

<b>EHL Funding LLC v McFarland</b>
2026 NY Slip Op 31128(U)
March 20, 2026
Supreme Court, New York County
Docket Number: Index No. 652546/2017
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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EHL FUNDING LLC,

Plaintiff,

- v -

WILLIAM Z MCFARLAND, JEFFREY ATKINS, ROBERT NEMETH,

Defendants.

INDEX NO. 652546/2017

MOTION DATE 06/13/2025, 07/15/2025

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 201, 202, 205, 208, 211, 255, 256, 259, 260, 261, 263, 265

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 203, 206, 209, 212, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 253, 262, 264

were read on this motion for SUMMARY JUDGMENT.

This case concerns the enforcement of a guaranty executed as security for a loan made in connection with the widely publicized but ill-fated Fyre Festival. EHL Funding LLC (“EHL”), as lender, moves for summary judgment on its sole cause of action against Robert Nemeth, as guarantor, for the sum of \$2,891,600 plus interest and attorney’s fees. Mr. Nemeth cross-moves for summary judgment dismissing EHL’s cause of action.

For the reasons set forth below, EHL’s motion is granted, and Mr. Nemeth’s cross-motion is denied.

### FACTUAL AND PROCEDURAL BACKGROUND

In late 2016, William McFarland established Fyre Festival LLC, a subsidiary of Fyre Media Inc. (“Fyre Media”), to promote Fyre Festival, a music event scheduled to take place in the Bahamas over April and May 2017 (NYSCEF 164 ¶ 7).

In or about March 2017, Mr. McFarland entered discussions with Ezra Birnbaum, EHL’s founder and managing member, regarding a potential financing arrangement (NYSCEF 168 at 86:13-19). Shortly thereafter, EHL retained David Fleischmann to serve as counsel in connection with a proposed \$3,000,000 loan (NYSCEF 147 [“Fleischmann Aff.”] ¶ 2).

On April 10, 2017, Mr. McFarland signed a promissory note on behalf of Fyre Festival LLC promising to repay \$3,000,000 plus interest in accordance with the terms contained therein (NYSCEF 135 [the “Note”]; NYSCEF 256 [“Material Facts”] ¶ 2). The Note contains references to “guarantee” and “guarantor(s)”, though they are not specifically identified (*e.g.*, Note at 5 [“This Note shall be the joint and several obligations of all makers, sureties, guarantors and endorsers, and shall be binding upon them and their successor and assigns”]).

At 2:14 p.m. that afternoon, Mr. Fleischmann emailed Farhad Novian, an attorney associated with Fyre Festival LLC (“Mr. Novian”), copying, among others, Mr. Nemeth and requesting confirmation “that you undertake, as counsel for the borrower and the individuals, to obtain all documents, (including the personal guarantees), signed via ink original and properly notarized to be emailed to me by [April 13] and fedex to my office within 7 days of today” (NYSCEF 138). The email further noticed that “[f]ailure to deliver same within the timeframe will be an immediate default under the loan” and that “[u]pon such confirmation, we will fund” (*id.*). Mr. Novian responded, “[c]onfirmed” (*id.*). Mr. Nemeth did not object or otherwise indicate that Mr. Novian lacked authority to act on his behalf (NYSCEF 192 at 97:12-21).

A few hours later, at 4:58 p.m., Mr. McFarland emailed Mr. Nemeth requesting that he “please sign by 5!” and attaching an agreement guaranteeing a loan of \$3,000,000 (NYSCEF 172). At 5:03 p.m., Mr. Nemeth replied to Mr. McFarland, “[o]k to sign a [sic] for me as proxy” (NYSCEF 173). Upon receiving Mr. Nemeth’s authorization, Mr. McFarland signed the agreement electronically on Mr. Nemeth’s behalf (NYSCEF 169 [Nemeth Aff.] ¶ 31). Mr. Nemeth’s position is that he “did not open—and never opened—the attachments to [Mr.] McFarland’s 4:58 p.m. email” (*id.* ¶ 28).

At 5:04 p.m., Mr. McFarland copied Mr. Nemeth on an email chain including Mr. Fleischmann, Mr. McFarland, and Mr. Novian concerning the execution of the loan documents (NYSCEF 174). At 5:06 p.m., Mr. Nemeth replied, “[a]ll good to go thanks” (*id.*). At 5:10 p.m., Mr. McFarland replied “final. original signatures notarized by end of day tomorrow” (NYSCEF 140). Mr. Birnbaum proceeded to authorize the wiring of \$3,000,000 (Material Facts ¶ 24).

On April 12, 2017, Mr. McFarland emailed Mr. Nemeth, “Bob, Could you sign, notarize, and send back today? Thanks!” (NYSCEF 178). Attached to this email was a single signature page identical to the one in the guaranty agreement included in the exchanges above (*id.*). Mr. Nemeth proceeded to forward this email to his wife, who printed the signature page and delivered it to Mr. Nemeth at a bank branch where he signed it and had it notarized (Nemeth Aff. ¶¶ 43-48). Mr. Nemeth then responded to Mr. McFarland attaching the signed signature page with the subject “signed sealed and delivered” (NYSCEF 179). Mr. Nemeth mailed the page to Mr. Fleischmann who, some time thereafter, attached it to the body of the agreement (Fleischmann Aff. ¶ 10).

Pursuant to the terms of the loan, weekly repayments were to be made beginning April 14, 2017 (Note at 1). During the period between April 18, 2017, and April 21, 2017, Fyre

Festival LLC remitted to EHL partial payments due on the Note, but no additional payments were made to EHL after April 21, 2017 (Material Facts ¶¶ 34-36). The Note matured on May 31, 2017 (Note at 2).

EHL now moves for an order granting it summary judgment against Mr. Nemeth on its First Cause of Action for breach of his agreement to guaranty payment of the loan. Mr. Nemeth cross-moves for summary judgment dismissing the same.

### DISCUSSION

Under CPLR 3212(b), summary judgment is appropriate when the record demonstrates “there is no material issue of fact to be tried, and that judgment may be directed as a matter of law” (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). Once the moving party has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the nonmoving party to produce “evidentiary proof in admissible form sufficient to require a trial of material questions of fact,” or to demonstrate an “acceptable excuse for [their] failure to meet the requirement of tender” (*Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Glassman v Weinberg*, 154 AD3d 407, 408 [1st Dept 2017]).

#### **I. EHL’s motion for summary judgment against Mr. Nemeth**

##### ***A. EHL has established prima facie entitlement to summary judgment***

To establish a *prima facie* case for breach of a guaranty, the plaintiff “must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the

guaranty” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015] [citations omitted]).

Here, EHL has made a *prima facie* showing of all three elements: namely, that (i) Fyre Festival LLC executed a promissory note in favor of EHL (Note; NYSCEF 134 [“Birnbaum Aff.”] ¶ 5); (ii) Mr. Nemeth unconditionally guaranteed to EHL the full payment of all amounts due and owing from Fyre Festival LLC to EHL under the Note and related documents (Birnbaum Aff. ¶¶ 9-24; NYSCEF 137 [the “Guaranty”]);<sup>1</sup> and (iii) Fyre Festival LLC defaulted (Birnbaum Aff. ¶¶ 25-30), from which it follows that (iv) Mr. Nemeth is liable to EHL for the outstanding balance plus interest, fees, and costs.

The fact that EHL has not produced the original version of the Guaranty does not disturb this *prima facie* showing. While a party seeking to prove the contents of a document must generally offer in evidence the original document, “secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings [...] that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith” (*Schozer v William Penn Life Ins. Co. of New York*, 84 NY2d 639, 644 [1994] [citations omitted]).

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<sup>1</sup> Mr. Nemeth’s argument that EHL provided no consideration for the Guaranty is unavailing; the Guaranty’s statement that it is issued for “good, valuable, and sufficient consideration” creates a presumption of consideration (*O’Connor v Society Pass Inc.*, 233 AD3d 139, 147 [1st Dept 2024]) and, in any event, the undisputed payment of funds to the borrower is good consideration (*Sun Oil v Heller*, 248 NY 28, 32-33 [1928]). Similarly, the fact that the \$3,000,000 was transferred to Fyre Media Inc, a subsidiary of the named borrower, Fyre Festival LLC, is immaterial (*see Longview Equity Fund, LP v McAndrew*, 2007 WL 186769, at 3 [SDNY 2007] [rejecting opposition based on lack of consideration where borrower “clearly benefited”]), not least given Fyre Festival LLC made the initial partial payments prior to the date of default.

Here, EHL has adduced secondary evidence of the Guaranty in the form of a facially valid copy of the original (Guaranty) and, through the affirmation of its former counsel, explained that the original cannot be located despite a thorough search (Fleischmann Aff. ¶ 18). While Mr. Nemeth challenges the enforceability of the guaranty (addressed below), there is no indication that either Mr. Fleischmann or EHL falsified the copy or otherwise procured it in bad faith.

*B. Mr. Nemeth has not submitted proof in admissible form sufficient to create a question of fact requiring a trial*

Mr. Nemeth resists summary judgment principally on the basis that there exist triable issues of fact concerning his alleged consent to guaranty the \$3,000,000 loan in the first instance. Specifically, Mr. Nemeth contends that, when he signed the signature page, he thought he was agreeing to guaranty certain of Mr. McFarland's shares of Facebook stock that, at least on his understanding, were to be held by Mr. McFarland in escrow as collateral for the loan (NYSCEF 169 [Nemeth Aff.] ¶¶ 16-49). Even putting aside the fact that "guaranteeing" the existence or escrowing of another person's shares of stock is inherently implausible, Mr. Nemeth has failed to adduce evidence sufficient to require a trial on the issue, or to demonstrate an acceptable excuse for not doing so. Accordingly, EHL's motion for summary judgment is granted.

As a threshold matter, EHL's contention that Mr. Nemeth waived this defense by failing to plead it as required by CPLR 3018(b) is unavailing (*see* NYSCEF 132 at 16-17). The defense is encompassed in the second affirmative defense of Mr. Nemeth's Answer that he "never agreed to be bound by the Guaranty attached to the Verified Complaint" (NYSCEF 85 ¶ 25).

Turning to the merits, it is undisputed that the signature page of the Guaranty was, first, individually signed and notarized by Mr. Nemeth and, at some point thereafter, attached to the

Guaranty's substantive pages. While Mr. Nemeth asserts that he "believe[d he] was guaranteeing the transfer of McFarland's Facebook (FB) stock" (Nemeth Aff. ¶ 48), the record conclusively shows that Mr. Nemeth agreed to guaranty the \$3,000,000 loan from EHL to Fyre Festival LLC: (i) Mr. Nemeth received an email from Mr. McFarland attaching an agreement guaranteeing a \$3,000,000 loan and stating, "please sign by 5!" (NYSCEF 172); (ii) Mr. Nemeth responded to this email five minutes later stating, "Ok to sign [...] for me as proxy" (NYSCEF 173); (iii) Mr. McFarland proceeded to send Mr. Nemeth the e-signed guaranty to which Mr. Nemeth responded, "All good to go thanks" (NYSCEF 174); and (iv) two days later, Mr. Nemeth signed and had notarized a single signature page which he proceeded to mail to Mr. Fleischmann (NYSCEF 179).

The exhibits relied on by Mr. Nemeth do not disturb this conclusion. First, a single screenshot of a trading account reflecting Mr. McFarland's ownership of 10,560 shares of Facebook stock which Mr. McFarland sent to Mr. Nemeth approximately eight hours before Mr. Nemeth agreed to sign (NYSCEF 170). The screenshot is devoid of any context indicating that the shares were the subject of a guaranty and the accompanying email makes no reference to any such agreement. All the screenshot establishes is that Mr. McFarland owned 10,560 shares on April 10, 2017. Second, a draft pledge agreement forwarded to Mr. Nemeth by Mr. McFarland approximately four hours before Mr. Nemeth told Mr. McFarland to sign as proxy (NYSCEF 171). Neither the draft agreement nor the accompanying email makes any reference to the existence of an accompanying guaranty, let alone to Mr. Nemeth serving as a guarantor.<sup>2</sup>

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<sup>2</sup> The logical explanation, it seems, for Mr. McFarland sending Mr. Nemeth a screenshot of the shares and the pledge agreement was to reassure Mr. Nemeth that there was little risk he would need to step in as guarantor.

Even construing these exhibits in the light most favorable to Mr. Nemeth, they provide no basis to conclude that a triable issue of fact exists as to which agreement Mr. Nemeth consented to guaranty (*see Korea First Bank of New York v Cha*, 259 AD2d 378, 379 [1st Dept 1999] [granting summary judgment on liability where defendant's claim he signed a blank page merely to act as a reference for the borrower rather than as a guarantor was "inherently incredible and insufficient to establish a triable issue of fact"]).

Accordingly, because Mr. Nemeth has failed to adduce admissible evidence sufficient to create a triable issue of fact concerning his liability under a straightforward loan guaranty, EHL's motion for summary judgment is granted.

## **II. Mr. Nemeth's motion for summary judgment against EHL**

Mr. Nemeth's motion for summary judgment dismissing EHL's claim is denied for related reasons. The motion boils down to two contentions: first, that it is impossible, as a matter of law, for EHL to establish the enforceability of the Guaranty; and second, that EHL cannot enforce the Guaranty without the original. Neither is availing for the reasons that follow in addition to those set forth above.

### *A. The Guaranty is enforceable*

The record contains sufficient evidence to hold Mr. Nemeth liable under the terms of the Guaranty: namely, that Mr. Nemeth agreed by email and by e-sign to guaranty the \$3,000,000 loan before physically signing and notarizing the signature page which he then emailed to Mr. McFarland before mailing the original to Mr. Fleischmann (Birnbaum Aff. ¶¶ 15-24 and referenced exhibits). As explained above, the Guaranty is enforceable notwithstanding Mr. Nemeth's argument that he in fact believed he was agreeing to guaranty a different agreement involving Facebook shares.

In response, Mr. Nemeth contends that NY Gen Oblig. 5-701(a)—pursuant to which a promise to answer for the debt of another (*e.g.*, a guaranty) is void “unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith”—renders any agreement made between Mr. Nemeth and EHL unenforceable. However, the fact that Mr. Nemeth only signed and returned a signature page does not itself preclude the Guaranty’s enforceability provided EHL can establish that Mr. Nemeth knew, or ought to have known, that the page corresponded to the terms of the Guaranty as presented in this action by EHL, which, as explained above, it has done (*see Friedman v Fife*, 262 AD2d 167, 168 [1st Dept 1998] [holding the plaintiff bound by an agreement despite the fact that he “received only a signature page [...], since he was bound to know and read what he signed”).

Similarly, the fact that EHL was filled in as lender after Mr. Nemeth signed does not entitle Mr. Nemeth to summary judgment dismissing EHL’s claim (*see Hotel 71 Mezz Lender LLC v Falor*, 64 AD3d 430, 430 [1st Dept 2009] [affirming summary judgment in favor of plaintiff on the basis that the defendant “had an obligation to exercise ordinary diligence to inquire and, if necessary, to seek proper assistance in determining whether any additional lenders were involved and to ascertain and understand the terms of the [...] guarantee before signing it”]; *Chemical Bank v Masters*, 176 AD2d 591, 592 [1st Dept 1991] [holding “defendant was under an obligation to exercise ordinary diligence to ascertain the terms of the document he signed”]). Likewise here, Mr. Nemeth had an obligation to ascertain the identity of the lender and, in any event, the surrounding circumstances made clear that the lender was EHL.

*B. EHL can enforce the Guaranty without the original*

Finally, as explained above, the fact that EHL has not adduced the Guaranty in original form does not require summary judgment in Mr. Nemeth’s favor; EHL may establish Mr. Nemeth’s obligation based on the copy, the signature page, and the surrounding circumstances.

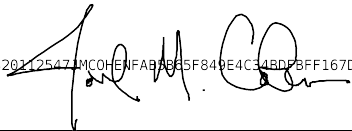
Accordingly, it is

**ORDERED** that the motion of Plaintiff EHL Funding LLC for summary judgment in its favor on its First Cause of Action against Defendant Robert Nemeth is **GRANTED**; it is further

**ORDERED** that the motion of Defendant Robert Nemeth for summary judgment dismissing the First Cause of Action is **DENIED**; and it is further

**ORDERED** that the parties settle a judgment pursuant to 22 NYCRR 202.48, returnable to the Court on April 3, 2026.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

3/20/2026  
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DATE

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