

Abrahami v Feldman

2024 NY Slip Op 32289(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 652641/2021

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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AVISHAI ABRAHAMI,

Plaintiff,

- v -

ZEIL FELDMAN and NIR MEIR,

Defendants.

INDEX NO. 652641/2021

MOTION DATE --

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 99, 100, 108, 109, 110, 111, 112, 113, 114, 115

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

In motion 001, plaintiff Avishai Abrahami moves pursuant to CPLR 3212 for (i) summary judgment against defendants Zeil Feldman and Nir Meir¹ (ii) dismissal of defendants' affirmative defenses;² (iii) judgment against defendants in the amount of \$30,000,000 plus all costs and expenses, including attorneys' fees, and applicable interest.

On September 8, 2020, Abrahami loaned HFZ Member RB Portfolio LLC and HFZ Member RB Acquisitions LLC (Borrowers) \$30 million. (NYSCEF 40, Loan Agreement at 1; *id.* ¶ 1.1 [loan amount].) Meir executed the note and held himself out

¹ The action is stayed against Meir who filed for bankruptcy. (NYSCEF 101, February 11, 2024 Order.)

² The parties fail to address Feldman's affirmative defenses instead focusing on ratification. While Feldman makes no other arguments on this motion, it is denied as to affirmative defenses since the movant has the initial burden and failed to satisfy his burden to dismiss Feldman's affirmative defenses here.

as the managing principal of Borrowers. (NYSCEF 59, Meir depo tr at 51:8-23, 84:8-13.) The loan was accompanied by a guarantee with Feldman's signature. (NYSECF 41, Guarantee at 1, 13.) The guaranty includes a carveout obligation which states that "(b)... Guarantor hereby irrevocably and unconditionally agrees that it shall be liable to [Abrahami] . . . for the payment and performance of all Carveout Obligations." (*Id.* §2.1.) The Carveout Obligation is defined as loses resulting from: "(i) any fraud or intentional misrepresentation by Borrower in connection with the Loan; and (ii) the misapplication or conversion by Borrower of any monies in contravention of any provision of the Loan Documents, including, without limitation, any Revenue." (*Id.* §1.1[a].) For the purposes of this motion, the parties agree that Feldman's signature is forged. (NYSCEF 73, Plaintiff's MOL at 6³.) Meanwhile, Borrowers also had a \$43 million loan from Monroe Capital. (See NYSCEF 57, Guaranty and Collateral Agreement at 1.) Monroe filed a UCC-1 financing statement claiming a secured lien in all of Borrowers' assets. (NYSCEF 58, UCC-1 Financing Statements ¶4.)⁴ The Monroe loan required the Borrowers to obtain Monroe's consent for the Abrahami loan. (See NYSCEF 57, Guaranty and Collateral Agreement; NYSCEF 64, Notice at 2.) Likewise, Meir failed to obtain the approval of the Riech Bros, who have an ownership interest in the assignors who provided the collateral for the Abrahami loan. (NYSCEF 42, 43, 44, Assignments; NYSCEF 54, 55, 56, Operating Agreements; NYSCEF 59, Meir depo tr at

³ NYSCEF pagination.

⁴ This case differs from *BSDT 2012 LLC v H F Z Capital Group LLC*, 2022 NY Misc LEXIS 2272022, *4, WL 135320, *2, 2022 NY Slip Op 30151(U) [Sup Ct, NY County 2021] because of the UCC filing on the Monroe loan which would have put Abrahami on notice of a lien on all of Borrowers' assets. (NYSCEF 58, UCC-1 Financing Statements ¶4.)

175:2-12, 176:11-23.) Meir misappropriated most of the proceeds from Abrahami loan. (NYSCEF 60, Feldman depo tr at 140:18-25; 141:2-11; 178:22-25; 179:2, 14-25; 180:2-16.) The Borrowers defaulted on January 1, 2021. (NYSCEF 39, Abrahami aff ¶¶16; NYSCEF 40, Loan Agreement ¶2.3.1 [a].) Abrahami sent a default notice on March 4, 2021. (NYSCEF 46, Letter.) On March 15, 2021, Abrahami demanded payment under the guaranty from Feldman, who owns the Borrowers, but Abrahami has not been paid. (NYSCEF 46, Demand; NYSCEF 39, Abrahami aff ¶¶16.)

A principal ratifies a guaranty when the principal retains the loan proceeds. (See *YH Lex Estates LLC v HFZ Capital Group LLC*, 203 AD3d 417, 417-18 [1st Dept 2022] [in a 3213 motion in lieu of complaint on guaranty rejecting Feldman's identical argument on a similar note]; *BSDT 2012 LLC v H F Z Capital Group LLC*, 2022 NY Misc LEXIS 2272022, *4, WL 135320, *2, 2022 NY Slip Op 30151(U) [Sup Ct, NY County 2021] [rejecting Feldman's argument on yet another similar guaranty on a motion in lieu of complaint].) In addition to his companies receiving the loan proceeds, Feldman took \$250,000 from HFZ's bank account which was transferred to his personal account on September 9, 2020. (NYSCEF 60, tr 159:20-160:20; NYSCEF 67, Bank Statement.) "[A] principal's acceptance of benefits from a contract that was unauthorized when originally executed constitutes an affirmance of the contract that, under appropriate circumstances, will give rise to a ratification." (*Cologne Life Reins. Co. v Zurich Reins. (N. Am.), Inc.*, 286 AD2d 118, 127 [1st Dept 2001] [citations omitted].) The Borrowers and Feldman are

"bound by the acts of his agent as against innocent third parties such as defendants, who ... had no way of knowing of ... any other reason to question the validity of the releases. It is the (principal), after all, who selected [the agent] to represent him, and he, not the (third person), should bear the risk of [the

agent's] unauthorized acts, having placed [agent] in a position to perpetrate the wrong." (*Cory v Nintendo of Am., Inc.*, 185 AD2d 70, 73 [1st Dept 1993] [internal quotation marks and citation omitted].)

Accordingly, as between Feldman and Abrahami, Feldman is responsible for his employee's bad acts.

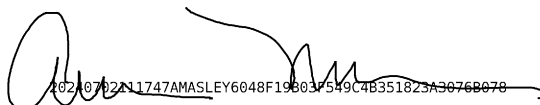
However, this motion on the guaranty only must be denied. Feldman alleges that he was unaware of the Abrahami loan and guaranty and did not become aware of the guaranty with his forged signature until November 11, 2020 when he immediately called the Borrowers' attorney Holland & Knight to inquire.⁵ (NYSCEF 91, Feldman depo tr at 55:22-67:12.) Feldman's alleged lack of knowledge of the Abrahami transaction distinguishes this case from *YH Lex Estates LLC v HFZ Capital Group LLC*, 203 AD3d 417, 417 [1st Dept 2022] where Feldman was aware of Meir's initial negotiation of the transaction. "[A] forged instrument may be ratified where the principal retains the benefit of an unauthorized transaction with knowledge of the material facts." (*Adirondack Bank v Midstate Foam and Equip., Inc.*, 159 AD3d 1354, 1355 [4th Dept 2018] [internal quotation marks and citations omitted].) However, "even if the note was ratified, [defendant] is not personally liable if his signature on the guaranties was forged and he lacked knowledge of the guaranties' existence, thus rendering the guaranties void ab initio." (*Id.* at 1356 [citation omitted].) Further, there is a question of fact as to whether Feldman's call to the attorney when he learned of the Abrahami loan and the forgery is sufficient investigation. (See *YH Lex Estates LLC*, 203 AD3d at 418 [Feldman conducted no investigation and made no objection to loan and forged

⁵ Abrahami initiated an action for fraud against Meir and Holland & Knight. (*Avishai Abrahami v Nir Meir, Holland & Knight LLP, Sean M. Garahan*, Index No: 651356/2023.)
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guaranty.) Ratification requires knowledge and benefit. (See *US Bank National Assn. v Gutierrez*, 136 AD3d 571, 571 [1st Dept 2016]; *Robinson v Day*, 103 AD3d 584, 586 [1st Dept 2013]; *Adirondack Bank*, 159 AD3d at 1355.) Again, Mir allegedly stole most of the loan proceeds from the Borrowers so there is an issue fact as to whether Feldman, via the Borrowers that he owns, benefited from the Abrahami loan. Therefore, with issues of fact as to Feldman’s knowledge, benefit, and investigation, a trial is necessary to determine whether Feldman ratified the guaranty.

Accordingly, it is

ORDERED that plaintiff Abrahami’s motion is denied.



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7/2/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE