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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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LONGVIEW FUND, L.P., LONGVIEW EQUITY FUND, L.P., and LONGVIEW INTERNATIONAL EQUITY FUND, L.P.,

Plaintiffs,

-against-

DANIEL L. HODGES,

Defendant.

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INDEX NO. 604382/2006

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: May 8, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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LONGVIEW FUND, L.P., LONGVIEW EQUITY FUND, L.P., and LONGVIEW INTERNATIONAL EQUITY FUND, L.P.,

Plaintiffs,

Index No. 604382/06

-against-

DANIEL L. HODGES,

Decision and Order

Defendant.

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KARLA MOSKOWITZ, J.:

Plaintiffs, Longview Fund, L.P., Longview Equity Fund, L.P. and Longview International Equity Fund, L.P. (collectively "Longview Funds"), bring this motion (sequence number 001), pursuant to CPLR 3213, for summary judgment in lieu of complaint. Specifically at issue are a note, dated April 19, 2005 ("April Note"), and two notes, dated October 4, 2005 ("October Notes"). For the reasons below, the court grants plaintiffs' motion for summary judgment in lieu of complaint against Hodges for the remaining principal and accrued interest and costs pursuant to his guarantees.

BACKGROUND

The following facts are primarily from the notice of motion for summary judgment in lieu of complaint and from papers the parties submitted on this motion.

On April 19, 2005 plaintiffs lent Bronco Coal Company ("Bronco") money pursuant to a Subscription Agreement that plaintiffs and Bronco's parent, Bronco Energy Fund, Inc., executed on April 21, 2005. The April Note, dated April 19, 2005, represented the loan of $3,000,000, and Hodges, as CEO of Bronco Energy Fund, Inc., personally guaranteed the April Note and also pledged shares of Fidelis Energy, Inc ("FEI Shares"). (Affidavit of Peter T. Benz, dated

December 21, 2006, ¶¶ 4-8). The April Note became due on April 18, 2006, and plaintiffs sold FEI Shares for $475,093.53 and credited that amount against the April Note. A principal of $2,938,573.40 remains on the April Note and $32,847.61 in interest has accrued. (*Id.* ¶¶ 10-11).

On October 4, 2005, plaintiffs Longview Equity Fund, L.P. ("LEF") and Longview International Equity Fund, L.P. ("LIEF") lent $600,000 to Bronco for which Hodges guaranteed two notes (one for $390,000 and the other for $210,000) and pledged FEI Shares. (Benz Aff. ¶¶ 13-14). Plaintiffs LEF and LIEF sold $95,018.71 in FEI Shares and credited that amount against the October Notes. (*Id.* ¶ 18). Although the October Notes were due on November 19, 2006, a principal of $582,095.57 remains and interest has accrued in the amount of $6,506.71. (*Id.* ¶ 19).

Hodges responds to plaintiffs' portrayal of their loan agreements by disputing the sale of the FEI Shares. He claims that Wayne Coleson ("Coleson"), as CIO and Managing Member of Viking Asset Management LLC, the investment advisor for plaintiffs, promised in emails on March 15, 2006 and April 20, 2006 to sell the FEI Shares and that "any deficiency would be addressed against Bronco and that Plaintiff would not pursue my Provisional Guarantee." (Defendant's Answer, p 3). Hodges further contends that plaintiffs reduced the value of the FEI Shares by flooding the market with them and consequently driving down the share price. (*Id.*). Coleson denies both these allegations – that he waived the guarantees and that plaintiffs depressed the stock value. (Affidavit of Wayne Coleson, dated February 1, 2007, ¶¶ 14-15, 24, 28, 37).

The Subscription Agreement, that outlined the parties' transactions, refers to Hodges's guarantee as a "Provisional Guarantee of the Loan" (Subscription Agreement ¶ 2[d]), but the guarantees themselves state, "[t]o induce the Lenders [the Longview Funds] to make the loans to the Company [Bronco] contemplated by the Subscription Agreement, the Guarantor [Hodges]

hereby unconditionally personally guarantees to the Lenders [the Longview Funds] the timely and full fulfillment of the Obligations of the Company [Bronco] under the Notes and Stock Pledge Agreement" (Guarantee, dated April 19, 2005; Guarantee, dated October 4, 2005). According to Hodges, plaintiffs' failure to include provisional language in the actual guarantees constitutes fraudulent inducement. (Defendant's Answer, p 5).

Hodges also disputes the role of Ed Grushko ("Grushko"), of Grushko & Mittman, P.C., an attorney who prepared all the documents at issue in this action. Hodges alleges that Grushko had ownership interests in plaintiffs and that "Grushko gave [him] legal advice to remove the restricted status of [FEI Shares], and to release the stock to Plaintiffs for them to sell in an orderly manner." (Defendant's Answer, p 3). Hodges further claims Grushko (and Coleson) failed to make many disclosures about participating in various alleged securities fraud and market manipulation violations. (*Id.* at 4). Hodges believes that the sale of the FEI stock constitutes both a securities violation (*id.*) and common law fraud against him, that estops plaintiffs from suing on the guarantees (*id.* at 6). Grushko, however, denies any ownership interest in plaintiffs and denies any allegations of litigation against him for securities fraud. (Affidavit of Edward Grushko, dated February 1, 2007, ¶¶ 3, 15). Coleson also states that no one has sued him for market manipulation. (Coleson Aff. ¶ 40).

In his answer, Hodges, who represents himself, asserts the following affirmative defenses: "accord and satisfaction, illegality of transaction, laches, license, payment, release, security violations, statute of frauds, statute of limitations, waiver, failure to mitigate damages, and failure to avoid avoidable consequences." (Defendant's Answer, p 6). Defendant contends plaintiffs have not established: (1) that they are entitled to judgment as a matter of law and (2) that there are no disputed issues of material fact. Plaintiffs counter that defendant has fabricated

allegations to create issues of material fact and that these allegations are "lame attempts to avoid personal liability on a personal guarantee given by Hodges as an inducement to Plaintiffs to invest funds in a company in which Hodges was a director and shareholder." (Plaintiffs' Reply Memorandum, p 1).

DISCUSSION

CPLR 3213 expedites the resolution of disputes by eliminating the service of formal papers in cases where the "action [is] based upon a judgment or an instrument for the payment of money only." (*Technical Tape, Inc. v Spray Tuck, Inc.*, 131 AD2d 404, 406 [1st Dept 1987]). To qualify for CPLR 3213 treatment, "an instrument for the payment of money only must be a written unconditional instrument. Documents which set forth more than the simple promise by the obligor to pay a sum of money may not be sued upon by way of CPLR 3213." (*Id.* at 406). In addition, "[a]n action comes within the ambit of CPLR 3213 if a prima facie case for nonpayment of a debt can be made out by the terms of the debt instrument itself . . . . " (*Diversified Invs.Corp. v DiversiFax, Inc.*, 239 AD2d 231, 233 [1st Dept 1997]).

To establish the sum certain that a party owes in a motion for summary judgment in lieu of complaint, a party may "refer to the underlying promissory notes to establish the amount of liability." (*Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737, 737 [Sup Ct, NY County 1983]). However, "the availability of CPLR 3213 can never depend upon the occurrence (or nonoccurrence) of any unrelated future event . . . . [T]erms and conditions precedent that remain unresolved within the instrument itself cannot be satisfied by future events requiring proof dehors the agreement." (*Kerin v Kaufman*, 296 AD2d 336, 338 [1st Dept 2002] [denying summary judgment in lieu of complaint because guarantee required plaintiff to refrain from making disparaging comments about her former employer and plaintiff could only fulfill this condition

after execution of the guarantee, so guarantee is not an instrument for the payment of money only]).

When issues of fact exist about "the quantum of damages due under the guaranty," summary judgment in lieu of complaint is not appropriate. (*Eugenia VI Venture Holdings, Ltd. v AMC Investors, LLC*, 35 AD3d 157, 159 [1st Dept 2006] [citation omitted]; *see also Sung Hwan Co. v Rite Aid Corp.*, 7 NY3d 78, 82 [2006] [denying summary judgment in lieu of complaint because of "unresolved issues of fact regarding the relationship between [the two companies]"]; *Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd., Sirketi v Leonard*, 26 AD3d 298, 299 [1st Dept 2006] [affirming summary judgment in lieu of complaint because "defendant has not demonstrated any triable issues of fact to warrant denial of summary relief"]).

Plaintiffs correctly argue that the issues of material fact defendant alleges to defeat the motion for summary judgment in lieu of complaint (*e.g.*, plaintiffs' failure to disclose alleged security violations or their failure to adopt certain procedures in selling the FEI Shares [*see supra* pp 2-3]) are not relevant because the issues of fact that pertain to a CPLR 3213 action are not in dispute here (*see* Plaintiffs' Reply Memorandum, p1). Namely, plaintiffs base their motion on these undisputed facts: (1) Bronco borrowed money, as the April and October Notes evidence; (2) Hodges signed an unconditional guarantee for both the April and October Notes and pledged FEI stock; (3) Bronco defaulted on the April and October Notes; and (4) upon Bronco's default, the guarantees obligate Hodges to pay the debts. Hodges's argument that plaintiffs did not prepare the guarantees as "provisional," pursuant to the provision in the Subscription Agreement (*see* Subscription Agreement ¶ 2[d]), is unavailing because Hodges signed the two guarantees of his own accord, without inclusion of the "provisional" language.

Hodges's argument about legal representation and plaintiffs' alleged oral waiver of the

guarantees does not change the outcome. Hodges provides absolutely no evidence to support either contention. For example, he states that plaintiffs promised to sell FEI Shares in return for not holding defendant responsible for the debts (*see supra* p 2), but the court has read the emails defendant submitted and finds no indication of any kind of waiver. As for legal representation, defendant makes similar conclusory allegations that "Grushko [plaintiffs' attorney] gave [him] legal advice to remove the restricted status of [FEI Shares], and to release the stock to Plaintiffs for them to sell in an orderly manner." (Defendant's Answer, p 3). Not only is it unclear how this alleged fact would support claims of conflict in legal representation, but this allegation about the sale of FEI Shares is also baseless because the guarantees (and the parties' Stock Pledge Agreement of April 21, 2005) specifically provide for the sale of FEI Shares as security for the notes and guarantees. Moreover, plaintiffs submitted evidence, in the form of a closing letter from Grushko to Kevin Sherlock ("Sherlock") regarding the loans, and this letter indicates Sherlock served as counsel for Bronco Energy Fund, Inc., Bronco and Hodges. (Grushko Aff., Exh. A [letter from Grushko to Sherlock, dated August 29, 2005]). Plaintiffs also point to the Subscription Agreement that lists Sherlock as counsel for Bronco. (Subscription Agreement § 13[a]).

Defendant therefore has no defenses against summary judgment in lieu of complaint. His list includes "accord and satisfaction, illegality of transaction, laches, license, payment, release, security violations, statute of frauds, statute of limitations, waiver, failure to mitigate damages, and failure to avoid avoidable consequences," but, as explained above, the court can either find no evidentiary basis for these defenses or cannot understand their relevance. Moreover, certain of these defenses either do not apply (*e.g.*, the statute of limitations for contract is six years, and, because the parties only signed the guarantees in 2005, the action is clearly timely) or belong in

federal court, not state court (*e.g.*, securities violations).

More importantly, Hodges's guarantees of the April and October Notes easily qualify for CPLR 3213 treatment. There is no issue of material fact, and both guarantees have sums certain: $3,000,000 for the April Note and $600,000 for the October Notes. (*See Eugenia VI Venture Holdings*, 35 AD3d at 159; *Sung Hwan Co.*, 7 NY3d at 82; *Tars Uluslararasi Dis Ticaret Turizm ve Sanayi Ltd.*, 26 AD3d at 299). As CPLR 3213 requires, the terms of the guarantees provide unambiguously for Hodges's unconditional guarantee of payment. (*See Kerin*, 296 AD2d at 338; *Diversified Invs.Corp.*, 239 AD2d at 233). Both guarantees recite similar terms. For example, they state, "Guarantor [Hodges] hereby unconditionally personally guarantees" the Notes; the "Guarantor agree[s] that the Lenders [the Longview Funds] may proceed against Guarantor alone on account of this Guarantee . . ."; and "Guarantor acknowledges that he is aware that Lenders are explicitly relying on the execution and delivery of this Guarantee by Guarantor and on the enforceability of this Guarantee against such Guarantor in making the determination to . . . extend the loans . . ." (Guarantee, dated April 19, 2005; Guarantee, dated October 4, 2005).

The guarantees also clearly refer to the April and October Notes, and notes can establish the amount a guarantor owes in a motion for summary judgment in lieu of complaint. (*Manufacturers Hanover Trust Co.*, 95 AD2d at 737). As plaintiffs correctly point out, nowhere does Hodges contest the amounts of the April and October Notes, the validity of Bronco's debt or the use of proceeds from the FEI Shares as credits against the Notes. (Coleson Aff. ¶ 6). Because the guarantees, and their underlying notes, contain both the same unconditional language of Hodges's personal guarantee and clearly set the terms of payment, that defendant has not fulfilled, the guarantees qualify for CPLR 3213 treatment. The court therefore grants plaintiffs' motion for summary judgment in lieu of complaint.

CONCLUSION

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is granted.

Settle judgment accordingly.

Dated: May 8, 2007

ENTER

J.S.C.