SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

OAK TREE FARM DAIRY

-v-

BEYER FARMS, INC. et al

INDEX NO. 650568/13

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment is GRANTED; further ORDERED that the issue of costs and reasonable attorney fees is severed and an assessment of such damages is directed; further ORDERED that upon filing by counsel for plaintiff of a copy of this order with notice of entry and a note of issue and the payment of the fee therefor with the Trial Support Office (Room 119) together with a completed Information Sheet, upon the Special Referee Clerk in Room 119M, the Clerk is directed to place this matter on the trial calendar of the Special Referee's Part for the earliest convenient date.

Decision as per the attached Decision and Order.

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

Dated: July 1, 2013

MELVIN L. SCHWEITZER J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

OAK TREE FARM DAIRY, INC.,	:	
Plaintiff,	:	Index No. 650568/13
-against-	:	DECISION AND ORDER
BEYER FARMS, INC., HENRY BEYER and MICHAEL BEYER,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiff moves for an order granting it summary judgment in lieu of complaint on the ground that this action is based on instruments for the payment of money only, in the form of a promissory note and two guarantees, and seeks judgment against defendant Beyer Farms, Inc. (Beyer Farms) in the principal amount of $1,025,822.40 plus 5% interest from February 7, 2013, against defendant Henry Beyer in the principal amount of $575,000 plus half of the interest due on the promissory note from February 7, 2013, and against defendant Michael Beyer in the principal amount of $575,00 plus half of the interest due on the promissory note from February 7, 2013.

This action involves a promissory note and two guarantees which were executed by the individual defendants in connection with a July 5, 2012 Asset Purchase Agreement, pursuant to which defendant Beyer Farms purchased from plaintiff Oak Tree Farm Dairy, Inc. (Oak Tree) certain assets Oak Tree used in its milk distribution and sale business (affidavit of Charlene Cosman, dated February 20, 2013, and Exhibit D annexed thereto, Asset Purchase Agreement). The purchase price of $1,150,000 was paid pursuant to a promissory note in that amount (the

Note) (Exhibit A to Cosman aff). The Note provided that Beyer Farms would make 36 equal monthly payments payable on the 20th day of each month starting on August 20, 2012 (*id.* at 1). It also provided that if there were an event of default, Oak Tree could accelerate the amount due, and provided for a default interest rate of 5% per annum from the date of the event of default until the unpaid principal was paid in full, and provided that Beyer Farms shall pay all reasonable out-of-pocket costs and expenses including reasonable attorneys' fees (Cosman aff, ¶¶ 7-8, and Exhibit A annexed thereto at 1-3).

Also in connection with the Asset Purchase Agreement, defendants Henry and Michael Beyer each executed a Limited Personal Guaranty Agreement in order to induce Oak Tree to accept the Note from Beyer Farms for the purchase price (Exhibits B and C to Cosman aff). Both guarantees provide that the guarantor "absolutely, unconditionally and irrevocably guarantees the full and prompt payment" of all amounts due under the Note, limited to the amount of $575,000, "plus an amount equal to all Costs [defined as out-of-pocket costs and expenses, including all court costs and reasonable attorneys' and paralegals' fees and expenses paid by Oak Tree], and an amount equal to 50% of any interest which may accrue under the Note" (Exhibits B and C to Cosman aff, at 1). The Guarantees also provided that the guarantors expressly, knowingly and intentionally waived "all defenses of any and every kind to any action or proceeding brought to enforce this Guaranty," and waived any right to raise as a defense any setoff or counterclaims of the guarantor (*id.* at 2). Further, they provided that the guarantors' obligations were absolute and unconditional and shall not be affected by the invalidity or unenforceability of the Guaranty, any part of the guaranteed obligations, the Note or other agreements evidencing all or any part of the guaranteed obligations, or any other circumstance

which might otherwise constitute legal or equitable discharges or defenses of a surety or guarantor (*id.* at 3).

Beyer Farms made the payments in August, September, October, and November, but failed to make the $31,944.40 payment due on December 20, 2012 (Cosman aff., ¶ 4). By letter dated January 14, 2013, Oak Tree notified Beyer Farms that it had defaulted on the Note, which as of January 22, 2012 would be accelerated and the entire unpaid amounts would become immediately due and payable (*id.*, and Exhibit E annexed thereto). Beyer Farms failed to cure its default, and by letter dated February 7, 2013, Oak Tree declared the entire unpaid principal amount of $1,025,822.40 immediately due and payable (*id.*, ¶ 5 and Exhibit F annexed thereto). Oak Tree asserts that Beyer Farms has defaulted on the Note, failed to make the accelerated payments, and defendants Henry and Michael Beyer were also notified of the default and acceleration, and have failed to make payment under their guarantees.

In moving for summary judgment, Oak Tree has asserted that the Note and guarantees are instruments for the payment of money only and that defendants have defaulted in paying their obligations thereunder. It seeks recovery from Beyer Farms of the entire unpaid principal of $1.025,822.40 plus 5% interest, as provided in the Note, and from the individual defendants the full amount of their guarantees in the principal amount of $575,000 plus half the interest due on the Note, as provided in their guarantees.

In opposition, defendants contend that they were fraudulently induced to enter into the Asset Purchase Agreement, Note and guarantees by Oak Tree materially misrepresenting its intention to exit the milk distribution business, the fundamental purpose for which defendants entered into the agreements in the first place. They claim that, but for Oak Tree's fraud, they

would never have agreed to pay over $1 million to a competitor, Oak Tree, in exchange for a customer list. Both of the individual defendants submit affidavits in which they attest that Beyer Farms was a dairy product distributor in the New York and New Jersey metropolitan area for nearly 10 years, and had purchased approximately 15 other dairy distribution businesses since the mid-1980s (affidavits of Henry Beyer and Michael Beyer, both dated March 20, 2013, ¶¶ 2-3, 5). They assert that Beyer Farms was approached by Oak Tree to purchase its dairy distribution business, and, during the course of negotiations, Oak Tree falsely represented numerous times that it wanted to leave the milk distribution industry (*id.*, ¶¶ 4, 7, and 10). The parties were entering into an agreement for Beyer Farms to purchase the Long Island wholesale portion of Oak Tree's distribution business, and Oak Tree had already sold off its New York City customer list to Farmland Dairies, the right to distribute to Oak Tree-owned Dairy Barn Stores to Dean Foods, and the right to serve Long Islands schools to Cream O Land Dairy (Henry Beyer aff, ¶¶ 16, 21; Michael Beyer aff, ¶ 11). Defendants claim that after the parties entered into the Asset Purchase Agreement and Beyer Farms began serving Oak Tree's customers, in the end of 2012, despite its numerous representations to Beyer Farms, Oak Tree did not exit the milk business. They contend that the representations were made in bad faith, and undermined the entire purpose of the parties' agreements. They urge that none of the provisions in the guarantees regarding waiver and disclaimers of defenses were meaningfully negotiated, and should not be enforced. They further argue that Oak Tree should be equitably estopped from enforcing the Note and guarantees which were procured through fraud, and that it breached the covenant of good faith and fair dealing.

Discussion

Summary judgment in lieu of complaint is granted to plaintiff Oak Tree as against defendant Beyer Farms in the principal amount of $1,025,822.40 plus 5% interest from February 7, 2013 until the date of the decision on this motion, and thereafter at the rate provided by the CPLR; against defendant Henry Beyer in the principal amount of $575,000 plus half the interest due on the Note from February 7, 2013; and against defendant Michael Beyer in the principal amount of $575,000 plus half the interest due on the Note from February 7, 2013. The issue of costs and attorneys' fees is severed, and an assessment is directed to determine the appropriate amount.

"CPLR 3213 is intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious. In the actions to which it applies, 'a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless'" (*Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 154 [1975] [citation omitted]). To establish a prima facie right to recovery under CPLR 3213, the plaintiff must present proof that the instrument sued upon is for the payment of money only, and that defendants failed to make payment thereon in accordance with its terms (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]; *Cicconi v McGinn, Smith & Co.*, 35 AD3d 292 [1st Dept 2006]). Once the plaintiff makes such a showing it is "incumbent upon defendant . . . to come forward with proof showing the existence of a triable issue of fact with respect to a bona fide defense" (*Banesto Banking Corp. v Teitler*, 172 AD2d 469, 469 [1st Dept 1991] [citation omitted]; *see Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d at 551).

Here, Oak Tree has established a right to recover on the Note from defendant Beyer Farms, and on the two Limited Personal Guaranty Agreements from defendants Henry Beyer and Michael Beyer. It presented proof that Beyer Farms executed the Note, and that it failed to make payment on that instrument in accordance with its terms. Oak Tree has also submitted proof of the absolute and unconditional guarantees signed by defendants Henry and Michael Beyer, proof of the underlying debt in the form of the Note, default on that Note, and the defendants' failure to perform under the guarantees. Both the Note and the two guarantees are instruments for the payment of money only (*see Weissman v Sinorm Deli*, 88 NY2d 437 [1996]; *DDS Partners v Celenza*, 6 AD3d 347, 348 [1st Dept 2004] [promissory note]; *Bank of Am., N.A. v Solow*, 59 AD3d 304, 305 [1st Dept], *lv dismissed* 12 NY3d 877 [2009] [guaranty]; *Valencia Sportswear v D.S.G. Enters.*, 237 AD2d 171 [1st Dept 1997] [guaranty and loan]). Whether a promissory note or guaranty precludes a fraudulent inducement defense depends upon the language used by the parties (*Citibank v Plapinger*, 66 NY2d 90, 92 [1985]; *Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d at 551). The note or guaranty must provide that it is absolute and unconditional, and contain either a general merger clause or a "statement that the unenforceability of the underlying liabilities shall not affect or be a defense to the notes" (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d at 551; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-213 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]).

In attacking the validity of the Asset Purchase Agreement and the Note and guarantees, defendants have advanced only vague allegations of fraudulent inducement, not only lacking in detail, but apparently inconsistent, which are insufficient as a matter of law (*see Cape Vincent Milk Producers Coop., Inc. v St. Lawrence Food Corp.*, 43 AD3d 606, 607 [3d Dept 2007];

Mariani v Dyer, 193 AD2d 456, 458 [1st Dept], *appeal denied* 82 NY2d 658 [1993]. They allege that Oak Tree told defendants it was exiting the dairy distribution business, that it had four distribution segments which constituted its business (Henry Beyer aff, ¶ 9), and that it sold off all four and to whom it sold those segments (Beyer Farms, Farmland Dairies, Dean Foods, and Cream O Land Dairy) (*id.*, ¶ 21). Then, the individual defendants assert, in a conclusory fashion, in identical terms in their affidavits, that "Oak Tree did not exit the milk business" in the end of 2012, without explaining or submitting any supporting evidence (*see* Henry Beyer aff., ¶ 26; Michael Beyer aff., ¶ 16). They fail to state how they became aware of this, and how it injured their business. They fail to make any showing that the statement was false when made, that Oak Tree knew it was false or that it recklessly made the statement (*see Newcourt Small Bus. Lending Corp. v Grillers Casual Dining Group*, 284 AD2d 681, 684 [3d Dept 2001]). Such conclusory, self-serving statements fail to create a triable issue to overcome Oak Tree's prima facie showing (*see Cape Vincent Milk Producers Co-op., Inc. v St. Lawrence Food Corp.*, 43 AD3d at 607 ["unsubstantiated conclusory allegations of fraudulent misrepresentations and purported oral agreements" are insufficient]; *Coleman v Norton*, 289 AD2d 130 [1st Dept 2001]; *HSBC Bank USA v Dollar Bill Boutique, Inc.*, 21 Misc 3d 1148 [A], 2008 NY Slip Op 52553 [U] [Sup Ct, Kings County 2008]; *cf. Silber v Muschel*, 190 AD2d 727, 728 [2d Dept 1993] [fact-specific affidavit and handwritten document signed by plaintiff memorializing misrepresentations are sufficient proof]; *Slavin v Victor*, 168 AD2d 399, 399 [1st Dept 1990] [fact-specific affidavit by president of companies who discovered financial misdeeds and had first-hand knowledge]). Moreover, defendants' damage claim is conclusory in form, devoid of documentary support, and belied by their allegations in their counterclaim against Tuscan/Lehigh Dairies, Inc. in an action

pending in Supreme Court, Queens County, entitled *Tuscan/Lehigh Dairies, Inc. v Beyer Farms, Inc.*, Index No. 24896/2012 (converted to efile Index No. 700994/2013) (Exhibit B to reply affidavit of Philip R. Hoffman).

With regard to the personal guarantees, the unconditional nature of the guarantees precludes a defense of fraudulent inducement. In New York, "corporate officers may not raise a defense of fraudulent inducement when the guarantee states that it is absolute and unconditional, and includes a general merger provision" (*HSBC Bank USA v Dollar Bill Boutique, Inc.*, 21 Misc 3d 1148 [A], 2008 NY Slip Op 52553 [U] at * 5, citing *Citibank v Plapinger*, 66 NY2d at 92 ["[f]raud in the inducement of a guarantee by corporate officers of the corporation's indebtedness is not a defense to an action on the guarantee when the guarantee recites that it is absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee"]). Here, the individual defendants were corporate officers and principals of Beyer Farms, and the guarantees clearly state that they were absolute and unconditional, "shall not be discharged or otherwise affected as a result of the invalidity or unenforceability" of the guarantees or Note, and that each "is intended as a complete and exclusive statement of the terms hereof," and "may not be explained, supplemented or qualified through evidence of trade usage or prior course of dealings" (Exhibits B and C to Cosman aff, at 3-4). This specific language bars the defendants' defense of fraudulent inducement. The Note also provided that payment was to be made without setoff, deduction or counterclaim, and the Asset Purchase Agreement provided, in relevant part:

> "This Agreement, the Schedules, and Exhibits, and the Transaction Documents [which includes the Note and guarantees] to which this Seller is a party executed on the Closing Date in connection with the Closing constitute the entire agreement among the Parties with respect to the subject matter of this Agreement and supercede all

> prior agreements and understandings, oral and written, among the Parties with respect to the subject matter of this Agreement."

(Exhibit D to Cosman aff, § 7.07, at 25, *and see* § 2.10 [c], at 8). This further bars any defense of fraudulent inducement with regard to both the Note and guarantees (*see Red Tulip, LLC v Neiva*, 44 AD3d at 209-213; *Quest Commercial, LLC v Rovner*, 35 AD3d 576, 576 [2d Dept 2006]). Defendants' estoppel argument is also without merit. Again, defendants rely on oral representations it claims were made during negotiations, which allegations are unsubstantiated conclusions, and are contradicted by defendants' own statements of the facts, and the Note and guarantees, as unambiguous documents, may not be modified by parol evidence (*see Cape Vincent Milk Producers Coop., Inc. v St. Lawrence Food Corp.*, 43 AD3d at 607).

The court also notes that the parties' Asset Purchase Agreement, in section 5.04 (b), contains a non-competition clause, specifically providing that for 5 years after the closing date, Oak Tree was prohibited from owning, managing, marketing, operating, controlling, consulting with, participating in or being connected with any business which engages in the sale or distribution of milk or milk products on Long Island (Exhibit D to Cosman aff., Asset Purchase Agreement, § 5.04 [b], at 17). Thus, defendants' claim that Oak Tree did not exit the milk business may raise a possible breach of contract claim not a fraud claim, which may be pursued in a separate action. This claim is separate and severable from Oak Tree's claim under the Note and guarantees, and does not defeat CPLR 3213 treatment (*see Quadrant Mgt. Inc. v Hecker*, 102 AD3d 410, 411 [1st Dept 2013]; *Mitsubishi Trust & Banking Corp. v Housing Servs. Assoc.*, 227 AD2d 305, 305-306 [1st Dept 1996]).

[* 11]

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff Oak Tree Farm Dairy, Inc. and against defendant Beyer Farms, Inc. in the principal amount of $1,025,822.40 plus 5% interest from February 7, 2013 until the date of the decision on this motion, and thereafter at the rate provided by the CPLR; against defendant Henry Beyer in the principal amount of $575,00 plus half the interest due on the Note from February 7, 2013 until the date of the decision on this motion, and thereafter at the rate provided by the CPLR; and against defendant Michael Beyer in the principal amount of $575,000 plus half the interest due on the Note from February 7, 2013 until the date of the decision on this motion, and thereafter at the rate provided by the CPLR; and it is further

ORDERED that the issue of costs and reasonable attorneys' fees due under the promissory note and personal guarantees is severed and an assessment of damages against defendants Beyer Farms, Inc., Henry Beyer, and Michael Beyer is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by plaintiff upon the Clerk of the Trial Support Office (Room 119 together with a completed Information Sheet ~~158M, who is directed~~ and upon the filing of a note of issue and ~~a statement of readiness and~~ the payment of proper fees, if any, to ~~place this action on~~ with the Special Referee Clerk in Room 119M, the Clerk is directed to place this matter on the the appropriate trial calendar for the assessment herein above directed for the earliest convenient date of the Special Referee Part

Dated: July 1, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER