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

----------X

CAPITAL ONE EQUIPMENT FINANCE CORP.,

Plaintiff,

- against -

OFFER HARARI, AMALIA HARARI, LUKE EMERY, KAREENE HARARI, JOELLE HARARI, PAULA BOUZAGLOU, NOREEN HARARI, DANIEL BOUZAGLOU, ARIE H, LLC, ASTREP SERVICE CORP., BUNDI CAB CORP., CHELSEA CAB CORP., FELICHE', LLC, FIRST H & H, LLC, FIRST IGAL H, LLC, FIRST SAAD TAXI CORP., G & K TAXI, INC., GABBI CAB CORP., GENT SERVICE CO., INC. a/k/a GENT SERVICE CORP., H. ASHIRA K, LLC, KAREENE JOELLE HACKING CORP., MAGYAR CAB CORP., MIDGET SERVICE CORP., RYDER TAXI, INC., SONG CAB CORP., TAIRI HACKING CORP., TERM TAXI, INC., and TIMOT CAB CORP.

Respondents

----------X

DECISION AND ORDER

Index No. 650803/2017
Mot. Seq. No.: 001

O. PETER SHERWOOD, J.:

Plaintiff's motions for summary judgment in lieu of complaint in three separate cases are consolidated for disposition.[1] Defendants cross-move to disqualify Herrick Feinstein, LP ("Herrick") as plaintiff's counsel and to transfer and/or consolidate these actions with *COTMF v The OSG Corp., et al.*, Index No. 600749/2017, pending before Justice Timothy Driscoll in Nassau County (the "Nassau County Action"). For the reasons discussed below, the cross-motions to disqualify are denied, plaintiff's motions for summary judgment are granted as to liability and the cases are transferred to Supreme Court Nassau County to be tried along with the Nassau County Action as to the issue of damages.

[1] Those cases are *Capital One Equipment Corp. v Offer Harari et al.*, Index No. 650803/2017 (the "Harari Action"), *Capital One Equipment Corp. v Andras Cab Corp. et al.*, Index No. 651034/2017 (the "Andras Action"), and *Capital One Equipment Corp. v Amalia-Molly LLC et al.*, Index No. 651154/2017 (the "Amalia-Molly Action," collectively with the Harari Action and the Andras Action, the "NY County Actions"). Unless otherwise noted, all references to NYSCEF Doc. Nos. or other filings will be to documents filed in the Harari Action.

I. BACKGROUND

The NY County Actions all arise out of the same general allegations. Between November 2012 and May 2013, non-party The OSG Corp ("OSG") made individual loans to the corporate defendants in the aggregate principal amount of roughly $33.5 million (the "Loans"). Each Loan was guaranteed by one or two of the individual defendants. Plaintiff and OSG are parties to a Master Joint Participation Agreement (the "MJPA"), and at various points between December 2012 and May 2013, OSG executed an Assignment & Transfer which assigned all of OSG's rights in the Loans to plaintiff. The notes all required the corporate defendants to make monthly payments until the maturity dates (all in 2015 and 2016), when the unpaid balance and accrued interest became due and payable. The corporate defendants failed to make monthly payments, and the notes are in default.

In the Nassau County Action, plaintiff has also asserted causes of action against OSG relating to alleged breaches of the MJPA (*see* affirmation of Gary M. Fellner ["Fellner aff"], exhibit A [complaint in Nassau County Action] ¶¶ 34-46, 202-207). In that action, plaintiff asserts that OSG collected payments from the corporate defendants but that plaintiff "has not received payment of its senior participation interests" in the Loans (*id.* ¶ 41). Plaintiff further asserts that, despite plaintiff's proper demand under the MJPA, OSG has failed to repurchase its senior participation interests in the Loans (*id.* ¶ 45-46). Offer Harari states in his affidavit that OSG was holding $14,595 in cash for the benefit of his Loans in March 2016 (aff of Offer Harari ["Harari aff"] ¶ 7, exhibit A), which defendants argue should have been paid to plaintiff.

II. DISCUSSION

A. *Disqualification*

Defendants ask that the issue of disqualification be deferred until after the cases have been consolidated (NYSCEF Doc. No. 92 ["defs' reply"] at 5). In the event the motion to consolidate is not granted, however, defendants contend Herrick should be disqualified from representing plaintiff in the New York Actions because Herrick represented eight of the defendants in 13 interrelated bankruptcy cases, the most recent of which occurred in 2003.[2]

[2] Specifically, those defendants are Gent Service Co. Inc., Timot Cab Corp., Midget Service Corp., Tairi Hacking Corp., Kareene Joelle Hacking Corp., Asterp Service Corp., G and K Taxi Inc., and Song Cab Corp. All of these entities are owned, related to, or affiliated with Offer Harari, who is also a defendant. These parties are only

Neither party disputes that, under New York law, a party seeking to disqualify a law firm based on prior representation must establish: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Town of Oyster Bay v 55 Motor Ave. Co., LLC*, 109 AD3d 549, 550 [2d Dept 2013]; *see* NYSCEF Doc. No. 83 ["defs' mem"] at 11; NYSCEF Doc. No. 85 ["pl's reply"] at 18). Such a showing raises an irrebuttable presumption of disqualification (*Falk v Chittenden*, 11 NY3d 73, 78 [2008]).

The New York State Bar Association's commentary to Rule 1.9 of the Rules of Professional Conduct states that:

> "Matters are 'substantially related' for purposes of this Rule if . . . under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

Defendants contend Herrick's prior representation of defendants is "substantially related" to these actions in that all actions arise "in the exact same context . . . namely, the parties' rights and obligations resulting from the secured financing, guaranteed by company owners, in which the principal collateral consists of the corporate defendants' taxi medallions issued by the New York City Taxi and Limousine Commission" (defs' mem at 14). Defendants argue that Herrick has gained knowledge of "which company owns what, how the business operate . . . and myriad other non-public issues addressed to the business' private and detailed finances" which would materially advantage plaintiff in this action (*id.* at 15). Defendants describe at length the extent of Herrick's purported knowledge of defendants' inner-workings, but fail to argue how any this knowledge might materially advance plaintiff's position in this matter. Defendants also dispute Herrick's position that the fact that Herrick's representation occurred "at least fourteen years ago" is relevant. Defendants contend that "the time factor is irrelevant here" as the "duty of loyalty and appearance of impropriety do not have expiration dates" (*id.* at 15, citing *e.g. T. C. Theatre Corp. v Warner Bros. Pictures*, 113 F Supp 265, 268 [SD NY 1953] [noting that "lawyer's duty of absolute loyalty to his client's interests does not end with his retainer" and

---

defendants to the Harari Action, thus defendants' arguments for disqualification are relevant only to Herrick's representation in that case.

that, as such, "[h]e is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship"]).

In opposition, plaintiff notes that a showing that the matters are "substantially related" requires more than "conclusory assertions that issues in the former and current representations are "similar, if not identical," (pl's reply at 19, quoting *Med. Capital Corp. v MRI Glob. Imaging, Inc.*, 27 AD3d 427, 428 [2d Dept 2006]). Rather, plaintiff argues that defendants must show that "the issues in the present litigation must be identical to or essentially the same as those in the prior case" (*id.* quoting *Lightning Park, Inc. v Wise Lerman & Katz, P.C.*, 197 AD2d 52, 55 [1st Dept 1994] [internal quotation marks and citations omitted]). Plaintiff contends that, under this standard, defendants have failed to demonstrate that Herrick's prior representation is substantially related to the current actions (pl's reply at 19). Plaintiff contends that defendants' allegations that Herrick has generally obtained "confidential" information is not enough to meet its burden (*id.* at 21, citing *Jamaica Pub. Serv. Co. Ltd. v AIU Ins. Co.*, 92 NY2d 631, 638 [1998] [noting that "[a]llowing a party seeking disqualification to meet its burden by generalized assertions of 'access to confidences and secrets' would both make it difficult, if not impossible, to test those assertions and encourage the strategic use of such motions" and holding that "[w]hile a movant need not actually spell out the claimed secrets and confidences in order to prevail, it must at a minimum provide the motion court with information sufficient to determine whether there exists a reasonable probability that [professional responsibility provisions addressed to confidential information of former clients] would be violated"]).

Plaintiff notes that the Promissory Notes and Guarantees did not exist at the time of Herrick's prior representation and contends there is no relation between those bankruptcy cases and the "issues present in this straightforward litigation to enforce notes and guarantees" (*id.* at 20). In support of its argument, plaintiff draws parallel to *Waehner v Northwest Bay Partners, Ltd.* (30 AD3d 799 [3d Dept 2006]), in which the Third Department affirmed the denial of a motion to disqualify plaintiff's counsel based on prior representation as well as the grant of summary judgment under CPLR 3213. In affirming denial of the motion to disqualify, the Third Department noted that the defendant "provided only conclusory allegations that counsel's prior representation [was] related to his current representation," and "fail[ed] to substantiate its claim that the promissory note in question [was] 'inextricably tied' to the parties' development project regarding which counsel provided representation" (*id.* at 800). The Third Department also found

that defendant failed to "controvert counsel's statements that he had no involvement in the execution of the note and that he was not aware of its existence until his representation of defendant ceased" (*id.*). Finally, plaintiff argues that the fact that most of the purported confidential information Herrick would have is over 14 years old further underscores its lack of relevance to this action (pl's reply at 21).

In reply, defendants contend that Herrick should be disqualified based simply on the fact that it represented the defendants in bankruptcy, "the subject of which is vast and covers all detailed aspects of Defendants' business" (defs' reply at 5). Defendants also rely on *SLC Ltd. V v Bradford Group W., Inc.* (999 F2d 464, 467 [10th Cir 1993]), which found that an attorney who previously represented a plaintiff in bankruptcy court had properly been disqualified from representing a creditor in that party's subsequent bankruptcy proceeding. Plaintiff adds that, in so ruling, the court noted that the attorney had "knowledge of [the plaintiff's] strategies and operation," and argues that the same result should attain here since "Herrick knows Defendants' strategies and its means of satisfying any obligation" (defs' mem at 5, quoting *SLC Ltd. V*, 999 F2d at 467).

The motion for disqualification turns on whether Herrick's prior representation is "substantially related" to the present action. Defendants do not assert that the bankruptcy cases are substantially related to this action. Defendants' assertion that all actions arise "in the exact same context" is little more than an overbroad assertion that issues in all actions are "similar, if not identical," an assertion which the Second Department found was insufficient in *Med. Capital Corp* (27 AD3d at 428). Defendants' arguments that the actions are "substantially related" turns on its assertion that factual information that would normally have been obtained in Herrick's bankruptcy representations would materially advance plaintiff's position in this matter. This argument fails as well. Although defendants contend Herrick has gained extensive knowledge of defendants' inner workings, defendants have failed to advance any argument as to how this knowledge includes secret information that is material to any of the issues involved here or otherwise might give plaintiff an advantage in this case, particularly in light of the straightforward nature of plaintiff's claims. Furthermore, the fact that Herrick's representation occurred "at least fourteen years ago" is relevant because any inside financial knowledge defendants claim Herrick gained is outdated and was disclosed in the bankruptcies. This branch of defendants' cross-motion is denied.

B. ***Plaintiff's Motions for Summary Judgment in Lieu of Complaint***

Plaintiff has made a prima facie showing of entitlement to summary judgment under CPLR 3213 as follows:

Borrower	**Guarantor**	**Maturity Date**	**Principal Balance (and amount of Guarantee)**	**Evidence of Debt & Guarantor Obligations**	**Evidence of Default**
Arie H, LLC	Offer Harari	12/01/15	$560,000.00	Robinson aff, exhibit 1	Robinson aff ¶¶ 47-50, Appendix A
Astrep Service Corp.	Amalia Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 2	Robinson aff ¶¶ 47-50, Appendix A
Bundi Cab Corp.	Joelle Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 3	Robinson aff ¶¶ 47-50, Appendix A
Chelsea Cab Corp.	Offer Harari	01/01/16	$2,250,000.00	Robinson aff, exhibit 4	Robinson aff ¶¶ 47-50, Appendix A
Feliche LLC	Offer Harari, Luke Emery	06/01/16	$650,000.00	Robinson aff, exhibit 5	Robinson aff ¶¶ 47-50, Appendix A
First H & H, LLC	Daniel Bouzaglou	12/01/15	$560,000.00	Robinson aff, exhibit 6	Robinson aff ¶¶ 47-50, Appendix A
First Igal H, LLC	Offer Harari	12/01/15	$560,000.00	Robinson aff, exhibit 7	Robinson aff ¶¶ 47-50, Appendix A
First Saad Taxi Corp.	Noreen Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 8	Robinson aff ¶¶ 47-50, Appendix A
Gabbi Cab Corp.	Joelle Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 9	Robinson aff ¶¶ 47-50, Appendix A
Gent Service Corp.	Amalia Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 10	Robinson aff ¶¶ 47-50, Appendix A
H. Ashira K, LLC	Kareene Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 11	Robinson aff ¶¶ 47-50, Appendix A
Kareene Joelle Hacking Corp.	Paula Bouzaglou	01/01/16	$1,500,000.00	Robinson aff, exhibit 12	Robinson aff ¶¶ 47-50, Appendix A

Magyar Cab Corp.	Kareene Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 13	Robinson aff ¶¶ 47-50, Appendix A
Midget Service Corp.	Offer Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 14	Robinson aff ¶¶ 47-50, Appendix A
Ryder Taxicab Inc.	Offer Harari	01/01/16	$3,000,000.00	Robinson aff, exhibit 15	Robinson aff ¶¶ 47-50, Appendix A
Song Cab Corp.	Offer Harari	01/01/16	$2,250,000.00	Robinson aff, exhibit 16	Robinson aff ¶¶ 47-50, Appendix A
Tairi Hacking Corp.	Offer Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 17	Robinson aff ¶¶ 47-50, Appendix A
Term Taxicab Inc.	Amalia Harari	01/01/16	$3,750,000.00	Robinson aff, exhibit 18	Robinson aff ¶¶ 47-50, Appendix A
Timot Cab Corp.	Offer Harari, Amalia Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 19	Robinson aff ¶¶ 47-50, Appendix A
G & K Taxi, Inc.	Offer Harari	01/01/16	$1,500,000.00	Robinson aff, exhibit 20	Robinson aff ¶¶ 47-50, Appendix A
Andras Cab Corp.	Kareene Harari	01/01/16	$1,500,000.00	Robinson aff (Andras Action), exhibits 1-2	Robinson aff (Andras Action) ¶¶ 36-39.
Amalia-Molly LLC	Aleksandr Mosheyev	06/01/16	$650, 000.00	Robinson aff (Amalia-Molly Action), exhibits 1-2	Robinson aff (Amalia-Molly Action) ¶¶ 37-40

Plaintiff adds evidence of assignment of the Loans from OSG to plaintiff prior to the New York Actions (Robinson aff, exhibits 1-20 [exh. "2" Assignment & Transfer]; Robinson aff [Andras Action], exhibit 7; Robinson aff [Amalia-Molly Action], exhibit 6).

In opposition, defendants contend that summary judgment should be denied for the reason it was denied by Justice Scarpulla in *Capital One Taxi Medallion v Corrigan* where she held that defendants' defenses were "enmeshed" with defenses of related defendants in a companion case (def's mem at 17; affirmation of Gary Fellner ["Fellner aff"], exhibit R [Scarpulla decision and order] at 4). That decision was reversed on appeal, as discussed below.

Defendants also argue there are several unresolved factual issues which preclude summary judgment. First, plaintiff is suing OSG for payment on the same loans at issue here (defs' mem at 18) and the issue of how much the operating companies have turned over to OSG and, in turn, plaintiff must be resolved through discovery. Defendants also contend there are material issues of fact regarding whether plaintiff breached the covenant of good faith and fair dealing through a partnership with Uber, which defendants contend "hasten[ed] the demise of the taxi industry" (*id.* at 18-19). Third, defendants argue that an allonge dated February 2, 2017, stating that OSC assigned and indorses the Note to plaintiff, creates an issue of fact regarding whether plaintiff has standing as a proper assignee under the relevant Assignment and Transfer agreement. Defendants also note that, in the Nassau County Action, plaintiff sought the appointment of an independent party to execute for each promissory note an allonge that would assign title and interest to that note from OSG to plaintiff (*see* Fellner aff, exhibits B [order to show cause], E [affirmation in support] ¶ 22, S [form allonge]). Plaintiff eventually signed the allonge itself. Finally, defendants claim they have never received a "goodbye letter" or notice of default, and note that plaintiff entered into an Information Rights Agreement, which defendants contend creates obligations which affect the corporate defendants in this case. Defendants do not further specify how either of these points preclude summary judgment.

In reply, plaintiff notes first that the referenced decision by Justice Scarpulla was reversed on appeal (*see Capital One Taxi Medallion Fin. v Corrigan*, 147 AD3d 677 [1st Dept 2017], *lv to appeal granted,* 29 NY3d 919 [2017]). In that case, defendant guarantors opposed plaintiff's motion under CPLR 3213 arguing that a decision on that motion needed to await a decision on the non-party borrower's defenses in the related action (*id.* at 125). The guaranties included a provision limiting defendants' liability where there is "a final adjudication by a court of competent jurisdiction of a valid defense to Borrower's obligations under the Loan Documents to payment of its liabilities" (*id.*). In reversing, the First Department found that the borrower's "claims of breach of contract and negligent interference with collateral are not defenses to [the borrower's] liability under the loan agreement; they are merely counterclaims" and that, consequentially, "adjudication of these claims will not affect [the borrower's] liability for repayment of the amounts borrowed before the breach occurred, although it may entitle [borrower's] to damages" (*id.* at 126). The First Department concluded that because "the breach of contract and negligent interference with collateral claims are separate from [borrowers']

unequivocal and unconditional obligation to repay the monies it was loaned, defendants are still liable under the guaranties and promissory notes." Plaintiff urges that the same result should attain here since the factual disputes in the Nassau County Action are not a defense to liability, but merely a dispute as to the amount that could be owed to plaintiff (pl's reply at 7-8).

Regarding standing, plaintiff urges that the Assignment & Transfer, as well as plaintiff's possession of the original Promissory Notes, are sufficient to confer standing on plaintiff to bring suit on the Promissory Notes and Guarantees (Robinson aff, exhibits 1-21; pl's reply at 8-9, citing *e.g. HSBC Bank USA, Nat. Ass'n v Roumiantseva*, 130 AD3d 983, 984 [2d Dept 2015] ["A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is either the holder or assignee of the underlying note at the time the action is commenced . . . The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing either a written assignment of the underlying note or the physical delivery of the note"] [internal quotation marks and citations omitted]). Plaintiff additionally contends that defendants lack standing to challenge the Assignment & Transfer since they are not parties to that agreement (*id.* at 9, citing *W. Loan Acquisition Holdings, LP v MWF Realty, Inc.*, 42 Misc 3d 1206(A) [Sup Ct 2013] [rejecting defendants' challenges "to the validity of the assignment of the note and the loan documents to the plaintiff as the answering defendants are not a signatories to those documents and thus lack[] standing to challenge them"]). Finally, plaintiff notes that the Assignment & Transfer permits plaintiff to indorse the Promissory Notes by allonge (pl's reply at 9, citing Assignment & Transfer at 2). Plaintiff argues that, even if the Promissory notes were never indorsed, the assignment itself is sufficient to confer standing (*id.* citing *Stabilis Fund II, LLC v Nostrand Plaza, Inc.*, 43 Misc 3d 1217(A) [Sup Ct 2014] [finding that the fact that the note was "validly assigned to plaintiff by way of the assignment agreement" established plaintiff's standing and rejecting borrower's argument that "the allonge was not firmly affixed to the note at the time of its assignment to plaintiff" since the "assignment agreement is sufficient, in and of itself, to establish a valid assignment of the note and mortgage to plaintiff"]).

Lastly, plaintiff argues that any dispute over amounts that may have been paid to OSG is not a basis to preclude summary judgment, and notes that in similar cases, courts have severed the issue of damages from the issue of liability and directed for an inquest (*id.* at 10, citing *e.g. Medallion Bank v. Butwin Transit Inc.*, 2017 WL 1550194, *3, 2017 N.Y. Slip Op. 30877[U] [Sup Ct, NY County 2017] [granting motion for summary judgment under CPLR 3213 and

directing parties to schedule an inquest to determine the amounts due for principal and any interest, costs and expenses]).

In reply, defendants contend this case involves "not simple instruments for the payment of money," but rather a series of complex agreements under the MJPA (defs' reply at 9-10). Defendants also argue plaintiff has failed to show what amounts have already been repaid or explain why plaintiff signed allonges (*id.* at 11). Defendants also contend summary judgment should be denied on the basis that plaintiff has taken inconsistent positions in this case and the Nassau County Action on whether it alone has authority to sign allonges for OSG (*id.* at 12). The cases defendants rely on, however, denied summary judgment on the basis of inconsistent statements regarding possession of the note, not regarding a parties' rights as a proper assignee (*see B and H Florida Notes LLC v Ashkenazi*, 149 AD3d 401, 402 [1st Dept 2017] ["inconsistent statements regarding possession of the note at the time plaintiff commenced the foreclosure action create a triable issue of fact as to standing precluding summary judgment"]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1377 [3d Dept 2015] [denying summary judgment in light of fact that "varying, and potentially inconsistent, statements d[id] not definitively establish that plaintiff maintained physical possession of the note at the relevant time"]). Finally, defendants argue that to grant summary judgment here would "inequitabl[y] . . . conclude that there may be credible defenses (or questions of fact) on [plaintiff's] good faith in dealing with taxi lenders such as OSG . . . but give plaintiff a complete pass against Defendants based on loans OSG serviced" (defs' reply at 12).

Analysis

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 (*see 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]). 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]). As discussed above, plaintiff has made its prima facie showing.

Of initial note, defendants' arguments that there are material issues of fact regarding whether plaintiff breached the covenant of good faith and fair dealing through a partnership with

Uber must be rejected as Justice Driscoll explains in his well reasoned September 11, 2017 Decision and Order dismissing those counterclaims. And even if those counterclaims still stood, they would have no bearing on defendants' liability under the respective Notes and Guarantees (*see Corrigan*, 147 AD3d at 677).

Defendants' arguments that there are issues of fact regarding plaintiff's standing to enforce these instruments fails as well. As plaintiff correctly notes, the Assignment and Transfer is sufficient to grant plaintiff standing (*see HSBC Bank USA, Nat. Ass'n*, 130 AD3d at 984) and demonstrate defendants lack standing to challenge the validity of those documents (*see W. Loan Acquisition Holdings, LP*, 42 Misc 3d 1206[A]). Defendants' attempts to raise an issue of fact regarding the indorsement of the notes has no bearing on the issue of standing, as the assignment itself is sufficient to confer standing (*see Stabilis Fund II, LLC*, 43 Misc 3d 1217[A]).

Finally, defendants' attempts to raise an issue of fact regarding amounts already paid on the instruments fails as well, as these arguments go to the extent of damages, not to defendants' liability under the instruments (*see Community Capital Bank v 'TIL The Phat Lady Sings LLC*, 6 Misc 3d 1009(A) [Sup Ct 2005] [noting that "any purported dispute as to the exact amount remaining due under the notes has no bearing on the plaintiff's prima facie case" for summary judgment under CPLR 3213, and that calculation of the extent of damages "could take place during an inquest . . . irrespective of this court's judgment on liability"]). Accordingly, plaintiff's motion for summary judgment, as to liability, shall be granted.

C. *Consolidation with the Nassau County Action*

Noting that this court has the right to change venue as incident to an order of consolidation, defendants argue that this court should transfer this action to Nassau County for consolidation with the first-filed Nassau County Action (defs' mem at 7-8, citing *e.g.* 3-602 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 602.13). Defendants contend consolidation is warranted on the basis that (i) the cases involve common questions of fact, (ii) there is a potential for double recovery and inconsistent verdicts (iii) discovery and admissible evidence in the various actions will overlap, and (iv) consolidation will not create any prejudice for plaintiff as the cases are all relatively new (*id.* at 8-10).

In opposition to the cross-motion, plaintiff argues first that there are no common questions of law or fact since the Nassau Action will determine only OSG's liability under the MJPA, which plaintiff claims is unrelated to defendants' liability under the Promissory Notes

and Guarantees (pl's reply at 11). Plaintiff further argues that, because there are no common questions of fact or law, there is also no risk of double recovery (*id.* at 12). In the alternative, plaintiff contends that, although it is restricted to a single satisfaction, it is permitted to recover against multiple parties for the same loss (*id.* citing *Fed. Ins. Co. v PGG Realty, LLC*, 529 F Supp 2d 460, 463 [SDNY 2008] [rejecting argument for reduction of award of attorney's fees on the basis that it would constitute an impermissible double recovery, and noting that "[w]hile double recovery is barred, it is well-established that, until finally paid, a claimant may seek recovery of the same loss from two different parties"]). Plaintiff also notes that the Loan Documents allow it to pursue alternative, non-exclusive remedies (*id.* citing Promissory Notes at 2 and Guarantees at 5). Finally, regarding judicial economy, plaintiff contends consolidation would serve only to unnecessarily drain judicial and party resources as the cases are ready for summary judgment under CPLR 3213 (*id.* at 13-14). Plaintiff contends consolidation would thus prejudice plaintiff by depriving it of its right to seek dismissal under CPLR 3213.

In reply, defendants note the fact that plaintiff's reply argued that an inquest could be had in this court to determine damages. Defendants contend that in so arguing, plaintiffs concede that some amount of discovery is warranted as well. (defs' reply at 3). Defendants also argue that plaintiff's argument regarding double recovery fails because defendants are seeking only to consolidate the various causes of action, and not to dismiss the causes of action in the New York Action (*id.* at 4-5).

In a letter to the court, defendants advise of two orders whereby the Circuit Court of Cook County, Illinois dismissed two similar cases filed by plaintiff without prejudice to refiling in Nassau County. Defendants argue that these cases are "on the exact footing as these § 3213 proceedings," presumably meaning that plaintiff also sought to collect on similar notes and guarantees. Both cases relate to the Nassau County Action, though to a different loan servicer than OSG (Triglobal), and thus a different MJPA. (*See* NYSCEF Doc. No. 96). Plaintiff, in its response, urges that these decisions are not binding on this court, and notes that the same court in Cook County denied a "virtually identical motion seeking to dismiss transfer or stay [that action] in favor of the Nassau County Action" in a different action one month prior (*see* NYSCEF Doc. No. 97). Plaintiff also includes a decision from the United States District Court for the Northern District of Illinois that granted plaintiff's motion for summary judgment over similar objections made by defendants (*see id.*).

"When actions involving a common question of law or fact are pending before a court, the court, upon motion, . . . may order the actions consolidated, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay" (CPLR 602 [a]). Consolidation is mandated by judicial economy where two lawsuits are intertwined with common questions of law and fact (*see Teitelbaum v PTR Co.*, 6 AD3d 254 [1st Dept 2004]). Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, "unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right" (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994]). Consolidation is appropriate where work performed at the same location involves questions of law and fact common to both actions, the parties to the second action possess knowledge and information relevant to the claim in the first action, witnesses in each case are almost identical, and consolidation would not serve to delay either action (*see Firequench, Inc. v Kaplan*, 256 AD2d 213 [1st Dept 1998]). The non-moving party bears the burden of proof for demonstrating prejudice to a substantial right by the granting of consolidation (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332 [1st Dept 2005]; *Leeco Constr. Co. v United States Liab. Ins. Co.*, 22 Misc 3d 611 [Sup Ct, NY County 2008]). In addition to the interests of judicial economy and ease of decision making, consolidation can prevent the injustice that would result from divergent decisions on the same facts (*see Amcan Holdings, Inc. v Torys, LLP*, 32 AD3d 337, 339-340 [1st Dept 2006]).

For the reasons discussed above, there are no common questions of law and fact with respect to defendants' liability. However, consolidation is warranted with respect to the issue of damages, and neither party disputes that discovery in the New York County Actions and the Nassau County Action is required with respect to amounts paid to OSG. Plaintiff's objections as to prejudice bear only on the issue of liability. Although consolidation is indicated, this court will merely transfer this case for damages to be heard along with damages in the Nassau Action, leaving the specific issue of consolidation for Justice Driscoll to decide.

D. *Service*

In their first memorandum, defendants contend that several corporate and individual defendants were not properly served (defs' mem at 21). In their reply, however, defendants concede this argument as to the corporate defendants and only maintain their arguments of improper service as to individual defendants Amalia Harari, Luke Emory, and Joelle Harari

(defs' reply at 13). Defendants contend service as to these defendants was improper because neither Amalia nor Joelle Harari live within New York State, and Luke Emory does not live at 723 Harbor Road (def's mem at 21, citing aff of Offer Harari ¶¶ 14-16). Defendants further contend that individual defendant Noreen Harari does not exist.

In reply, plaintiff contends that Amalia Harari and Luke Emory were properly served under CPLR 308 (2) (*id.* at 15-16). Amalia Harari was served at her last known address by personally delivering and leaving a copy of the motion papers at her actual place of business, 723 Hungry Harbor Road in North Woodmere, New York, with a copy being subsequently mailed by first class mail to her last known address, the same location (*see* NYSCEF Doc. No. 28). Luke Emory was served by leaving a copy of the motion papers with his wife at his place of residence, 8 Arnold Court in East Rockaway, New York, with a copy being subsequently mailed by first class mail to his last known address, at the same location (*see* NYSCEF Doc. No. 51). Plaintiff contends Joelle Harari was served pursuant to CPLR 308 (4) by affixing a copy of the motion papers conspicuously on the outer glass door of his actual place of business, 245 Everit Ave. in Hewlett, New York and subsequently mailing a copy to his last known address, which was the same address (*id.* at 16, citing NYSCEF Doc. No. 47)

In response to defendants' contention that "there is no Noreen Harari," plaintiff argues that the loan documents for First Igal H, LLC demonstrate this person's existence, with Offer Harari signing under a Power of Attorney on a signature block denoting "Noreen Ashira Harari" and a Power of Attorney signed and notarized by Noreen Harari (*id.* at 16). Plaintiff does not specify where these signatures can be found and after reviewing the documents for First Igal H, LLC, the court was not able to locate the signatures to which plaintiff is referring. However, Noreen Harari is referenced in the documents for First Saad Taxi Corp (*see* NYSCEF Doc. No. 12 pages 6, 13). Plaintiff contends Noreen Harari was properly served under CPLR 308 (4) (*id.* at 16-17).

Lastly, plaintiff notes that the Guarantees permit "service of process [to be] made upon the undersigned by mailing a copy of the summons to the undersigned at the address set forth below or other address of borrower designated in writing" (Guarantees at 4). Plaintiff contends it has complied with this provision (pl's reply at 17).

In reply, defendants argue plaintiff's records are outdated and incorrect and contend that, with respect to these three individual defendants, plaintiff's "service of the summons and

complaint at defendant's last known address is insufficient as a matter of law" (*215 African & Hispanic American Realty of New York LLC v. Chef, Inc.*, 2012 WL 3638865 [Sup Ct, NY County 2012]; defs' reply at 13-14). Defendants also contend plaintiff has failed to rebut the assertions made in the Offer Harari's affidavit that these defendants do not work or reside at the places of service. Regarding Noreen Harari, defendants note that this individual is not mentioned in the documents for First Igal H, LLC and posit that plaintiff may be confusing Noreen with "Kareen." Defendants contend OSG is "the only one in a position of personal knowledge who can address which documents apply to which loans" and urges that this militates in favor of having the actions consolidated. (Defs' reply at 14).

Defendants' argument of improper service is based solely on the statements in Offer Harari's affidavit, which speaks only to the residences of the three defendants both parties acknowledge exist. Accordingly, this affidavit does not rebut the service on Amalia or Joelle Harari. In both cases, service was made to actual places of business in accordance with, respectively, CPLR 308 (2) and CPLR 308 (4). Actual place of residence is thus irrelevant with respect to those individuals. With respect to Luke Emery, Offer Harari states only that Luke Emery is his son-in-law and that "he does not live at 723 Hungry Harbor Road in North Woodmere. He lives in Hewlett, New York" (Harari aff ¶ 15). At most, this statement contradicts the affidavit of service to the extent it asserts Luke Emery was served at "the actual place of residence" at 8 Arnold Court, East Rockaway, NY 11518-1624. However, since all that is required for purposes of CPLR 308 (2) is that service be made at the "actual place of business, dwelling place *or* usual place of abode of the person" (emphasis added), the failure to dispute that location being Luke Emery's "dwelling place" or "usual place of abode" means that defendants have failed to rebut plaintiff's prima facie showing (*see Fed. Home Loan Mortg. Corp. v Venticinque*, 230 AD2d 412, 415 [2d Dept 1997] [finding service that occurred at defendants usual place of abode was valid despite defendant's statement that, on the dates of delivery and mailing, he was living at another address as part of a "trial separation" from his wife]).

With respect to Noreen Harari, defendants' bare contention that "there is no Noreen Harari" is contradicted by the loan documents for First Saad Taxi Corp.[3] Defendants offer no support for their contention that this individual does not exist (including any sworn statements

[3] At oral argument defendants' counsel abandoned this claim.

from Offer Harari), and accordingly, have failed to rebut plaintiff's prima facie showing of valid service under CPLR 308 (4) (*see* NYSCEF Doc. No. 85).

The branch of the motions to dismiss for failure of proper service is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant to dismiss the complaints as to individual defendants Noreen Harari, Amalia Harari, Luke Emory, and Joelle Harari for failure of proper service of process is DENIED; and it is further

ORDERED that the motion for summary judgment of plaintiff is GRANTED as to liability only in each of the following actions: *Capital One Equipment Corp. v Offer Harari, et al.*, Index No. 650803/2017 (the "Harari Action"), *Capital One Equipment Corp. v Andras Cab Corp. et al.*, Index No. 651034/2017 (the "Andras Action"), and *Capital One Equipment Corp. v Amalia-Molly LLC et al.*, Index No. 651154/2017; and it is further

ORDERED that the three said actions are hereby transferred to Supreme Court Nassau County to be heard along with *COTMF v The OSG Corp., et al.,* Index No.: 600749/2017 (Sup Ct Nassau Co) currently pending before Justice Driscoll on the issue of damages.

This constitutes the decision and order of the court.

DATED: November 21, 2017

E N T E R,

O. PETER SHERWOOD J.S.C.