Clerk of the Superior Court
*** Electronically Filed ***
08/07/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009141 08/06/2019

HONORABLE TIMOTHY J. THOMASON

CLERK OF THE COURT
N. Johnson
Deputy

J P MORGAN CHASE BANK N A LISA SUE KASS

v.

CRUDO L L C, et al.

ERIK C CAMPBELL
4242 44TH ST
PHOENIX AZ 85018
KENNETH M FRAKES
STEVEN GREGORY JONES
LARRY O FOLKS
JUDGE THOMASON

MINUTE ENTRY

East Court Building – Courtroom 713

9:03 a.m. This is the time set for a Trial Management Conference and Oral Argument on Plaintiff's Motion for Summary Judgment, filed April 17, 2019 and Defendants McGrath's and Olson's Cross-Motion for Summary Judgment, filed June 5, 2019. Plaintiff, JP Morgan Chase Bank, NA, is represented by counsel, Larry O. Folks. Defendant, Micah Olson, is represented by counsel, Kenneth M. Frakes. Defendant, Maureen E. McGrath, is represented by counsel, Steven Gregory Jones.

A record of the proceedings is made digitally in lieu of a court reporter.

Oral argument is presented on the motions.

For the reasons stated on the record,

IT IS ORDERED granting Plaintiff's Motion for Summary Judgment.

IT IS FURTHER ORDERED vacating the Bench Trial set on August 22, 2019.

9:31 a.m. Matter concludes.

LATER:

Both sides have filed Cross-Motions for Summary Judgment. The Court has considered those Motions and the respective Responses and Replies, along with the arguments of counsel.

There is no dispute about the material facts. Defendants Micah Olson, Erik Campbell and Maureen McGrath ("Guarantors") guaranteed a loan extended by plaintiff J.P. Morgan Chase Bank, N.A. ("Chase" or "Bank") to Crudo, LLC. The loan is in default and plaintiff filed suit to collect the debt. Plaintiff has moved for summary judgment against the Guarantors. McGrath and Olson have responded and cross moved. Campbell did not respond.

The subject guarantees ("Guarantees") provide as follows:

> NATURE OF GUARANTY. This Guaranty is a guaranty of payment and not of collection. Therefore, the Lender can insist that the Guarantor pay immediately, and the Lender is not required to attempt to collect from the Borrower, any collateral, or any other person liable for the Indebtedness.
>
> GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender---(C) to resort for payment or to proceed directly, initially or at once against Borrower, any surety, endorser, guarantor, or other person, including but not limited to, any right to request or require Lender to commence, prosecute and/or enforce any action against Borrower, any surety, endorser, guarantor, or any other person; (D) to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to give notice of the terms, time and place of any public or private sale of personal property security held by Lender from Borrower or to comply with any other applicable provisions of the Uniform Commercial Code.

As such, the Guarantees specifically provided that the Bank was not required to exhaust any collateral before demanding payment from the Guarantors. The Bank contends that there is

no requirement that it exhaust its collateral before collecting from the Guarantors. Therefore, Chase contends that it is entitled to judgment as a matter of law.

The Guarantors contend that the Bank was required to reasonably exhaust its collateral before collecting from the Guarantors. The Guarantors rely on the Uniform Commercial Code ("U.C.C."), A.R.S. §47-9602, which provides that loan obligors cannot waive certain requirements under the Code. The various requirements addressing "disposition of collateral" is one set of statutory requirements that cannot be waived. §47-9602(7). The Guarantors argue that the Bank did not dispose of collateral in a commercially reasonable manner, as required by various provisions in the U.C.C. For example, a secured party must proceed "in a commercially reasonable manner if the secured party undertakes to collect from or enforce an obligation of an account debtor…" A.R.S. §47-9607 (C). Moreover, "(e)very aspect of a disposition of collateral…must be commercially reasonable." A.R.S. §47-9610(B).

According to the Guarantors, this case is in fact governed by Article 9 of the U.C.C. and the statutory provisions discussed above. Therefore, the waivers are ostensibly not enforceable. The Guarantors point out that cases that have allowed waivers to be enforced were decided under the common law and under U.C.C. Article 3, not Article 9. *See, e.g., Pi'IKEA v. Williamson Family Trust*, 234 Ariz. 284 (App. 2014).

Guarantors claim that the Bank did not seize or liquidate any of the purportedly valuable assets which secured the loan, let alone in a commercially reasonable manner. As such, the failure to liquidate collateral in a commercially reasonable fashion bars recovery, so say the Guarantors.

This case does not, however, involve a situation where a lender allegedly did not reasonably dispose of collateral. Rather, the Bank here did not dispose of collateral at all.

Rather, Chase elected its remedy to pursue a money judgment. The Bank opted to not take possession of collateral. In other words, it waived its collateral. There is nothing in the loan documents, the common law, or the U.C.C. that prevented the Bank from waiving its collateral and pursuing payment from the Guarantors.

Article 9 does not impose a duty on a lender to take possession of and liquidate collateral. The requirement that collateral be disposed of in a commercially reasonable manner applies only if the lender in fact opted to take possession of collateral. *See Connecticut National Bank v. Douglas*, 606 A.2d 684, 688-89 (Conn. 1992). That did not happen here.

Defendants cite no authority for the proposition that a lender is required to exhaust collateral before pursuing the debtor or any guarantor. Indeed, no provision in the U.C.C. requires a lender to pursue and exhaust its collateral. *See WM Capital Partners, LLC v. Thornton*, 525

S.W.3d 265, 270 (App. Tenn. 2016). As such, the Bank had the right to waive collateral and pursue account obligors for payment of the debt.

Indeed, the Guaranty here is a guaranty of payment. Such a guaranty is an unconditional promise to pay and does not require the lender to exhaust collateral. *See Tenet Healthsystem TGH, Inc. v. Silver,* 203 Ariz. 217, 222 (App. 2001). This type of contractual undertaking is fully enforceable.

Moreover, the Guarantors here clearly waived any right they otherwise might have had to require the lender to proceed against or exhaust any collateral.[1] This type of waiver is enforceable. *First National Bank of Arizona v. Bennett Venture, Ltd.,* 130 Ariz. 562, 565-66 (App. 1981).

When a secured lender exhausts collateral, it must be done in a commercially reasonable fashion. That obligation cannot be waived. However, there is no law prohibiting borrowers and Guarantors from confirming that the lender is not obligated to exhaust collateral at all.

It makes absolute sense to require lenders to dispose of the collateral in a reasonable manner, if the lender decides to take possession of and dispose of the collateral. After all, lenders should not be allowed to "fire sale" collateral, to the detriment of loan obligors. Indeed, it would be unfair to allow a lender to sell collateral for significantly less than fair market value and only provide the borrowers a corresponding credit on the debt for the actual sales price received.

On the other hand, lenders should not be required to take possession of collateral at all. There may be a myriad of reasons why a lender may choose to not exercise rights against certain collateral. For example, a lender may not want to take possession of collateral that may have a high risk of liability attendant to it. A lender might also decide to not take possession of and exhaust collateral that has little or no equity. The law does not require, and should not require, lenders to take possession of and dispose of collateral that has potential liability attendant to it or has little or no value. If the lender chooses not to take possession of collateral, then it correspondingly has no obligation to dispose of it in a reasonable manner.

It would be unprecedented to require a lender to take possession of and reasonably exhaust all collateral before being allowed to proceed against borrowers and Guarantors. Lenders often receive multiple sources of collateral for loans, many of which may end having little or no value. Requiring a lender to take possession of and reasonably exhaust each piece of collateral is simply unworkable.

[1] There is no requirement that a lender first exhaust collateral before collecting the debt. As such, the waiver here of any requirement that the lender do so was a "belt and suspenders" approach.

In their Reply brief, the Guarantors contend that the Bank here did proceed against collateral. At page six of the Reply, the Guarantors state that "Chase's assertion that it did not take possession of any of its secured assets is just not true." This directly contradicts a statement made in the Cross Motion. Indeed, the defendants admitted that "Chase did not collect or liquidate any of the substantial assets which secure the note obligation…" (Cross Motion at 7.) There is in fact no evidence that the Bank seized and liquidated any of its collateral.

The only "collateral" that was "seized" by the Bank was $7,725 in cash. There is no requirement, however, that cash collateral be disposed of in a reasonable fashion. Indeed, such a rule would be nonsensical. Cash is cash. It does not have to be disposed of at all. There is no dispute that the Bank applied the cash to the debt balance.

Moreover, there is no requirement that a lender must seize and reasonably dispose of all collateral, if it chose to seize one piece of collateral. A lender has the right to seize and sell a valuable piece of collateral and waive other collateral. There is simply no legal or logical support for the notion that a lender assumes a duty to seize and sell all collateral simply because it seized one piece of collateral.

The Guarantors also argue in the Reply brief that Chase "should have enforced" its rights in certain collateral. (Reply at 6.) Whether it "should have" or not, however, is not the question. The Bank had no obligation to seize and dispose of any collateral. The Bank had the absolute right to choose to forego some or all collateral. It did not have to prove that it "should not have" seized and liquidated collateral.

The Bank does not have to "prove" that any decision it made about seizing any specific piece of collateral was a reasonable one.[2] The Bank had the right to decide whether to seize and sell any collateral, in its sole and exclusive discretion.[3]

[2] For example, the parties dispute whether the collateral here had equity and disagree about the priority of a landlord's lien. The Guarantors contend that the collateral had substantial value and that the landlord's lien was inferior to the Bank's lien. A lender, however, simply does not have to establish that its decisions about the equity in the collateral and the priority of the competing liens were correct. Indeed, if the Guarantors were correct, a lender would never be allowed to pursue collection of a debt without first proving and establishing that every decision it made about whether or not it should seize certain collateral was "reasonable." If that were the law, borrowers and Guarantors would "challenge" every decision by lenders to waive collateral, resulting in lenders having to justify decisions to waive collateral that may have minimal or no value or may carry with it a high risk of liability. The Guarantors point out that notes in the Bank's file indicate that the Bank thought, at least at the time of default, that it had priority over the landlord's lien. Once again, however, the Bank is simply not obligated to prove that all of its actions were reasonable or "correct." It had the right to not pursue its collateral.

[3] The Guarantors certainly could have tried to negotiate a provision in the loan documents that obligated the Bank to exhaust collateral. There is, however, no such provision in the loan documents.

During oral argument, Guarantors' counsel emphasized that the Bank did not in fact waive its collateral. Rather, according to the Guarantors, the Bank began the process of realizing on the collateral and then stopped that process, without explanation. Guarantors contend that the commencement of action against the collateral carried with it an obligation to act in a commercially reasonable manner. There are two problems with this argument.

First, there is no factual support for the notion that the Bank began steps to realize on the collateral. The Court has gone back and carefully looked at the defendants' Statement of Facts. There is no factual support for the notion that the Bank ever did anything to start the process of seizing and selling collateral. Rather, the Statement of Facts refers only to a Bank representative talking about conducting a site visit and an appraisal. Then, the Guarantors never heard anything further from the Bank and did not learn "what happened to the valuable collateral….until Chase sued Defendants." (Statement of Fact, para. 22.) There is no factual premise for the contention that the Bank took any steps to seize its collateral. Conducting a site visit and appraisal is hardly taking action to realize on collateral. Rather, those are steps that a lender would take to determine if it should take possession of collateral.

The second problem is that it is legally insignificant if the Bank took initial steps to seize collateral and then stopped. The Bank had the right to do that. The Bank could have, for example, noticed a U.C.C. sale, and then decided to cancel it. The Guarantors' obligations would not be impacted by such a sequence of events.

Moreover, the Guarantors are hardly in a position to complain. If the Bank did not take possession of collateral, then the borrower still had ownership of that collateral and could do whatever it wanted to do with that collateral, including selling the collateral and paying the proceeds to the Bank. Indeed, the Guarantors complain that the Bank did not liquidate what it refers to as "valuable" or "substantial" collateral. Since the Bank did not seize the "valuable" collateral, however, it still belonged to the borrower. The borrower still had the benefit of those substantial assets. As such, the alleged failure of the Bank to realize on its collateral resulted in no damage to the borrower and the Guarantors.[4]

The Bank's Motion is granted and the Cross-Motion is denied. Plaintiff may file a fee application within ten days from the date of entry of this Order. Plaintiff to lodge a form of judgment within five judicial days after the Court rules on fees.

[4] In the Statement of Facts, defendants state that the defendant McGrath never learned what happened with the collateral. It appears as if the landlord of the subject premises may have kept the collateral, at least for a period of time. The fact that the borrower may not have taken steps to sell and realize the benefit of the collateral is an issue between the borrower and the Guarantors. The point is that the borrower and the Guarantors retained the collateral and could have sold it and realized any benefit from that collateral.