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

Plaintiff,

-against-

FIRST CAPITAL REAL ESTATE INVESTMENTS, LLC, FIRST CAPITAL RE FUND 1, LLC, FIRST CAPITAL MANAGEMENT COMPANY LLC, FIRST CAPITAL MANAGEMENT, LLC, FIRST CAPITAL RETAIL, LLC, FIRST CAPITAL PARTNERS, LLC, FIRST CAPITAL BUILDERS, LLC, SUNEET SINGAL AND FIRST CAPITAL REAL ESTATE ADVISORS, LP,

Defendants.
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DECISION AND ORDER

Index No.: 653825/2016
Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

This is one of three cases in which JFURTI, LLC (JFURTI) has moved for summary judgment in lieu of complaint. The cases are related, and the parties filed combined oppositions and replies. In this case, JFURTI seeks to enforce a June 2, 2016, agreement (the Settlement Agreement, attached as Exhibit A to Frydman aff, NYSCEF Doc. No. 4) between JFURTI and the defendants to this action, First Capital Real Estate Investments, LLC, First Capital Re Fund 1, LLC, First Capital Management Company LLC, First Capital Management, LLC, First Capital Retail, LLC, First Capital Partners, LLC, First Capital Builders, LLC, Suneet Singal, and First Capital Real Estate Advisors, LP (Advisors, and together, the Settlement Action Defendants). In the Settlement Agreement, the parties discuss indemnification for the judgment owed by JFURTI to 8430985 Canada, Inc., in yet another action (*id.*, ¶ 2). In the Settlement Agreement, the Settlement Action Defendants

> "agree, jointly and severally, to be solely responsible for the Canada Judgment, and to indemnify and hold the JF Parties and each of their respective affiliates . . . harmless with respect to , and shall reimburse the JF Indemnified Persons for the amount of any sums collected by, or paid to, or the value of any assets seized or obtained by, the Canada Judgment creditor from Frydman or any of Frydman's affiliates, whether involuntarily,

> voluntarily, by execution, purchase, sale or any other way. . . and any loss liability claim, damage, expense paid or incurred by the JF Indemnified Parties in connection therewith . . . arising from, directly or indirectly, or in any way in connection with the Canada Judgment and/or Frydman's guaranty obligation relating to, or otherwise with respect to, the Canada Judgment. . . . In the event that any JF Indemnified Persons shall have paid any sums against, in reduction of, to acquire or otherwise with respect to the Canada Judgment, whether voluntarily or involuntarily, whether as payment of, reduction of, satisfaction of, by execution, by purchase of, or otherwise with respect to the Canada Judgment . . . or if any of the JF Indemnified Persons shall have had or hereafter may have, any of their assets attached, seized or sold in connection with the judgment creditor's collection efforts . . . then the FC Parties and the Advisor hereby agree. . . to fully reimburse all such sums, and/or pay an amount equal to the value of any assets seized or obtained by the judgment creditor by execution . . . ."

(Settlement Agreement, ¶ 11). On June 16, 2016,

> "Plaintiff posted $1,302,44.80 [sic] in cash with the New York County Court, office of the County Clerk and Clerk of the Supreme Court pursuant to CPLR 5519 to stay execution pending appeal of the Canada Judgment, provided the Defendants with notice under the Settlement of the same, and demanded indemnification under Section 11 of the Settlement Agreement. On that same date, Plaintiff noticed the Defendants of legal fees consisting of $12,860 for which indemnification was also sought"

(Memo at 2). Settlement Action Defendants responded by reimbursing only the $12,860 in legal fees. JFURTI then sued, filing this motion for summary judgment in lieu of complaint, seeking payment of the $1,302,444.80 undertaking (Memo at 5).

CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where 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 Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri*, 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with

its terms constitute a *prima facie* case for summary judgment (*Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327 [1st Dept 2000]).

The parties dispute whether this motion is proper, as they disagree as to whether the Settlement Agreement is an instrument for the payment of money only, and whether the right to payment can be ascertained from the face of the document with de minimis other evidence. However, this court will not address that issue because, regardless of whether this agreement provides the proper basis for such a motion, the motion will fail. As discussed below, the event triggering defendants' obligations pursuant to the Settlement Agreement has not yet occurred.

Defendants argue that the undertaking does not trigger their obligation under the Settlement Agreement, as the undertaking was a sum of money deposited with the County Clerk, not paid to the Canada Judgment creditor (Opp at 17). The Settlement Action Defendants argue that the undertaking does not qualify as a "loss, liability, claim, damage, [or] expense" pursuant to the Settlement Agreement (Opp at 18, quoting Settlement Agreement, ¶ 11). It is a conditional deposit, and some or all of it may be returned to JFURTI (Opp at 19).

Plaintiff argues the Settlement Agreement requires reimbursement "in the event that Plaintiff or Frydman pay 'any sums against, in reduction of, to acquire or otherwise with respect to the Canada Judgment . . .'" (Reply at 10, quoting Settlement Agreement, ¶ 11). Plaintiff relies on the phrase "or otherwise" as a catchall to encompass the undertaking (*id.*). Plaintiff also contends that the Third Party Subpoena Deuces Tecum and Restraining Notice on Goldman Sachs & Co. served by the Canada Judgment creditor had the effect of attaching Frydman's funds, and so triggered the obligation (Opp at 10, citing *Sequa Capital Corp. v Nave*, 921 F Supp 1072, 1076 [SDNY 1996] ["Restraining the sale of assets, as provided by CPLR 5229, has substantially the same effect as an attachment and a seizure of property"]).

An undertaking, according to Black's Law Dictionary, is "a promise, pledge, or engagement." It "is an unconditional promise . . . to pay the full amount of the judgment, or such proportion as is ultimately affirmed" (*Kreitzer v Chamikles*, 107 Misc 2d 398, 399 [Sup Ct 1980]). It is not, by itself, a payment of the judgment. While JFURTI argues that the language of the Settlement Agreement "clearly encompasses payments of any kind with respect to the Canada Judgment" (Reply at 10), an undertaking is not a payment. As far as JFURTI attempts, in its reply papers, to base its claim on

the restraining notice filed in the *8430985 Canada* action, the court will not credit such an argument. "[T]he function of a reply . . . is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (*see Ritt by Ritt v Lenox Hill Hosp.* 182 AD2d 560, 562, [1st Dept 1992]). While the court has discretion to consider such an argument (*see Eujoy Realty Corp. v. Van Wagner Communications LLC*, 22 N.Y.3d 413, 422, [2013]), it will not do so here, as, among other reasons, that restraint had already been lifted (Order dated August 8, 2016, [*8430985 Canada Inc. v United Realty Advisors LP, et al*, Index No. 653564/2014] Index No. 653564/2014, NYSCEF Doc. No. 185). Further, the demand dated June 16, 2016 (attached as Exhibit A to Frydman Reply aff, NYSCEF Doc. No. 55), did not make a demand on that basis.

Therefore, the undertaking does not qualify as "paid . . . with respect to the Canada Judgment" (Settlement Agreement, ¶ 11), and the defendants do not yet have an obligation to indemnify JFURTI. Accordingly, pursuant to CPLR 3212(b), summary judgment is granted to the defendants and plaintiff's claim is DISMISSED.

This constitutes the decision and order of the court.

**DATED: November 2, 2016**

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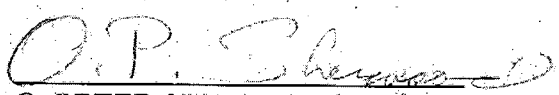

**O. PETER SHERWOOD**
**J.S.C.**