

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**DEVELOP MICHIGAN REAL ESTATE  
FUND, L.P.,  
Plaintiff,**

v.

**Case No. 18-170292-CB  
Hon. James M. Alexander**

**400 SOUTH OLD WOODWARD, LLC,  
JOSEPH JONNA, and DEVELOP  
MICHIGAN REAL ESTATE FUND, L.P.,  
Defendants.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on cross motions for summary disposition.

According to Plaintiff's Complaint, Plaintiff agreed to lend \$9,590,000 to Defendant 400 South Old Woodward pursuant to Construction Loan Agreement in 2015. Defendant Joseph Jonna executed a personal Guaranty in connection with the Construction Loan Agreement. Defendant 400 South Old Woodward defaulted on the terms of the Construction Loan Agreement by failing to pay the balance due when the loan matured on May 28, 2018. Plaintiff also alleges that Defendant Jonna breached the terms of the Guaranty by failing to pay and perform.

On these general allegations, Plaintiff filed its Complaint on claims titled (Count I) breach of contract - 400 South Old Woodward, LLC; (Count II) appointment of receiver; and (Count III) breach of contract – Joseph Jonna.<sup>1</sup>

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<sup>1</sup> The Court appointed a receiver on December 6, 2018, which resolved Count II of Plaintiff's Complaint.

As stated, both Plaintiff and Defendants move for summary of Plaintiff's Complaint under MCR 2.116(C)(8) and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).<sup>2</sup> And a (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden*, 461 Mich at 120.<sup>3</sup>

### **I. Count I – Breach of Contract – 400 South Old Woodward**

In Defendants' motion, Defendant, 400 South Old Woodward states that it "does not contest liability but reserves its right to a hearing regarding the proper amount of the final judgment, if any, following the Receiver's liquidation of the subject property and distribution of proceeds." (Defendants' Motion, p. 3).

In response, Plaintiff argues that it is undisputed that Defendant breached the terms of the Construction Loan Agreement. Plaintiff further argues that it was not required to pursue the collateral prior to pursuing a judgment against Defendant. Therefore, Plaintiff argues that it is entitled to judgment against Defendant 400 South Old Woodward in the amount of \$5,249,314.66. Plaintiff acknowledges that Defendant may be entitled to a credit against the amounts due once the property is sold, but Plaintiff maintains that the pending sale does not preclude entry of judgment. The Court agrees.

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<sup>2</sup> Such a motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).

Further, "[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

<sup>3</sup> In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

Here, as stated, Defendant does not contest liability. Further, Defendant does not seem to dispute the amount of damages. Rather, Defendant argues that the Construction Loan Agreement will be fully satisfied upon the Receiver's sale. Defendant does not, however, provide any legal or evidentiary support for its position.

Based on the foregoing, the Court finds that Plaintiff is entitled to a judgment in the amount of \$5,249,314.66 against Defendant 400 South Old Woodward. The Court will stay the execution of the judgment until the proceeds from the Receiver sale have been distributed.

## **II. Count III – Breach of Contract – Joseph Jonna**

Next, Defendant Jonna argues that his entering a judgment finding him personally liability is premature since the proceeds from the Receiver's sale will satisfy his obligations under the Guaranty. If the proceeds do not satisfy Defendant's obligations, Defendant contends that the Court should hold a hearing to determine what, if any, liability he has pursuant to the Guaranty. Further, Defendant argues that any liability he may have pursuant to the Guaranty only arises from the Construction Loan Agreement.

Conversely, Plaintiff argues that the Guaranty secures both the Construction Loan Agreement and a separate loan agreement, the Mezzanine Loan. Since the amount due under both loans is in excess of \$1,000,000, Plaintiff argues that judgment in the full amount of the Guaranty is warranted.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). And, “[c]ontracts of guaranty are to be

construed like other contracts, and the intent of the parties, as collected from the whole instrument and the subject-matter to which it applies, is to govern.” *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010) (internal quotation omitted).

The Guaranty provides:

THIS GUARANTY (this “Guaranty”), dated as of this 20th day of August, 2015, is executed by JOSEPH “JOEY” JONNA, an individual . . . (“Guarantor”) in favor of INDEPENDENT BANK, as administrative agent for the Lenders (“Administrative Agent”) in connection with that Construction Loan Agreement, dated as of even date herewith, by and among 400 South Old Woodward, LLC (“Borrower”), the Administrative Agent, and the Lenders now or hereafter party thereto (the “Lenders”) as amended, restated, modified or supplemented from time to time hereafter (“Credit Agreement”). Capitalized terms not otherwise defined herein shall have the respective meanings ascribed to them by the Credit Agreement. (Complaint Exhibit K).

To induce the Administrative Agent and the Lenders to make loans and grant other financial accommodations to the Borrower under the Credit Agreement, Guarantor hereby unconditionally, and irrevocably, guaranties to the Administrative Agent and each Lender; and becomes surety, as though it was a primary obligor for, the full and punctual payment and performance when due . . . of all Indebtedness, including, without limiting the generality of the foregoing, all obligations, liabilities, and indebtedness from time to time of the Borrower to the Administrative Agent or any of the Lenders or any affiliate of any Lender under or in connection with the Credit Agreement or any other Loan Document. *Id.* at §1.

The Guaranty further provides:

This Guaranty and the Credit Agreement constitute the entire agreement of the parties hereto with respect to the subject matter hereof and supersede any and all other prior and contemporaneous understandings and agreements. *Id.* at §16(d).

“Indebtedness” is a defined term in the Construction Loan Agreement. Pursuant to the same, Indebtedness is defined as “all indebtedness, obligations and liabilities of the Credit Parties under the Loan or arising out of any of the Loan Documents . . . excluding, however, any of the foregoing arising under or in connection with the Mezzanine Loan. (Complaint Exhibit B, §1.1)

Plaintiff argues that the Mezzanine Loan is connected to the Construction Loan Agreement, and that the Construction Loan Agreement was negotiated with the Mezzanine Loan in mind. Further, Plaintiff argues that the indebtedness guaranteed by the Guaranty includes more than the defined “Indebtedness” in the Construction Loan Agreement. And since the Mezzanine Loan is included within the Construction Loan Agreement, the Guaranty includes the Mezzanine Loan. The Court disagrees.

Here, the Guaranty specifically states that it was made in connection with the Construction Loan Agreement. And, the Construction Loan Agreement specifically excludes the Mezzanine Loan in the definition of “Indebtedness.” Plaintiff attempts to argue that the Guaranty’s definition of indebtedness is broader since it includes “all obligations, liabilities, and indebtedness from time to time of the Borrower to . . . Lenders in connection with the Credit Agreement and any other Loan Document.” (Complaint Exhibit K, §1).

The Construction Loan Agreement, however, defines “Loan Document” as:

collectively, when executed and delivered, this Loan Agreement, the Construction Loan Notes, the Security Documents, the Environmental Indemnity Agreement, the Guaranty, the Intercreditor Agreement, all certificates and all other documents or agreements, executed by and/or delivered to Agent and/or the Lenders on behalf of the Credit Parties in connection with the Loan or this Loan Agreement, including without limitation, those documents and instruments listed on the Closing Agenda attached hereto as Exhibit A. (Complaint Exhibit B, §1.1)

Although the Guaranty may include any other “Loan Documents” within its definition of indebtedness, “Loan Documents” as defined in the Credit Loan Agreement does not include the Mezzanine Loan. Further, as previously stated, the Construction Loan Agreement specifically excludes the Mezzanine Loan. Additionally, the Guaranty contains an integration clause that

states that the Guaranty and the Credit Loan Agreement constitute the entire agreement between the parties.<sup>4</sup>

Therefore, based on the clear and unambiguous language of the Guaranty and the Credit Loan Agreement, the Court cannot conclude that the Guaranty included the Mezzanine Loan. As such, any personal liability Defendant has under the Guaranty arises only from the Construction Loan Agreement.

As stated, Defendant contests liability pursuant to the Guaranty since the proceeds from the Receiver's sale should satisfy his obligations under the same. This, however, is not a defense to breaching the Guaranty.

Here, it is undisputed that Defendant's obligation under the Guaranty was triggered when Defendant 400 South Old Woodward defaulted on the Construction Loan Agreement. It is also undisputed that Defendant Jonna did not satisfy his obligations under the Guaranty. And again, Defendant does not dispute the amount Plaintiff claims is owed, rather, Defendant argues that a judgment would be premature.

Based on the foregoing, Defendant is liable pursuant to the terms of the Guaranty for \$1,087,812.66. Again, the Court will stay enforcement of the judgment until the proceeds from the Receiver sale have been distributed.

### **III. Conclusion**

Plaintiff's motion as to Count I of its Complaint is GRANTED in its entirety and Judgment is entered against Defendant 400 South Old Woodward in the amount of

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<sup>4</sup> "When two parties have entered into a written contract and have expressed their intention that the writing constitute the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714-15; 580 NW2d 8 (1998).

\$5,249,314.66. Plaintiff's motion as to Count III is GRANTED IN PART in that Defendant Jonna is liable pursuant to the Guaranty for the indebtedness arising from the Construction Loan Agreement. Judgment is entered in favor of Plaintiff and against Defendant Jonna in the amount of \$1,087,812.66. Defendants' motion as to Count I is DENIED. Defendants' motion as to Count III is GRANTED IN PART in that the Guaranty does not include the Mezzanine Loan. Both judgments are stayed until the proceeds from the Receiver sale have been distributed.

**IT IS SO ORDERED.**

January 8, 2020  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge