

Eastern Funding LLC v Initial Motors Inc.

2018 NY Slip Op 32571(U)

October 10, 2018

Supreme Court, New York County

Docket Number: 156402/2018

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 45

Justice

-----X INDEX NO. 156402/2018

EASTERN FUNDING LLC,

MOTION DATE 09/11/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

INITIAL MOTORS INC., JIM LIN

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10 ,
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT

Upon the foregoing documents, it is

Plaintiff, Eastern Funding LLC (“Plaintiff”) commenced this action by way of a Motion for Summary Judgment in Lieu of a Complaint against Defendants Initial Motors Inc. (“Initial Motors”) and Jim T. Lin (“Lin”) (collectively, “Defendants”). Plaintiff alleges Defendants were lent \$171,687.64 in 2016, which was memorialized by one promissory note, one personal guaranty and two loan payment schedules. To date, according to Plaintiff, Defendants have repaid only a portion of the loaned amount. Plaintiff claims entitlement to \$122,914.00 in outstanding principal and interest as of the date the instant motion was filed (July 10, 2018) plus statutory interest at 9% per annum from that date until satisfaction of judgment.

Plaintiff now seeks Summary Judgment in Lieu of a Complaint pursuant to CPLR §3213. For the following reasons, Plaintiff’s unopposed motion is granted with respect to liability. With respect to damages, however, Plaintiff has failed to provide evidence with respect to how much Defendants have paid towards the loan, the current amount of unpaid principal, and how the final damage amount claimed was calculated. Given uncertainties as to the calculation of the amounts

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due and owing on the loans, the matter is referred to a Judicial Hearing Officer for hearing and determination of the amount of damages to which Plaintiff is entitled.

Factual and Procedural Background

On May 26, 2016, Plaintiff and Defendant Initial Motors entered into a Master Promissory Note and Security Agreement. The same day Defendant Lin also executed an Irrevocable Guaranty in favor of Plaintiff. (*see* Exhibit “A” to Cohen Affirmation). On May 27, 2016 Plaintiff and Initial Motors agreed on the first loan schedule (“Loan Schedule 001”) whereby Initial Motors agreed to repay Plaintiff \$85,843.82 in 58 consecutive monthly payments of principal and interest, each in the amount of \$1,661.00, the first of which was due on July 1, 2016. *Id.* On June 1, 2016, Initial Motors and Plaintiff agreed on a second loan schedule (“Loan Schedule 002”) whereby Initial Motors agreed to repay \$85,843.82 in 58 consecutive monthly payments of principal and interest, each in the amount of \$1,661.00, the first of which was due on July 6, 2016. *Id.* The Promissory Note incorporated the two Loan Schedules by reference. *Id.* Under the terms of the Promissory Note, failure to pay the monthly installments would result in a default. In the event of a default, the lender retained the option to: a) declare the entire unpaid principal sum of all Loan Schedules immediately due and payable; and b) increase the interest rate on the outstanding indebtedness to 15.9% per annum. *Id.*, ¶8 (emphasis added).

Defendants made an unspecified number of payments toward the loans. (*see*, Plaintiff’s Memorandum of Law, ¶14). On June 7, 2018, Plaintiff issued a letter to Defendants advising the Loan was in default and demanding payment of \$5,747.40 on Loan Schedule 001 and \$5,503.05 on Loan Schedule 002 to bring the loan out of default. (*see* Exhibit “B” to Cohen Affirmation). The monies were not paid, necessitating the instant action.

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Analysis

“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. Courts have found “supporting papers” to include a promissory note executed by defendants and proof of defendants’ failure to make payments according to its terms. *See Blumenstein v Waspit Group, Inc.*, 140 A.D.3d 620, 620 (1st Dept 2016). To establish its prima facie entitlement to judgment as to the amount of a debt, however, a plaintiff must submit records supporting its calculation of the debt amount. *See Citibank N.A., v. Villano*, 140 A.D.3d 553, 553-54 (1st Dept 2016).

Here, through an Affidavit of Merit offered by Plaintiff’s Vice President of Collections, Plaintiff has submitted evidence that Defendant Initial Motors received two loans, each in the amount of \$85,843.82, and each was to be repaid in equal installments of \$1,661 over 58 months. (*see* Exhibit A to Cohen Affirmation; and Fagan Affid., ¶4). By June 7, 2018 Defendant Initial Motors defaulted on an unknown number of payments, resulting in \$5,747.40 past due and owing on Loan Schedule 001 and \$5,503.05 on Loan Schedule 002. (*see* Exhibit B to Cohen Affirmation; and Fagan Affid., ¶4). Defendant Lin failed to make payments, as guarantor, in Initial Motors’ stead. As such, Plaintiff declared the loans in default as of June 12, 2018 and thus immediately due and payable.

Plaintiff has sufficiently presented prima facie evidence of Defendants’ unconditional obligation to repay the two loans and their failure do so, entitling it to summary judgment on liability. *See H & H Custom Homes, Inc. v Kossoff*, 96 A.D.3d 445, 445 (1st Dep’t 2012) (Plaintiff made a *prima facie* showing of its entitlement to judgment as a matter of law in the

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principal sum of \$200,000 by submitting the promissory note and the amended letter, as well as evidence of default under those documents).

Defendants did not file an opposition to the instant motion and thus have not offered any evidence or explanation as to why they have failed to remit full payment on the promissory notes nor otherwise raised any triable issues of fact. *Citibank N.A., v. Villano*, 140 A.D.3d 553 at 534-535; *see also Grand Pac. Fin. Corp. v. 97-111 Hale, LLC*, 90 A.D.3d 534, 534-535 (1st Dep't 2011). (In an action to recover the amounts due under three loans, Plaintiff established its prima facie entitlement to judgment as a matter of law by providing evidence that it held the three notes and that Defendants had failed to make the payments due under the notes. Defendants' opposition failed to raise a triable issue of fact sufficient to defeat summary judgment.).

Therefore, the Court finds there are no issues of material fact which prevent awarding Plaintiff summary judgment with respect to liability.

However, the Court cannot, based on the current record, enter judgment in the requested amount of \$122,914.00. In a motion for summary judgment, a lender bears the burden of establishing its "prima facie entitlement to judgment as to the amount of the debt." *See Citibank N.A., v. Villano*, 140 A.D.3d 553 at 553; *see also HSBC Bank USA v IPO, LLC*, 290 A.D.2d 246 (1st Dep't 2002) (The prima facie case for such relief requires documentary evidence or an explanation of how the indebtedness is calculated, not mere conclusory allegations).

Here, Plaintiff does not provide any evidence as to how much Defendants have paid towards the loan, whether such payments were applied to the principal or interest (to the extent they were less than the total amount due and owing), and how the final damage demand was calculated.

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Conclusion

Plaintiff's motion for Summary Judgment in Lieu of a Complaint is granted as to liability only. The matter shall be referred to a Judicial Hearing Officer to hear and determine Plaintiff's entitlement to damages, if any. *Id.* at 553-54 (remanding for further proceedings to determine amount of indebtedness for which defendant was liable).

Therefore, it is:

ORDERED Plaintiff's Motion for Summary Judgment is granted in part. Plaintiff is awarded Summary Judgment on liability and is referred to a Judicial Hearing Officer to hear and determine the amount of damages he is entitled to; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defendants within 5 days and counsel for plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/supctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as

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practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of the Court.

HON. JOEL M. COHEN
J.S.C.



10/10/2018
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>		<input checked="" type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	