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SHORT FORM ORDER

INDEX No. 13-15288

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7/31/13
ADJ. DATE 2/4/14
Mot. Seq. #001 - MD

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GEORGE GABRIEL,

Plaintiff,

- against -

MIKEN TRAPFER, INC., KENNETH FERRALL and MICHAEL TRAPANI,

Defendants.

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THOMAS PERSICHILLI, ESQ.
Attorney for Plaintiff
2137 Deer Park Avenue
Deer Park, New York 11729

JEFFREY S. SCHWARTZ, ESQ., P.C.
Attorney for Defendant Kenneth Ferrall
7600 Jericho Turnpike
Woodbury, New York 11797

THE MARGIOTTA LAW FIRM, P.C.
Attorney for Defendant Michael Trapani
Four West Main Street
Bay Shore, New York 11706

Upon the reading and filing of the following papers in this matter: (1) Summons and Notice of Motion for Summary Judgment in Lieu of Complaint, dated April 29, 2013, and supporting papers; (2) Affirmation in Opposition by defendant Kenneth Ferrall, dated August 20, 2013, and supporting papers; (3) Affirmation in Opposition by defendant Michael Trapani, dated August 30, 2013, and supporting papers (including Memorandum of Law); and (4) Reply Affirmation by the plaintiff, dated September 28, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

***ORDERED*** that the motion by the plaintiff pursuant to CPLR 3213 for summary judgment in lieu of complaint, directing the entry of judgment in his favor and against the defendants in the principal amount of $448,375.54, plus interest from September 15, 2012, together with reasonable attorney's fees and the costs and disbursements of this action, is denied.

This action, brought on by notice of motion pursuant to CPLR 3213, is to recover money due on a promissory note executed by Kenneth Ferrall on behalf of defendant Miken Trapfer, Inc. in favor of Gabriel Transport, Inc., the plaintiff's assignor. The individual defendants, Kenneth Ferrall and Michael Trapani, are sued as guarantors of payment on the note.

The plaintiff is the owner of property located at 617 Acorn Street, Deer Park, New York. In and prior to June 2004, the plaintiff owned Gabriel Transport, Inc. d/b/a Gabriel Tire, which operated a motor vehicle repair business at the property. On or about June 15, 2004, Gabriel Transport entered into a written agreement with Miken Trapfer pursuant to which Gabriel Transport agreed to sell and Miken Trapfer agreed to purchase the business, assets, and good will of Gabriel Transport for a price of $900,000.00. On June 29, 2004, in connection with the agreement, Miken Trapfer executed and delivered to Gabriel Transport a promissory note in the amount of $600,000.00. The note provides, in relevant part, as follows:

Due: July 1, 2019

FOR VALUE RECEIVED, I promise to pay to the order of Gabriel Transport, Inc. a New York corporation having its principal place of business located at 617 Acorn Street, Deer Park, New York 11729, or such other place as may be designated in writing by the holder of this note, the principal sum of Six Hundred Thousand and 00/100 ($600,000.00) Dollars with interest at seven and one-half (7.5%) per cent per annum on the unpaid balance of the debt to be computed from the date of this note, in one hundred eighty (180) equal monthly installments of principal and interest of $5,562.07, commencing on August 1, 2004. This note shall mature on July 1, 2019.

It is agreed that in the event of (a) the default in the payment of any installment due under this note for more than thirty (30) days past its due date; or (b) the filing of an involuntary or voluntary petition in bankruptcy or an assignment for the benefit of creditors by the maker of this note; or (c) a default in the payment of rent or additional rent due under a certain lease dated June 29, 2004, by and between George Gabriel, as Landlord, and Miken Trapfer, Inc., as Tenant, with respect to premises 617 Acorn Street, Deer Park, New York then, at the option of the holder of this note, all or any part of the remaining unpaid note shall forthwith become due and payable. The failure to assert this right shall not be deemed a waiver thereof.

Presentment for payment, notice of dishonor, protest and notice of protest are hereby waived. This note may not be changed or terminated orally. This note may be prepaid at any time without penalty.

If the unpaid principal balance under this note is not paid in full when it becomes due, whether at its original maturity or prior thereto by reason of acceleration upon any default, interest thereon shall be computed and paid, beginning on the due date, at the maximum rate of interest permitted by General Obligations Law Section 5-501 and Banking Law Section 14-a.

In the event that any payment due under the terms of this obligation shall not be received within five (5) days after it shall become due, a late charge of not in excess of five (5) cents for each One ($1.00) Dollar overdue may be charged by the holder of this note for the purpose of defraying the expense incidental to the handling of such

delinquent payment.

In the event the holder of this note proceeds to enforce its rights hereunder, the holder shall be entitled to recover all of their reasonably incurred attorney's fees and expenses of collection.

Also on June 29, 2004, Gabriel Transport assigned its interest in the note to the plaintiff, Kenneth Ferrall and Michael Trapani executed a guarantee of payment with respect to the note, the plaintiff and Miken Trapfer entered into a security agreement to secure the payment of the indebtedness, the plaintiff and Miken Trapfer entered into a written lease agreement with respect to the premises providing for a base monthly rent of $7,700.00, and Miken Trapfer commenced operation of a motor vehicle repair business at the premises.

According to the plaintiff, in 2009 and again in 2011, Miken Trapfer became delinquent in the payment of the note. In March 2010, the parties entered into a written modification and extension agreement providing, in part, as follows:

1. DEFERRAL OF PAYMENTS AND EXTENSION OF THE NOTE. Obligor and Obligee agree that the monthly installments of principal and interest due under the Note, commencing with the November 1, 2009 installment through and including the October 1, 2010 installment, shall be deferred. The Principal Balance plus interest under the Note shall be paid as follows: The next monthly installment payment of principal and interest under the Note in the sum of $5,562.07 shall be made on November 1, 2010. The remaining 116 monthly installment payments of principal and interest under the Note each in the sum of $5,562.07 (representing the 64th through 180th installment payments inclusive due under the Note) shall thereafter continue up to and including July 1, 2020. The parties further agree that the interest accruing on the Principal Balance for the period October 1, 2009 through September 30, 2010, in the sum of Thirty-four Thousand Nine Hundred Twenty-one and 92/100 ($34,921.92) Dollars shall be deferred and shall be paid in twelve (12) equal and consecutive monthly installments of $2,910.16 commencing August 1, 2020 and on the first day of each month thereafter. The maturity date of the Note is extended one year to July 1, 2021.

2. AMENDMENT OF NOTE. The parties agree that the Note is hereby deemed to be amended to reflect those changes set forth in paragraph "1" above and the parties agree to execute any and all instruments, if any be required, to reflect such amendment. Obligor and Guarantors acknowledge that the calculation of the deferred interest is fair and accurate. The parties further agree that the Note, as modified, shall continue to be secured by the Security Agreement and that Schedule A shall be amended in an Amended Security Agreement to be executed simultaneously herewith and that an amended UCC-1 reflecting such amendment may and shall be filed with the New York State Department of State. All of the other terms and conditions of the Note except as herein modified shall continue in full force and effect. The Guarantors hereby acknowledge their continuing guaranty of the Note, as amended, and that their joint and several liability thereunder shall

continue in full force and effect.

In December 2011, the plaintiff and Miken Trapfer, by its president, Michael Trapani,[1] entered into a second such agreement providing, in part, as follows:

> 1. REDUCTION OF PRINCIPAL BALANCE AND EXTENSION OF THE NOTE. Obligor and Obligee hereby agree to a reduction of the principal balance due under the Note from $465,625.59 to the sum of $457,942.43. Obligor and Obligee hereby further agree to a reduction of the interest rate under the note from seven and one-half (7.5%) percent per annum to six (6%) percent per annum. Obligor and Obligee agree that the term of the Note shall be extended and that the maturity date of the Note shall be March 15, 2027. Except as otherwise set forth herein, the Obligor hereby waives any interest accruing under the Note through March 15, 2012.
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> Obligor and Obligee agree that monthly installments of principal as reduced and interest due under the Note, shall commence on April 15, 2012. The reduced principal balance of $457,942.43 plus interest under the Note shall be paid as follows: No payments shall be due from the date hereof through April 14, 2012. The next monthly installment payment of principal and interest under the Note in the sum of $3,864.86 shall be made on April 15, 2012. The remaining 179 monthly installment payments of principal and interest under the Note each in the sum of $3,864.86 shall be paid on the fifteenth day of each month thereafter up to and including the maturity date of the Note, March 15, 2027.
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> 2. AMENDMENT OF NOTE. The parties agree that the Note is hereby deemed to be amended to reflect those changes set forth in paragraph "1" above and the parties agree to execute any and all instruments, if any be required, to reflect such amendment. The parties further agree that the Note, as modified, shall continue to be secured by the Security Agreement. All of the other terms and conditions of the Note except as herein modified shall continue in full force and effect.

The plaintiff now claims that Miken Trapfer is in default under the note as amended, having failed and refused to pay the monthly installments due under the note since September 15, 2012 and having failed and refused to pay rent due under the lease, despite due demand, since December 15, 2012. By letter dated March 8, 2013, the plaintiff's attorney notified each of the defendants of Miken Trapfer's default and of the plaintiff's election to declare the entire remaining principal balance plus interest immediately due and payable. As a result, the plaintiff claims that the sum of $448,375.54, plus interest from September 15, 2012 and attorney's fees, is due and owing to him from Miken Trapfer on account

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[1] Based on documents submitted by Kenneth Ferrall in opposition to the plaintiff's motion, it appears, on or about December 8, 2011, that Ferrall resigned as a director and officer of Miken Trapfer and that Michael Trapani executed a release of Ferrall for any claims or rights arising from ownership, management, operation, affairs, assets or liabilities of Gabriel Tire and Miken Trapfer.

of the note, and that Kenneth Ferrall and Michael Trapani are likewise indebted to him on account of the guarantee.

CPLR 3213 provides an accelerated procedure to secure a judgment on a presumptively meritorious claim by allowing a motion for summary judgment to be made before issue is joined (*cf.* CPLR 3212 [a]). To qualify for such expedited treatment, the plaintiff must first show that the action "is based upon an instrument for the payment of money only or upon any judgment" (CPLR 3213). "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money–an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time" (***Weissman v Sinorm Deli***, 88 NY2d 437, 444, 646 NYS2d 308, 311 [1996]). If the instrument qualifies for CPLR 3213 treatment, the plaintiff can establish a prima facie case by proof of the instrument and a failure to make the payments called for by its terms (***Seaman-Andwall Corp. v Wright Mach. Corp.***, 31 AD2d 136, 295 NYS2d 752 [1968], *affd* 29 NY2d 617, 324 NYS2d 410 [1971]). However, "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (***Weissman v Sinorm Deli***, *supra* at 444, 646 NYS2d at 311).

Here, the plaintiff cannot demonstrate, without resort to evidence extrinsic to the note, that it provided the defendants with adequate notice of default and acceleration of debt or, consequently, that any indebtedness on the note is due and payable (*see* ***Riverside Inn Real Estate Partnership v Niagara Gorge Jet Boating***, 34 AD3d 1328, 823 NYS2d 738 [2006], *lv denied* 8 NY3d 807, 833 NYS2d 427 [2007]). While the note provides its holder with an option to accelerate any part of the unpaid balance in the event of a default, it does not specify how the holder is to exercise this option. That information, rather, would appear to be set forth in the parties' security agreement, which provides that all notices "shall be in writing and shall be delivered by certified mail" and which, in reference to the eventuality of a default by Miken Trapfer in payment of the note, provides that any indebtedness "shall immediately become due and payable in full upon ten (10) days written notice and demand." Unless a debtor waives notice of acceleration to maturity–there is no indication that Miken Trapfer did so here–and as a matter of contract, the holder of an option to accelerate the maturity of a loan is generally required to exercise the option in the manner agreed to by the parties (*see* ***Wells Fargo Bank v Burke***, 94 AD3d 980, 943 NYS2d 540 [2012]); such agreement, in this case, is not evidenced in the note.

To afford the parties an opportunity to sharpen the issues presented, the court hereby converts the plaintiff's motion to a conventional action and directs the service of formal pleadings (*see* ***Schulz v Barrows***, 263 AD2d 565, 693 NYS2d 658 [1999], *affd* 94 NY2d 624, 709 NYS2d 148 [2000]). The plaintiff shall serve his complaint within 20 days after service of a copy of this order with notice of its entry, the defendants shall serve their answer or move with respect to the complaint within 20 days thereafter, and the action shall subsequently proceed in accordance with the requirements set forth in the CPLR.

Dated: 6-3-14

PETER H. MAYER, J.S.C.