SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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GODDARD INVESTORS II, LLC,

Plaintiff,

-against-

GODDARD DEVELOPMENT PARTNERS II, LLC, GODDARD DEVELOPMENT PARTNERS III, LLC, ACPG, LLC and BVS DRADOG, LLC,

Defendants.

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DECISION AND ORDER
Motion Sequence Number: 001

Index No.: 653907/2013

O. PETER SHERWOOD, J.:

Goddard Investors II, LLC ("GI" or "Lender") moves pursuant to CPLR 3213 for summary judgment in lieu of complaint on a note and guaranty. For the reasons discussed below, the motion must be denied.

BACKGROUND

The facts of the case, to the extent stated here are taken from the submissions of plaintiff.

On June 19, 2008, Goddard Development Partners LLC ("GDP" or "Borrowers") redeemed all of the membership interests in GDP held by GI. As part of the consideration for redemption, GDP executed a Promissory Note in the amount of $500,000 to GI (the "Note"). The annual rate of interest is 8%. The Note is secured by a Guaranty signed by defendant, BVS Dradog, LLC ("BVS") and others. Pursuant to section 2 of the Note, GDP was required to repay the principal amount of $500,000 as follows:

1. $100,000 was due and payable after GDP's acquisition of all or any part of the property named Warwick 1 (the "Property")

2. $200,000 was due and payable after GDP's resale of all or any part of the Property

3. The remainder (of the $500,000) payable in installments of $100,000 each time GDP acquired of any property other than the Property.

4. Accrued interest was payable with each principal payment described above.

The Note states that "[n]o payments of principal or interest shall be due and payable unless and until the acquisition by any Maker Party of any property (or any interest in any property)" (Note § 2).

In the event of default on the Note, if GDP failed to cure within 10 days of receipt of a written notice, the interest rate ould increase to 15% on the outstanding principal balance and the unpaid principal would be accelerated, becoming immediately due and payable. Further, GI would be entitled to recover attorney fees in connection with collection efforts (Note § 4).

BVS, Goddard Development III, LLC and ACPG, LLC (the "Guarantors") signed a Guaranty guaranteeing the payment of the Note (Fisher aff, Ex. E). Pursuant to the Guaranty, the Guarantors, jointly and severally unconditionally agreed to pay:

> (a) the full an prompt payment when due, whether by acceleration or otherwise, with such interest as may accrue thereon, either before or after maturity thereof, of that certain Promissory Note dated of even date herewith, made by Borrower the order of Lender in the principal amount of Five Hundred Thousand and No/100 Dollars ($500,000.00) (hereinafter referred to as the "Note"), together with any renewals, modifications, consolidations and extensions thereof, and
>
> (b) all expenses (including reasonable attorney's fees) paid or actually incurred by Lender in endeavoring to collect the indebtedness, to enforce the obligations of Borrower guaranteed hereby, or any portion thereof, or to enforce this Guaranty. Guarantor does hereby agree that if the Note is paid by Borrower in accordance with its terms, Guarantor will immediately make such payments.

GDP purchased the Property and made the first required $100,000 payment. Thereafter, GDP sold the Property, but failed to pay the next $200,000 which became due. On July 3, 2013, GI gave written notice of default to GDP. On August 22, 2013, GI delivered a second written notice of default where it advised GDP that if full payment was not received before September 1, 2013, it would pursue collection. GDP did not respond to either notice and did not cure the default. On September 24, 2013, GI issued a notice of collection.

Relying on CPLR 3213, GI requests entry of an order granting summary judgment against GDP and Guarantors in the principal amount of $400,000 with interest, costs and expenses, including attorney's fees. GDP does not oppose to GI's motion, but two of the Guarantors, BVS and

Goddard Development Partners III, LLC, have submitted opposition. They claim that CPLR 3213 may not be invoked to enforce the Guaranty because 1) the Guaranty is not an instrument for the payment of money only and 2) triable issues of facts preclude summary judgment

DISCUSSION

CPLR 3213 provides that "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 usual standards for summary judgment apply to CPLR 3213 motions.

A claim on an instrument for the payment of money is established by proof of the instrument and a failure to make the payments called for by its terms (*see Seaman-Andwall Corp v Wright Mach. Corp.*, 31 Ad2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971], *Bonds Financial, Inc. v Kestrel Technologies, LLC,* 48 AD3d 230, [1st Dept 2008]). "[P]roof of the fulfillment of the condition precedent to the obligation to repay, ..., comes within this limited category of elements of proof which may be established by extrinsic evidence without rendering accelerated treatment unavailable (*Kirkwood v Nakhamkin*, 169 AD2d 693 [1st Dept 1991]).

The fact that defenses may be asserted against the instrument sued upon does not preclude the use of CPLR § 3213 as long as the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinomr Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus Products Ltd. v R.S.M Electron Power*, 37 NY2d 151, 155 [1975]). Determining the amount to be paid under the guaranty by reference to a note (*European American Bank & Trust Co. v Schirripa*, 108 AD2d 684 [1st Dept 1985]; *SCP (Bermuda) Inc. v. Bermudatel Ltd.* 224, AD2d 214, [1st Dept 1996]) or a mortgage (see *Bank of America, N.A. v Solow*, 59 AD3d 304 [1st Dept 2009]) to which the Guaranty relates is a *de minimis* deviation in CPLR § 3213 actions for payment.

An unconditional guaranty is an instrument for the payment of money only (*see European American Bank & Trust Co.,* 108 AD 2d at 684 [" it is well established that an unconditional guarantee ... is an instrument for the payment of money only within the meaning of CPLR 3213"]; *Bank of America, N.A.,* 59 AD 3d at 304 ["The guaranty was absolute and unconditional, expressly waived demand or presentment and was expressly made a primary obligation of the defendant, so that no formal demand, beyond the motion in lieu of complaint itself, was necessary to state a cause of action on the guaranty; *Poah One Acquisition Holdings V Ltd. v Armenta,* 96 AD3d 560 [1st Dept 2012]). A guaranty is not an instrument for the payment of money only when it is relates to a stock purchase agreement which did not specify a sum certain (*see Weissman,* 88 NY 2d at 446) or a series of purchase orders with separately issued invoices (*see Metal Management., Inc. v Esmark, Inc*, 49 AD3d 333 [1st Dept 2008]). The same result is reached when the guaranty is conditioned upon creditor refraining from disparaging comments about her former employer, because it requires investigation into whether the condition was respected or not (*see Kerin v Kaufman,* 296 AD2d 336 [1st Dept 2002] [*Times Square Associates v Grayson*, 39 AD2d 845, [1st Dept. 1972][same]).

The Note not is a an instrument for the payment of money only because the right to payment cannot be ascertained from the face of the document. Although the Note reads that the GDP promises to pay the principal amount of $500,000 with an annual 8% interest, the payment is expressly conditional on the acquisition and sale of property. This is not the sort of *de minimus* deviation from the face of document that CPLR 3213 contemplates.

Defendants, relying on *Dubovsky & Sons, Inc. v Schwartz,* 75 AD2d 802 (2nd Dept 1980), argue persuasively that proof of acquisition and sale of the property is extrinsic evidence that brings the case outside of CPLR § 3213 (Def. Memo in Opp. at 6). In *Dubovsky*, the Second Department held that CPLR § 3213 was not applicable to a guaranty securing a corporate buyer for the goods it purchased because additional proof dehors the instrument would be necessary, i.e "there actually were goods sold and delivered to the corporate debtor for which it remains liable." Similarly here, the purchase and sale of property were required to triggered the payments GDP eventually defaulted on.

GI's argues that because GDP has defaulted on the motion, the court can grant summary judgment in its favor and thereby trigger the Guaranty. The court disagrees. Summary judgment in lieu of complaint cannot be granted against GDP even on default because GI has failed to establish a prima facie case that it is owed money under an instrument for the payment of money only. The Guaranty at issue here may not be enforced using the accelerated procedure CPLR 3213 provides.

GI also cites *Kirkwood v Nakhamkan*, 169 AD2d 693 (1st Dept 1991), which found that, under the circumstances of that case "proof of the fulfillment of the condition precedent to the obligation to repay . . . comes within th[e] limited category of elements of proof which may be established by extrinsic evidence.." K*irkwood* is distinguishable. In that case, the extrinsic evidence was the absence of the execution of a contract. The absence of a contract, like non-payment, is *de minimis* deviation from the face of the contract. In this case, GI needs to establish specific real estate transactions, before payment becomes due. Such proof is not *a de minimis* deviation from the face of the Note.

Accordingly, it is hereby

ORDERED the motion for summary judgment in lieu of complaint is DENIED; and it is further

ORDERED that the moving and answering papers shall be deemed the complaint and answer. Counsel shall appear at Part 49, 60 Centre Street, New York, New York 10007 for a preliminary conference on June 24, 2014 at 10:30 am.

This constitutes the decision and order of the court.

DATED: May 20, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.