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

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DRAGONS 516 LIMITED,

Plaintiff,

-against-

GDC 138 E 50 LLC, and SHANGHAI MUNICIPAL INVESTMENT (GROUP) USA LLC,

Defendants.

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DECISION AND ORDER
Index No.: 651690/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. MOTION AND ARGUMENTS

Plaintiff Dragons 516 Limited (Dragons) moves for summary judgment in lieu of complaint. According to plaintiff, Dragons loaned $30 million to defendant GDC 138 E 50 LLC (Borrower) at 12% annually (with a 14% default interest rate), pursuant to an agreement dated June 1, 2017 (the Facility Agreement). The funds were to finance Borrower's investment in 50 LEX Development LLC (Project Co). Defendant Shanghai Municipal Investment (Group) USA LLC (Guarantor) signed an agreement dated March 6, 2018, guaranteeing the loan (the Guarantee).

Plaintiff claims the Borrower breached the Facility Agreement by incurring more than the permitted amount of debt (taking on three loans, for a total of $239 million, which did not fall into the exceptions to the prohibition in section 16.11), by amending organizational documents without Dragons' consent (in Borrower's UCC-1 financing statement dated August 1, 2017, Borrower describes a second amended and restated LLC agreement for Project Co dated July 31, 2017, in violation of section 16.14), by changing Project Co's ownership structure without Dragons' consent (sections 16.9[b] and 17.12). Each of those qualifies as an Event of Default, as defined in the Facility Agreement, making Borrower liable for the $30 million balance due plus interest, costs, and fees. The guarantee also included a confession of judgment waiving all rights of appeal and relief. Pursuant to the unconditional guarantee, the Guarantor is therefore liable for that full amount.

Defendant Borrower opposes the motion, arguing this action does not qualify for a motion for summary judgment in lieu of complaint because the defaults do not relate to non-payment, and

inquiries are required into facts outside the agreement at issue. Where a motion relates to failures other than the failure to make payment, the motion should be denied (*Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231 [1st Dept 2008] [A note "does not qualify [as the basis for a motion for summary judgment in lieu of complaint] if outside proof is needed, other than simple proof of nonpayment or a similarly *de minimis* deviation from the face of the document"]). Here, none of the alleged breaches leading to the alleged default involve non-payment. Further, this motion relies on several documents outside of the underlying agreement, which is improper for a motion for summary judgment in lieu of complaint (Borrower Memo at 4).

Plaintiff replies that this motion is based on a failure to pay, specifically, the failure to pay the full amount upon default and demand (Reply1 at 1). Borrower does not dispute any of the facts as stated in the motion, and this is sufficient (*see Solomon v Langer*, 66 AD3d 508 [1st Dept 2009] ["Plaintiff established her entitlement to summary judgment in lieu of complaint on the promissory note made by defendant by establishing execution, delivery, demand and failure to pay"]). Plaintiff argues the Facility Agreement is an instrument for the payment of money, unlike the notes in the cases cited by Borrower (Reply1 at 2).

Defendant Guarantor also opposes the motion (Guarantor Opp, Dkt. # 45). Guarantor argues, as did Borrower, that this case is not appropriate for a motion for summary judgment in lieu of complaint. It also claims that the Guarantee agreement is a fraudulent document, with the signature cut and pasted from another document. The Guarantor insists it did not agree to the guarantee (*id.* at 2, 4).

Plaintiff replies to the Guarantor that the motion is appropriate with these facts, and that Guarantor's bald assertions of forgery and fraud do not create an issue of material fact sufficient to defeat this motion (Reply2 at 4). Guarantor merely provides a self-serving, unsupported affidavit, which is insufficient (*id.*).

II. DISCUSSION

CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88

NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d; 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri*, 307 AD2d 947 [2d Dept 2003]).

While the Facility Agreement is an agreement for the payment of money, it is not an agreement for the payment of money only (*see PDL Biopharma v Wohlstadter*, 147 AD 3d 494, 494-95 [1st Dept 2017] [A document does not qualify for CPLR 3213 treatment if the court must consult other materials beside the bare document and proof of nonpayment or if it must make a move than *de minimis* deviation from the face of the document"]). The Facility Agreement (Dkt. # 5) is approximately 70 pages long, and contains a variety of obligations for Borrower, including those which plaintiff claims Borrower breached. Further, the motion is not one where the right to payment can be ascertained from the face of the Facility Agreement without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman*, 88 NY2d at 444).

The cases offered by plaintiff as example of exceptions to this simple rule are inapposite. Four of the cited cases involve written guarantees of payment where there were no triable issues of fact as to the asserted defenses. In *Webster Business Credit Corp. v Durham*, 29 Misc 3d 1206[A] (Sup Ct, NY County 2010), the principal case relied on by plaintiff, Justice Fried granted a motion for summary judgement in lieu of complaint where defendant argued that it was "impossible to ascertain the amounts allegedly due without resort to extrinsic documents." He distinguished cases that denied the motion where, as here, extrinsic evidence was needed to determine whether the defendants had actually defaulted.[1] This case is not appropriate for disposition pursuant to CPLR 3213.

[1] The cases cited include *Ian Woodner Family Collection v Abaris Books, Ltd.*, 284 AD 2d 163 (1st Dept 2001) ("[E]xtrisic evidence was needed to determine not only the quarterly amounts due under the promissory note, but also whether the defendants had actually defaulted according to the note's terms") and *Bonds Financial, Inc. v Kestrek Technologies, LLC*, 48 AD 3d 230, 231 (1st Dept 2008) ("[C]laim based on acceleration of credit clause, thus requiring resort to external documents to define event of default").

It is hereby

ORDERED that the motion for summary judgment in lieu of complaint is DENIED; and it is further

ORDERED that defendants shall answer the complaint within twenty (20) days of service of this Decision and Order with notice of entry; and it is further

ORDERED that counsel shall appear at a preliminary conference at Part 49, Room 252, 60 Centre Street, New York, New York 10007, on September 24, 2019 at 10:00 am.

This constitutes the decision and order of the court.

DATED: August 26, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.