

Eastern Funding LLC v 843 Second Ave. Symphony, Inc.
2015 NY Slip Op 31588(U)
August 20, 2015
Supreme Court, New York County
Docket Number: 652205/2015
Judge: Shirley Werner Kornreich
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SHIRLEY WERNER KORNREICH**J.S.C**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54-----X
EASTERN FUNDING LLC,

Index No.: 652205/2015

Plaintiff,

DECISION & ORDER

-against-

843 SECOND AVE. SYMPHONY, INC., SYMPHONY
44 CLEANERS INC., and SYMPHONY 37 CORP.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff Eastern Funding LLC moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants 843 Second Ave. Symphony, Inc. (Symphony 843), Symphony 44 Cleaners Inc. (Symphony 44), and Symphony 37 Corp. (Symphony 37). Defendants did not file opposition papers. Plaintiff's motion is granted on liability, on default, for the reasons that follow.

Plaintiff commenced this action to recover the unpaid balances on three loans made to defendants, each of which is memorialized by a note governed by New York law (the Notes). First, plaintiff loaned \$200,000 to Symphony 37 pursuant to a Negotiable Promissory Note dated November 10, 2009 (the First Note). *See* Dkt. 3 at 13. The First Note carries 9.56181% annual interest and is payable in 54 consecutive monthly installments beginning on December 15, 2009. Plaintiff also loaned \$75,000 to Symphony 44 pursuant to a Secured Promissory Note and Agreement dated July 14, 2012 (the Second Note). *See* Dkt. 3 at 9. The Second Note carries 10% annual interest and is payable in 72 consecutive monthly payments beginning on November 24, 2012. Then, plaintiff loaned \$330,000 to Symphony 843 pursuant to a Secured Promissory Note and Agreement dated March 19, 2013 (the Third Note). *See* Dkt. 3 at 5. The Third Note

carries a variable interest rate and is payable in 87 consecutive monthly installments beginning on April 19, 2013.

On March 18, 2013, all three defendants executed an Agreement of Cross Default, Guaranty and Collateral Security (the Guaranty), whereby, *inter alia*, they each jointly and severally guaranteed all three of the Notes. *See* Dkt. 3 at 15. By letter dated March 24, 2015, plaintiff informed defendants that they were in default and that the total amount outstanding on the Notes was in excess of \$600,000. *See id.* at 17. Plaintiff commenced the instant action on June 19, 2015, by filing a summons and the instant motion for summary judgment in lieu of complaint. In support of its motion, plaintiff submits the affidavit of its Vice President of Collections, Robert Fagan, who sets forth the circumstances of the Notes, which are attached to his affidavit. *See* Dkt. 3. On June 22, 2015, all three defendants were served via the Secretary of State. *See* Dkt. 6-8 (affidavits of service). The defendants did not file opposition papers.

“Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is ‘based upon an instrument for the payment of money only or upon any judgment.’” *Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). It is well settled that a motion under CPLR 3213 is an appropriate means to collect on a note and a guaranty. *See Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560 (1st Dept 2012) (“Plaintiff demonstrated its entitlement to summary judgment ... by submitting the guaranty executed by [defendant] and an affidavit of nonpayment”), citing *Bank of Am., N.A. v Solow*, 59 AD3d 304 (1st Dept 2009) (“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”). “To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note’s terms.” *Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 (1st Dept 2012). “Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense.” *Id.*

Plaintiff is entitled to summary judgment on liability. Plaintiff has submitted three promissory notes evidencing loans made to defendants and evidence of their default. Pursuant to the Guaranty, each of the defendants are jointly and severally liable on the Notes. Summary judgment on damages, however, cannot be granted since the record on this motion does not clearly establish the amount owed. As set forth below, an inquest on damages will be held before a Special Referee, who shall account for the outstanding principal, interest, and fees and all amounts paid on the Notes to date. Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Eastern Funding LLC against defendants 843 Second Ave. Symphony, Inc., Symphony 44 Cleaners Inc., and Symphony 37 Corp. is granted, on default, as to liability only; and it is further

ORDERED that an inquest on damages is referred to a Special Referee to hear and determine; and it is further

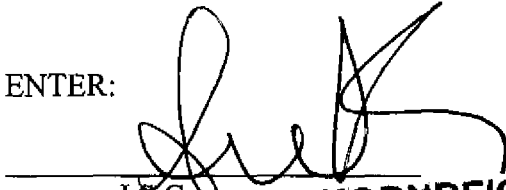
ORDERED that within 15 days, plaintiff shall pay the appropriate fees, file a note of issue and serve a copy of this order with notice of entry, as well as a completed information

sheet,¹ on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, plaintiff shall serve a copy of this order on defendants.

Dated: August 20, 2015

ENTER:


J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

¹ Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".