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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BRT REALTY TRUST and
W FINANCIAL FUND, LP,

Plaintiffs,

-against-

MOSHE LAX, ESTATE OF CHAIM LAX,
and YITZCHOK HAGER a/k/a Isaac Hager,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 001473-10
Motion Seq. No: 1
Submission Date: 3/12/10

The following papers have been read on this motion:

Notice of Motion, Affidavit in Support and Exhibits.....x
Plaintiffs' Memorandum of Law.....x
Defendants' Memorandum of Law in Opposition.....x
Affirmation in Further Support.....x

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiffs BRT Realty Trust ("BRT") and W Financial Fund, LP ("W Financial") (collectively "Plaintiffs") on January 22, 2010 and submitted on March 12, 2010. For the reasons set forth below, the Court 1) grants Plaintiffs' motion for judgment against Defendants in the principal amount of $8,700,000.00; and 2) directs that a hearing will be held on the issues of interest, late fees, costs and counsel fees.

BACKGROUND

A. Relief Sought

Plaintiffs request an Order, pursuant to CPLR § 3213, directing the entry of summary judgment in favor of Plaintiff and against Defendants in the sum of $9,151,668.35 plus, 1) with

respect to the entire principal, any and all additional interest accrued thereon from December 31, 2009 at the rate of 24% *per annum*, and advances and/or costs incurred therein, together with 2) costs and expenses.

Defendants Moshe Lax ("Lax"), Estate of Chaim Lax ("Estate") and Yitzchok Hager a/k/a Isaac Hager ("Hager") (collectively "Defendants") oppose Plaintiffs' motion.

B. The Parties' History

Plaintiffs provide an Affidavit in Support of David Heiden ("Heiden") dated January 19, 2010 in which he affirms as follows:

Heiden is a Managing Member of W Financial GP, LLC, which is the managing partner of Plaintiff W Financial, and is familiar with the facts and circumstances of this matter.

On or about October 14, 2008, W Financial agreed to lend the principal sum of $17,400,000.00 ("Loan") to 20 Bayard Views, LLC and More Marketing Inc. ("Borrowers") pursuant to a Consolidated, Amended and Restated Note dated October 14, 2008 ("Note") (Ex. A to Ps' motion). The Note provided that the maturity date for the entire outstanding principal balance, together with all accrued interest, was due and payable on October 31, 2009 ("Maturity Date").

The Note provided in pertinent part as follows on pages 2-3:

> It is expressly agreed that upon the failure of the [Borrowers] to make any payment due hereunder on or prior to the fifth (5th) day after such payment is due, or upon the occurrence of any "Event of Default" under the Loan Documents..., the principal sum hereof, or so much thereof as may be outstanding, together with accrued interest and all other expenses payable by the [Borrowers] under the Loan Documents, including, but not limited to, reasonable attorneys' fees for legal services incurred by the Holder hereof in collecting or enforcing payment hereof whether or not suit is brought...shall immediately become due and payable at the option of [W Financial], notwithstanding the Maturity Date set forth above. Upon the stated or accelerated maturity of this Note, the [Borrowers] [agree] that this Note shall bear interest at a rate equal to the lesser of (a) twenty-four percent (24%) per annum, or (b) the maximum rate permitted under applicable law (the "Default Rate") until the principal, together with accrued interest and any other sums payable by [Borrowers] under the Loan Documents, are fully paid.

On or about October 14, 2008, Plaintiffs entered into a Participation Agreement ("Participation Agreement") pursuant to which BRT agreed to purchase a fifth percent (50%) interest in the Note for which it paid the sum of $8,700,000.00 to W Financial pursuant to the

Participation Agreement (Ex. B to Ps' motion). The Participation Agreement provided that BRT was entitled to an undivided interest, to the extent of its participation percentage, in all payments that W Financial received with respect to the Note, including payments made by the Guarantor.

In conjunction with the Note, on October 14, 2008, the Defendants made, executed and delivered to Plaintiffs a guaranty ("Guaranty") (Ex. C to Ps' motion), pursuant to which Defendants guaranteed prompt and complete payment of the Note. The Guaranty limits Guarantors' liability to principal of $8,700,000.00, plus, with respect to the entire loan amount, all accrued interest, advances and collection costs, including attorney's fees. On or about March 10, 2009, Plaintiffs sent to Defendants a Notice of Default for failure to make the March 1, 2009 payment required under the Note ("Notice of Default") (Ex. D to P's Motion). In that Notice of Default, Plaintiffs advised Defendants that, pursuant to the Loan Documents, 1) all unpaid amounts not timely paid accrued interest at the Default Rate; and 2) all other amounts due and payable under the Loan Documents were hereby accelerated and immediately due and payable.

The first introductory paragraph of the Guaranty reflects that the Loan was secured by, among other things, a first mortgage on 38 residential condominium units and 40 parking spaces at 20 Bayard Street, Brooklyn, New York which was described in Schedule A of the Mortgage, Security Agreement and Assignment of Leases and Rents given by the Borrower, referred to as the "Mortgage." This paragraph of the Guaranty further provided that the Note and Mortgage, "together with each and every instrument and document executed and/or delivered to [W Financial] to evidence or secure the Loan [is] collectively referred to as the 'Loan Documents[.]'" Pursuant to Paragraph 1(ii) of the Guaranty, the Guarantors guaranteed the prompt and complete "performance, observance and discharge by Borrower of all of the covenants and conditions set forth in the Loan Documents[.]"

Following the Notice of Default, the March 1, 2009 payment was made, although payment was late. Plaintiffs subsequently reinstated the Note but payment on the Note continued to be erratic and untimely. Plaintiffs provide a Summary of Defaults on Bayard Street ("Summary") (Ex. E to motion) reflecting that 1) payments were timely made for the December 1, 2008 and January 1, February 2, May 1, June 1, and July 1, 2009 payments; and 2) payments due on March 1, April 1, August 1, September 1, October 1, and November 1, 2009

were late ("Late Payments"). The words "No Exit Fee or Late Fee" appear next to the notations regarding the Late Payments. In addition, the words "Also, let them use $9,694 from their insurance reserve towards the April payment" appear next to the notation regarding the Late April Payment.

Thereafter, at the request of the Defendants, Plaintiffs extended the Maturity Date of the Note to January 13, 2010 pursuant to an agreement executed on or about October 13, 2009 ("Loan Extension Agreement") (Ex. F to Ps' motion). Following this extension, Defendants failed to make the November and December 2009 payments pursuant to the Note and Borrowers filed a Chapter 11 Bankruptcy Petition on December 4, 2009 in the United States District Court for the Eastern District of New York.

Heiden affirms that the Note has fully matured, all applicable grace periods have expired, and Defendants have not paid the outstanding principal balance on the Note. As of December 31, 2009, the unpaid principal balance due to Plaintiffs pursuant to the Note was $16,975,072.00, plus accrued interest advances and costs totaling $451,668.35 consisting of the following: 1) $186,725.79 representing interest at the contract rate from November 1 to December 3, 2) $10,574.44 representing the late fee for November, 3) $316,868.01 representing Default Interest at 24% from December 4 to December 31, 4) less $62,5000.00 for payments received. Thus, Heiden affirms, as of December 31, 2009, Defendants, as Guarantors, have guaranteed the payment of 1) $9,151,668.35 comprised of the $8,700,000.00 principal obligation and $451,668.35 in interest and fees, plus, 2) with respect to the entire outstanding principal, all additional interest accrued from December 31, 2009 at the rate of 24% *per annum*, and 3) advances and costs on these additional sums.

Plaintiffs have provided Affidavits of Service reflecting the service of the instant motion and supporting papers on Defendants.

C. The Parties' Positions

Plaintiffs submit that the Court should grant their motion for Summary Judgment in Lieu of Complaint because 1) a guaranty qualifies as an instrument for the payment of money only, and is therefore the proper subject of a motion pursuant to CPLR § 3213; and 2) Plaintiffs have demonstrated their right to judgment through the documentary evidence and Heiden Affidavit. Plaintiffs submit that the amount due is clearly determinable from the Guaranty which entitles

Plaintiffs to 1) principal of $8,700,000.00, 2) interest, advances and costs on the entire outstanding loan amount, and 3) with respect to the entire outstanding principal, interest from December 31, 2009 at the rate of 24% *per annum*, advances and costs.

Defendants oppose Plaintiffs' motion, submitting that the Guaranty on which this action is based guarantees not only the payment of the Note, but also the performance of other agreements that were executed in connection with the Note. Defendants make specific reference to the provision in the Guaranty whereby the Guarantors guaranteed the prompt and complete "performance, observance and discharge by Borrower of all of the covenants and conditions set forth in the Loan Documents." Thus, Defendants submit, because the Guaranty obligates Defendants to do more than simply pay money, the Court should deny Plaintiffs' motion.

Defendants submit, further, that even if the Court grants Plaintiffs' motion for summary judgment, Defendants may still contest the outstanding sum owed. Defendants argue that Plaintiffs' Summary, for which Plaintiffs provide no supporting documentation in support of their calculations, is insufficient to establish the outstanding balance under the Note.

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

> 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. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d

434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

An agreement qualifies for treatment as an instrument for the payment of money only under CPLR § 3213, even if it contains other provisions and terms, as long as those provisions and terms do not require additional performance by the lender as a condition precedent to repayment, or otherwise alter the insured's promise of repayment. *Afco Credit Corp. v. Boropark Twelfth Avenue Realty Corp.*, 187 A.D.2d 634, 634 (2d Dept. 1992) (premium finance agreement containing unconditional promise by insured to repay lender qualifies for treatment as instrument for payment of money only under CPLR § 3213). *See also Juste v. Niewdach,* 26 A.D.3d 416 (2d Dept. 2006) (mere presence of additional provisions in guaranty referring to defendant's assumption of tenant's obligations in lease did not constitute bar to CPLR § 3213 relief).

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept. 2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc., supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185

A.D.2d 913 (2d Dept. 1992).

C. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept. 2001), *app. dism.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

Plaintiff-Lender has demonstrated all of the elements to recover as a matter of law on the guarantees here. Lender's affirmations, and the accompanying documentation, demonstrate that judgment as a matter of law is appropriate. Accordingly, the Court concludes that Plaintiff is entitled to summary judgment against the Guarantor who personally guaranteed the Notes.

D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair*

Ridge Development Corp., 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Application of these Principles to the Instant Action

The Court concludes that Plaintiffs have demonstrated their entitlement to judgment against Defendants in the sum of $8,700,000.00 by virtue of their production of 1) the Note and other Loan Documents, 2) proof that Plaintiffs furnished Borrower with the Loan money, and 3) evidence that Defendants have defaulted on their obligations, pursuant to the Guaranty, to repay the principal of the Loan up to the sum of $8,700,000.00 as well as interest, late fees, costs, and attorney's fees. The Court concludes that the language in the Guaranty reflecting that the Loan was secured by a Mortgage does not require additional performance by the Plaintiffs as a condition precedent to repayment, or otherwise alter the Defendants' promise of repayment. Thus, the Guaranty is an instrument for the payment of money within the meaning of CPLR § 3213.

With respect to interest and costs, however, the Court concludes that the record does not definitively establish Plaintiffs' entitlement to the interest and costs they request, in part because of the notations on the Summary that suggest that Plaintiff may have agreed to forego certain non-principal payments. Similarly, with respect to counsel fees, the Court does not have sufficient information to determine the appropriate award. Accordingly, the Court directs that a hearing is necessary to determine interest, late fees and costs, as well as an appropriate counsel fee award.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a conference before the Court on May 20, 2010 at 9:30 a.m., at which time the Court will schedule the inquest as directed herein.

ENTER

DATED: Mineola, NY
April 28, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.