background

This case arises out of an alleged default on a loan. Defendant Wise Electrical Services ("Wise") was an electrical engineering company until it ceased business operations in 2018. In 2014, Wise secured an SBA Express loan for \$100,000. As part of this loan, co-defendant Prograno signed a commercial guaranty. According to plaintiff, the agreement required that defendants would pay interest monthly until May 19, 2021, at which point all principal and interest on the loan became due. Failure to make this final payment constituted a default under the terms of the loan.

The loan went through several changes. In 2015, Wise signed a new agreement increasing the SBA loan amount to \$350,000. Plaintiff alleges that all other terms of the agreement remained the same. In 2016, a third agreement was signed stating the principal loan

amount was \$349,393.13 and the SBA loan was converted to a term loan with a heightened interest rate of 6.00%.

On November 28, 2019, defendants allegedly defaulted by failing to make a timely monthly payment and one year later, on November 13, 2020, plaintiff sent a default letter to defendants. A follow up letter was sent a month after that. Plaintiff now seeks summary judgment in the amount of \$197,753.11—the total outstanding amount as of October 25, 2022 plus per diem interest of \$26.87 from October 26, 2022 (NYSCEF Doc. No. 22 at 8).

Plaintiff contends it is entitled to summary judgment as the loan documents are clear and unambiguous and should be enforced as written. Moreover, plaintiff argues it has established the *prima facie* elements to enforce a guaranty, namely that the guaranty and underlying debt exist, and that the guarantor failed to perform under the agreement. Plaintiff alleges that defendants only offer conclusory denials but do not offer any evidence disputing plaintiff's allegations. Additionally, plaintiff asserts it has established the validity of the security agreement as the collateral is adequately described, value was exchanged via plaintiff's advancement of funds, and defendants retained rights in the defined collateral. Plaintiff further contends defendants' affirmative defenses are without merit, as defendants waived the right to assert any affirmative defenses in the guaranty. Thus, plaintiff argues that all 18 of defendants' affirmative defenses should be dismissed.

In opposition and styled as a cross-motion for denial of summary judgment, defendants contend the stipulation dated October 11, 2022 precludes any summary judgment motions until discovery is complete. Defendants argue the stipulation is akin to a contract and because the agreement calls for discovery prior to summary judgment, defendants assert plaintiff's motion should fail. Additionally, defendants dispute the amounts owed, claiming that plaintiff never

served a notice to cure and instead served default notices. According to defendants, the promissory note required a notice to cure, and because such notice was never issued, defendants argue the cure provision is ambiguous and creates an issue of fact. Furthermore, defendants assert the date of default is unsubstantiated as it maintains the notice of default was sent to the wrong address. Moreover, defendants contend the loan documents are inconsistent in the amount of interest to be charged and whether proper notice and opportunity to cure was given to defendants. Thus, the documents are ambiguous and do not entitle plaintiffs to summary judgment.

Defendants further argue Prograno signed the guaranty under the impression it related only to the initial SBA loan for \$100,000. Prograno never signed another guaranty in relation to the other agreements. Additionally, defendants contend the commercial guaranty requires the application of Connecticut law, which holds that whether a guaranty is signed in relation to a particular note is a question of fact regarding the intention of the parties at the time of signing. Finally, defendants argue discovery is necessary in this action, and plaintiff has failed to provide discovery to defendants. Defendants claim plaintiff's previous summary judgment motion was withdrawn by a stipulation between the parties due to lack of discovery. According to defendants, their discovery demands have been ignored by plaintiff. Defendants maintain that the bank's notes of communications with defendants, internal working documents for each of the subject loans, and loan workout applications are necessary to pursue a defense against plaintiff's claims. Defendants did not preserve any of their affirmative defenses in their opposition papers.

In reply, plaintiff contends that defendants failed to provide a counter statement of material facts, thus rendering defendants' opposition as procedurally defective. Additionally, plaintiff argues the parties never agreed to stay summary judgment motions until discovery was

complete. Instead, the parties agreed that plaintiff would produce responses to all outstanding discovery before moving for summary judgment. According to plaintiff, it served discovery responses and any alleged deficiencies are boilerplate language. Next, plaintiff alleged the loan documents do not require a cure notice. Further, plaintiffs maintain that the interest rate is accurately recorded in the loan documents. Although the interest rate was variable, the variation was tied to the Wall Street Journal prime rate. Plaintiffs further contend the guaranty is valid, and each loan agreement was not a new loan in itself but a modification to the initial agreement, therefore not requiring a new guaranty.

Plaintiffs contend that the guaranty is a continuing guaranty by the express terms of the agreement, including but not limited to any renewals, extensions or modification of the loan. Additionally, plaintiff argues the guaranty is governed by New York law, and the provision for the use of Connecticut law is a clerical error. Regardless of which state law is used, plaintiff contends the result is the same, as it has established its claim for breach of guaranty. Finally, plaintiff asserts defendants failed to establish a need for further discovery, as the agreement holds that no notice of default was necessary for the outstanding amounts to become due, and defendants were given a reasonable opportunity to conduct discovery prior to the instant motion.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff's motion for summary judgment is granted. As an initial matter, the guaranty is governed by Connecticut law. Despite plaintiff's contention the choice of law provision was an error, a closer analysis of the guaranty indicates that the guarantor's home address is in Stamford, Connecticut. This Court cannot look to plaintiff's post-hoc interpretation about this choice of law provision and ignore the clear and unambiguous provision in the agreement. Nevertheless, Connecticut law provides, "to establish a prima facie case of entitlement to recover on [a] [g]uaranty. . . plaintiff must show (1) that it is owed a debt from a third party; (2) that defendant made a guaranty of payment of the debt; and (3) that the debt has not been paid by either the third party or defendant," (*TD Bank, N.A. v. Sch. St. Plaza, LLC*, 2012 Conn. Super. LEXIS 154 at *16 [Super Ct, Jan. 10, 2012, No. CV 09 6001534]). Plaintiff has clearly established the necessary elements to enforce the guaranty. Plaintiff provided funds to

defendants and Prograno signed a continuing guaranty related to those funds, and these debts have not been paid.

As for the remaining loan agreement and subsequent modifications, defendants failed to raise a material issue of fact relating to the validity the agreements. Defendants claim they were never given a proper opportunity to cure the default; however, the loan agreement plainly states cures are available only for defaults that are not based on non-payment (NYSCEF Doc. No. 22 at 14). Moreover, plaintiff sent defendants a notice of default approximately one year after defendants defaulted on the loan payments. Defendants had 12 months to make any form of payment on the loan but failed to make payments. Additionally, there are no ambiguities present with the loan agreements. The interest accrual was clearly outlined in the agreement, and while the interest may have fluctuated according to the Wall Street Journal prime rate, such fluctuation does not create an ambiguity in the contract itself. Furthermore, even if Prograno did not realize the guaranty attached to all future modifications, the four corners of the agreement clearly establishes the document is a continuing guaranty under which Prograno agreed to “guarantee the full and punctual payment... of the indebtedness of borrowers to lender, now existing or hereafter arising or acquired, on an open and continuing basis” (NYSCEF Doc. No. 35 at 1).

The discovery stipulation does not preclude summary judgment motions from going forward. Plaintiff produced responses to defendants’ discovery requests, and defendants offer no evidence that in the five months since entering the stipulation they requested any additional documents that had not already been produced. Defendants have a number of avenues open to them to pursue production of documents, but defendants only supply one deficiency letter from November to prove that they are lacking necessary documents. The letter is written with boilerplate language and this Court is unable to see how the documents requested by defendants


demonstrate the existence of any remaining issues of fact. Plus, defendants did not establish that their requested discovery would reveal material evidence that would compel the Court to deny this motion.

Finally, plaintiff requests legal fees in conjunction with the outstanding loan relief. Pursuant to the parties' agreement, "borrower agrees to pay upon demand all of lender's costs and expenses, including lender's reasonable attorneys' fees and Lender's legal expenses," (NYSCEF Doc. No. 33 at 10). Plaintiff included an attorney affirmation complete with time logs of the work performed on this matter, all of which was adequately detailed with appropriate time apportionments. Given the amount requested in legal fees compared to the overall relief, the Court finds plaintiff's request is reasonable.

Accordingly, it is hereby

ORDERED that defendants' cross-motion for summary judgment is denied and the defendants' affirmative defenses are dismissed; and it is further

ORDERED that the plaintiff's motion for summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants jointly and severally in the amount of \$197,753.11, together with interest at the rate of \$26.87 per diem from October 26, 2022 until the date judgment is entered, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, plus legal fees in the reasonable amount of \$8,264.40.

<p><u>5/18/2023</u> DATE</p>	 <hr/> ARLENE BLUTH, J.S.C.													
<p>CHECK ONE:</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%;"><input checked="" type="checkbox"/> CASE DISPOSED</td> <td style="width: 50%;"><input type="checkbox"/> NON-FINAL DISPOSITION</td> </tr> <tr> <td><input checked="" type="checkbox"/> GRANTED</td> <td><input type="checkbox"/> GRANTED IN PART</td> </tr> <tr> <td><input type="checkbox"/> DENIED</td> <td><input type="checkbox"/> OTHER</td> </tr> <tr> <td><input type="checkbox"/> SETTLE ORDER</td> <td><input type="checkbox"/> SUBMIT ORDER</td> </tr> <tr> <td><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</td> <td><input type="checkbox"/> FIDUCIARY APPOINTMENT</td> </tr> <tr> <td></td> <td><input type="checkbox"/> REFERENCE</td> </tr> </table>	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> DENIED	<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"/> REFERENCE	
<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION													
<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART													
<input type="checkbox"/> DENIED	<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"/> REFERENCE													
<p>APPLICATION:</p>														
<p>CHECK IF APPROPRIATE:</p>														
<p>650061/2021 TD BANK, N.A. vs. WISE ELECTRICAL SERVICES, INC. ET AL Motion No. 002</p>		<p>Page 7 of 7</p>												