

Dominion Capital LLC v Philippe Equities LLC

2018 NY Slip Op 32478(U)

October 1, 2018

Supreme Court, New York County

Docket Number: 155691/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Dominion Capital LLC,

Plaintiff,

Index No.
155691/2018

**DECISION and
ORDER**

- against -

Mot. Seq. #001

Philippe Equities LLC, Merchants Hospitality Inc.,
Abraham Merchant and Richard Cohn

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

On or about June 15, 2018, Plaintiff Dominion Capital LLC (“Dominion”) commenced this action pursuant to CPLR 3213 for an Order granting it summary judgment in lieu of complaint against Defendants Philippe Equities LLC (“Philippe Equities”), Merchants Hospitality, Inc. (“Merchants”), Abraham Merchant (“Abraham”), and Richard Cohn (“Cohn”) (collectively “Defendants”). Defendants oppose.

A. Background and Factual Allegations

Dominion, alleges that it executed a note with Philippe Equities on May 17, 2017. Merchants, Abraham, and Cohn allegedly guaranteed all monetary payments that became due under the note. According to Dominion, “the note required Philippe [Equities] to make periodic interest payments to Dominion and ultimately to pay the entire principal amount of \$1,250,000 to Dominion at the maturity date.” (Dominion’s memorandum of law at 1) Dominion claims that the maturity date of the note was May 1, 2018. (affirmation of Gurevich at 2). Accordingly, on May 1, 2018, Dominion claims “the Note [matured] and the entire unpaid Principal Amount, together with accrued and unpaid interest thereon,” [became] due and payable in full.” (affirmation of Gurevich at 2) Additionally, Dominion alleges that the note also required Philippe Equities to “make monthly interest payments to Dominion at a rate of 6% per annum when not in default and at a rate of 16% per annum when in

default.” (affirmation of Gurevich at 1) These interest payments were allegedly scheduled “to begin on January 1, 2018 and were to continue until the note was repaid in full.” (affirmation of Gurevich at 2) Dominion further claims that the note obligates Philippe Equities to pay “such reasonable amounts as shall be sufficient to cover the reasonable costs and expenses of [Dominion] incurred in any enforcement or collection . . . including without limitation, the reasonable attorneys’ fees of [Dominion].” (affirmation of Gurevich at 2)

Although Philippe Equities “made timely interest payments on the first of each month . . . through the May 1, interest payment,” Dominion alleges that Philippe Equities failed to make payment on the entire outstanding principal amount on May 1, 2018. (affirmation of Gurevich at 2) Dominion also claims that Philippe Equities did not provide payment during the subsequent five-day cure period and therefore Philippe defaulted under the note as of May 9, 2018. (affirmation of Gurevich at 2) On May 2, 2018, Dominion allegedly made a demand for payment on the note. On May 16, 2018, Philippe Equities allegedly made a \$100,000.00 payment to Dominion, and a payment of \$5,750 on June 1, 2018. Dominion further alleges that it made a demand via e-mail on Merchants, Abraham, and Cohn on June 12, 2018. (affirmation of Gurevich at 2) Dominion claims that it delivered a hardcopy “via FedEx the next day to each.” (affirmation of Gurevich at 2) However, Merchants, Abraham and Cohn did not make payment. Accordingly, Dominion seeks a “a total of not less than \$1,150,000 plus costs of collection, late fees, and accruing interest, in amounts to be finally determined at a hearing before this Court.” (affirmation of Gurevich at 3)

Defendants oppose and cross-move to dismiss. Defendants argue that Dominion did not properly effectuate service on Cohn and Abraham and therefore this Court lacks jurisdiction over them. Defendants argue that although “the process server claims to have personally served Defendant Cohn in West Orange, New Jersey, . . . the documentary proof establishes [Cohn] was in New York City at the time of the purported service.” (affirmation of Marcus at 3) Alternatively, Defendants request a traverse hearing to determine if service was sufficient.

Defendants also argue that Dominion improperly filed and served an Amended Notice of Motion. They allege that “[t]he Amended Notice of Motion specifically states that annexed thereto was the affidavit of Mikhail Gurevich, exhibits and a memorandum of law.” (affirmation of Marcus at 4) However, Defendants claim that “None of these documents were included in the Amended Notice of Motion which was simply mailed to all of the four named Defendants.” (affirmation of Marcus at 4) According to Defendants, “[t]he defective Amended

Notice of Motion was merely mailed, without any supporting papers, to the two corporate defendants at 285 Fulton Street, New York NY. The initial Notice of Motion with supporting affidavits was served upon the Secretary of State.” (affirmation of Marcus at 4) Defendants further assert, that Dominion elected to initially personally serve the corporate defendants via the secretary of state in Albany and cannot now serve “an incomplete Amended Notice of Motion via regular mail to a completely new address.” (affirmation of Marcus at 4)

Defendants further argue that the note was modified and extended. Defendants argue that Mikhail Gurevich (“Gurevich”), a Manager of Dominion, allegedly “agreed to extend the maturity date for thirty (30) days while discussion continued on a permanent extension and modification of the Note.” (affirmation of Marcus at 2) Thereafter on May 16, 2018, Gurevich allegedly agreed to modify the Note to provide for an immediate \$100,000 principal repayment, a subsequent \$500,000 principal payment, and an extension of the maturity date to November 1, 2018. (affirmation of Marcus at 3) Allegedly, “[t]his modification was memorialized in writing and confirmed by an exchange of text messages” between Gurevich and Adam Hochfelder (“Hochfelder”), an authorized representative of Philippe Equities. (affirmation of Marcus at 3) Philippe Equities claims that in reliance on the modification, it immediately wired the \$100,000 to Dominion. According to Defendants, “[i]n an apparent ploy to grab the \$100,000 payment, [Dominion] abrogated its agreement and before the next payment was due under the modification, made a demand for full payment under the Note, which was not then due[.]” (affirmation of Marcus at 3)

In reply, Dominion argues *inter alia* that “Defendants appear to take issue with Dominion’s Amended Notice of Motion . . . complaining in turns: 1) that it did not re-attach the papers that had already been served on them . . . and 2) that it was delivered via first class mail to their office rather than via personal service through the Secretary of State.” Dominion argues that Defendants “are clearly apprised of the nature of the action and are in possession of all the relevant documents, and they offer no reason why the documents they already possess should be re-attached nor do they explain what the remedy for the supposed technical breach should be.” (affirmation of Moscow at 8) “Indeed, the only purpose in filing the Amended Notice of Motion was to change the return date to July 30, the date Defendants themselves chose when cross moving to dismiss for lack of personal jurisdiction.” (affirmation of Moscow at 8)

B. Relevant Affidavits

Bayo Affidavit

In his affidavit filed on July 10, 2018, Manny Bayo avers that “On 06/23/2018, at 5:06 PM at 345 Araneo Drive, Unit 345, WEST ORANGE, NJ 07052 Deponent served the within Summons, Notice of Motion for Summary Judgment in Lieu of a Complaint, Affidavit of Mikhail Gurevich in Support of Dominion Capital LLC’s Motion for Summary Judgment in Lieu of Complaint With Exhibit 1, Memorandum of Law in Support . . . ON RICHARD COHN . . . Said documents were conformed with Index number and date of filing endorsed thereon . . . By delivering a true copy of each to said recipient personally; Deponent knew the person so served to be the person described in as said recipient therein.”

(aff of Bayo at 1)

Drepaul Affidavit

Baldeo C. Drepaul avers that “On 6/26/2018, at 9:31 AM at ONE BLOCK AWAY FROM 15 BROAD STREET, NEW YORK, NY 10005 Deponent served the within Summons, Notice of Motion for Summary Judgment in Lieu of a Complaint, Affidavit of Mikhail Gurevich . . . , Memorandum of Law . . . On; Abraham Merchants, therein named. Said documents were conformed with index number and date of filing endorsed thereon, by delivering a true copy of each to said recipient personally; Deponent knew the person so served to be the person described in as said recipient therein.”

(aff of Drepaul at 1)

Cohn Affidavit

Cohn avers to the following in his affidavit, “Plaintiff asserts that service was effectuated upon Defendant Richard Cohn by personal service on Saturday, June 23, 2018 at 5:06 p.m.” (aff of Cohn at 1) “Your affiant was working at his office at that time at One World Trade Center, New York, NY.” (aff of Cohn at 1) “As is my custom and practice when working on a weekend, I email a nearby restaurant that I am a principal of to prepare a take-out order for me to take home and have dinner with my wife in West Orange, NJ.” (aff of Cohn at 2) “Attached as collective Exhibit B is my email trail dated June 23, 2018, along with a copy of the signed check, indisputably demonstrating that I was in NYC at the time the process server claims to have served me in West Orange, N.J.”

Cohn further avers, “Reserving all of its rights with respect to the lack of personal jurisdiction due to insufficient service and defective notices, the Defendants

also have a meritorious defense.” (aff of Cohn at 3) “Adam Hochfelder is a representative of the Defendants and was specifically authorized by your affiant to negotiate a modification of the Note.” (aff of Cohn at 3) “As set forth in Mr. Hochfelder’s affidavit sworn to the 23rd Day of July, 2018, Mr. Hochfelder met with Mr. Gurevich in person at Eden Restaurant in NYC or about May 16, 2018 and reached an agreement to modify the Note by making an immediate \$100,000 principal payment, another \$500,000 principal payment on June 14, 2018, and the balance by November 11th.” (aff of Cohn at 3) “Mr. Gurevich agreed but modified the November 11th date to November 1st.” (aff of Cohn at 3) “In accordance with the modification of the Note, Philippe Equities wired the \$100,000 principal payment to Dominion.” (aff of Cohn at 3) “Assuming arguendo, the Note was not extended and modified, the action was prematurely commenced as Mr. Gurevich sets forth in his Affidavit . . . that he made ‘written demand . . . for payment from Richard Cohen [sic], Abraham Merchant, and Merchants Hospitality Inc.’ Again it is notable that this ‘demand’ is not attached to the motion papers.” (aff of Cohn at 4)

Cohn further avers, “By Amended Notice of Motion for Summary Judgment in Lieu of Complaint, Plaintiff purports to cure its short service of its original noticed motion.” (aff of Cohn at 2)

Hochfelder Affidavit

In his affidavit, Adam Hochfelder avers, “I am an authorized representative of Defendant Philippe Equities LLC, the borrower under the Promissory Note given to Plaintiff/Lender.” (aff of Hochfelder at 1) “The Plaintiff/Lender is proceeding in bad faith as the Note has been modified and extended and in accordance with that modification, the Borrower, Defendant Philippe Equities made a \$100,000 principal repayment.” (aff of Hochfelder at 1) “I personally had several telephone conversations, personal meetings and multiple email and text messages with Mikhail Gurevich, Managing Partner of Dominion Capital.” (aff of Hochfelder at 1) “This included meeting Mikhail at Eden Restaurant on May 16, 2016, where we discussed and agreed upon the terms for an extension of the Note initially to his birthday, November 11, but then at his request, to November 1st.” (aff of Hochfelder at 1) “We also agreed on an immediate principal payment of \$100,000.” (aff of Hochfelder at 2) “I then memorialized this agreement by taking a picture of the notes I made while meeting Mikhail and then texting Mikhail the notes, along with a text message stating the terms of the modifications and asking Mikhail to confirm, which he immediately did by reply text.” (aff of Hochfelder at 2) “I then called Richard Cohn and Abraham Merchant and reported what was agreed to and asked them to immediately wire the \$100,000 payment. The write went out the same day . . .” (aff

of Hochfelder at 2) “I was shocked and dismayed to hear that on June 12th, Plaintiff made a demand for the entire amount due under the Note and then subsequently commenced this lawsuit. This was not what we agreed and not in accordance with the written modification of the Note.” (aff of Hochfelder at 2) “Had I know that Plaintiffs would have taken this action, I never would have asked Richard Cohn to write the \$100,000 payment.” (aff of Hochfelder at 2)

Abraham Affidavit

In his affidavit, Abraham avers, “I am a Manager of Defendant Philippe Equities LLC, an Officer of Defendant Merchants Hospitality Inc., and named individual Defendant . . . Plaintiff asserts that service was effectuated upon Defendant Abraham Merchant by personal service on June 26, 2018 at 9:31 a.m. by purportedly serving me as I was entering a taxi one block from 15 Broad Street . . . I did not accept any papers from this process server . . . On or about July 8, 2018, I received an envelope in the mail from Plaintiff’s counsel containing a 4-page document styled ‘Amended Notice of Motion for Summary Judgment in Lieu of Complaint’ . . . This document states, ‘that, upon the annexed Affidavit of Mikhail Gurevich, sworn to on June 15, 2018, along with the exhibit thereto, and the accompanying memorandum of law . . . I can say with 100% certainty that none of the referenced documents were in this envelope nor was I previously served with these documents.’”

(aff of Abraham at 1, 2)

Gurevich Affidavit

Gurevich avers, “On at least three occasions, I sent (individually or through my lawyers) proposed documents setting forth my proposed terms for modifying the Note – first on May 2, then on May 21, and finally on June 11. I likewise sent proposed terms via text message to Adam Hochfelder, seeking 12% annual interest and an earlier repayment date. Defendants never accepted any of those proposals. We therefore never reached an agreement on modification on the Note. The parties had additional discussions and negotiations regarding potential modification, but as with the emails and text messages before the Court, these discussions never culminated in an agreed-upon modification of the Note.” (aff of Gurevich at 2)

C. The Wire Debit, Emails & Text-Message

Defendants submit a copy of what appears to be an outgoing wire debit from a checking account in the name of Philippe Equities LLC Operation to Dominion Capital LLC in the amount of \$100,000.00 (Defendants' exhibit D) The date range provides, "5/1/2018 to 5/20/2018." (Defendants' exhibit D)

Defendants submit *inter alia* a photograph of a text-message purportedly from Hochfelder to Gurevich. It indicates *inter alia* "Mikhail. Please confirm our handshake and hug. \$100,000 immediately for principal pay-down. \$500,000 by June 14th principal pay-down. \$25,000 on June 14 as a fee/penalty. Balance due by Nov 11th (your bday)." (Defendants' exhibit C) A response provides, "Balance due by Nov 1, 1% /mo int, the rest is good." (Defendant's exhibit C)

Defendants also submit a copy of an email chain. One email dated May 2, 2018 from Gurevich to Abraham, Hochfelder and Cohn provides, "Abraham, Richard, Adam, The philippe loan was due yesterday. When can I expect repayment?" (Defendants' exhibit E) Another email dated May 2, 2018 from Gurevich to Cohn provides, "Richard, thanks for coming on Monday. We are drafting the extension document right now and will have it to you by end of day. Needless to say I expected a prompt repayment after everything I've done for you and your firm, and this delay create a huge burden on myself and my business." (Defendants' exhibit E)

Dominion also submits *inter alia* copies of email chains. One email dated May 2, 2018 from John H. Riley provides, "Hi Richard, Good afternoon. At the behest of . . . Mikhail, I am forwarding to you and the rest of the thread drafts of certain agreements relative to the amendment of the Note issued by Philippe to Dominion in May, 2017. These drafts are being forwarded to you subject to further internal review." (Plaintiff's exhibit A) Another email dated May 3, 2018 on the same chain from Gurevich provides, "John, thanks for sending out. Richard and team, when can we expect signatures? The loan has matured several days ago." (Plaintiff's exhibit A) The next email dated May 4, 2018 from Gurevich on the same chain provides, "Richard, Abraham, Adam, based on lack of response from you I assume we are going to do this through the court system?" (Plaintiff's exhibit A) A subsequent email dated May 4, 2018 in the chain from Cohn provides, "I will review later today and revert." (Plaintiff's exhibit A) The next email dated May 8, 2018 from Gurevich provides, "Richard, it has been four days, have you finalized your review? It is now past the cure period and the loan is in default." (Plaintiff's exhibit A) A subsequent email dated May 8, 2018 from Gurevich provides, "Can't even bother responding to an email after taking millions of dollars from us for your projects huh? Don't worry about replying anymore. I'm going to make sure the entire investment community

knows how big of a scam artists you are, and how you treat investors that's been nothing but friendly to you. Expect to hear from our attorneys shortly." (Defendant's exhibit A)

Another email dated May 21, 2018 from John Riley provides, "Hi Richard, Good afternoon. At the behest of . . . Mikhail, I am forwarding to you for your consideration redlined redrafts of certain agreements relative to the amendment of the Note issued by Philippe to Dominion in May, 2017. These redrafts hopefully reflect, in part, certain issues discussed between the principals. These redrafts are being forwarded to you subject to further internal review." (Plaintiff's exhibit B) The next email dated June 11, 2018 from Gurevich to Cohn, Abraham, Hochfelder among others provides, "Richard, Abraham, Adam, I'm resending the documents from John, with updated payment schedule Adam and I just discussed on the phone. Please get this signed tomorrow, and send back along with a \$40,622.22 payment (this includes legal, extension, and default interest fees) to bring the loan back into good standing. Next payment of \$507,283.33 will be due end of this month, with \$6,500.00 payments on a monthly basis until November 1, 2018 when the remaining \$650,000 principal will be due." (Plaintiff's exhibit B)

D. Standards

CPLR 3213

CPLR 3213 provides, "When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." "The prototypical example of an instrument within the ambit of CPLR 3213 is of course a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time." (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dept 2017].) "CPLR 3213 is generally used to enforce 'some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness,' so that 'a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.'" (*id.*)

For instance, in *German American Capital Corp. v Oxley Development Co., LLC*. (102 AD3d 408, 408 [1st Dept 2018]), the First Department held that the plaintiff established its entitlement to judgment to recover on a promissory note by submitting evidence "including the note, . . . the guaranty, and an affidavit of

plaintiff's principal [attesting] to [the defendant's] failure to make payment on the loan at its maturity date.”

“[A] guarantor is only liable upon the noncompliance of the principal obligor.” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro.*, 24 NY3d 485, 492 [2015].))

Modification

“Parties to a written agreement who include a proscription against oral modification are protected by subdivision 1 of section 15-301 of the General Obligations Law.” (*Rose v Spa Realty Associates*, 42 NY2d 338, 341 [1977].) GOL 15-301 (1) provides, “A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.” However, “[t]here are exceptions to GOL 15-301(1).” (*HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, 37 Misc3d 1217(A)* 4 [Sup Ct, NY County 2012])

One exception is the doctrine of partial performance. As the Court of Appeals has stated, “[p]artial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the [GOL 15-301(1)] statutory requirement of a writing. (*Rose v Spa Realty Associates*, 42 NY2d 338, 341 [1977].) [I]n order to be unequivocally referable, conduct must be inconsistent with any other explanation[,] not merely “consistent with the alleged oral agreement.” (*Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 558, [1st Dept 2016].) That is, “the actions alone must be ‘unintelligible or at least extraordinary,’ explainable only with reference to the oral agreement.” (*id.*) “It is insufficient that the agreement confers some ‘significance’ on or provides some motivation for plaintiff’s conduct. Even if the conduct may be explainable as ‘preparatory steps’ in the expectation of a future agreement, this, too, is insufficient.” (*Steele v Delverde S.R.L.*, 242 AD2d 414, 414 [1st Dept 1997].) For instance, the First Department has previously stated, “Not only do the emails fail to even indicate that the closing was adjourned by agreement, but all these items were clearly explainable as preparatory steps taken with a view of attempting to arrive at a possible agreement in the future.” (*Nassau Beekman, LLC v Ann/Nassau Realty, LLC.*, 105 AD3d 33, 40 [1st Dept 2013].)

Another exception is the doctrine of equitable estoppel. “The purpose of invoking the doctrine [of equitable estoppel] is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another.”

(*American Bartenders School, Inc. v 105 Madison Co.*, 59 NY2d 716, 716 [1983].) The doctrine of promissory estoppel “has been applied to preclude a party from asserting the Statute of Frauds, but is properly reserved for that limited class of actions where the result of enforcing the contract would be so egregious as to render unconscionable the Statute of Frauds.” (*Carvel Corp v Nicollini*, 144 AD2d 611, [2d Dept 1988].) The Court considers whether “[t]he circumstances set forth . . . rise to a level of unconscionability warranting application of equitable estoppel.” (*American Bartenders School, Inc.*, 59 NY2d at 716)

Accordingly, “when a party’s conduct induces another’s significant and substantial reliance on the agreement to modify, albeit oral, that party may be estopped from disputing the modification notwithstanding the statute [of frauds].” (*Rose*, 42 NY2d at 341) “Comparable to the requirement that partial performance be unequivocally referable to the oral modification, so, too, conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written.” (*id.* at 344) In *Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*, the First Department held that the plaintiff failed to establish that equitable estoppel applied because “[N]othing in its submissions demonstrates that defendant induced [plaintiff] to significantly and substantially rely to its detriment on the alleged oral modification.” (*Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*, 105 A.D.3d 33, 41, [1st Dept 2013].) Similarly, in *HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, the court denied the defendants estoppel argument because “nothing suggests that [the plaintiff] had begun to work under an understanding of changed terms on the notes.” (*HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, 37 Misc3d 1217(A)* 5 [Sup Ct, NY County 2012].) Further, the plaintiff’s “actions were compatible with the agreements as written and not explainable only with reference to the alleged oral modification.” (*id.*)

Personal Jurisdiction

In *Brooklyn Federal Savings Bank v Crosstown West 28 LLC*, the Court noted that the “Borrowers and Guarantors . . . expressly consented to personal jurisdiction . . . which precludes defendants’ challenge to this court’s jurisdiction.” (*Brooklyn Federal Sav. Bank v Crosstown West 28 LLC*, 29 Misc 3d 1237(A)* [Sup Ct, Kings County 2010].) The Court further noted, that “[a]lthough the defendants have contractually consented to personal jurisdiction, they are, however, still entitled to serve upon them in accordance with the terms of the Note and the Guarantees. They are further entitled to protection of their due process rights to notice and the opportunity to be heard, which they have not waived.” (*id.*)

Validity of Service

“A process server’s affidavit is prima facie evidence of proper service sufficient to withstand a naked denial of receipt of service.” (*Nazarian v Moanco Import, Ltd.*, 255 AD2d 265, 266 [1st Dept 1998].) However, “a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit . . .” (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004].) Where factual issues as to the validity of service exist, the threshold issue of personal service should be resolved with a traverse hearing. (*id.*)

Joint and Several Liability

CPLR 1002 (b) provides, “Persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transaction or occurrences, may be joined in one action as defendants if any common question of law or fact would arise.”

“[G]iven that all of the guarantors . . . are jointly and severally liable, it cannot be argued that [one guarantor] was indispensable to the suit.” (*Newman-Green, Inc. v Alfonzo-Larrain*, 490 US 826, 838 [1989].) Indeed, in *Slutsky v Leftt* (609 NYS2d 528, 530 [Civ Ct, NY County 1993]), the Honorable Sheila Abdus-Salaam held that, “[t]he doctrine of contribution which is founded upon general equitable principles is available to co-guarantors.” However, “[o]nly a co-guarantor who has paid more than his or her proportionate share of the common liability is entitled to contribution from the other co-guarantors.” (*Mediclaim, Inc. v Groothuis*, 38 AD3d 730, 731 [2d Dept 2007].)

Accordingly, “[i]f a principal obligation is guaranteed by two or more persons, each must pay the proportional share of the liability, and a guarantor who has paid more than his or her share is entitled to contribution from the others and may sue to enforce that right.” (63 NY Jur 2d Guaranty and Suretyship § 480)

E. Discussion

Preliminarily, the note provides that “Each party hereto hereby irrevocably waives and agrees not to assert, by way of motion, as a defense, or otherwise, in every suit, action or other proceeding arising out of or based on this Note . . . any claim that such party is not subject personally to the jurisdiction of” New York courts sitting in Manhattan. (Plaintiff’s exhibit 1 at 6) Like *Brooklyn Federal Savings Bank v Crosstown West 28 LLC*, the Defendants here who are borrowers and guarantors

consented to personal jurisdiction and therefore are precluded from challenging this court's jurisdiction. (*Brooklyn Federal Sav. Bank v Crosstown West 28 LLC*, 29 Misc 3d 1237(A)* [Sup Ct, Kings County 2010].) However, Defendants are "entitled to protection of their due process rights to notice and the opportunity to be heard, which they have not waived." (*id.*)

Accordingly, in reviewing Abraham's challenge to service, the Court notes that Baldeo C. Drepaul's affidavit of service is "prima facie evidence of proper service sufficient to withstand a naked denial of receipt of service." (*Nazarian v Moanco Import, Ltd.*, 255 AD2d 265, 266 [1st Dept 1998].) However, Abraham's averment "I did not accept any papers from this process server" is tantamount to a naked denial of receipt of service. (aff of Abraham at 1) With respect to Cohn's challenge to service, Manny Bavo's affidavit of service is similarly prima facie evidence of proper service. (*Nazarian*, 255 AD2d at 266) However, in Cohn's affidavit he avers, "Your affiant was working at his office at that time at One World Trade Center, New York, NY" as is Cohn's "custom" on certain weekends culminating in the purchase of "take-out" from a "nearby restaurant." (aff of Cohn at 2) This averment is "a sworn non-conclusory denial of service . . . sufficient to dispute the veracity or content of [Manny Bayo's] affidavit . . ." (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004].) Lastly, Defendants assertion that they were short served is unavailing. (*Brooklyn Federal Sav. Bank v Crosstown West 28 LLC*, 29 Misc 3d 1237(A)* [Sup Ct, Kings County 2010].) As the Court noted in *Brooklyn Federal Savings Bank v Crosstown West 28 LLC*, "Defendants argue that, even if the defendants were served, they were short served, which, they claim, constitutes an incurable jurisdictional defect. Because defendants have all contractually consented to the jurisdiction of this court, they cannot prevail upon such objection absent lack of notice or other due process violation, which is not present here. (*id.*) To the extent that Defendants argue that the amended notice was improper, they cite no statute or case law in support of their proposition.

Accordingly, a factual issue as to the validity of service exists with respect to Cohn only and the threshold issue of personal service should be resolved with a traverse hearing. (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004].) That Cohn requires a traverse hearing, but service is deemed sufficient as to the remaining defendants does not preclude further adjudication of this matter. Although the note provides that "Abraham Merchants, Richard Cohn and Merchants Hospitality, Inc., jointly and severally guaranty all monetary payments," it is well settled that Abraham and Merchants would be entitled to contribution from Cohn and may sue to enforce that right." (63 NY Jur 2d Guaranty and Suretyship § 480)

Dominion meets its prima facie burden on this motion for summary judgment in lieu of complaint pursuant to CPLR 3213. In the note, Philippe Equities “formally and explicitly acknowledged an indebtedness” because the note provides, Philippe Equities “hereby unconditionally promises to pay to the order of the Lender, in lawful money of the United States of America and in immediately available funds, the principal sum of One Million, Two Hundred Fifty Thousand Dollars (\$1,250,000).” (Plaintiff’s exhibit 1 at 2) Additionally, the note provides that, “At the Maturity Date, [Philippe Equities] shall pay in immediately available funds, all amounts due hereunder.” (Plaintiff’s exhibit 1 at 2) Accordingly, “a prima facie case would be made out by [this note] and a failure to make the payments called for by its terms.” (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dept 2017].) Like the plaintiff in *German American Capital Corp. v Oxley Development Co., LLC*. (102 AD3d 408, 408 [1st Dept 2018]), Dominion established its entitlement to judgment to recover on the note by submitting evidence “including the note . . . and an affidavit of [Gurevich] [attesting] to [Philippe Equities’] failure to make payment on the loan at its maturity date.” Specifically, Gurevich’s affidavit provides, that Philippe Equities failed to make payment on the entire outstanding principal amount on May 1, 2018. (aff of Gurevich at 2) Because Dominion established the noncompliance of Philippe Equities, Dominion established that the co-guarantors Abraham, Cohn and Merchants became liable. (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro.*, 24 NY3d 485, 492 [2015].) It is undisputed that the note provides, “Abraham Merchants, Richard Cohn and Merchants Hospitality, Inc., jointly and severally guaranty all monetary payments due here under that are not paid with ten (10) days of their due date within fourteen (14) days after receipt of written demand.” (Plaintiff’s exhibit 1 at 7) Additionally, Gurevich avers that he made a demand via e-mail on Merchants, Abraham, and Cohn on June 12, 2018. (affirmation of Gurevich at 2) Gurevich also avers that although he delivered a hardcopy “via FedEx the next day to each,” Merchants, Abraham and Cohn did not make payment. (aff of Gurevich at 3)

Defendants have not established by admissible evidence, the existence of a triable issue with respect to a bona fide defense. Defendants argument that the “modification was memorialized in writing and confirmed by an exchange of text messages” between Gurevich and Hochfelder is unavailing. (affirmation of Marcus at 3) The note provides, explicitly, “This Note may not be amended, modified, or terminated in whole or in part, except in writing, executed by each of the Parties.” (Plaintiff’s exhibit 1 at 6) Accordingly, “[t]his clause of the contract required a signed writing to modify the agreements.” (*HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, 37 Misc3d 1217(A)* 4 [Sup Ct, NY County 2012].) Indeed, to the extent GOL 15-301(1) mandates a writing “signed by the party against

whom enforcement of the change is sought or by his agent,” the submitted e-mail chain and text message do not suffice. Like *HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, “Defendants have not presented a writing to support their claim of modification.” (*HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, 37 Misc3d 1217(A)* 4 [Sup Ct, NY County 2012].) However, the analysis is not complete because “[t]here are exceptions to GOL 15-301(1).” (*id.*)

The doctrine of partial performance is inapplicable here. Although Hochfelder avers that “in accordance with th[e] modification . . . Philippe Equities made a \$100,000 principal repayment,” Philippe Equities’ wiring of \$100,000 to Dominion is not unequivocally referable to the alleged modification.” (*Rose v Spa Realty Associates*, 42 NY2d 338, 341 [1977].) This \$100,000 wire debit is merely “consistent with the alleged oral agreement.” (*Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 558, [1st Dept 2016].) It is “insufficient” that the alleged oral agreement between Hochfelder and Gurevich “confers some ‘significance’” on an outgoing wire debit from a checking account in the name of Philippe Equities LLC Operation to Dominion Capital LLC in the amount of \$100,000 with a date range of “5/1/2018 to 5/20/2018.” (*Steele v Delverde S.R.L.*, 242 AD2d 414, 414 [1st Dept 1997]; Defendant’s exhibit D) It is also insufficient that the alleged oral agreement “provides some motivation” for this outgoing wire debit. (*id.*) However, this wire debit with a date range from May 1, 2018 to May 20, 2018 is not “explainable only with reference to the oral agreement.” (*Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 558, [1st Dept 2016].) For instance, this wire debit is not “inconsistent with any other explanation” especially because the note matured on May 1, 2018 and the “entire unpaid Principal Amount . . . [became] due and payable in full” on that date. (*Gootee v. Glob. Credit Servs., LLC*, 139 A.D.3d 551, 558, [1st Dept 2016]; Plaintiff’s exhibit 1 at 2) Similar to *Nassau Beekman, LLC v Ann/Nassau Realty, LLC.*, “not only do the emails fail to even indicate” that the parties orally modified the note, “but all these items were clearly explainable as preparatory steps taken with a view of attempting to arrive at a possible agreement in the future.” (*Nassau Beekman, LLC v Ann/Nassau Realty, LLC.*, 105 AD3d 33, 40 [1st Dept 2013].) An outgoing wire debit from a checking account in the name of Philippe Equities LLC Operation to Dominion Capital LLC in the amount of \$100,000 is at best a partial payment in a varying amount at an irregular interval not unequivocally referable to the parties’ alleged oral agreement. (*Bon Temps Agency, Ltd v. Towers Organization, Inc.*, 187 AD2d 376 [1st Dept 1992].)

Similarly, the doctrine of promissory estoppel is inapplicable here. Nothing, in Defendants’ submissions demonstrates that Dominion induced Defendants to “significantly and substantially rely to their detriment on the alleged oral

modification.” (*Nassau Beekman, LLC v Ann/Nassau Realty, LLC.*, 105 AD3d 33, 40 [1st Dept 2013].) Similarly, nothing in the text message or emails suggests that Dominion had begun to work under an understanding of changed terms on the notes. (*HCG Mezzanine Development Fund, L.P. v Jreck Holdings, LLC*, 37 Misc3d 1217(A)* 5 [Sup Ct, NY County 2012].) Indeed, receiving a wire debit in the amount of \$100,000 is compatible with the note that became due on May 1, 2018 and not explainable only with reference to the alleged oral modification. (*id.*) Moreover, the allegation that Dominion induced Defendants who are parties to a note in excess of \$1,000,000 to make an alleged payment of \$100,000 does “not rise to a level of unconscionability warranting application of equitable estoppel.” (*American Bartenders School, Inc.*, 59 NY2d at 716) As the Appellate Division stated, “Even if all allegations made by the defendants were to be taken as true, we would not find the circumstance to be so egregious as to warrant the application of the doctrine of promissory estoppel.” (*Carvel Corp v Nicollini*, 144 AD2d 611, [2d Dept 1988].)

Wherefore it hereby,

ORDERED that Plaintiff Dominion Capital LLC’s motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted as to Defendants Philippe Equities LLC, Merchants Hospitality Inc., and Abraham Merchant; and it is further

ORDERED that Defendants Philippe Equities LLC, Merchants Hospitality Inc., Abraham Merchant and Richard Cohn’s Cross Motion to dismiss Plaintiff Dominion Capital LLC’s motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the matter of personal service with respect to Defendant Richard Cohn is referred to a special referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that the matter of the amount and calculation of damages plus costs of collection, late fees, and accruing interest is referred to a special referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119 A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing; and it is further

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED:  ~~September~~ 1, 2018



EILEEN A. RAKOWER, J.S.C.