SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

BANCO AZTECA

INDEX NO. 653778/12

-v-

MOTION DATE

UNA VEZ MAS SAN FRANCISCO, LLC, et al

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 is by plaintiff for summary judgment in lieu of complaint is GRANTED per the Decision and Order attached.

Plaintiff is to settle Order and Judgment.

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

Dated: July 9, 2013

Melvin L. Schweitzer, J.S.C.

MELVIN L. SCHWEITZER

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 : PART 45

BANCO AZTECA,	:	
Plaintiff,	:	Index No. 653778/12
-against-	:	DECISION AND ORDER
UNA VEZ MAS SAN FRANCISCO, LLC, ET AL.	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Banco Azteca moves for summary judgment in lieu of complaint pursuant to New York CPLR 3213. For the reasons discussed below, Banco Azteca's motion is granted.

Background

On September 29, 2011, Una Vez Mas San Francisco, LLC (Borrower Defendant) executed and delivered to Banco Azteca a Credit Agreement (Credit Agreement) by and among Borrower Defendant, as Borrower, Una Vez Mas San Francisco License, LLC, as Subsidiary Guarantor, Una Vez Mas California, LLC, as Parent Guarantor, and Banco Azteca, as Lender. Pursuant to the Credit Agreement, Borrower Defendant executed and delivered to Banco Azteca a Term Loan Note (Note) in the original principal amount of $6,600,000.00. Currently, $6,364,517.50 of this principal balance is due and owing.

Under the Credit Agreement, an occurrence of "an 'Event of Default' as defined in the Dallas/Houston Credit Agreement" constitutes an Event of Default under the Credit Agreement. This is a classic cross-default provision. Furthermore, "[u]pon the occurrence . . . of an Event of Default," Banco Azteca "may . . . (a) [d]eclare all or any portion of the Obligations . . .

immediately due and payable." Under the terms of the Note, Borrower Defendant "absolute[ly] and unconditional[ly]" agreed to pay Banco Azteca the lesser of the $6,600,000.00 and the unpaid principal amount. The Note also provides that "[u]pon the occurrence and continuance of an Event of Default, the unpaid balance of the principal amount of th[e] Note, together with all accrued and unpaid interest thereon, may become . . . due" as per the Credit Agreement.

Simultaneously with the execution and delivery of the Credit Agreement and Note, Defendants Una Vez Mas California, LLC, Una Vez Mas San Francisco License, LLC, Una Vez Mas California Holdings, LLC, and Una Vez Mas GP, LLC (collectively, Guarantor Defendants), and defendant Una Vez Mas, LP (UVM) and 34 of its subsidiaries (collectively, Limited Guarantor Defendants), executed and delivered a General Continuing Guaranty (Guaranty) to Banco Azteca. Pursuant to the Guaranty, the Guarantor Defendants guaranteed payment of the Borrower Defendant's Obligations to Banco Azteca under the Note, the Credit Agreement and other Loan Documents, and the Limited Guarantor Defendants guaranteed payment of any amounts loaned by the Borrower Defendant to UVM. Under the Guaranty, in the event that the borrower fails to make a payment, the Guarantor Defendants become liable to Banco Azteca. The liability of the Limited Guarantor Defendants is limited to the aggregate amount of all loans from the Borrower to UVM outstanding at such time. As of the date of this action, the maximum $1,000,000.00 that the Borrower Defendant could loan to UVM was outstanding.

Simultaneously with the execution and delivery of the Credit Agreement, Note, and Guaranty, UVM executed and delivered to the Borrower Defendant a promissory note (UVM Note), pursuant to which UVM unconditionally agreed to pay the principal amount of $1,000,000.00, together with interest thereon, on demand. The Borrower Defendant endorsed

the UVM Note "PAY TO THE ORDER OF BANCO AZTECA" and delivered it to Banco Azteca.

On March 31, 2012, there was a default as defined by the Dallas/Houston Credit Agreement. In light of the cross-default provision in the Credit Agreement, this constitutes a default under the Credit Agreement. On October 24, 2012, Banco Azteca sent an acceleration notice to the Borrower Defendant, which declared "all of the Obligations to be immediately due and owing" and demanded "immediate payment thereof." Banco Azteca brings this action to compel payments under the Note, Guaranty, and UVM Note.

Discussion

Summary judgment in lieu of complaint should be granted where the "action is based upon an instrument for the payment of money only" and where the plaintiff establishes that the defendant has defaulted on that instrument. CPLR 3213. A promissory note is an instrument for the payment of money only within the meaning of CPLR 3213. *See e.g. Alard, LLC v Weiss*, 1 AD3d 131, 131 (1st Dept 2003); *Nissan Motor Acceptance Corp. v Scialpi*, 83 AD3d 1020, 1021 (2d Dept 2011).

A *prima facie* case for summary judgment in lieu of complaint is established, without more, where the plaintiff establishes that the defendant (a) executed a note or guaranty for a sum certain and (b) defaulted under the note or guaranty. *See e.g. Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 (1st Dept 1968), *aff'd* 29 NY2d 617 (1971); *Alard, LLC*, 1 AD3d at 131 (affirming order granting summary judgment in lieu of complaint based on a promissory note); *Bank of Am., N.A. v Solow*, 59 AD3d 304, 304-05 (1st Dept 2009) (affirming order granting summary judgment in lieu of complaint based on a guaranty).

Once a *prima facie* case is established, summary judgment is only defeated by the existence of a triable issue of fact with respect to a *bona fide* defense, not by conclusory or irrelevant allegations. CPLR 3212 (b); *see also George L. Penny, Inc. v Zaweski*, 254 AD2d 255, 255 (2d Dept 1998) (rejecting "defendants' unsubstantiated, conclusory allegations of constructive fraud and fraud in the inducement" as "insufficient to defeat the plaintiff's motion for summary judgment in lieu of complaint"); *Nissan*, 83 AD3d at 1020 ("The conclusory and unsubstantiated allegations of fraud and misrepresentation set forth in affidavits submitted by the defendants are insufficient to [raise a triable issue of fact] . . .").

The plaintiff asserts, and the defendant does not contest, that the Note and Guaranty were both executed and delivered. The plaintiff asserts, and the defendant does not contest, that the failure to pay the quarterly interest payment in the Dallas/Houston Credit Agreement constitutes an Event of Default under the Credit Agreement. The Borrower Defendant's liability for the Note, as well as the Guarantor Defendants and Limited Guarantor Defendants liability under the Guaranty, may be found as a matter of law pursuant to CPLR 3213. *See Richmond v Plaza Associates v Santucci*, 192 AD2d 412, 412 (1st Dept 1993) (holding that plaintiff's *prima facie* showing that a promissory note was valid was sufficient for the purposes of a Section 3213 motion), *see also Bank of America, N.A.* 59 AD3d at 305 (holding that a guaranty is "an instrument for the payment of money only"). By the terms of the Note and Guarantee, therefore, the Borrower Defendant and the Guarantor Defendants are jointly and severally liable for the outstanding balance of the loan.

Similarly, the plaintiff asserts, and the defendant does not contest, that the Borrower Defendant executed and delivered the UVM Note to UVM, and that the Borrower Defendant thereafter endorsed it "PAY TO THE ORDER OF BANCO AZETCA" and delivered it to the

plaintiff. By the terms of the UVM Note, UVM is liable to Banco Azteca for the outstanding balance of this loan. Under the terms of the Guaranty, the Limited Guarantor Defendants are jointly and severally liable for the $1,000,000.00 in principal and other related costs.

The defendant's estoppel argument is unavailing. Its claims are merely conclusory, and are insufficient to overcome the plaintiff's *prima facie* case for summary judgment in lieu of a complaint under CPLR 3213. *See e.g. Quest Commercial, LLC v Rovner*, 35 AD3d 576, 577 (2d Dept 2006).

ORDERED that Banco Azteca's motion is granted.

Dated: July 9, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER