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

PRESENT: _____ Justice

PART 56

Index Number : 600675/2008

COMMERCE BANK, N.A.

VS.

METRO-TECH CONTRACTING CORP.,

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

INDEX NO. 600675-08

MOTION DATE 5/12/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/29/08

HON. RICHARD B. LOWE, III.

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 56

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COMMERCE BANK, N.A,

Index No: 600675/08

Plaintiff

-against-

DECISION AND ORDER

METRO-TECH CONTRACTING CORP., METRO-TECH INDUSTRIES CORP., MTCC CORP., JOSEPH PAVONE, KATHY PAVONE, LEWIS VISCONTI, DAWN VISCONTI, and D&K REALTY,

Defendants

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RICHARD B. LOWE III, J:

This dispute arises out of the defendants' failure to repay the plaintiff in accordance with a business loan agreement. The plaintiff brings this motion for summary judgment in lieu of complaint pursuant to CPLR § 3213.

BACKGROUND

The plaintiff, Commerce Bank, N.A. ("Commerce"), is a national banking association, authorized to provide loans, organized and existing under United States law and maintains a branch for business transactions in New York. (Robinson Aff. ¶ 3.)

Commerce entered into a Business Loan Agreement (the "Loan Agreement") with the defendants, Metro-Tech Contracting Corp., Metro-Tech Industries Corp., and MTCC Corp (collectively, the "Metro-Tech Defendants") on August 10, 2005, whereby

Commerce extended to the Metro-Tech Defendants a $1,300,000.00 line of credit. The Metro-Tech Defendants are contractors engaged in excavation and site work for public and private improvement jobs in the New York City area. (Pavone Aff. ¶ 8.) Further, Metro-Tech Defendants promised to repay the amount of the above line of credit, in addition to all accrued interest, to Commerce on or before the maturity date in a Promissory Note (the "Note"). Likewise, Commerce sought Commercial Guaranties (the "Guaranties"), executed on August 10, 2005 by the other defendants Joseph Pavone, Kathy Pavone, Lewis Visconti, Dawn Visconti, and D&K Realty on June 6, 2006 (collectively, the "Guarantors" and together with "Metro-Tech Defendants," the "defendants"), who promised to guarantee and to pay Commerce any and all of the Metro-Tech Defendants' liabilities, obligations, and debts to Commerce. (Robinson Aff. ¶ 14.)

The original maturity date of the loan was February 28, 2006. However, the Note was modified on June 6, 2006 to extend the maturity date to July 31, 2007. (Robinson Aff. ¶ 16.) After the expiration of the new maturity date, other than a payment of interest in the amount of $10,383.70, which Commerce received on or about November 1, 2007, the Metro-Tech Defendants failed to repay the amounts due on the Note. (Robinson Aff. ¶ 18.)

After the loan matured, the defendants and Commerce agreed to negotiate an agreement to pay all of the amounts due. During this time, the Metro-Tech Defendants sought to obtain bonding from Fidelity & Deposit Company of Maryland ("Fidelity") in connection with a Central Park Zoo project for which the Metro-Tech Defendants received a subcontract. (Pavone Aff. ¶ 10.) It was believed that this project would earn

sufficient funds to reach an agreement with Commerce. In order for the Metro-Tech Defendants and the Guarantors to reach an agreement with Commerce, the defendants needed to reach an agreement with Fidelity to issue bonds. However, Fidelity required, prior to issuance of the bonds, that the Metro-Tech Defendants reach an agreement with Commerce. (Pavone Aff. ¶ 11.) Those negotiations were undertaken simultaneously and it was referred to by the parties as the "Inter-Creditor Agreement."

In the instant motion, Commerce seeks to receive payment from the defendants for the default by the Metro-Tech Defendants. The defendants oppose this motion arguing Commerce conducted the Inter-Creditor Agreement negotiation in bad faith, thereby preventing them from receiving bonding from Fidelity. Therefore, according to the defendants, there is an issue of fact precluding summary judgment in lieu of complaint.

DISCUSSION

"When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." (CPLR 3213). As a threshold rule to succeed under CPLR 3213, the plaintiff must first establish a prima facie case by demonstrating (1) "the existence of the instrument" and (2) "a failure to make payments called for by its terms." (*Staten Island Sav. Bank v Bayview Associates*, 251 AD2d 320, 321 [2nd Dept 1998]). "It is then incumbent upon the defendant to demonstrate, by admissible evidence, the existence of a genuine triable issue of fact as to the defenses" otherwise, summary judgment will be granted in favor of the plaintiff.

(*Seaman-Adwall Corp. v Wright Machine Corp.*, 31 AD2d 136, 138 [1st Dept 1968]; *Zitel Corp. v Fonar Corp.*, 210 AD2d 221 [2nd Dept 1994]).

"In order to qualify for CPLR 3213 treatment, it is incumbent upon the moving party to show that the documents on which the action is based are instruments for the payment of money only." (*Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]). Additionally, the plaintiff must show a failure to make payments pursuant to the instrument's terms. (*Interman Industrial Products*, 37 NY2d at 155). Commerce argues that the Note and Guaranties are instruments for the payment of money only and meet the standards of CPLR 3213.

"An 'instrument' is a formal written document, evincing legal rights and duties; it is one which clearly, unequivocally and unconditionally sets forth the basis of liability and the particular liability involved." (*Stern v Chemical Bank*, 83 Misc.2d 508, 513-514 [Civ Ct, NY County [1975]). Furthermore in this jurisdiction, a note qualifies as an instrument for payment of money only. (*East N.Y. Sav. Bank v. Baccaray*, 214 AD2d 601, 602 [2nd Dept 1995]; see also *St. John Associates Engineers, P.C. v Chase Architectural Associates, P.C.*, 106 AD2d 743, 744 [1st Dept. 1984]).

In *East N.Y. Savings Bank*, the court ruled that the note at issue contained an unequivocal and unconditional promise by the promissor to repay to the holder the funds that were loaned to them. (*East N.Y. Savings Bank*, 214 AD2d at 602). Since the plaintiff's claim was based exclusively on the express terms of the note for the payment of money only, the plaintiff had established a prima facie case by proof of the existence and genuineness of the instrument. (*East N.Y. Savings Bank*, 214 AD2d at 602).

Similarly, an unconditional guarantee of payment also qualifies as an "instrument for the payment of money only" under CPLR 3213. (*Valencia Sports Wear, Inc. v D.S.G. Enterprises, Inc.*, 237 AD2d 171 [1st Dept 1997]). The Guaranties in *Valencia Sports Wear* make no reference to conditions or any comprehensive agreements outside of the original agreement. (*Valencia Sports Wear, Inc.*, 237 AD 2d at 171).

Here, Commerce provided proof of the Note and the Guaranties as instruments for the payment of money only, and the action is based upon the Metro-Tech Defendants' nonpayment called for by its terms. Like the plaintiff in *East N.Y. Savings Bank*, Commerce based its actions exclusively on the express terms of the Note in which the Metro-Tech Defendants promised to repay Commerce the full payment of the amount outstanding including all accrued interest due on the maturity date. Although the terms of the Loan Agreement as to the new agreed maturity date has changed to July 31, 2007, that is irrelevant to the proof of the existence of an instrument under CPLR 3213 because the changed maturity date did not change the defendants' obligations. Additionally, the defendants concede to the validity and the default of the Note. (Pavone Aff. ¶ 6.) The payment was due on the new maturity date, *supra*, and besides the payment of interest in the amount of $10,383.70, which Commerce received on or about November 1, 2007, the Metro-Tech Defendants had failed to repay the Note, and it still remains unpaid. (Robinson Aff. ¶ 18.) Therefore, Commerce has shown that (1) the Note and the Guaranties were instruments for the payment of money only, and (2) the Metro-Tech Defendants and the Guarantors had failed to make payments under the Note and Guaranties, respectively.

It follows then that the burden shifts to the defendants to supply a defense creating an issue of fact to defeat a CPLR 3213 motion. (*Seaman-Adwall Corp.*, 31 AD2d at 138). The Metro-Tech Defendants have adopted the Guarantors' defenses by association, and the Guarantors' arguments will be treated as representing both herein.

The Guarantors allege that Commerce used "bad faith" in negotiating the Inter-Creditor Agreement with a third party creditor, Fidelity, and as a result, prevented an agreement from being reached. (Pavone Aff. ¶ 16.) Fidelity did not issue the bonds needed, and further, the defendants could not repay the loans allegedly due to Commerce's conduct.

It is well established in New York law that the assertion of a defense which implicates facts or documents that are extrinsic to the instrument at issue cannot bar a summary judgment motion. (*Warburg, Pincus Equity Partners, L.P. v O'Neill*, 11 AD3d 327 [1st Dept 2004]; *Judarl L.L.C. v. Cycletech Inc.*, 246 AD2d 736, 737 [3rd Dept 1998]). In *Warburg*, the defendant asserted, as a defense, that the plaintiff "breached the implied obligation of good faith and fair dealing, depriving him of the benefit of the bargain" concerning a third party agreement. (*Warburg*, 11 AD3d at 327). The court ruled that such extrinsic dealings have no bearing on the relevant agreement.

In the instant case, the Note by the Metro-Tech Defendants and the Guaranties by the Guarantors fully establish the original instrument of payment at issue. The extrinsic dealings of the Inter-Creditor Agreement between Commerce, the defendants, and Fidelity could not be recognized as relating to the payment of the loans set out by the Note. This outside agreement has no relevance to the Note and Guaranties at issue. The Loan Agreement, the Note, and the Guaranties never stated a condition precedent

requiring the completion of an Inter-Creditor Agreement. (Robinson Aff. ¶¶ 17, 22.) In fact, it was an outside method by which the defendants were to obtain funds to repay Commerce pursuant to the Note and completely extrinsic to the Loan Agreement. Even if the defendants could establish bad faith conduct on the part of the plaintiff, those negotiations were irrelevant and immaterial to the original loan agreement and the promise to repay.

Next, the Guarantors further allege that they should be relieved of their contract obligations on the ground of "economic duress." However, this argument lacks support. In order to succeed under "duress," the complaining party must show that it was "compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will." (*Edison Stone Corp. v 42nd Street Dev. Corp.*, 145 AD2d 249, 254 [1st Dept 1989]).

Here, the defendants were not "compelled" to agree to any contract terms in the original Loan Agreement, the Note, or the Guaranties. Furthermore, the Loan Agreement, the Note, and the Guaranties were never grounded upon duress and the defendants do not dispute that fact. Even assuming, *arguendo*, that the defendants were coerced, they provide no evidence of "economic duress" that Commerce used some wrongful threat which precluded the exercise of the defendants' free will, but rather, they merely state empty assertions without any support. Commerce was never obligated to negotiate the Inter-Creditor Agreement; it was merely refusing to do what it was not legally required to perform. (*805 Third Ave. Co. v M.W. Realty Associates*, 58 NY2d 447, 453 [1983]). Therefore, the defendants' economic duress assertion will not succeed.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is granted.

Settle Order

Dated: July 24, 2008

ENTER:

RICHARD B. LOWE, III

RICHARD B. LOWE, III, J.S.C.