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SHORT FORM ORDER

INDEX No. 6197-12

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/5/13
ADJ. DATES 3/29/13
Mot. Seq. # 001 - MotD
Prelim. Conference: **5/23/13**
CDISP Y____ N XX

RMP CAPITAL, CORP Plaintiff, -against- VICTORY JET LLC, JEFF ERICKSON CHRISTOPHER BARNES and ROGER MALDANADO Defendants.	REISMAN, PEIREZ, *et.al.* Attys. For Plaintiff 1305 Franklin Ave. Garden City, NY 11530 KEITH D. BLACK, P.C. Atty. for Defendant BARNES 626 RexCorp Plaza Uniondale, NY 11566 BERKMAN, SHWARTZ, *et.al.* Attys. for Defendant ERICKSON 1050 Franklin Ave Garden City, NY 11530 MACCO & STERN, LLP Attys for Defendant MALDANADO 132 Pinelawn Rd. Suite 120 South Melville, NY 11747

Upon the following papers numbered 1 to 15 read on this motion by the plaintiff for summary judgment on certain causes of action against individual defendants; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 5-7; Reply papers 8-10; Other 11-12 (plaintiff memorandum); 13-15 (Counsel's affirmation and Defendant Maldonado's affidavit); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for summary judgment on its THIRD and SIXTH causes of action in which the plaintiff seeks recovery of damages from the individual guarantor defendants and recovery of counsel fees under the terms of their written guaranties, is considered under CPLR 3212 and is granted to the extent that the plaintiff is awarded partial summary judgment against the individual defendants on the issue of their liability to the plaintiff under the THIRD and SIXTH causes of action; and it is further

ORDERED that the plaintiff's entitlement to an immediate trial on the issue of its damages pursuant to CPLR 3212(c) is hereby fixed and determined subject to the court's certification of the matter as ready for such immediate trial and the filing of a note issue as directed below; and it is further

ORDERED that a preliminary conference limited to the issue of the damages the plaintiff claims are due from the individual defendants shall be held on **Thursday, May 23, 2013** at 9:30 am in the courtroom of the undersigned located in the Supreme Court Annex Building of the courthouse at One Court Street, Riverhead, New York 11901, at which, counsel shall appear ready for such conference.

The plaintiff is engaged in the business of providing various types of financing to businesses and other entities in need thereof. In September of 2010, defendant Victory Jet, LLC was an air charter broker engaged in the business of providing charter air transport to corporate and private clients.

This action arises out of the corporate defendant's purported breach of the September 25, 2010 Factoring and Security Agreement as amended by an April 27, 2011 written amendment and the individual defendants' purported breaches of the terms of their written guaranties of the corporate defendant's performance under such agreement. The agreement called for the plaintiff's discount purchase of future accounts receivable generated by Victory Jet, ownership of which, could vest in the plaintiff, at its sole discretion. As security, Victory Jet granted the plaintiff a security interest in all of its assets, including its accounts. Further security for Victory's performance was the subject of three separate written guaranties executed by the individual defendants on October 13, 2010. The plaintiff claims to have advanced to Victory Jet the sum of $1,272,009.61 for the purchase of invoices totaling $1,830,888.19 (*see* ¶ 21 of the affidavit of Matthew Davis submitted in support of plaintiff's motion).

Victory Jet paid the plaintiff the monthly installments due under the terms of the Factoring and Security Agreement from October of 2010 through April of 2011. Such payments totaled $478,623.28. The plaintiff claims that Victory defaulted in its payment obligations in May of 2011. A notice of default and acceleration of monies due in the amount of $873,741.74 issued in October of 2011. Following the defendants' failure to respond, the plaintiff commenced this action to recover the damages sustained by reason of the defendants' defaults in payment under the terms of the Factoring and Security Agreement, as amended, and the written guarantees executed by the individual defendants. The plaintiff claims a balance is due and owing from the defendants in the amount $956,586.76, plus counsel fees and costs.

All of the claims interposed against the corporate defendant, Victory Jet, LLC, were withdrawn by the plaintiff due to a bankruptcy filing by such defendant prior to the commencement of this action. All such claims are thus dismissed, without prejudice.

Issue was joined by the service of separate answers by each of the three individual defendants. The answers served by defendants Barnes and Maldonado raise common defenses that challenge the validity of the Factoring Agreement and the written guarantees of payment and performance by Victory Jet. These defenses rest principally upon claims of equitable estoppel, violations of public policy and statutes, usury laws, the true nature of the loan as one personal to one or more of the guarantors and to the plaintiff's own breach of the Factoring and Security Agreement (*see* Answers attached as Exhibits

C & D to the plaintiff's moving papers). Defendant Erickson's pleaded defenses rest upon claims that the plaintiff's failure to purchase the accounts receivable owned by Victory Jet and/or to advance monies called for by the Factoring Agreement constituted a material breach which vitiated or altered the agreement to such an extent that the guarantee of the obligations of Erickson were concomitantly discharged (*see* answer attached as Exhibit B to the plaintiff's moving papers). Notably, each of the written guaranties contain waivers by the guarantors of all defenses, set offs, counterclaims and/or cross claims against the plaintiff. The guaranties further contain provisions making them enforceable separately from the Factoring and Security Agreement.

By the instant motion, the plaintiff seeks summary judgment against the individual defendants on its THIRD cause of action which sounds in breach of their written guaranties of the obligations of Victory Jet under the terms of the Factoring Agreement. The plaintiff further seeks summary judgment on its claim for recovery of counsel fees that is the subject of its SIXTH cause of action. Defendants, Maldonado and Erickson, oppose the motion in papers that raise one or more of their pleaded defenses.

Defendant Erickson admits that the plaintiff advanced monies to Victory under the Factoring Agreement. He nevertheless claims that the plaintiff breached the said agreement by failing to purchase any accounts receivable or other accounts and by failing to acquire title to any such accounts. The breach is allegedly substantial enough to vitiate the Factoring and Security Agreement and effect of a discharge of defendant Erickson from his guaranty obligations (*see* affirmation of defense counsel Livoti, ¶¶ 49 -57). Defendant Erickson also raises a procedural challenge to the plaintiff's motion that rests upon a claim of prematurity due to the absence of pre-trial discovery. For the reasons stated below, partial summary judgment is awarded to the plaintiff on the issue of the defendants' liability with an immediate trial on the issue of damages to be held as hereinafter set forth.

A guaranty is a separate undertaking and may impose lesser or greater collateral responsibility on the guarantor (*see* ***American Trading Co. v Fish***, 42 NY2d 20, 26, 396 NYS2d 617 [1977]). Execution of an unqualified guaranty makes the guarantor personally liable for the obligations of an obligor under a contract or note to the same extent as the obligor extent that such obligations are the subject of the guaranty (*see* ***Desiderio v Devani***, 24 AD3d 495, 806 NYS2d 240 [2d Dept 2005]; ***Pollina v Blatt***, 262 AD2d 384, 691 NYS2d 156 [2d Dept 1999]). Here, each of the individual defendants executed written guaranties in which they unconditionally guaranteed the payment and performance of Victory's obligations under the Factoring and Security Agreement.

A prima facie entitlement to judgment as a matter of law on claims to recover damages by reason of a breach under the terms of a written guaranty is made upon proof of the existence of a primary obligation under a contract or note, the guarantee of such obligation by a guarantor and a default on the part of the obligor and the guarantor (*see* ***Valley Natl. Bank v INI Holding, LLC,*** 95 AD3d 1108, 945 NYS2d 97 [2d Dept 2012]; ***Imperial Capital Bank v 11-13-15 Old Fulton D, LLC***, 88 AD3d 652, 930 NYS2d 267 [2d Dept 2011]; ***Urstadt Biddle Prop., Inc. v Excelsior***, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]; ***Verela v Citrus Lake Dev., Inc.***, 53 AD3d 574, 575, 862 NYS2d 96 [2d Dept 2008]). Here, the plaintiff satisfied its initial burden with respect to the defendants' liability by the plaintiff's production of the Factoring and Security Agreement, the written guaranties of the individual defendants and due proof by affidavit of Victory's default in payment and the like defaults of the individual defendants under their unconditional guaranties. Such proof was sufficient to establish, as a matter of

law, the defendants' liability for the damages due to the defendants' breach of their guaranties as claimed in the plaintiff's THIRD and SIXTH causes of action (*see* ***Urstadt Biddle Prop., Inc. v Excelsior Realty***, 65 AD3d 1135, *supra*; ***North Fork Bank v ABC Merchant Servs., Inc.***, 49 AD3d 701, 701, 853 NYS2d 633 [2d Dept 2008]; ***Suffolk County Natl. Bank v Columbia Telecom. Group, Inc.***, 38 AD3d 644, 645, 832 NYS2d 80 [2d Dept 2007]). The plaintiff's submissions were, however, insufficient to establish the amount of the damages to which the plaintiff is entitled to recover under the terms of the contract and guaranties, including, the reasonable value of legal fees incurred.

It was thus incumbent upon the guarantor defendants to demonstrate by due proof in admissible form that questions of fact exist which rebuts the plaintiff's prima facie establishment of its liability claims or establishes that the defendants are possessed of one or more potentially viable legal defenses (*see* ***Signature Bank v Galit Props., Inc.***, 80 AD3d 689, 915 NY2d 138 [2d Dept 2011]; ***Gullery v Imburgio***, 74 AD3d 1022, 905 NYS2d 221 [2d Dept 2010]). Upon its review of the record, the court finds that no such questions of fact were raised.

There are no denials that the plaintiff did not advance funds in excess of one million dollars to Victory following the execution of the Factoring and Security Agreement or that Victory fulfilled its payment obligations by payment to the plaintiff of some $873,741.74 prior to its default in May of 2011. No questions of fact regarding the plaintiff's prima facie showing of its entitlement to partial summary judgment on the issue of the defendants' liability were raised by the defendants.

Nor did the defendants raise any questions of fact premised upon their assertion of any bona fide defenses to the plaintiff's liability claims. As indicated above, the written guaranties of the individual defendants contained, among other things, broad waivers of all defenses, set offs, counterclaims or cross claims. It is well established that a waiver of defenses may be set forth in contracts and written guaranties of the obligations of the obligor or in agreements executed subsequent to the loan documents by the parties thereto or their successors in interest (*see* ***JPMCC CIBC Bronx Apts., LLC v Fordham Fulton, LLC***, 84 AD3d 613, 922 NYS2d 779 [1st Dept 2011]; ***Inland Mtge. Capital Corp. v Realty Equities NM, LLC***, 71 AD3d 1089, 900 NYS2d 79 [2d Dept 2010]; ***Reliance Constr., LTD v Kennelly,*** 70 AD3d 418, 893 NYS2d 548 [1st Dept 2010]; ***North Fork Bank v Computerized Quality Separation Corp.***, 62 AD3d 973, 879 NYS2d 575 [2d Dept 2009]; ***Red Tulip, LLC v Neiva,*** 44 AD3d 204, 842 NYS2d 1 [2007]); ***Fleet Bank v Petri Mech. Co.***, 244 AD2d 523, 664 NYS2d 462 [2d Dept 1997]). Such waivers are enforceable as they do not contravene the public policy of this State (*see* ***Chemical Bank NY Trust Co. v Batter***, 31 AD2d 801, 297 NYS2d 363 [1st Dept 1969]). They do, however, present defendants who have waived such defenses with "an insurmountable obstacle" to defeating a claim for recovery under the terms of loan documents to which the waiver relates (*see* ***JPMCC CIBC Bronx Apts., LLC v Fordham Fulton, LLC***, 84 AD3d 613, *quoting* ***Red Tulip, LLC v Neiva,*** 44 AD3d 204, *supra*).

In light of these appellate authorities, the court finds the defendants' resort to the legal defenses asserted by them in their opposing papers to be wholly unavailing. Such defenses, including the defenses of usury, material breach on the part of the plaintiff purportedly discharging one more of the defendants from their guaranty obligations, the purported invalidity of the Factoring and Security Agreement under state and federal statutes and the other defenses asserted in opposition to this motion

are not available to the defendants due to their waiver under the terms of their written guaranties. The unlimited and continuing nature of the guaranties and the express waiver of all legal defenses set forth therein are conclusively binding upon the individual defendants (*see* ***Fleet Bank v Petri Mech. Co., Inc.***, 244 AD2d 523, 664 NYS2d 462 [2d Dept 1997]; *see also* ***Inland Mtge. Capital Corp. v Realty Equities NM***, 71 AD3d 1089, *supra*; ***Reliance Constr., LTD v Kennelly,*** 70 AD3d 418, *supra*; ***North Fork Bank v Computerized Quality Separation***, 62 AD3d 973, *supra*).

Also rejected is defendant Erickson's procedural challenge that this motion is premature and should be denied as such due to absence of engagement in pre-trial discovery proceedings as contemplated by CPLR 3212(f). The rule at CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]; ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011; ***McFadyen Consulting Group, Inc. v Puritan's Pride***, 87 AD3d 620, 928 NYS2d 87 [2d Dept 2011]; ***Urstadt Biddle Prop., Inc. v Excelsior Realty***, 65 AD3d 1135, *supra*). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738, 740, 913 NYS2d 103 [2d Dept 2010], *quoting* ***Lopez v WS Distrib., Inc.***, 34 AD3d 759, 760, 825 NYS2d 516; *see* ***Friedlander Org., LLC v Ayorinde***, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

Defendant Erickson made no such showing, at least with respect to the issue of liability. However, in light of the plaintiff's failure to sufficiently establish the measure of its damages, the court finds that the defendants should be afforded the opportunity to engage in limited discovery with respect to the amounts claimed as due by the plaintiff, prior to the scheduling of a trial on the limited issue of the plaintiff's damages pursuant to CPLR 3212(c). Accordingly, a preliminary conference limited to the issue of the plaintiff's damages shall be held herein on **Thursday May, 23, 2013**, in the courtroom of the undersigned in the Supreme Court Annex Building of the courthouse located at One Court Street, Riverhead, New York 11901. Further directives regarding the fixation of a schedule of discovery, if necessary, certification of the matter as ready for the immediate trial on damages and the filing of a note issue are among the matters the court shall explore with counsel at the conference.

DATED: 4/12/13

THOMAS F. WHELAN, J.S.C.