

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

RICHARD B. LOWE III

PRESENT:

Justice

PART 56

DWHK Recovery

INDEX NO.

116222/2004

MOTION DATE

1/21/06

MOTION SEQ. NO.

003

MOTION CAL. NO.

- v -
Daeba Company LTD

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 02 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCEPTED NY AND NYS DRAMATI
DECISION

Dated:

1/30/07

RICHARD B. LOWE III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/DATE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

-----X
DWHK RECOVERY COMPANY, on behalf of the
Trust Created by a Trust Agreement and Assignment for
the Benefit of the Creditors of Daewoo Hong Kong
Limited,

Plaintiff,

-against-

Index No. 116222/04

DAEHA COMPANY LIMITED, DAEWOO
ENGINEERING & CONSTRUCTION CO., LTD and
DAEWOO CORPORATION,

DECISION AND ORDER

Defendants.

-----X
RICHARD B. LOWE III, J.:

FILED
FEB 02 2007
NEW YORK
COUNTY CLERKS OFFICE

This is an action brought by plaintiff DWHK Recovery Company Ltd. (DWHK-R), as Trustee on behalf of the creditors of Daewoo Hong Kong Limited (DWHK), to recover the unpaid principal, plus accrued interest, on a \$69 million loan made by DWHK to defendant Daeha Company Limited (Daeha), a Vietnamese entity. DWHK-R also seeks to recover on guarantees issued by defendant Daewoo Corporation (DWC), and assumed by defendant Daewoo Engineering & Construction Co., Ltd. (DWEC), in the amounts of \$69 million and \$49 million, to secure that loan. The loans from DWHK to Daeha were made in 1994 and 1996 to finance the development of a hotel and conference center in Hanoi, Vietnam. At the time of the loans, a majority of Daeha's shares was owned by DWC, a Korean company that was the flagship company of the Daewoo group of companies. DWHK was also a subsidiary of DWC. DWHK-R currently seeks a judgment against defendants in excess of \$105 million.

Motion Sequence Nos. 003 and 004 are consolidated for disposition. In Motion Sequence No. 003, DWHK-R seeks an order, pursuant to CPLR 3212, granting summary judgment against defendants Daeha, DWEC and DWC. In Motion Sequence No. 004, DWEC moves, pursuant to CPLR 2201, for an order staying this action as to DWEC, pending the resolution of a related declaratory judgment action filed by DWEC in the Republic of Korea.

For the reasons set forth below, DWEC's motion for a stay is denied, and DWHK's motion for summary judgment against Daeha and DWEC is granted. As DWC has recently filed for bankruptcy, this action is currently stayed against DWC, and, accordingly, the motion for summary judgment against DWC is denied.

FACTS

On December 30, 2003, DWHK-R, a special purpose international business company organized and existing under the laws of the Virgin Islands, was appointed to serve as the trustee of DWHK, an insolvent Hong Kong company, by DWHK's creditors pursuant to a Trust Agreement (see 7/18/06 Aff. of Michael R. Huttenlocher, Esq., Exh SS). Under the Trust Agreement, DWHK's creditors charged DWHK-R with the power to take all necessary actions to collect amounts due to DWHK, including the power to commence litigation against DWHK's creditors (Trust Agreement, § 6.1).

DWHK commenced this action on November 16, 2004 in order to collect the largest single debt owed to DWHK's creditors. In DWHK-R's amended complaint, DWHK-R alleged the following: on January 27, 1994, DWHK and Daeha entered into a Loan Agreement, pursuant to which DWHK loaned Daeha \$49 million (Amended Complaint, ¶ 11). This loan was guaranteed by DWC for the full \$49 million (id., ¶ 12). On March 20, 1996, pursuant to the

"Amendment to the Loan Agreement Dated January 27, 1994," DWHK and Daeha agreed to increase the amount of the loan facility to \$69 million (*id.*, ¶ 14). This loan was also guaranteed by DWC for the full \$69 million (the \$69 Million Guaranty) (*id.*, ¶ 15).

Plaintiff alleges that, in December 2000, when DWEC was spun off from DWC as part of DWC's corporate restructuring, DWEC accepted and assumed all of DWC's obligations under these guaranties and, thereby, became jointly and severally liable on those guaranties with DWC (*id.*, ¶¶ 1, 21). Plaintiff further alleges that Daeha has failed to repay DWHK \$65,950,030, the amount of the outstanding principal of the \$69 million loan, as well as its interest obligations (*id.*, ¶ 22). Therefore, plaintiff alleges, because Daeha has defaulted on the loans, DWC, DWEC and Daeha jointly and severally owe DWHK-R at least \$105,950,600, which includes the outstanding \$65,950,030 principal due, plus accrued interest, and all expenses of collection, including attorneys' fees (*id.*, ¶¶ 23-24; wherefore clause, subparagraph [a]).

DWEC denies liability based, among other things, on the terms of a restructuring agreement between DWC and certain of its Korean creditors that is governed by Korean law.

On September 9, 2005, DWEC and DWC moved to dismiss DWHK-R's amended complaint. In that motion, DWEC and DWC made two principal arguments as to why this action should be dismissed. First, DWEC and DWC argued that, because DWHK-R could not locate a signed copy of the \$69 Million Guaranty, the guaranty was unenforceable under the statute of frauds. Thus, DWEC and DWC took the express position that the \$69 Million Guaranty had never been issued. Second, DWEC and DWC argued that this action should be dismissed on the ground of forum non conveniens because all of the witnesses and documents relevant to this dispute are allegedly located in Asia.

In opposing the motion to dismiss, DWHK-R overcame the statute of frauds argument by producing a copy of the \$69 Million Guaranty that had been initialed by DWC; Daeha's signed request that DWC issue the \$69 Million Guaranty; and the fully-executed Amended Guaranty Facility Agreement between Daeha and DWC, pursuant to which DWC promised to issue the \$69 Million Guaranty. In this same opposition, DWHK-R overcame DWEC's forum non conveniens argument by demonstrating that both the \$69 Million Guaranty and the Amended Guaranty Facility Agreement included exclusive New York forum selection and choice of law clauses.

On November 11, 2005, following oral argument, this court denied DWEC's motion to dismiss.

Subsequently, the parties engaged in discovery. The documents produced by defendants apparently revealed several key pieces of evidence that directly contradicted DWEC's contention that the \$69 Million Guaranty had never been issued. On July 18, 2006, based on this documentary evidence, DWHK-R moved for summary judgment. On September 25, 2006, DWEC served its papers in response to DWHK-R's summary judgment motion. In these papers, DWEC finally admits, for the first time in this action, that it had in fact assumed DWC's obligation with respect to the \$69 Million Guaranty.

On September 12, 2006, less than two months after DWHK-R filed its summary judgment motion, and almost two years after DWHK-R brought this action, DWEC commenced a parallel lawsuit against DWHK-R in Korea (the Korean Action). The Korean Action is a mirror image of the present action. While in this action, DWHK-R seeks to enforce the \$69 Million Guaranty against DWEC, in the Korean Action, DWEC seeks a declaratory judgment

from the Korean court that it has no present obligation to honor that same guaranty. DWEC now asks this court to stay this action, two years after it was commenced, pending the resolution of its new Korean Action.

The complaint filed by DWEC in the Korean Action – just like the papers recently filed by DWEC in opposition to DWHK’s summary judgment motion – raises and relies on a new defense to DWHK-R’s guaranty claims. This new defense is based on a certain “Agreement for the Work-Out of Daewoo Corporation,” dated March 15, 2000 (the Workout Agreement). Specifically, DWEC contends that the Workout Agreement “precludes the guarantee claims asserted by DWHK-R ... unless and until Daeha loses its identity following bankruptcy or liquidation proceedings” (DWEC’s Opp Mem., at 4).

DWC is in formal bankruptcy proceedings in Korea (Aff. of Robert S. Fischler, ¶ 8). On September 25, 2006, DWC filed a petition in the United States Bankruptcy Court for the Southern District of New York, pursuant to Chapter 15, title 11 of the United States Bankruptcy Code, requesting recognition of DWC’s Korean bankruptcy proceeding, and a stay of this action, as of right, upon recognition of that proceeding (*id.*, ¶ 9). On October 20, 2006, the Bankruptcy Court granted DWC’s petition, with the result that DWHK-R’s claims against DWC in this action are now stayed (*see* Fischler Reply Aff., Exh C).

DISCUSSION

I. Motion Sequence No. 004 – Motion for a Stay

CPLR 2201 provides that “the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” A stay can be a drastic remedy, “on the simple basis that justice delayed is justice denied” (Siegel, Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:7, at 11). It should, therefore, be refused "unless the proponent shows good cause for granting it" (*id.*). As such, a court may grant a stay if "considerations of orderly procedure and judicial economy" require it (Sterling Natl. Bank v Kings Manor Estates, LLC, 9 Misc 3d 1116(A) [Civ Ct, NY County 2005], citing General Aniline & Film Corp. v Bayer Co., 305 NY 479 [1953]; Procter & Gamble Distrib. Co. v Lloyd's Underwriters, 44 Misc 2d 872 [Sup Ct, NY County 1964]; see also Research Corp. v Singer-General Precision, Inc., 36 AD2d 987 [3d Dept 1971]). However, a court should not grant a stay motion that was not "brought in good faith" (Kayser v Horton, 42 AD2d 839, 840 [4th Dept 1973]; Research Corp. v Singer-General Precision, Inc., 36 AD2d at 988), or that will cause the non-moving party to suffer "undue detriment" (Trinity Products, Inc. v Burgess Steel LLC, 18 AD3d 318, 319 [1st Dept 2005]).

Although DWEC argues that this action should be stayed pending resolution of its recently-filed Korean Action, as set forth below, this argument is not sufficient to support DWEC's motion for a stay of this two-year old action on the eve of summary judgment.

First, the Korean Action does not, as a matter of law, warrant a stay of this action because DWEC has no good faith excuse for its extraordinary delay in bringing the Korean Action. It is well settled that a New York lawsuit should not be stayed in deference to a foreign proceeding if either (1) the foreign proceeding was commenced after the New York action and without excusable delay; or (2) the foreign proceeding was commenced as part of a bad faith effort to delay, or avoid judgment in, the New York action.

New York courts almost never defer to a parallel judicial proceeding that was initiated after a New York action. Indeed, DWEC concedes that "[i]n most cases where New

York courts have issued a stay pending resolution of another action, the other action was filed first” (DWEC’s Stay Mem., at 13). Indeed, in the majority of cases cited by DWEC in support of its stay motion, the New York courts deferred to a first-filed action (see Kubricky Constr. Corp. v Bucon, Inc., 282 AD2d 796 [3d Dept 2001] [stay granted where a litigation in Missouri dealing with similar issues was filed first]; American Marine Ins. Group v Price Forbes Ltd., 166 AD2d 263 [1st Dept 1990] [stay granted where a related litigation had been filed in Great Britain 10 months earlier]; El Greco Inc. v Cohn, 139 AD2d 615, 616 [2d Dept 1988] [stay granted where federal action was “earlier-commenced”]; Goodridge v Fernandez, 121 AD2d 942, 945 [1st Dept 1986] [stay of state action granted where a related federal proceeding was “commenced first” and was already in the discovery phase]; Deutsche Anlagen-Leasing GMBH v Kuehl, 111 AD2d 69 [1st Dept 1985] [stay granted where litigation in Germany had been initiated first]; Proctor & Gamble Distrib. Co. v Lloyd’s Underwriter’s, 44 Misc 2d 872, supra [stay of state action granted where a related federal proceeding had been initiated first]).

DWEC cites only one case, Research Corp. v Singer-General Precision, Inc. (36 AD2d 987, supra), where a New York action was stayed in deference to a second-filed proceeding. In that case, however, the defendant moved to stay the state court action at its inception – before even filing an answer to the complaint (id.). Here, in stark contrast, DWEC filed its stay motion 22 months into the litigation – after this court had already ruled on DWEC’s motion to dismiss, after all defendants had answered the complaint, after document discovery was complete, and most importantly, after DWHK-R filed a dispositive motion for summary judgment. DWEC does not, and cannot, cite to any New York case that has ever granted a stay at such a late stage of the litigation.

Moreover, DWEC does not offer any credible excuse for its two-year delay in commencing the Korean Action. The defense raised by DWEC in the Korean Action is based on the Workout Agreement – a March 2000 contract that existed long before this action was filed in 2004. Thus, every fact that the Korean Action is based upon has existed since long before DWHK-R commenced this action. This fact, by itself, eviscerates DWEC’s argument that this litigation should be stayed in deference to the Korean Action. For example, in Shine v Duncan Petroleum Transport, Inc. (60 NY2d 22 [1983]), a defendant-employer moved to stay a state court action pending a decision by the Workers’ Compensation Board that, defendant claimed, would be dispositive of all claims in the lawsuit. In reversing the lower court’s grant of the stay, the Court of Appeals explained:

For [the defendant], having been fully acquainted with the factual and legal aspects of each of the ... claims arising out of the explosion of April, 1976, to have waited more than two years longer and until the jury was about to be drawn in the common-law action to seek a stay and then for the first time to assert the primary jurisdiction of the Workers’ Compensation Board is unacceptable.

Id. at 27.

The same can be said here. It is similarly “unacceptable” for DWEC to wait two years to assert the primary jurisdiction of a Korean court, and to seek to stay this action, on the basis of a contract – the Workout Agreement – that it has known about from day one of this litigation. Although DWEC tries to excuse its long delay in filing the Korean Action by claiming that the parties “were engaged in settlement negotiations that DWEC did not wish to prejudice by commencing litigation in Korea” (DWEC Mem., at 4), as set forth in the affidavit of Chi-Pyung Ihn, DWHK-R’s director, “substantial and sustained settlement negotiations”

between the parties did not commence until April 2006 (Ihn Aff., ¶ 7). As such, DWEC's assertion is not credible. A court should also deny a stay motion where, as here, it is being asked to defer to a parallel proceeding that was brought in bad faith, as part of a plan to delay or avoid judgment in a New York lawsuit (see Kayser v Horton, 42 AD2d at 840 [stay cannot be granted where the parallel proceeding was not "brought in good faith"]; Trieber v Hopson, 27 AD2d 151, 153 [3d Dept 1967] [denying stay where "motion for the stay was not made in good faith"]).

Here, DWHK-R presents evidence that DWEC commenced the Korean Action in an effort to avoid a determination of the summary judgment motion. Ihn alleges that, on three separate occasions – July 30, August 2 and August 7, 2006 – DWEC threatened to commence a lawsuit against DWHK-R in Korea unless it agreed to withdraw its summary judgment motion, and that, on September 12, 2006, after it became clear that DWHK-R would not withdraw its summary judgment motion, DWEC commenced the Korean Action (see Ihn Aff., ¶¶ 11-21). The close proximity between DWEC's threats and its commencement of the Korean Action clearly suggests that DWEC brought such action in order to prevent a decision on DWHK-R's summary judgment motion. As such, its application for a stay must be denied.

In addition, the parties explicitly agreed that New York is the only forum that can decide issues related to this controversy. In fact, the Loan Agreement (as amended), the Guaranty Facility Agreement (as amended), and the \$69 Million Guaranty each contain an exclusive New York forum selection clause. Specifically, paragraph 15 of the \$69 Million Guaranty provides as follows:

Jurisdiction: The guarantor [DWC, and by later assumption, DWEC] hereby consents to the jurisdiction of any state of [sic] federal court located within the County of New York, State of New

York, U.S.A. and irrevocably agrees that subject to the Lender's sole and absolute election, all actions or proceedings relating to this Guaranty or the other documents in connection herewith shall be litigated in such court and the Guarantor waives any objection which it may have based on improper venue or forum non conveniens.

Huttenlocher Aff., Exh L (emphasis added). Identical New York forum selection clauses are contained in the Loan Agreement (as amended) and the Guaranty Facility Agreement (as amended) (id., Exhs E and I).

This forum selection clause must be enforced under New York General Obligations Law § 5-1402 (providing that New York choice of law and forum selection clauses are enforceable where, as here, a contract contains a provision whereby the foreign corporation submits to jurisdiction). In fact, section 5-1402 was intended to establish New York as the preeminent forum for financial disputes, and New York courts have recognized that intent (see TCW Gem V. Ltd. v Grupo Iusacell Cellular S.A. De C.V., 7 Misc 3d 1008(A) [Sup Ct, NY County 2004] ["it must be recognized that New York courts have an interest, sitting in one of the financial capitals of the world, in adjudicating actions where the parties have chosen New York as the forum to resolve disputes"]).

Finally, the forum non conveniens arguments raised by DWEC have already been rejected by this court. DWEC argues, in support of its stay motion, that Korea is the most convenient forum to resolve this dispute:

The relevant factors ... all point towards staying the New York Action pending resolution of the Korean action: the parties, potential witnesses, and relevant documents are all in Korea or elsewhere in Asia; the Daeha hotel project financed by DWHK is located in Vietnam; the underlying loan and guarantee transactions

were negotiated and were to be performed in Korea or elsewhere in Asia

DWEC's Mem., at 9.

This argument, however, is almost exactly the same argument that DWEC unsuccessfully asserted in its motion to dismiss this action on the ground of forum non conveniens. In that motion, DWEC argued:

Not only were all of the negotiations, transactions and discussions surrounding the loans at issue and the purported "New Guaranty" held in Asia, most/all were conducted in the Korean language by individuals who do not speak English with sufficient fluency to be able to provide testimony without the aid of an interpreter. Moreover, the documents relevant to this case are in Asia, and many of those are written in the Korean language and would require translation

DWEC's Motion to Dismiss Mem., at 3.

The purpose of the law of the case doctrine is to prevent relitigation of legal issues that have already been determined at an earlier stage of the proceeding (Dondi v Jones, 40 NY2d 8 [1976]; Martin v City of Cohoes, 37 NY2d 162 [1975]; Brownrigg v New York City Hous. Auth., 29 AD3d 721 [2d Dept 2006]). Thus, where a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation (see Thompson v Cooper, 24 AD3d 203 [1st Dept 2005]; Hass & Gottlieb v Sook Hi Lee, 11 AD3d 230 [1st Dept 2004]; Gee Tai Chong Realty Corp. v GA Insurance Co. of N.Y., 283 AD2d 295 [1st Dept 2001]).

On November 11, 2005, this court denied DWEC's motion to dismiss in its entirety, rejecting the forum non conveniens arguments made by DWEC in that motion. This decision thus necessarily resolved on the merits the issue of whether Korea is the most

convenient forum to resolve this dispute, and is thus “law of the case” on this issue, requiring denial of DWEC’s motion seeking to stay this action on the ground that Korea is the more convenient forum (Martin v City of Cohoes, 37 NY2d at 165 [“when an issue is once judicially determined, that should be the end of the matter”]; see e.g. In re Oak Street Mgt., Inc., 20 AD3d 571, 571 [2d Dept], lv granted 5 NY3d 711 [2005], appeal withdrawn 6 NY3d 808 [2006] [“Our prior resolution of this issue constitutes the law of the case and the appellants failed to show any basis for changing our prior determination”]; Rosso v Beer Garden, Inc., 12 AD3d 152 [1st Dept 2004] [partial summary judgment constituted law of the case]).

Accordingly, DWEC’s motion for a stay of this action is denied.

On October 12, 2006, defendant Daeha filed a “Response” to DWEC’s stay motion. In that response, Daeha asks the court to enlarge the relief requested in DWEC’s motion. Specifically, while DWEC’s motion seeks to stay this action only as against DWEC, Daeha’s “Response” seeks a “stay of this action in its entirety, including any claims against Daeha” (Daeha’s Response, at 1). Daeha’s request to stay this action is denied. Daeha is not entitled to request affirmative relief from this court without first filing a separately noticed motion or cross motion (see CPLR 2214 [a]; Arriaga v Michael Laub Co., 233 AD2d 244 [1st Dept 1996] [as plaintiffs failed to formally and specifically demand in notice of motion that counterclaims be stricken, the trial court did not err in denying such relief]; In re City of New York, 12 Misc 3d 1198(A) [Sup Ct, Kings County 2006] [refusing to address demands for relief made in the body of papers where the requests were not made by motion or cross motion]; North American Van Lines, Inc. v American Intl. Co., 11 Misc 3d 1076(A) [Sup Ct, NY County 2006]

["It would be procedurally improper to grant [defendant's] request, as [defendant] failed to include this request for relief in a notice of cross motion"]]).

II. Motion Sequence No. 003 – Plaintiff's Motion for Summary Judgment

DWHK-R seeks summary judgment against Daeha, DWEC and DWC on the ground that Daeha has clearly defaulted on its obligations to pay the \$69 million loan, and DWHK has not been repaid by either Daeha, or by DWC and DWEC, as guarantors.

Here, as set forth below, DWHK-R provides undisputed evidence that DWHK loaned \$69 million to Daeha; DWC guaranteed Daeha's loan obligation to DWHK; DWEC subsequently assumed DWC's obligation under the \$69 Million Guaranty and became liable on that guaranty; Daeha defaulted on its loan obligations to DWHK; and DWHK has not been repaid by the borrower (Daeha), or by either of the guarantors (DWC and DWEC), leaving a balance due of \$65,950,030 plus interest (the actual amount borrowed). In response, Daeha and DWEC fail to raise any triable issues of fact. Accordingly, DWHK-R is entitled to summary judgment against both Daeha and DWEC¹.

With respect to Daeha, the borrower, DWHK-R has made a prima facie showing of entitlement to summary judgment as a matter of law. In order to obtain summary judgment on a loan, a lender must provide evidence of: (1) a loan; and (2) the borrower's default (Campione v Rose Hill Property Assoc., 216 AD2d 130 [1st Dept 1995] [summary judgment granted where borrower defaulted on loan principal]; North Fork Bank & Trust Co. v Romet

¹ Because, as previously discussed, DWC is in bankruptcy, this action is stayed against it.

Corp., 192 AD2d 591 [2d Dept 1993] [bank entitled to summary judgment on notes when borrower in default]; Northside Savings Bank v Sokol, 183 AD2d 816 [2d Dept 1992] [summary judgment granted when borrower defaulted on loan]).

The undisputed facts are as follows: on January 27, 1994, DWHK and Daeha entered into a Loan Agreement, pursuant to which DWHK extended a \$49 million loan to Daeha. The same day, Daeha executed a Promissory Note under which Daeha agreed to pay DWHK the principal sum of \$49 million (the 1994 Note). The 1994 Note provides that:

Upon the happening of any "Event of Default" under the Loan Agreement, the outstanding principal of this Note and any interest accrued thereon shall immediately become due and payable at the option of the holder of this Note.

1994 Note [Huttenlocher Aff., Exh F]).

In 1996, the parties amended the Loan Agreement (the Amended Loan Agreement) to increase the Loan by \$20 million, to \$69 million. Attached as Annex A to the Amended Loan Agreement is a Promissory Note signed by Daeha's representative (the 1996 Note). Under the 1996 Note, Daeha promised to pay \$69 million to DWHK. The 1996 Note also provides that the outstanding principal and interest shall become due and payable upon the event of default under the Loan Agreement (*id.*, Exh G).

Daeha has admitted in its answer that it entered into the Loan Agreement and the Amended Loan Agreement (Answer, ¶¶ 11, 14 [Huttenlocher Aff., Exh B]). Moreover, Daeha's own accounting and correspondence confirm that DWHK extended the \$69 million loan, and that Daeha defaulted on that loan. For example, Daeha repeatedly sent requests for audit confirmations to DWHK, asking DWHK to confirm the principal and interest owed on the loan

to Daeha's auditors for purposes of their financial reports (see Huttenlocher Aff., Exhs MM-OO). Thus, Daeha, the borrower, calculated from its own records the amount of principal and interest due, and asked DWHK, the lender, to confirm those amounts. On March 20, 1997, March 19, 1999 and June 15, 2001, Daeha and its accountants requested that DWHK confirm that the outstanding principal amounts owed by Daeha was \$63,500,000 million, \$66,300,000, and \$65,950,000 million, respectively (see id., Exh NN). On February 27, 2002, DWHK confirmed to Daeha that the outstanding principal due under the Amended Loan Agreement was \$65,950,030 million, plus interest, plus "default interest." On January 9, 2003, Daeha sent a request for audit confirmation to DWHK asking DWHK to confirm that the outstanding principal due was \$65,950,030 million plus interest, plus over \$11.8 million in "default interest" (see id., Exh OO). These requests show that, according to Daeha's internal accounting, Daeha owed DWHK \$65,950,030 million, and that the loan was in default (see id., Exhs MM-OO). In light of this request, Daeha began to request confirmation of the accrued "default interest" (see id., Exh OO).

In addition, each of Daeha's audited financial statements since 1997 show that DWHK extended the \$69 million loan to Daeha (see id., Exhs KK, LL). Its 1997 audited financials state that Daeha got a loan from DWHK of "\$69 million," and moreover, that the loan is "fully guaranteed by [DWC]" (see id., Exh KK). Daeha began admitting that it was in default of the \$69 million loan in its 2002 audited financial statements (see id., Exh LL). For example, in its 2004 Audited Financial Statement, Daeha stated that:

The loan from [DWHK-R] represents the unpaid principal amount due under a loan agreement with [DWHK] dated January 24, 1994

as amended on 20 March 1996, with a maximum facility of USD69,000,000 ... This loan is guaranteed by DWEC ... All the loans have been defaulted

Id., Exh LL, ¶ 12 (emphasis added). These 2004 financial statements list the principal owed to DWHK as \$65,950,000 (id.).

Indeed, in opposition to the summary judgment motion, Daeha expressly concedes that it “does not oppose” paragraphs 1 through 146 of the Statement of Undisputed Facts submitted by DWHK-R with its summary judgment motion (see Daeha Opp. Mem., at 1). Accordingly, by not contesting DWHK-R’s Statement of Undisputed Facts, Daeha has now admitted that there is no dispute that DWHK agreed to loan Daeha up to \$69 million, and that it has defaulted on the \$65,950,030 principal amount actually borrowed from DWHK.²

DWHK-R, therefore, is entitled to summary judgment against Daeha in the principal amount of \$65,950,030, plus interest, as provided for in the Loan Agreement and the Amended Loan Agreement.

In addition, DWHK-R presents evidence establishing that DWEC is also liable as a guarantor of the \$69 million loan. Daeha and DWC entered into a Guaranty Facility Agreement on the same day that Daeha and DWHK executed the Loan Agreement – January 27, 1994, pursuant to which DWC agreed to provide a guaranty for the full amount of the loan:

as an inducement to the Lender for entering into the Loan Agreement, [Daeha] has agreed to deliver or cause to be delivered

2

Although Daeha does oppose the final seven paragraphs in DWHK-R’s Statement of Undisputed Facts (¶¶ 147-153), these paragraphs concern a side issue that DWHK-R does not need to prove in order to establish liability in this case, i.e., that Daeha made unauthorized preferential payments to DWC. Therefore, Daeha’s opposition to these seven paragraphs has no effect on this motion.

to [DWHK] a guaranty from [DWC] ... guaranteeing the full and timely discharge of all of [Daeha's] obligations under the Loan Agreement.

Guaranty Facility Agreement, at 2nd Whereas Clause (Huttenlocher Aff., Exh H).

On January 27, 1994, DWC issued a Guaranty to DWHK (the 1994 Guaranty), under which DWC:

absolutely, irrevocably and unconditional guarantee[d] to DWHK the prompt, timely and complete payment in full when due (whether at the stated due date, by acceleration or otherwise) of all outstanding principal amount of the Loan together with any interest accrued thereon under the Loan Agreement and the Note (as defined in the Loan Agreement) and all fees, costs, expenses, indebtedness, liabilities and obligations of the Borrower now existing or hereafter incurred under or arising out of or in connection with the Loan Agreement and the Note.

1994 Guaranty, ¶ 1 (Huttenlocher Aff., Exh J).

The Guaranty also provides that, in the event of an assignment or transfer, DWC and the assignee or transferee shall be jointly and severally liable:

This Guaranty shall inure to the benefit of the Lender, its successors, assigns, indorsees, transferees and legal representative and shall bind the Guarantor and its successors and assigns. The Guarantor shall assign or transfer its obligations hereunder only with the prior consent of the Lender, which consent may be withheld in the absolute discretion of the Lender and, in the event of any such assignment or transfer, the Guarantor and each assignee or transferee shall be primarily and jointly and severally responsible under this Guaranty.

Id., ¶ 11.

In 1996, the parties increased the loan facility from \$49 million to \$69 million, and agreed that a new guaranty would be issued. To that end, Daeha and DWC amended the Guaranty Facility Agreement on the same day that the Amended Loan Agreement was signed –

March 20, 1996 (the Amended Guaranty Facility Agreement). The Amended Guaranty Facility Agreement provides that “[Daeha] plans to borrow additional funds from DWHK” and that “[Daeha] has promised to cause [DWC] to issue to [DWHK] a new Guaranty” (Amended Guaranty Facility Agreement, at 4th and 5th Whereas Clauses [Huttenlocher Aff., Exh I]). The Amended Guaranty Facility Agreement attached a form of guarantee (the 1996 Guaranty). With the exception of a New York choice of law and consent to jurisdiction, the material terms of the 1996 Guaranty are the same as the 1994 Guaranty.

On December 27, 2000, DWC and DWEC entered into an Assumption Contract, pursuant to which DWEC assumed DWC’s guaranty obligations. The Assumption Contract provides that:

by virtue of spin-off, [DWEC] has been incorporated and has succeeded to all the rights and obligations of [DWC] connected with Daeha Business Center ... and Daeha.

Assumption Contract, at 1 (Huttenlocher Aff., Exh X). In paragraph 1 of the Assumption Contract, DWC and DWEC acknowledge[d] and represent[ed] that [DWEC] has succeeded to the role of [DWC] in [Daeha] (*id.*, ¶ 1), and “all [of DWC’s] rights and obligations in whatsoever contracts and agreements connected with and arising from [Daeha] have been fully and effectively transferred from [DWC] to [DWEC]” (*id.*, ¶ 2).

Although DWC and DWEC previously took the position in this litigation that because a signed copy of the 1996 Guaranty was never produced, they could not be held liable on the full \$69 million obligation, DWEC now expressly admits, for the first time in this case, that it did guarantee the entire \$69 million loan. As Young-Min Kim, DWEC’s Deputy General

Manager, explicitly concedes in the affidavit he filed in response to DWHK-R's summary judgment motion, "DWEC assumed DWC's guarantee obligations with respect to approximately \$65 million in loans made by DWHK ... to Daeha" (Kim Aff., ¶ 4). Thus, DWEC has now expressly admitted its obligation under the full \$69 million guaranty.

Accordingly, DWHK-R is entitled to summary judgment against DWEC as guarantor of the \$69 million loan. A lender is entitled to summary judgment on a guaranty agreement upon proof of "an underlying note, a guarantee, and the failure to make payment in accordance with their terms" (E.D.S. Security Sys. v Allyn, 262 AD2d 351, 351 [2d Dept 1999]). There is no question that Daeha issued the Notes for the loans made by DWHK under the Loan Agreement and the Amended Loan Agreement, and there is no question that Daeha failed to make payments on the Notes in accordance with their terms. There is also no question that in 2000, DWEC assumed DWC's guaranty obligations. Under the guaranties, DWC was obligated to "absolutely, irrevocably and unconditionally" guarantee to DWHK the "prompt, timely and complete payment in full when due ... of all outstanding principal" under the Loan Agreements and the Notes (see Huttenlocher Aff., Exhs I and L). The guaranties also provide that DWC's obligations shall not be discharged unless and until all of the guaranteed obligations are paid in full, the conditions of the Loan Agreements and the Notes have been fully performed, and DWC's obligations as guarantor have been fully performed (see id.). DWEC does not dispute that neither it nor DWC has ever remitted any payments to DWHK under the guaranties.³ As

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In its opposition papers, DWEC has refused to submit a paragraph by paragraph response to DWHK-R's Undisputed Statement of Material Facts. Thus, pursuant to Commercial Division Rule 19 (c), all the facts set forth in, and documents cited in, DWHK-R's Statement of Undisputed Facts are "deemed to be admitted" by DWEC (see e.g. CMI II LLC v Interactive

such, DWHK-R is entitled to summary judgment against DWEC in the principal amount of \$65,950,030, plus interest, as provided for in the Loan Agreement and the Amended Loan Agreement.

In response to the summary judgment motion, Daeha and DWEC fail to raise a triable issue of fact. Although Daeha and DWEC now claim, in their opposition papers, that DWHK-R's guaranty claims are "premature" under the Workout Agreement, this defense fails, as a matter of law.

Specifically, DWEC contends that the Workout Agreement precludes DWHK-R from pursuing its guaranty claims against DWEC "until and unless the 'principal obligor' (here Daeha, the borrower), 'loses its juristic personalty pursuant to bankruptcy or liquidation'" (DWEC Opp Mem., at 2). Thus, DWEC is contending that, under the Workout Agreement, its now-admitted guaranty obligations do not mature until Daeha is put into formal bankruptcy. However, the provision contained in the Workout Agreement that DWEC relies upon for its defense to the guaranty was explicitly deleted from the final version of the Agreement. Moreover, it is undisputed that DWHK is not a signatory to the Workout Agreement, and thus, as a matter of law, cannot be bound by the contract.

DWEC has submitted to this court a version of the Workout Agreement that includes the following text for Subsection 2, subparagraph (3), of Agenda IV of the Agreement:

Brand Devel., Inc., 13 Misc 3d 1214(A), n2 [Sup Ct, NY County 2006] [because defendants did not contest plaintiff's statement of undisputed facts, "the facts set forth in [plaintiff's statement] are deemed to be true"]; Zemel v Horowitz, 11 Misc 3d 1058(A) [Sup Ct, NY County 2006 [same]]. In any event, since DWEC has now expressly admitted its obligation under the full \$69 Million Guaranty, DWEC has implicitly admitted all of the key facts in DWHK-R's Statement of Undisputed Facts.

The guarantee obligations shall become due when the guaranteed amount becomes final as the principal obligor (the person on whose behalf the guarantee has been issued) loses its juristic personality pursuant to bankruptcy or liquidation. The exercise of the rights to demand performance of guarantee obligations against the principal obligors shall be deferred during the grace period granted for the existing claims against newly incorporated companies, and any interest thereon (including accrued interest, future interest and default interest, etc.) shall be exempted.

See Affidavit of Soogeum Oh, dated September 21, 2006 (Oh Aff.), Exhibit C, at 77. DWEC is relying on the language in the above-quoted provision as its last defense to DWHK-R's claims in this action (see DWEC Opp Mem, at 7, 15; Oh Aff., ¶¶ 104-108). Specifically, DWEC contends that this provision (1) requires DWHK-R to wait for Daeha's "bankruptcy or liquidation" before pursuing its guaranty claims against DWEC; and (2) "exempts" DWEC from paying any interest due on the loans to Daeha (id.).

However, the specific provision of the Workout Agreement relied upon by DWEC in this litigation was not included in the final version of the Agreement. To the contrary, the provision relied on by DWEC was deleted in its entirety from the Workout Agreement pursuant to a written Resolution of the Creditors' Financial Institution Council of Daewoo Corporation on March 7, 2001 (see Ihn Aff., ¶¶ 6-9; Exh A). Under this March 7, 2001 Resolution, the provision relied on by DWEC was deleted and replaced with the following language:

The time to request the fulfillment of guarantee obligations to Daewoo Corporation shall be the time of default by the primary obligor (guaranteed party).

Id., ¶ 10; Exh A.

Thus, DWEC has submitted an outmoded version of the Workout Agreement to this court, and as a result, DWEC is relying on language that was explicitly deleted from the Agreement. The final version of the operative provision of the Workout Agreement does not require Daeha's "bankruptcy or liquidation" as a precondition to the enforcement of guaranty claims, nor does it purport to exempt guarantors such as DWEC from paying loan interest.

Indeed, less than two years ago, in a lawsuit then pending against DWEC in the United States District Court for the Southern District of New York (the Federal Action), DWEC provided the federal court with a copy of the correct version of the Workout Agreement – i.e., the final version that does not contain the language relied on by DWEC in this litigation, and swore “under penalty of perjury under the laws of the United States of America” that this version was the “true and correct” copy of the Workout Agreement (see Aff. of B. Ted Howes, ¶¶ 6-10; Exhs A-C). Moreover, the attorney who submitted, and swore to the accuracy of, the correct Workout Agreement on DWEC's behalf in the prior Federal Action – Jin Yeong Chung, partner in the Korean law firm of Kim & Chang – is also representing DWEC in this action (id., ¶ 13).

DWEC cannot escape its prior sworn admission in the Federal Action that the “true and correct” Workout Agreement does not contain the provision relied on by DWEC in this action. It is well-settled that a party cannot create a material issue of fact, and avoid summary judgment, by taking a position that contradicts a prior sworn statement (see Conolly v Thuillez, 26 AD3d 720 [3d Dept 2006]; Lupinsky v Windham Constr. Corp., 293 AD2d 317 [1st Dept 2002]; Columbus Trust Co. v Campolo, 110 AD2d 616 [2d Dept], affd 66 NY2d 701 [1985]). As such, the “Workout Agreement” defense is baseless.

Moreover, even assuming, arguendo, that DWEC was relying on the correct and final version of the Workout Agreement in this action, it is undisputed that DWHK (and, by extension, DWHK-R) was not a signatory to the Workout Agreement. Accordingly, to the extent that any provisions in the Workout Agreement could limit the parties to that contract from enforcing loan guaranty claims against DWEC, these provisions do not limit DWHK-R. Nevertheless, DWEC contends that DWHK (and, by extension, DWHK-R) should be derivatively bound by the Workout Agreement because DWHK's parent company – defendant DWC – was a signatory to the agreement. In support of this contention, DWEC submits the affidavit of Sooguen Oh, a Korean professor of law at Ewha Womans University in Korea, who opines that, based on Korean “business practices,” and contract “drafting style,” a Korean company can bind its independent subsidiaries to a contract without obtaining their explicit consent to the contract (Oh Aff., ¶ 6). However, in his 40-page affidavit, Professor Oh does not cite to a single Korean case to support his opinion that an independent Hong Kong company, like DWHK, can be bound to a contract executed by its Korean parent company.

In contrast, DWHK-R presents evidence that, as a matter of both Hong Kong and Korean law, DWHK-R is an independent Hong Kong company that cannot be bound by the signature of its Korean parent. First, DWHK-R submits the affidavit of Neil Edward McGregor McDonald, the partner in charge of Lovells' Hong Kong bankruptcy and restructuring practice, who opines that because DWHK is a Hong Kong company, the question of whether DWHK can be bound to a contract it did not sign is governed by Hong Kong law. Mr. McDonald concludes that, as a matter of Hong Kong law, which Mr. McDonald specifically cites in and attaches to his

affidavit, DWHK cannot be bound by the Workout Agreement, because it is "one of the fundamental pillars of Hong Kong company laws" that "a Hong Kong company is considered to be a separate legal entity and its rights cannot be exercised by another company in its group, including its parent" (McDonald Aff., ¶ 5). In addition, Mr. McDonald opines that, as a matter of Hong Kong bankruptcy law, a workout agreement cannot be binding on a Hong Kong company unless all of the company's creditors agree to the workout agreement or, alternatively, unless the company successfully obtains approval of the workout agreement from the High Court of Hong Kong in compliance with Section 166 of the Companies Ordinance Law (id., ¶ 6; see also, ¶¶ 7-22 and supporting case law).

Second, in the eventuality that Korean law, rather than Hong Kong law, applies, DWHK-R submits the affidavit of Young Seok Lee, a partner in the Korean law firm of Woo Yun Kong Jeony & Han, which rebuts Professor Oh's assertions. In his affidavit, Mr. Lee provides ample case law showing that "[it] is a basic, unassailable and clearly established principle of Korean contract and corporate law that a parent company cannot take corporate action on behalf of its subsidiary, such as the signing of the Workout Agreement, without the subsidiary's consent" (see Lee Aff., ¶¶ 6-10 and supporting case law). Accordingly, defendants' Workout Agreement defense is insufficient, as a matter of law, to create an issue of fact requiring the denial of summary judgment.

In the alternative, if Oh is correct, and Korean law allows a parent to bind its subsidiary, DWHK is bound to its terms because of DWC's assent to it. Therefore, DWEC is now obligated to begin payments to DWHK-R because Deaha defaulted. If Lee is correct, and Korean

law does not allow a parent to bind its subsidiary, DWHK is not bound by the Work-Out Agreement. Therefore, it can now proceed under the original Deaha-DWHK loan agreement to collect from DWEC because Deaha defaulted. If McDonald is correct, and Hong Kong law governs the agreement, DWHK is not bound to the Work-Out Agreement and can proceed under the original loan agreement. Accordingly, regardless of the applicable law, DWEC is now required to repay the loan because Deaha failed to do so.

Finally, defendants argue that the summary judgment motion is premature because the parties have not yet taken depositions. However, pursuant to CPLR 3212 (a), “[a]ny party may move for summary judgment ... after issue has been joined.” Here, DWHK-R moved for summary judgment on July 18, 2006, nearly two years after the commencement of this lawsuit, and long after issue was joined. Thus, as a matter of law, DWHK-R’s motion is not premature.

In any event, it is clear that further discovery will not likely shed any light on the matters addressed in the motion papers, as DWEC and Deaha have now expressly admitted all of the predicate facts necessary to establish liability in this action. Moreover, DWEC has not identified any specific facts which it must seek through discovery in order to oppose the motion (see CPLR 3212 [f]). Mere speculation that additional discovery will uncover a question of fact is insufficient to defeat a summary judgment motion (Rogan v Giannotto, 151 AD2d 655 [2d Dept 1989]).

Accordingly, DWHK-R’s motion for summary judgment is granted. However, summary judgment is granted as to liability only. Although the outstanding principal amount

due of \$65,950,0430 is undisputed, the Loan Agreement and the Amended Loan Agreement provide that interest shall be calculated at a rate of 1.5% above LIBOR. For the \$49 million tranch of the loan, the default interest rate is 3.5% above LIBOR. For the \$20 million tranch, the default interest is 2.5% above LIBOR (see Huttenlocher Aff., Exhs D-E). Accordingly, a determination of the entire amount owed by Daeha and DWEC to DWHK must be referred to a Special Referee to hear and report.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of defendant Daewoo Engineering and Construction Co., Ltd. for a stay of this action (Motion Sequence No. 004) is denied; and it is further

ORDERED that plaintiff's motion for summary judgment against defendants Daeha Company Limited and Daewoo Engineering and Construction Co., Ltd. (Motion Sequence No. 003) is granted, and the Clerk of the Court is directed to enter judgment against these defendants as to liability only; and it is further

ORDERED that the issue of the entire amount owed by defendants Daeha Company Limited and Daewoo Engineering and Construction Co., Ltd. to plaintiff – the principal amount of \$65,950,030, plus interest and attorneys' fees, as provided for in the Loan Agreement and the Amended Loan Agreement – is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4402 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that plaintiff's motion for summary judgment (Motion Sequence No. 003) against defendant Daewoo Corporation is denied, due to the stay of this action against Daewoo Corporation imposed by the Bankruptcy Court, without prejudice to renew upon the lifting of such stay.

Dated: January 30, 2007

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RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.