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

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CAPITAL ONE EQUIPMENT FINANCE CORP.,

Plaintiff,

-against-

RAMI CAB CORP., SHIMON MILUL

Defendants.

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DECISION AND ORDER

Index No. 654454/2018
(RCC Action)

CAPITAL ONE EQUIPMENT FINANCE CORP.,

Plaintiff,

-against-

GEE-NEE-K HACKING CORP., ALEXANDER LEMPERT, SVETLANA SUDIT

Defendants.

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Index No. 654866/2018
(GNK Action)

HON. JENNIFER G. SCHECTER, J.S.C.

Motion sequence 001 in the RCC Action (Index No. 654454/2018) and motion sequence 001 in the GNK Action (Index No. 654866/2018) are consolidated for disposition.

In the RCC Action, plaintiff Capital One Equipment Finance Corp. (Capital One) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against corporate defendant Rami Cab Corp. (RCC) and individual defendant Shimon Milul (RCC Guarantor, with RCC, RCC Defendants). RCC Defendants oppose. In the GNK Action, plaintiff moves for summary judgment in lieu of complaint against corporate defendant Gee-Nee-K Hacking Corp. (GNK, with RCC, Borrowers) and individual defendants Alexander Lempert and Svetlana Sudit (GNK Guarantors, with RCC Guarantor, Guarantors; with GNK, GNK Defendants), who oppose. As discussed below, plaintiff's motions for summary judgment in lieu of complaint are granted as to liability only.

I. Background [1]

These actions arise from two similar loans made in the year 2013 by non-party The OSG Corp. (Lender), a taxicab medallion lending company, to Borrowers, both New York corporations that owned taxi medallions (otherwise, Borrowers have no apparent relationship). After selling Borrowers' taxi medallions, which secured the loans, at public auction in March 2018, plaintiff, as Lender's assignee, seeks to recover a deficiency judgment on promissory notes against Borrowers and on unconditional guarantees against Guarantors.

A. RCC Loan

In early 2013, Lender made a $1.5 million loan to RCC (RCC Loan) at a 3.5% per annum interest rate (computed based on a 360-day year), evidenced by a promissory note dated January 28, 2013 (RCC Action, Dkt. 5 [RCC Note]).[2] The note required RCC to make monthly payments of $4,375 beginning on March 1, 2013 until the February 1, 2016 maturity date, on which all accrued interest and principal became due and payable. Milul, RCC's president, personally guaranteed the RCC Note pursuant to an irrevocable, unconditional guaranty dated the same day as the RCC Note (RCC Action, Dkt. 6 [RCC Guaranty]). RCC also entered into a security agreement with Lender (RCC Security Agreement) dated contemporaneously with the RCC Note, securing RCC's obligations thereunder with RCC's personal property, including two taxicab medallions (RCC Medallions) (RCC Action, Dkt. 7 [RCC Security Agreement]).

B. GNK Loan

Several months later, Lender loaned $1.4 million to GNK at the same rate of interest (GNK Loan, with RCC Loan, Loans), evidenced by a promissory note dated April 3, 2013 (GNK Action,

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[1] Unless otherwise indicated, the following facts are undisputed.

[2] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

Dkt. 5 [GNK Note (with RCC Note, Notes)]). The GNK Note required monthly payments of $4,083.33 beginning June 1, 2013 until May 1, 2016, when all accrued interest and principal became due and payable. GNK Guarantors, who are GNK's co-principals, personally guaranteed the GNK Note pursuant to an irrevocable, unconditional guaranty, dated the same day as the GNK Note (GNK Action, Dkt. 6 [GNK Guaranty (with RCC Guaranty, Guarantees)]; GNK Action, Dkt. 15 [Lempert Aff.]). GNK also entered a contemporaneous security agreement with Lender, securing GNK's repayment obligations with personal property including two taxicab medallions (GNK Medallions, with RCC Medallions, Medallions) (GNK Action, Dkt. 7 [GNK Security Agreement (with RCC Security Agreement, Security Agreements)]).

C. Terms of Both Loans

New York law governs interpretation of the Notes, Guarantees and Security Agreements (collectively Loan Documents)[3] (RCC Note at 8; RCC Security Agreement at 12 ¶ 21; RCC Guaranty at 5; GNK Note at 5; GNK Security Agreement at 11 ¶ 21; GNK Guaranty at 4). Payments on the Notes were to be allocated "first to any outstanding fees, charges or expenses, then to accrued interest and last to the reduction of principal" (RCC Note at 6; GNK Note at 3). Following the maturity date or an event of default, Borrowers were obligated to "pay interest to the Lender, on demand, on the entire principal amount then outstanding … at the highest rate permitted by law" (RCC Note at 6-7; GNK Note at 3). Each of the Notes incorporate by reference "all of the covenants, conditions and agreements contained" in the respective Security Agreement (RCC Note at 7; GNK Note at 4). Further, the Notes provide that "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

[3] The Guarantors also executed confessions of judgment (RCC Action, Dkt. 8; GNK Action, Dkt. 8) in connection with the Loans. These confessions expired in 2016 pursuant to CPLR 3218(b).

simultaneously or in such order as the holder shall deem in its best interest" (RCC Note at 7; GNK Note at 4). Finally, the Notes require Borrowers to "pay all costs of collection, including reasonable attorneys' fees and disbursements, in case the unpaid principal balance of this Note … is not paid when due" (RCC Note at 7; GNK Note at 4).

The Security Agreements, in turn, restate Borrowers' obligations to repay principal and interest on the respective Notes (RCC Security Agreement at 2 ¶ 1; GNK Security Agreement at 1 ¶ 1). Like the Notes, the Security Agreements specify that upon maturity of the Loans, default interest on the unpaid balance "shall accrue and be payable at the highest interest rate permitted by law" (RCC Security Agreement at 13 ¶ 27; GNK Security Agreement at 12 ¶ 27).

The Security Agreements prohibit modification or waiver, "except by writing signed by the party against whom such termination, change or waiver is sought to be applied" (RCC Security Agreement at 12 ¶ 21; GNK Security Agreement at 11 ¶ 21).

The Security Agreements allow Lender to sell the Medallions at public or private sale:

> [I]f the Borrower shall fail to pay the entire unpaid principal balance of the Note and accrued interest thereon upon the Maturity Date[,] … the Lender shall have the right … (d) ***to sell, assign and deliver the Collateral at public or private sale***, for cash, on credit or future delivery, ***with or without advertisement of the time, place or terms of sale*** and in connection therewith to grant options and to use the services of a broker, except that if the sale be a private sale upon five (5) days' written notice to the Borrower of the date, time and place of any sale and the terms of the sale, which notice the Borrower agrees is reasonable, ***all other demands, advertisements and notices being hereby waived***. Any sale shall be free of any and all equity or right of redemption, which Borrower hereby waives and releases.
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> ***At any sale the Lender, or its designee, may purchase the Collateral.*** The Lender shall not be obligated to make any sale of any Collateral if it shall determine not to do so, regardless of the fact that notice of sale may have been given. ***The Lender may, without notice or publication, adjourn any public or private sale*** or cause the same to be adjourned from time to time … and such sale may, without further notice, be made at the time and place to which the same was so adjourned. … ***Any sale conducted upon the foregoing terms or by any other method of sale (if conducted in conformity***

> ***with practices of any banks disposing of similar security) shall be deemed commercially reasonable.***
>
> The Borrower agrees that the Lender shall have the right to continue to retain the Collateral until such time as the Lender, in its reasonable judgment, believes that an advantageous price can be obtained for the Collateral and, ***absent gross negligence, the Lender shall not be liable to the Borrower for any loss in the value of the Collateral*** by reason of any such retention of the Collateral by the Lender.
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> Further, ***the Lender may elect to retain the Collateral in full satisfaction of the Indebtedness***, in which event notice thereof shall be given to the Borrower, and if the Lender receives an objection in writing from the Borrower within twenty-one (21) days after service of the notice, then and in such event the Lender shall commence to dispose of the Collateral in the manner hereinbefore set forth … (RCC Security Agreement at 8-9 ¶ 7 [emphasis added]; *accord* GNK Security Agreement at 7-8 ¶ 7).

The Guarantees designate the respective Guarantors as "primary obligor and not merely as a surety" who "irrevocably and unconditionally guarantee[] to the Lender payment when due … 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" (RCC Guaranty at 2; GNK Guaranty at 1). The liabilities referenced by each of the Guarantees include "duties, debts, liabilities and obligations of the Borrower" under the corresponding Security Agreement and Note (RCC Guaranty at 2; GNK Guaranty at 1). 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 …, make the liabilities of the Borrower to the Lender … immediately due from and payable hereunder by the [guarantor(s)], and the Lender shall be entitled to enforce the obligations of the [guarantor(s)] hereunder" (RCC Guaranty at 2-3; GNK Guaranty at 2-3). Plaintiff is also entitled to attorneys' fees it incurs to enforce the Guarantees (RCC Guaranty at 5; GNK Guaranty at 4).

The Guarantees waive many notices and defenses, as well as counterclaims and set-off, and provide that "[n]o invalidity, irregularity or unenforceability of all or any part of the liabilities hereby guaranteed … 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" (RCC Guaranty at 2-3, 5; GNK Guaranty at 1-2, 4). The Guarantees also expressly allow for release or sale of collateral:

> The Lender may at any time … without the consent of or … notice to the [Guarantor(s)], without incurring responsibility to the [Guarantor(s)], without impairing or releasing the obligations of the [Guarantor(s)] hereunder, upon or without any terms or conditions and in whole or in part …(2) sell, exchange, release, surrender, realize upon or otherwise deal with any manner and in any order any property by whomsoever at any time pledged or mortgaged to secure, or howsoever securing, the liabilities hereby guaranteed (RCC Guaranty at 2; GNK Guaranty at 2).

Like the Security Agreements, the Guarantees state that Lender's rights under the Guarantees may not be modified or waived except by a signed writing (RCC Guaranty at 4; GNK Guaranty at 4).

D. Assignment and Enforcement of the Loans

Lender and plaintiff are parties to a contract titled "Master Joint Participation Agreement" dated August 2010 (RCC Action, Dkt. 10; GNK Action, Dkt. 10), pursuant to which Lender assigned the RCC Loan to plaintiff on January 28, 2013, doing the same for the GNK Loan on April 5, 2013 (RCC Action, Dkt. 9 [RCC Assignment]); GNK Action, Dkt. 9 [GNK Assignment]). The Notes were endorsed to the order of plaintiff on July 5, 2018 (RCC Action, Dkt. 5 at 5 [RCC Allonge]; GNK Action, Dkt. 5 at 2 [GNK Allonge]).

Until the Loans matured in early 2016, Borrowers made timely payments in accordance with the Loan Documents. On the respective maturity dates, well over $1 million remained outstanding on each of the Notes (RCC Action, Dkt. 26 [RCC's calculation] and 36 [plaintiff's calculation]; GNK Action, Dkt. 4 [plaintiff's calculation]). Borrowers made some payments after maturity but failed to repay the Loans in full.

In December 2017, plaintiff publicly auctioned dozens of taxi medallions (December Auction), including the GNK Medallions, reportedly setting the minimum bid (or reserve price) for all medallions at $262,500. The RCC Medallions were initially to be included in the December Auction until Milul paid plaintiff $10,000 to forbear (*see* RCC Action, Dkt. 31 [Dec. 4, 2017 letter from plaintiff to RCC Defendants]). None of the four Medallions were sold at the December Auction. In March 2018, plaintiff conducted another public auction in New York County (March Auction) that included all four Medallions, where plaintiff reportedly purchased them for $230,000 each (March Sale). Milul attests that he attempted to negotiate a compromise with plaintiff for payment on the RCC Loan both before and after the March Sale (*see* RCC Action, Dkt. 33 [Mar. 1, 2018 letter from plaintiff to RCC Defendants]).

Plaintiff initiated the RCC Action on September 7, 2018 and the GNK Action on October 2, 2018, by motion for summary judgment in lieu of complaint. Plaintiff submitted the Loan Documents and affidavits from Michael Robinson, a Vice President of plaintiff, with its moving papers (RCC Action, Dkt. 4; GNK Action, Dkt. 4). Based in part on corporate documents, Robinson attests to the Loan Documents' authenticity[4] and the Loans' histories, including the Assignments. Robinson avers that the Loans matured on the respective Maturity Dates, that Borrowers failed to make the payments due at maturity, that the Medallions, along with others, were publicly auctioned in New York County on March 14, 2018, and that plaintiff purchased them through credit bids of $230,000 per medallion. Finally, Robinson attests to the amounts outstanding on the Loans after crediting Borrowers with the auction "proceeds."

[4] Robinson avers that the original RCC Note cannot be located and attests to the accuracy of the copy submitted in the RCC Action (*see* RCC Action, Dkt. 5 at 2-3 [affidavit of lost note]). RCC Defendants do not contest the enforceability of the RCC Note based on this substitution.

On reply, plaintiff submitted affidavits from two of plaintiff's "Special Assets" employees: Tarik Hussain and Victoria Brown (RCC Action, Dkt. 30 [Hussain Affidavit]; GNK Action, Dkt. 20 [Brown Affidavit, with Hussain Affidavit, Reply Affidavits]) attaching records computing the amounts owed under the Loans (applying a 9% post-maturity interest rate) and documentary evidence that defendants and the public were notified of the March Auction. [5] The notices disclosed plaintiff's reservation of rights to bid a portion of its claims against Borrowers without tendering the payment required of other bidders.

On March 19, 2019, the court sua sponte granted leave to defendants in both actions to file surreply papers within 10 days in response to plaintiff's reply papers (RCC Action, Dkt. 39; GNK Action, Dkt. 25). On surreply, GNK Defendants took no issue with the adequacy of the notice of the sale (*see* GNK Action, Dkt. 26 [Surreply Br.] at 7). RCC Defendants submitted no surreply.

II. Discussion

A. Legal Standards

"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 containing "an unconditional promise to pay a sum certain over a stated period of time" is eligible for CPLR 3213 (*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

[5] Evidence of publication includes an advertisement reportedly published in the New York Post on March 2, 2018 and March 9, 2018 (NY Post Ad) and a notice of public auction sale for the March Auction, which was reportedly faxed to TLC-registered brokers and agents. Letters to defendants dated February 21, 2018 attached the Notice of Public Auction and a draft of terms for the auction.

Dept 2016]). Eligibility for CPLR 3213 treatment is not defeated by a grant of security for the obligations (*see E. New York Sav. Bank v Baccaray*, 214 AD2d 601, 602 [2d Dept 1995]; *N. Fork Bank & Tr. Co. v Cardiff Rose Enterprises, Inc.*, 104 AD2d 932, 933 [2d Dept 1984]).

"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 enforce a guaranty, 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]). Moreover, it is sufficient to "submit the instrument sued upon along with [an] affidavit of nonpayment" (*European Am. Bank & Tr. Co. v Schirripa*, 108 AD2d 684, 684 [1st Dept 1985]; *see generally* CPLR 3212[b] ["A motion for summary judgment shall be supported by affidavit ... by a person having knowledge of the facts"]). Failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). On a CPLR 3213 motion, however, the court may permit plaintiff to correct omissions in response to defendant's arguments so long as defendant has an opportunity to address the merits of the supplementation (*Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013]).

Once plaintiff establishes its prima facie entitlement to summary judgment in lieu of complaint, the burden shifts to defendant to establish "the existence of a triable issue with respect to a bona fide defense" (*Zyskind*, 101 AD3d at 551). Defendant must submit evidentiary proof in admissible form, such as an affidavit by a person having personal knowledge, or else demonstrate an acceptable excuse (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to contradict facts is an admission (*Costello Assocs., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st

Dept 1984], *appeal dismissed*, 62 NY2d 942 [1984]). Evidence must be examined in the light most favorable to the motion's opponent (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). Indeed, summary judgment cannot be defeated by the "shadowy semblance of an issue" (*Jeffcoat v Andrade*, 205 AD2d 374, 375 [1st Dept 1994]).

B. Liability Under the Loan Documents

By way of the Notes, the Guarantees and the affidavits attesting to defendants' failure to fully repay the obligations thereunder, plaintiff established its prima facie entitlement to summary judgment in lieu of complaint against defendants on the issue of liability (*Zyskind*, 101 AD3d at 551; *Navarro*, 25 NY3d at 492). The affidavits of nonpayment are sufficient (*see Schirripa*, 108 AD2d at 684; *see also German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408 [1st Dept 2013], *lv denied*, 21 NY3d 862; *Nordea Bank Finland PLC v Holten*, 84 AD3d 589, 590 [1st Dept 2011]; *Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560, 560 [1st Dept 2012]; *Bank of Am., N.A. v Solow*, 59 AD3d 304, 304 [1st Dept 2009]). No controverting evidence even suggests that the Loans were paid in full or that the matter requires discovery (*see* CPLR 3212[f]; *Bailey v New York City Transit Auth.*, 270 AD2d 156, 157 [1st Dept 2000] ["a claimed need for discovery" requires "some evidentiary basis … to suggest that discovery may lead to relevant evidence"]).

The Loans were not, as RCC Defendants argue, fully satisfied by plaintiff's retention of the Medallions. Uncontroverted evidence reflects a public sale of the Medallions at which plaintiff ***purchased*** the Medallions, as permitted by the Security Agreements. Defendants submit no evidence to the contrary. Indeed, an election to fully satisfy the loans by retaining the Medallions

would have obviated the need for the auction unless defendants had ***insisted*** on one (*see* Security Agreements ¶ 7).

Taking a different approach, GNK Defendants argue that plaintiff fraudulently misrepresented the availability of refinancing during a fall 2017 meeting, or else that plaintiff should be equitably estopped from enforcing the GNK Loan due to plaintiff's failure to refinance as allegedly promised. GNK Defendants, however, identify no acts they took in reliance on the alleged misrepresentations or promises, other than continued payments on the Loans, which they were already contractually required to fully repay (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [fraud requires "justifiable reliance" and damages]; *New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004] [estoppel requires injury caused by reasonable reliance]; *NY State Urban Dev. Corp. v Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 770-771 [2d Dept 1983] [one "cannot claim to have been defrauded into doing what it already was legally bound to do"]). Moreover, reliance on alleged promises to modify the Loans—which, under the Security Agreements, required a signed writing—was not justifiable (*see Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498-499 [1st Dept 2011] ["a party … 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"]; *see also Medallion Bank v Butwin Transit Inc.*, 2017 NY Slip Op 30877(U), at 3 [Sup Ct, NY County, Apr 27, 2017] ["express language in the loan documents declaring no modification or waiver of their terms without a writing negates the element of justifiable reliance"]).

Next, GNK Defendants assert that plaintiff wrongfully partnered with Uber Technologies, Inc. (Uber)—an app-based, "e-hail" competitor to New York City taxicabs that is not subject to the same regulatory hurdles as street-hail vehicles for-hire—to promote Uber's services and the Capital One Quicksilver credit card. GNK Defendants argue that this partnership "unjustifiably

impaired" the collateral under UCC 3-606[6] or otherwise estopped plaintiff from enforcing the Loan Documents but cite no authority supporting the idea that plaintiff or its affiliates were forbidden to compete with Borrowers in the market while holding or enforcing the Loan Documents. Defendants present no evidence that plaintiff engaged in "bad faith, fraud, or oppressive or unconscionable conduct" (*see, e.g.*, *192 Sheridan Corp. v O'Brien*, 252 AD2d 934, 936 [3d Dept 1998]) or brought about a "condition precedent" to accelerate the Loans (*see, e.g.*, *Canterbury Realty and Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 [3d Dept 1988]). To the contrary, the Loans automatically matured by their terms in 2016, and defendants failed to pay the outstanding balances.

On surreply, GNK Defendants argue that plaintiff orally extended the GNK Loan and that the post-maturity payments were made in accordance with the purported refinancing. But these payments did not "unequivocally refer" to a modification (*see Rose v Spa Realty Assocs.*, 42 NY2d 338, 345 [1977]) because—notwithstanding their insufficiency and untimeliness—they were also consistent with the obligation to repay the loan upon maturity. Moreover, the Security Agreements bar modification of the Loans without a signed writing (*see Jordan Panel Sys., Corp. v Turner Constr. Co.*, 45 AD3d 165, 169-170 [1st Dept 2007] ["the 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"]).[7]

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[6] Notably, an impairment defense is unavailable to a guarantor—much less an unconditional one—where plaintiff had no obligation to resort to the collateral (*see European Am. Bank v Kahn*, 175 AD2d 704, 707 [1st Dept 1991] [UCC § 3–606 has no application to guarantee where lender "had no obligation to resort to the collateral at all"]).

[7] GNK Defendants argue further that they have various counterclaims and defenses, but unsubstantiated and conclusory allegations cannot defeat plaintiff's motion (*see Zuckerman*, 49 NY2d at 562). In any event, the lender-borrower relationship did not give rise to a fiduciary or confidential relationship as required for negligent misrepresentation (*see River Glen Assocs., Ltd. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [1st Dept 2002]) or breach of fiduciary duty.

Defendants' remaining arguments, as to commercial reasonability of the sale of the Medallions and amounts due under the Loans, speak solely to damages and are addressed below. In any event, these arguments would not preclude summary judgment on liability (*see Gen. Trading Co. v A & D Food Corp.*, 292 AD2d 266, 267 [1st Dept 2002]; *M & T Bank v Sailor*, 131 AD3d 1017, 1018-1019 [2d Dept 2015]; *Commerce Commercial Leasing, LLC v PIO Enterprises, Inc.*, 78 AD3d 1105, 1106-1107 [2d Dept 2010]).

C. *Damages for Breach of the Loan Documents*

As to plaintiff's entitlement to summary judgment on damages, defendants failed to establish a need for discovery on the issue of payments (*see* CPLR 3212[f]; *Bailey*, 270 AD2d at 157). However, as to the commercial reasonableness of the March Sale, in an action for a deficiency judgment, where collateral has been sold in partial satisfaction of a debt, plaintiff bears the burden of demonstrating that the sale of collateral was commercially reasonable after defendant raises the issue (*see M & T Bank*, 131 AD3d at 1018-1019; UCC 9-626[a][2]). Defendants successfully raise the issue of commercial reasonableness by pointing to plaintiff's unexplained decision to reduce the reserve and/or credit bid pricing of the Medallions between the December Auction ($262,500) and the March Auction ($230,000).[8]

UCC 9-610(b) states that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable"; moreover, UCC 9-602 prevents waiver of that rule (*see Weinsten v Fleet Factors Corp.*, 210 AD2d 74, 74 [1st Dept

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GNK Defendants also do not identify a breach by plaintiff of any express or implied term of the Loan Documents—which did not include a noncompete clause or an agreement to refinance.

[8] Defendants also argue that plaintiff needlessly delayed the sale of the collateral for over two years. However, Lender was permitted to retain the medallions "until … Lender, ***in its reasonable judgment***, believes that an advantageous price can be obtained" and "***absent gross negligence***, the Lender shall not be liable to the Borrower for any loss in the value … by reason of any such retention" (Security Agreements ¶ 7 [emphasis added]). Defendant has not demonstrated an issue of fact as to gross negligence.

1994]). Paragraph seven of the Security Agreements state that "Any sale conducted upon the foregoing terms or by any other method of sale (if conducted in conformity with practices of any banks disposing of similar security) shall be deemed commercially reasonable."

Plaintiff argues that it conducted the March Auction "upon the foregoing terms" of the Security Agreements, rendering the medallion sales "commercially reasonable." While parties are free to set by agreement the standards to be used for measuring whether collateral was disposed of in a commercially reasonable manner, such standards must not be "manifestly unreasonable" (*Leonia Bank PLC v Kouri*, 286 AD2d 654, 655 [1st Dept 2001]; *see* UCC 9-603[a]). The Security Agreements, however, lack ***any*** constraints upon the method, manner, time or place of a "public sale" of collateral (*see* Security Agreements ¶ 7) and appear to bless ***any*** purported "public sale" as commercially reasonable ***regardless*** of the manner in which it was conducted (*see, e.g.*, RCC Security Agreement at 8-9 ¶ 7 ["the Lender shall have the right … to sell, assign and deliver the Collateral at public or private sale, for cash, on credit or future delivery, with or without advertisement of the time, place or terms of sale and in connection therewith to grant options and to use the services of a broker …. At any sale the Lender, or its designee, may purchase the Collateral"]; *accord* GNK Security Agreement at 7-8 ¶ 7]).[9] Therefore, the commercial reasonableness of the March Sale must be measured under UCC 9-627(b), which states:

> A disposition of collateral is made in a commercially reasonable manner if the disposition is made
> (1) in the usual manner on any recognized market;
> (2) at the price current in any recognized market at the time of the disposition; or
> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

[9] In any event, when a contract confers discretion on one party, that party is still bound by the implied covenant of good faith and fair dealing in exercising that discretion (*see Dalton v. Educ. Testing Serv.*, 87 NY2d 384, 389-390 [1995]).

While plaintiff's reply papers describe the ***notice*** given of the March Auction, plaintiff provides no detail on how its credit bid procedure was implemented and thereby fails to meet its burden to establish commercial reasonableness of that procedure. Moreover, plaintiff cannot—as it attempted on its motion—rely on UCC 9-627(b)(1), because a one-off public auction is not a "recognized market" (*see Merchants Bank of New York v Gold Lane Corp.*, 28 AD3d 266, 269 [1st Dept 2006] [to be a "recognized market" requires "standardized price quotations" for "essentially fungible" property (citing UCC 9-627, Comment 4)]). In the end, plaintiff did not meet its prima facie evidentiary burden of establishing commercial reasonableness here. Thus, the sufficiency of defendants' opposition is inapposite on the issue.

Accordingly, the special referee shall, upon inquest, report on the commercial reasonableness of the March Sale, the amounts owed on the Notes and plaintiff's reasonable attorneys' fees. In calculating the amounts owed on the Notes, if the referee finds that the March Sale was not commercially reasonable, the referee shall report on what proceeds plaintiff would have realized had it conducted a commercially reasonable sale and shall credit defendants with the greater of (A) $230,000 per Medallion or (B) the amount of proceeds that would have been realized at a commercially reasonable sale (*see* UCC 9-626[a][3]). Accordingly, it is

ORDERED in the RCC Action that the motion of plaintiff Capital One Equipment Finance Corp. for summary judgment in lieu of complaint against defendants Rami Cab Corp. and Shimon Milul is granted as to liability; and it is further

ORDERED in the GNK Action that the motion of plaintiff Capital One Equipment Finance Corp. for summary judgment in lieu of complaint against defendants Gee-Nee-K Hacking Corp., Alexander Lempert and Svetlana Sudit is granted as to liability; and it is further

ORDERED in both actions that the issue of damages, including reasonable attorneys' fees, is referred to a Special Referee to hear and report; and it is hereby

ORDERED in both actions that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet,[10] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place these matters 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 in both actions that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in section J (2) of the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (available at http://www.nycourts.gov/courts/1jd/supctmanh/Efil-protocol.pdf); and it is further

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

Dated: October 4, 2019

ENTER:

Jennifer G. Schecter, J.S.C.

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