

TPCAF I, LLC v Aboutaam

2024 NY Slip Op 34420(U)

December 10, 2024

Supreme Court, New York County

Docket Number: Index No. 654474/2024

Judge: Nancy M. Bannon

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within the parameters of CPLR 3213. See Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., 25 NY3d 485 (2015); Springprince, LLC v Elie Tahari, Ltd., 173 AD3d 544 (1st Dept. 2019); Board of Mgrs. of the Saratoga Condominium v Shuminer, 148 AD3d 609 (1st Dept. 2017). Further, it is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof in admissible form to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Here, the plaintiff, TPCAF I, LLC, seeks to recover on an agreement signed by the defendant, Hicham Aboutaam, and the plaintiff's predecessor in interest, TPC Art Finance LLC ("Lender") to guaranty payment under a Loan Agreement between the Lender and Petrarch, LLC (the "Borrower"). Aboutaam also signed the Loan Agreement on behalf of the Borrower, in his capacity as its President.

In support of the motion, the plaintiff submits, among other things, an affirmation of Michael Hansen, the Manager of the plaintiff company and Chief Operating Officer of the Lender. Hansen avers that the plaintiff is the successor in interest to the Lender under the express terms of the loan documents. The plaintiff also submits the subject guaranty, by which the defendant unconditionally guaranteed the loan between the Lender and Borrower, as well as any interest due. Section 5 provides that the defendant remains liable even if the Loan Agreement is amended, which may increase the interest rate or extend the time of payment. Section 15 states that the guaranty is binding on the Lender and the defendant, as well as their respective successors in interest. The guaranty also includes a waiver clause, by which the defendant waives any available defenses.

The plaintiff also submits the subject Loan Agreement between the Lender and the Borrower, dated September 21, 2020, by which the Lender agreed to loan the Borrower up to \$9,900,000. The plaintiff also submits a promissory note, by which the Borrower promised to pay that amount. The plaintiff also submits seven amendments to the Loan Agreement. Notably, the first amendment states that the plaintiff is the successor in interest to the Lender under the Loan Agreement and is signed by Aboutaam as Borrower's president and Hansen as plaintiff's

manager. The second through seventh amendments, signed by the same parties, list the plaintiff as the lender under the Loan Agreement.

In his affirmation, Hansen further states that the Borrower defaulted on the loan on May 11, 2024, by failing to make its \$117,548.25 interest payment within ten days after the April 30, 2024, due date. The plaintiff's proof also includes an invoice sent to the Borrower on July 11, 2024, for interest payments due under the Loan Agreement. The invoice shows that \$117,548.25 was due for the month of April 2024, and no payments were made after that. This invoice states that the total principal balance due is \$9,735,762.99, with an accrued contractual interest of \$163,479.69, for a total of \$9,899,242.68.

By this proof, the plaintiff has established an "unequivocal and unconditional obligation to repay" (Zyskind v FaceCake Mktg. Tech., Inc., *supra*) a sum over a stated period of time (see Bloom v Lugli, *supra*) and the defendant's failure to pay in accordance with the terms of the agreement. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008); Zyskind v FaceCake Mktg. Tech., Inc., *supra*. The plaintiff further establishes a clear and unambiguous guaranty signed by the defendant with language that conclusively binds the defendant guarantor to its terms (see Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 [1st Dept. 2012]) such that enforcement of the guaranty is warranted. Specifically, the defendant is liable for the amounts owed by the Borrower under the Loan Agreement and its seven amendments, as Section 5 of the guaranty provides that the defendant's liability continues notwithstanding any modification or amendment to the Loan Agreement. Furthermore, the first amendment to the Loan Agreement, signed by the Borrower and Lender, assigned the Lender's rights to the plaintiff.

In opposition, the defendant does not dispute the plaintiff's factual allegations, or the amount sought by the plaintiff. Indeed, in his purported affirmation in opposition, the defendant essentially admits that the Borrower defaulted on the loan, and that it did so due to "current market conditions" and "slow to no business" in the art industry. While the court is sympathetic to the defendant's current unfortunate financial circumstances, the inability to pay is not a defense to this action, particularly as the guaranty contains broad and unconditional language holding the defendant liable for the Borrower's default under the Loan Agreement. See 1029 Sixth, LLC v Riniv Corp., 9 AD3d 142 (1st Dept. 2004); see also Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc., 46 NY2d 573 (1979), Chelsea 19 Assoc. v James, 67 AD3d 601 (1st

Dept. 2009). In any event, the parties are free to enter into any stipulation of settlement of the judgment, and the court encourages them to do so.

The defendant also represents that the plaintiff is in possession of collateral, artworks pledged by the Lender to secure the loan, and argues that the plaintiff is wrongly seeking “double recovery” in moving for summary judgment. The defendant opines that the plaintiff should instead sell the collateral to satisfy the debt. This argument is without merit, as a lender may choose to proceed against a borrower or guarantor on a note and is not obligated to sell the collateral it retains under such a note. See First Intern. Bank of Israel, Ltd. v L. Blankstein & Son, Inc., 59 NY2d 436 (1983); Marine Midland Bank v Hakim, 247 AD2d 345 (1st Dept. 1998); Chem. Bank v Alco Gems Corp., 151 AD2d 366 (1st Dept. 1989). In any event, there has been no recovery, much less double recovery.

Finally, the plaintiff seeks attorney’s fees and costs. It is well settled that attorneys’ fees are recoverable where, as here, there is a specific contractual provision for that relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). Paragraph 12 of the guaranty provides for such relief. However, the plaintiff has not submitted any proof of the amount of fees and costs incurred, such as an affirmation and billing records. The plaintiff may submit such supplemental proof within 30 days.

Accordingly, upon the foregoing papers, it is,

ORDERED that the plaintiff’s motion for summary judgment in lieu of a complaint (CPLR 3213) is granted, and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, TPCAF I, LLC, and against the defendant, Hicham Aboutaam, in the sum of \$9,899,242.68, plus statutory interest from May 11, 2024, and it is further

ORDERED that the plaintiff may file supplemental papers, within 30 days of the date of this order, to establish the amount of its attorneys’ fees and costs incurred, and the plaintiff shall provide notice to the court of any such filing by emailing the Part 61 Clerk at SFC-Part61-Clerk@nycourts.gov; and it is further,

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/10/2024
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE