SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CAPITAL ONE EQUIPMENT FINANCE CORP., Index No.: 651153/2017

Plaintiff, **DECISION & ORDER**

-against-

ALAN ZUBLI, ISACC ZUBLI, BARHA TAXI INC.,
DEZ CAB CORP., REZ CAB CORP., & SEZ CAB CORP.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Capital One Equipment Finance Corp. (Capital One)[1] moves, pursuant to § 3213, for summary judgment in lieu of complaint for liability only against defendants Alan Zubli (Alan),[2] Isacc Zubli (Isacc, with Alan, Guarantors), Barha Taxi Inc. (Barha), Dez Cab Corp. (Dez), Rez Cab Corp. (Rez), and Sez Cab Corp. (Sez, with Barha, Dez, and Rez, Borrowers). Defendants oppose. For the reasons discussed below, plaintiff's motion is granted.

I. Procedural History & Factual Background

Unless otherwise indicated, the following facts are undisputed.

In December 2012, the OSG Corp. (OSG), a taxicab medallion lending company, made for loans of $1.5 million to each of the defendant-corporations, the four Borrowers, (collectively, the Loans), owned by Guarantors, who guaranteed the Loans. *See* Dkt. 5 (Barha Loan Documents); Dkt. 6 (Dez Loan Documents); Dkt. 7 (Rez Loan Documents); Dkt. 8 (Sez Loan Documents). Thereafter, OSG assigned the Loans to Capital One pursuant to an existing Master

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[1] Plaintiff Capital One Equipment Finance Corp., formerly known as All Points Capital Corp., presently does business as Capital One Taxi Medallion Finance. Dkt. 4 (Robinson Aff.) ¶ 1.

[2] To avoid confusion, the court will refer to the individual defendants by their first names.

Joint Participation Agreement dated August 2010, endorsing the Notes to the order of Capital One in January 2017. Dkt. 5 at 45-50 (Barha Assignment); *id.* at 3 (Allonge); Dkt. 6 at 45-50 (Dez Assignment); *id.* at 3 (Allonge); Dkt. 7 at 45-50 (Rez Assignment); *id.* at 3 (Allonge); Dkt. 8 at 45-50 (Sez Assignment); *id.* at 3 (Allonge). OSG continued to service the Loans as Capital One's agent. Dkt. 27 (Oral Arg. Tr.) at 5.

Each Borrower executed a promissory note dated December 26, 2012, evidencing the loan made to it by OSG in the principal amount of $1.5 million (collectively, Notes). Dkt. 5 at 4-7 (Barha Note); Dkt. 6 at 4-7 (Dez Note); Dkt. 7 at 4-7 (Rez Note); Dkt. 8 at 4-7 (Sez Note). Borrowers and OSG also executed security agreements (Security Agreements), dated December 26, 2012, securing Borrowers' obligations under the respective Notes with Borrowers' personal property, including taxicab vehicles, licenses, and medallions. Dkt. 5 at 16-30 (Barha Security Agreement); Dkt. 6 at 16-30 (Dez Security Agreement); Dkt. 7 at 16-30 (Rez Security Agreement); Dkt. 8 at 16-30 (Sez Security Agreement). Isacc, who attests that he is president of Borrowers (Dkt. 23 (Isacc Aff.) ¶ 1),[3] executed the Barha Note and Security Agreement on behalf of Barha. Dkt. 5 at 6, 27. Both Isacc and Alan, Isacc's son, executed the other Notes and Security Agreements on behalf of Dez, Rez, and Sez. Dkt. 6 at 6, 27; *accord* Dkts. 7-8.

As additional assurance for repayment of Borrowers' obligations under the Notes and Security Agreements, Guarantors executed irrevocable, unconditional personal guarantees of payment (Guarantees), also dated December 26, 2012, for each of the Loans. Dkt. 5 at 9-14 (Barha Guaranty); Dkt. 6 at 9-14 (Dez Guaranty); Dkt. 7 at 9-14 (Rez Guaranty); Dkt. 8 at 9-14

[3] The Barha Loan Documents list Isacc as President and Secretary of Barha. Dkt. 5 at 43 (Barha Loan Documents). The Dez, Rez, and Sez Loan Documents list Alan as President and Isacc as Secretary of the respective entities. Dkt. 6 at 43 (Dez Loan Documents); Dkt. 7 at 43 (Rez Loan Documents); Dkt. 8 at 43 (Sez Loan Documents). The record is silent on this discrepancy with Isacc's affidavit.

(Sez Guaranty). Moreoever, the Guarantees are each secured by a respective pledge agreement dated December 26, 2012 (collectively Pledges) executed by OSG and one or both Guarantors. Dkt. 5 at 32-39 (Barha Pledge); Dkt. 6 at 32-39 (Dez Pledge); Dkt. 7 at 32-39 (Rez Pledge); Dkt. 8 at 32-39 (Sez Pledge). Isacc executed the Barha Guaranty and Pledge in his personal capacity and is sole guarantor on the Barha Loan. Dkt. 5 at 13, 38. Both guarantors, having executed the remaining Guarantees and Pledges in their personal capacities and are joint guarantors on the remaining Loans. Dkt. 6 at 13, 38; *accord* Dkts. 7-8. Consequently, the indebtedness for which Isacc is guarantor has a principal balance of $6 million, $4.5 million of which Alan also jointly and severally guarantees.

New York law governs the interpretation of the Notes, Guarantees, Security Agreements, and Pledges (collectively Loan Documents). Dkt. 5 at 6 (Barha Note); *id.* at 12 (Barha Guaranty); *id.* at 26 (Barha Security Agreement); *id.* at 38 (Barha Pledge); *accord* Dkts. 6-8 (Dez, Rez, and Sez Loan Documents).[4] All the Notes set forth a maturity date of January 1, 2016, "on which date all outstanding principal, interest and/or related charges shall be due and payable to the Holder." Dkt. 5 (Barha Note) at 4; *accord* Dkts. 6-8. Non-default interest on the Notes is 3.75% per annum, with default interest specified as follows:

> ***[I]f*** (i) there shall occur an "Event of Default" under the Security Agreement described below (as such term is defined in the Security Agreement) or (ii) ***the Maturity Date shall occur***, or (iii) any sum shall not be paid when it is due hereunder, ***then from and after any such occurrence*** or nonpayment ***the undersigned shall pay interest to the Lender, on demand, on the entire principal amount then outstanding hereunder*** and/or under the Security Agreement ***at the highest rate permitted by law***.

[4] Guarantors (individually and on behalf of Borrowers) also executed affidavits for judgment by confession. Dkts. 5-8 at 41-43 (Confessions). Capital One does not seek to use the Confessions—which were executed over three years ago—to enforce the Notes and Guarantees.

Dkt. 5 at 4-5 (emphasis added); *accord* Dkts. 6-8.

In addition, the Notes also set forth a 5% "late charge":

> In the event that any payment due hereunder shall not be received by the Lender within ten (10) days of the date when such payment is due and payable, a late charge of five cents ($0.05) for each dollar ($1.00) so overdue may be charged by the Lender.

Dkt. 5 at 5; *accord* Dkts. 6-8. The Notes incorporate the covenants, conditions, and agreements of the Security Agreement:

> This Note is a promissory note and is secured by a Security Agreement of even date herewith between the undersigned and the Lender (the "Security Agreement") affecting property more particularly described therein, and ***all of the covenants, conditions and agreements contained in the Security Agreement are by this reference incorporated herein and made a part hereof***.

Dkt. 5 at 5 (emphasis added); *accord* Dkts. 6-8.

> Further, the Notes provide:
>
> In enforcing its rights under this Note and under such Security Agreement and other instruments delivered in connection with the loan represented hereby, ***the holder shall have the right and option to pursue its remedies with respect to this Note*** or to enforce the provisions of the Security Agreement or such other instruments, or any combination thereof, and ***either simultaneously or in such order as the holder shall deem in its best interest***.
>
> The ***undersigned, and all persons liable or to become liable on this Note, agree, jointly and severally, to pay all costs of collection, including reasonable attorneys' fees and disbursements, in case the unpaid principal balance of this Note, or any payment of principal and/or interest thereon, is not paid when due***, or in case it becomes necessary to protect the security for the indebtedness evidenced hereby, whether suit be brought or not.
>
> Presentment for payment, notice of dishonor, protest, notice of protest, and trial by jury are hereby waived.

Dkt. 5 at 5-6 (emphasis added); *accord* Dkts. 6-8. The Security Agreements continue:

> WHEREAS, the Borrower has executed and delivered to the Lender a note ***(the "Note") dated of even date herewith*** and payable to the order of the Lender in the principal sum of ONE MILLION FIVE

> HUNDRED THOUSAND ($ 1,500,000.00) Dollars, which Note evidences a certain loan in such amount made by the Lender to the Borrower (the "Loan"). ...
>
> 1. ***The principal amount of the Loan shall be repaid by the Borrower in the manner described in the Note, with interest described therein***. The principal sum of the Note, together with all payments due hereunder or under the Note ..., together with any interest due and payable with respect to any of the foregoing until all such sums and the interest thereon are paid, are hereinafter collectively referred to as the "Indebtedness."

Dkt. 5 (Barha Security Agreement) at 16 (emphasis added); *see also id.* at 17 (agreeing that "Borrower shall pay the Indebtedness and shall perform all of the obligations of this Agreement in accordance with the terms hereof"); *accord* Dkts. 6-8.

The Security Agreements prohibit modification or waivers, except by a signed writing:

> 21. ... This Agreement may not be terminated nor may any of its provisions be changed or waived, ***except by writing signed by the party against whom such termination, change or waiver is sought to be applied***. A waiver by the Lender of any default, right or remedy hereunder on any one occasion shall not be construed as a waiver of any other default or a bar to any right or remedy the Lender would otherwise have on any future occasion.

Dkt. 5 at 26 (emphasis added); *accord* Dkts. 6-8. They also state:

> 26. In the event that any payment due hereunder or under the Note and upon any other part of the Indebtedness is not received by the Lender within ten (10) days of the date when such payment is due and payable, ***a late charge of five cents ($0.05) for each dollar ($1.00) so overdue may be charged by the Lender*** for the purpose of defraying the expense incident to handling such delinquent payment, which late charge shall be payable on demand.
>
> 27. ***From and after*** the date of occurrence of an Event of Default or ***the Maturity Date***, or, if any other sum is not paid when it is due hereunder, from and after the date when it is due, ***interest on the entire unpaid balance of the Indebtedness, and on any other sums payable hereunder to the Lender, shall accrue and be payable at the highest interest rate permitted by law.***

Dkt. 5 at 27 (emphasis added); *accord* Dkts. 6-8. [5]

The Guarantees designate one or both Guarantors as "primary obligor and not merely as a surety" who "irrevocably and unconditionally guarantee[] to the Lender payment when due, whether by acceleration or otherwise, of any and all liabilities of the Borrower to the Lender, together with all interest thereon and all attorneys' fees, costs and expenses of collection incurred by the Lender in enforcing any of such liabilities." Dkt. 5 (Barha Guaranty) at 9; *accord* Dkts. 6-8. The liabilities referenced by each of the Guarantees include "duties, debts, liabilities and obligations of the Borrower" under the respective Security Agreements and Notes. Dkt. 5 (Barha Guaranty) at 9; *accord* Dkts. 6-8. The Guarantees provide that, upon and at any time after "any default with respect to payment or performance of the liabilities of the Borrower ... the Lender may, without notice to the Borrower or any aforesaid person, make the liabilities of the Borrower to the Lender, whether or not then due, immediately due from and payable hereunder by the undersigned, and the Lender shall be entitled to enforce the obligations of the undersigned hereunder." Dkt. 5 (Barha Guaranty) at 10-11; *accord* Dkts. 6-8.

The Guarantees include waivers:

> The undersigned waives notice of acceptance of this guaranty and notice of any liability to which it may apply, and waives presentment, demand of payment, protest, notice of dishonor or nonpayment of any such liabilities, suit or taking other action by the Lender against, and any other notice to, any party liable thereon (including the undersigned). ...

[5] The Security Agreements further specify that amounts purportedly due under the Notes and Security Agreements only upon notice or demand are nonetheless due no later than the maturity date, even if no notice or demand is made or if the notice period extends beyond the maturity date. Dkt. 5 at 26 ("***If any amounts due under this Agreement or the Note are due upon demand or notice*** by the Lender and if the Lender does not demand or notice the same or if noticed, the period under the notice extends beyond the Maturity Date, then ***such amounts shall in any event be due and payable upon the Maturity Date***." (emphasis added)); *accord* Dkts. 6-8.

> ***No invalidity, irregularity or unenforceability*** of all or any part of the liabilities hereby guaranteed or of any security therefor ***or any other circumstance that might otherwise constitute a legal or equitable defense of a guarantor*** shall affect, impair or be a defense to this guaranty, and this guaranty is a primary obligation of the undersigned. ...
>
> The undersigned waives the right of trial by jury in the event of any litigation between the parties hereto in respect of any matter arising under this guaranty and agrees that, should the Lender bring any judicial proceedings in relation to any such matter, ***the undersigned will not interpose any counterclaim or setoff of any nature***.

Dkt. 5 at 9-12 (emphasis added); *accord* Dkts. 6-8.

The Guarantees entitle Capital One to its costs, expenses, and attorneys' fees incurred to enforce them:

> The undersigned shall pay to the Lender all costs and expenses, including filing fees and attorneys' fees, incurred by the Lender in connection with the custody, care, preservation or collection of any of the property of the undersigned or in seeking to enforce any of the liabilities or obligations of the undersigned hereunder.

Dkt. 5 at 12; *accord* Dkts. 6-8. Like the Security Agreements, the Guarantees specify that lender's rights under the Guarantees may not be modified or waived except by a signed writing:

> ***No delay*** on the part of the Lender in exercising any of its options, powers or rights, or partial or single exercise thereof, ***shall constitute a waiver*** thereof. ***No waiver of any of its rights hereunder, and no modification or amendment of this guaranty, shall be deemed to be made by the Lender unless the same shall be in writing, duly signed on behalf of the Lender***, and each such waiver, if any, shall apply only with respect to the specific instance involved, and shall in no way impair the rights of the Lender or the obligations of the undersigned to the Lender in any other respect at any other time.

Dkt. 5 at 12 (emphasis added); *accord* Dkts. 6-8.

The Pledge Agreements grant a lien upon and a security interest in Guarantors' ownership interests in the Borrowers to secure the obligations of Guarantors and Borrowers under the Loan Documents. Dkt. 5 at 32; *accord* Dkts. 6-8. Like the Security Agreements and the

Guarantees, the Pledge Agreements indicate that delay is not a waiver, and that amendment requires a signed writing. *See* Dkt. 5 at 37 ("No delay on the part of the Secured Party in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof."); *id.* at 38 ("This Agreement may not be terminated nor may any of its provisions be changed or waived, except by a writing signed by the party against whom such termination, change or waiver is sought to be applied."); *accord* Dkts. 6-8.

To support its motion for summary judgment in lieu of complaint, Capital One submits the Loan Documents and an affidavit of Michael Robinson, Vice President of Capital One. Dkt. 4 (Robinson Aff.) ¶ 1. Robinson attests that OSG made the four loans evidenced by the Loan Documents to Borrowers on or about December 26, 2012, and that OSG transferred all of its interests and rights in the Loans to Capital One on December 28, 2012. *Id.* ¶¶ 4, 13-14, 30-33. He avers that the Loans matured on January 1, 2016, that Borrowers failed to make the payments due on the maturity date, and that the entire principal balance remains outstanding. *Id.* ¶¶ 6-8, 36, 38-40.[6]

In response, Isacc attests that in December 2015, just prior to the January 1, 2016 maturity date of the Loans, OSG informed him that the Loans would be refinanced so long as Borrowers continued to make $4,700 monthly payments on each of the Loans. Dkt. 23 (Isacc Aff.) ¶ 7. Isacc further attests that in April 2016, Salvatore Chierico, representative of Capital One, began corresponding with him and reiterated that Borrowers should continue to make the monthly payments because Capital One was still working on the refinancing. *Id.* ¶ 9. Borrowers'

[6] The Robinson Affidavit vaguely alleges that Borrowers defaulted "beginning in 2015" and "prior to the Maturity Date". Dkt. 4 ¶¶ 5, 37. At oral argument, plaintiff clarified it seeks summary judgment (and default interest) based on the January 1, 2016 default for failure to repay the principal amount of the loan upon maturity.

last communication with Chierico ended with a May 18, 2016 email in which Chierico stated "[w]ill get back to you shortly, I will be discussing with my underwriting team." *Id.* For eight more months, according to Isacc, OSG reassured Borrowers that the Loans would be refinanced as long as the monthly payments continued. *Id.* ¶ 10. By the time this action was filed, Borrowers had made fourteen consecutive monthly payments. *Id.* Isacc avers that, in reliance on Capital One and OSG's representations that Capital One would refinance the Loans, Borrowers made no effort to refinance the Loans through another lender, to consider any restructuring, sales, bankruptcy, or alternative financing options, or to responsibly liquidate and use other "potential assets" to repay any of the Loans. *Id.* ¶¶ 8, 11, 13-14.

Capital One filed the instant suit on March 3, 2017, by filing a summons (Dkt. 1) and notice of the instant motion for summary judgment in lieu of complaint (Dkt. 2). Capital One's motion seeks a judgment of liability and an inquest to determine the amounts due under the Notes. Defendants do not contest that they failed to fully repay the Loans on the maturity date or at any time thereafter, or that Capital One has the rights to enforce the Loan Documents. Instead, they assert that Capital One defrauded defendants and breached the covenant of good faith and fair dealing by soliciting and accepting fourteen consecutive monthly payments following the maturity date while promising to refinance the loans. Dkt. 23 (Isacc Aff.) ¶¶ 7-15. Defendants also assert a promissory estoppel defense based on Capital One's alleged promises to refinance the loans. Dkt. 27 (Oral Arg. Tr.) at 11. The court reserved on the motion after oral argument. *See* Dkt. 27 (Oral Arg. Tr.) at 14-15.[7]

[7] The oral argument transcript was e-filed on October 20, 2017. *See* Dkt. 27. Plaintiff's motion was not marked fully submitted until February 16, 2018, because Chambers did not receive a hard copy of the transcript or notice from the moving party that the transcript had been e-filed.

II. Discussion

A. Legal Standard

"When an action is based upon an instrument for the payment of money only …, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." CPLR 3213; *see Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). "An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time." *Lawrence*, 95 AD3d at 957, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 (1996). CPLR 3213 may be thus used to collect on a promissory note and unconditional guaranty. *See Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 (2015); *Blumenstein v Waspit Grp., Inc.*, 140 AD3d 620, 620 (1st Dept 2016).

"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). To meet its prima facie burden to enforce a guaranty, a plaintiff "must prove 'the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty.'" *Navarro*, 25 NY3d at 492, quoting *Davimos v Halle*, 35 AD3d 270, 272 (1st Dept 2006).

"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." *Zyskind*, 101 AD3d at 551. Failure to contradict facts is an admission. *Costello Assocs., Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are

insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate an acceptable excuse for his failure to offer admissible evidence. *Id.* Nor can summary judgment be defeated by the "shadowy semblance of an issue." *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept 1994). Hearsay evidence may be considered in opposition, but it is insufficient to bar summary judgment if it is the only evidence submitted. *Arnold v NY City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002). Summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact following the court's examination of the documents submitted in connection with the motion. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Enforcement of the Loan Documents

Capital One seeks a judgment of liability on defendants' repayment obligations under the Notes and Guarantees.[8] Through its submission of the Loan Documents and the Robinson Affidavit, Capital One has met its burden to establish the undisputed facts that Borrowers executed the Notes, that Guarantors executed the Guarantees, and that defendants failed to fully repay the Loans upon the maturity date set forth in the Loan Documents. *See 8430985 Canada Inc. v United Realty Advisors LP*, 148 AD3d 428, 428 (1st Dept 2017) ("The motion court properly granted plaintiff summary judgment in lieu of complaint, based on [defendant's] guaranty and an affidavit from plaintiff's director establishing that there was a default in

[8] During oral argument, plaintiff's counsel indicated that plaintiff also sought to enforce the Security Agreement against collateral pledged by the Borrowers. An award of collateral (e.g., under the Security Agreement) cannot be made on a CPLR 3213 motion, because it is not "based upon an instrument for the payment of money only."

payment."); *German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408, 408 (1st Dept 2013) (affirming grant of summary judgment in lieu of complaint based on "the note, the loan agreement and guaranty, and an affidavit of plaintiff's principal who attested to [defendant's] failure to make payment on the loan at its maturity date"); *Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560, 560 (1st Dept 2012) ("Plaintiff demonstrated its entitlement to summary judgment as against [defendant] by submitting the guaranty executed by him and an affidavit of nonpayment."). As noted, to rebut Capital One's prima facie case, defendants unsuccessfully assert defenses of fraud, breach of the implied covenant of good faith and fair dealing, and promissory estoppel.

Defendants' fraudulent misrepresentation claims are based on their assertion that Capital One, through its agents, told them that it would refinance the Loans, defendants relied on these statements to their detriment, and, therefore, made monthly payments and failed to pursue other refinancing options or other alleged means of discharging the debt. The elements of fraud are a misrepresentation or a material omission of fact by a party, which was false and known by that party to be false, made to induce the other party to rely upon it, justifiable reliance of the other party, and injury. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Defendants' fraud defense fails on several grounds.

To begin, representations of present intentions, such as a promise to refinance, may constitute fraudulent statements of material existing fact. *See Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 168-69 (1st Dept 2015). However, defendants fail to meet even the pleading standard for knowledge of falsity, much less proffer evidence that Capital One knowingly misrepresented its intent to refinance the Loans. *See Stuart Lipsky, P.C. v Price*, 215

AD2d 102, 103 (1st Dept 1995), citing *Lanzi v Brooks*, 54 AD2d 1057, 1058 (3d Dept 1976) ("A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement."), *aff'd* 43 NY2d 778 (1977). From the facts attested by Isacc—which show only that Capital One elected to sue in lieu of refinancing as allegedly promised—it is equally, if not more likely, that Capital One changed its mind on refinancing due to the admittedly turbulent market for taxi medallions, the security for the Loans. *See Lanzi*, 54 AD2d at 1058 ("[A]ny inference drawn from the fact that the expectation did not occur is not sufficient to sustain the plaintiff's burden of showing that the defendant falsely stated his intentions.").

Furthermore, defendants fail to substantiate their claim of injury caused by Capital One's alleged misrepresentations. Neither at the time of the alleged misrepresentations in December 2015, nor at any point thereafter, do defendants attest they would have had the means to repay any of the Loans upon maturity. *See Citibank, N.A. v Pullman*, 190 AD2d 839, 839 (2d Dept 1993) ("[D]efendant's unsubstantiated and conclusory claim that [plaintiff] caused the default is ... insufficient to defeat the motion."). Defendants proffer only vague, nonspecific, and speculative allegations of "alternative financing options", "explor[ing]" bankruptcy, sale of the medallions (despite an admittedly illiquid market), and liquidation of (unspecified) assets, which are insufficient. *See Zuckerman*, 49 NY2d at 562 ("expressions of hope or unsubstantiated allegations or assertions are insufficient" to avoid summary judgment). As to defendants' monthly payments following maturity, one "cannot claim to have been defrauded into doing what it already was legally bound to do," *see NY State Urban Dev. Corp. v Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 770-71 (2d Dept 1983); defendants unquestionably owed repayment under the terms of Loan Documents. Their complaint that this litigation foreclosed refinancing

options has no merit. Indeed, had defendants stopped the monthly payments, it is likely Capital one would have sued far earlier.

Finally, the Security Agreements prohibit modification absent a writing signed by the lender. "[T]he courts of this State will give effect to a party's clearly stated intention not to be contractually bound until it has executed a formal written agreement." *Jordan Panel Sys., Corp. v Turner Const. Co.*, 45 AD3d 165, 169–70 (1st Dept 2007). The Security Agreements, including the maturity date and repayment terms, could not be amended absent a writing signed by the lender. Thus, defendants could not justifiably rely on Capital One's ***unsigned*** and/or oral statements allegedly modifying those terms. *See Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498-99 (1st Dept 2011) ("[A] party claiming fraudulent inducement cannot be said to have justifiably relied on a representation when that very representation is negated by the terms of a contract executed by the allegedly defrauded party."); *City of NY v Grosfeld Realty Co.*, 173 AD2d 436, 437 (2d Dept 1991) ("[A]ppellant's bare and unsubstantiated assertion that the plaintiff made certain assurances thereby waiving indefinitely its right pursuant to the mortgage to foreclose on the property, contradicts the express terms of the mortgage and is insufficient to create an issue of fact which would warrant a trial."); *West v Szwalla*, 234 AD2d 638, 638 (3d Dept 1996) (holding that unsubstantiated claim of oral assurances contradicting the terms of the note and mortgage was insufficient to create an issue of fact); *Garvey*, 98 AD2d at 771 ("In the face of the outstanding conflict between the alleged oral representations and the uncontroverted documentary evidence containing the written terms of the [contracts], appellant

cannot claim justifiable reliance and, thus, has failed to establish the elements of a defense of fraud in the inducement or estoppel.").[9]

Defendants similarly fail to substantiate their defense that Capital One breached the implied covenant of good faith and fair dealing. Contracts interpreted under New York law include an implied covenant of good faith and fair dealing, which "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002), quoting *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 (1995). Defendants fail to demonstrate that Capital One undermined their rights under the Loan Documents. They present no evidence to substantiate their claim that Capital One caused the defaults, which would require defendants to proffer evidence that they would have had the means to repay any of the Loans in full absent the alleged misconduct.[10] Moreover, having executed the Security Agreements—which incorporate the repayment terms of the respective Notes and cannot be amended without a signed writing—defendants cannot use the ***implied*** covenant to

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[9] In a separate case also filed against Isacc, Justice Scarpulla similarly ruled that the defendants failed to demonstrate justifiable reliance on oral representations where a contractual provision prevented oral modification. *See Medallion Bank v Butwin Transit Inc.*, 2017 NY Slip Op 30877(U), at 3 (Sup Ct, NY County, Apr. 27, 2017) ("[Plaintiff's] alleged oral promises to refinance cannot serve as a basis to modify the terms of the loan documents, specifically, the maturity date or the amounts owed. Defendants' fraud allegations are without merit because the express language in the loan documents declaring no modification or waiver of their terms without a writing negates the element of justifiable reliance on the alleged oral promise.").

[10] Defendants' failure to proffer evidence that plaintiff ***caused*** defendants' failure to repay the Loans upon maturity distinguishes the cases cited by defendants' opposition papers. *See, e.g., Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 108 (2d Dept 1988) (holding that "an issue of fact was presented as to whether the Bank unfairly brought about the occurrence of the very condition precedent ([plaintiff's] suspension of business) upon which it relied to accelerate the loan"); *Bank of China v Chan*, 937 F2d 780, 788 (2d Cir 1991) (holding that bank's bad faith behavior and deliberate destruction of borrower's commercial viability would be complete defense to loan guaranty).

extend the January 1, 2016 maturity date.[11] *See Jennifer Realty*, 98 NY2d at 153 (noting that covenant does not imply obligations inconsistent with other terms of contract); *Transit Funding Assocs., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 29 (1st Dept 2017) ("The covenant of good faith and fair dealing cannot negate express provisions of the agreement ....").

Nor is the doctrine of promissory estoppel—which, like fraud, also requires reasonable reliance—availing. *See NYC Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 (1st Dept 2004) ("[T]o state a viable cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance."); *see also Bank of NY v Spring Glen Assocs.*, 222 AD2d 992, 994 (3d Dept 1995) ("[D]efendants' estoppel argument is unavailing as they could not have justifiably relied on such an assurance, given the express language in the guarantees declaring that no modification or waiver of their terms ... can be brought about except by a signed writing.").

As defendants have failed to demonstrate a triable issue of material fact as to plaintiff's claim or any bona fide defense,[12] summary judgment is granted to Capital One on defendants' liability to repay loan principal, late charges, unpaid interest (including default interest),[13] and

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[11] The Security Agreements also specify that amounts purportedly due thereunder or under the Notes only "upon demand or notice" are nonetheless due no later than the January 1, 2016 maturity date. *See* Dkt. 5 at 26 (Barha Security Agreement); *accord* Dkts. 6-8.

[12] Under the Guarantees, Guarantors waived all defenses to their personal liability for Borrowers' obligations under the Notes and Security Agreements. *See Steve Young Int'l, Ltd. v Barnes*, 267 AD2d 24, 25 (1st Dept 1999); *see also Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 (1st Dept 2009); *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 (1st Dept 2010); *Sterling Nat. Bank v Biaggi*, 47 AD3d 436, 437 (1st Dept 2008). As Guarantors fail to raise any bona fide defense to Borrowers' or their own liability, the court need not rely on Guarantors' waiver of defenses to hold them personally liable under the Guarantees.

[13] While Capital One's brief requested only 9% statutory interest on unpaid loan principal from January 1, 2016, under the Note, Capital One is entitled to default interest "at the highest rate permitted by law." Dkt. 5 at 4-5; *accord* Dkts. 6-8. General Obligation Law (GOL) § 5-501

costs (including attorneys' fees) owed under the Loan Documents following the January 1, 2016 maturity of the Loans. Damages will be determined at inquest. Accordingly, it is

ORDERED that plaintiff Capital One Equipment Finance Corp.'s motion for summary judgment in lieu of complaint against defendants Alan Zubli, Isacc Zubli, Barha Taxi Inc., Dez Cab Corp., Rez Cab Corp., and Sez Cab Corp. is granted as to liability, and the issue of loan principal, late charges, unpaid interest, and costs that plaintiff is entitled to recover from defendants is hereby referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine, and within twenty days of the date of this decision and order, plaintiff shall serve a copy with notice of entry, as well as a completed information sheet,[14] 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 notify the parties of the time and date of the hearing; and it is further

ORDERED that within 10 days of entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendants by overnight mail.

Dated: April 11, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

states a maximum of 16% per annum, *see O'Donovan v Galinski*, 62 AD3d 769 (2d Dept 2009); however, under GOL § 5-501(6)(a), the 16% maximum is not applicable to loans of $250,000 or more, such as the instant Loans. Instead, such loans are subject only to the 25% per annum maximum legal rate for criminal usury under Penal Law § 190.42. To the extent imposition of the 5% "late charge" increases the effective interest rate above the statutory maximum, "[i]t is well settled that 'the defense of usury does not apply where … the terms of the … note impose a rate of interest in excess of the statutory maximum ***only after default or maturity***.'" *Hicki v Choice Capital Corp.*, 264 AD2d 710, 711 (2d Dept 1999) (emphasis added), quoting *Miller Planning Corp. v Wells,* 253 AD2d 859, 860 (2d Dept 1998).

[14] Copies of the Information Sheet are available at:
http://www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/SRP-InfoSheet.pdf