Medallion Bank v Our Cab Corp.
2020 NY Slip Op 31418(U)
April 23, 2020
Supreme Court, New York County
Docket Number: 653374/2019
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MEDALLION BANK,

Plaintiff,

- v -

OUR CAB CORP., DAVID BIELSKI,

Defendants.

INDEX NO. 653374/2019

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-8, 11-24 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Medallion Bank (Lender) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants Our Cab Corp. (Borrower) and David Bielski (Guarantor). Defendants oppose. The motion is granted.

I. Factual Background and Procedural History [1]

This action arises from an April 2015 loan made by Lender, a Utah bank, to Borrower, a New York corporation. The $1.2 million loan was secured by Borrower's two New York City taxi medallions.[2] In connection therewith, Borrower executed a promissory note to the order of Lender, dated April 16, 2015, with an original maturity date of April 16, 2017 (Dkt. 5 [Note]). Guarantor, who was Borrower's president and sole stockholder, personally guaranteed payment and performance on the Note pursuant to a guaranty dated on the same day (Dkt. 7 at 1-5 [Original Guaranty]). Two years later, the parties entered into an agreement dated April 26, 2017 to modify the loan (Dkt. 6 [Modification Agreement]), and Guarantor executed an Amended and Restated Guaranty dated the

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

[2] Guarantor attests that the April 2015 loan refinanced an earlier purchase price loan for the two medallions, which were bought years earlier at a far lower cost (Dkt. 19 [Guarantor Aff.] ¶ 9).

same day, personally guaranteeing Borrower's obligations on the Note as modified (Dkt. 3 at 7-11 [Guaranty (with Note and Modification Agreement, Loan Documents)]). The Modification Agreement acknowledged, as of April 16, 2019, an outstanding principal balance of $1,145,591.66, plus $2,545.75 in accrued interest, and required Borrower to make monthly payments of $4,548.29, including 2.5% per annum "Current Interest" (Dkt. 6 [Modification Agreement] at 2). The unpaid principal balance, plus 2.5% per annum "Deferred Interest," along with any accrued and unpaid interest, was to become due and payable "on the earlier of the New Maturity Date [of April 16, 2019] or at such time that the Note is paid off" (*id.* at 2).

By express terms of the Note (Dkt. 5 at 3) and Guaranty (Dkt. 7 at 10), New York law governs interpretation of the Loan Documents. Payments on the Note were to be "applied first to any outstanding fees, charges or expenses, then to accrued interest and last to the reduction of principal" (Dkt. 5 [Note] at 2). Following the April 16, 2015 maturity date, Borrower was obligated to "pay interest to the Lender, on demand, on the entire principal amount then outstanding … at the highest rate permitted by law until the principal is paid in full" (*id.*). Upon Borrower's failure to make any payment when due, the Note gave Lender "the right and option to pursue its remedies with respect to this Note or to enforce the provisions of the [contemporaneous] Security Agreement or such other instruments, or any combination thereof, and either simultaneously or in such order as the [Lender] shall deem in its best interest" (*id.* at 3).

The Note specifies a late charge of 5% for payments overdue by more than ten days (*id.* at 2). The Note further provides that "[i]n the event that an automatic debit is returned by the borrowers bank for any reason whatsoever, the account will be charged a $50.00 fee" (*id.* at 3). Finally, under the Note, Borrower agreed "to pay all costs of collection, including reasonable attorneys' fees and disbursements, in case the unpaid principal balance of this Note, or any payment of principal and/or interest thereon, is not paid when due" (*id.* at 2).

Under the Modification Agreement, Borrower "ratified and confirmed" the terms of the Note and agreed that "all sums outstanding under the Note are due and owing without defense, offset or counterclaim of any kind of nature whatsoever" (Dkt. 6 at 3). The agreement further stated that "all payments that are or may become due and payable under the Note on or before April 16, 2017 shall be due and payable in accordance with the terms of the Note, without giving effect to the modification to the Note herein" (*id.*). Finally, it stated that "[t]his Agreement may not be modified or terminated except by a writing signed by the parties hereto" (*id.*).

The Guaranty designates Guarantor as "primary obligor and not merely as a surety" who "irrevocably and unconditionally guarantees to the Lender payment when due … of any and all liabilities of the Borrower to the Lender," including those under the Note, "together with all interest thereon and all attorneys' fees, costs and expenses of collection" (Dkt. 7 at 7). The Guaranty provides that, if the Borrower defaults, Lender may make Borrower's liabilities immediately due from and payable by Guarantor and enforceable by Lender against Guarantor (*id.* at 8-9). Lender is also entitled to attorneys' fees to enforce the Guaranty (*id.* at 9).

The Guaranty waives various notices and defenses, counterclaims and set-off (*id.* at 7, 9), and provides that "[n]o invalidity, irregularity or unenforceability of all or any part of the liabilities hereby guaranteed or of any security there for 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" (*id.* at 7). The Guaranty also states as follows:

> No delay on the part of the Lender in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof. No waiver of any of its rights hereunder, and no modification or amendment of this guaranty, shall be deemed to be made by the Lender unless the same shall be in writing, duly signed on behalf of the Lender … (*id.* at 9).

Lender commenced this action on June 10, 2019 by motion for summary judgment in lieu of complaint.[3] With its moving papers, Lender submitted the Loan Documents, a demand letter that was reportedly mailed to defendants' New York, Florida and Pennsylvania addresses on or about April 30, 2019 (Dkt. 11), a loan payment history record dated as of April 25, 2019 (Dkt. 12) and an affidavit from Thomas Munson, an assistant treasurer of Lender (Dkt. 4 [Munson Aff.]). Based in part on corporate documents, Munson attests to the loan payment history and to the Loan Documents' authenticity, and attests that defendants failed to repay the outstanding principal and interest due and payable under the Note as modified by the Modification Agreement. According to Munson, a total of $1,161,754.20 remained due and outstanding as of April 25, 2019, consisting of: (1) $1,100,981.38 in unpaid principal; (2) $2,140.79 in unpaid interest; (3) $909.64 in unpaid late fees; (4) $57,597.39 in deferred interest[4]; and (5) $125 in bounced payment fees. Finally, $76.46 per diem interest[5] continues to accrue from and after April 25, 2019.

In opposition, defendants submitted an affidavit of Guarantor (Dkt. 19), who attests that Lender made the loan in April 2015 without any investigation into his credit status or assets, knew that defendants had no ability to make the balloon payment—indeed, the parties expected to, and did, refinance the loan on the April 2017 maturity date—and relied solely on the value of the two medallions that were used as loan collateral (¶¶ 3, 7, 9). He explains that the advent of Uber and other e-hail taxi services—and New York City's failure to sufficiently regulate them—rendered the New York City medallion business unprofitable, resulting in lower monthly fees earned through operation of taxicabs using Borrower's medallions (¶ 3) and bringing the value of the medallions down to

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[3] The Loan Documents and original Notice of Motion set forth a Florida address for Guarantor. On July 25, 2019, after serving Guarantor at his Pennsylvania address (Dkt. 14 [affidavit of service]), plaintiff filed an amended notice of motion.

[4] Reflecting 724 days of 2.5% per annum (360-day year) interest on the prior $1,145,591.66 principal balance. (730 days elapsed between April 16, 2017 and April 16, 2019.)

[5] Reflecting 2.5% per annum (360-day year) on the $1,100,981.38 principal balance.

$110,000 from their zenith of at least $1 million (¶¶ 9-12). Guarantor further attests that Borrower "paid all the monthly payments even going past the due date which plaintiff accepted" (¶ 3), that there was no "notice whatsoever that there [w]as a default," that "[t]he schedule of payments submitted by plaintiff shows timely payments being made" and that "principal was [inexplicably] not reduced as payments were made after the balloon date" (¶ 6). He attests that he never received the notice of default sent to his former address (¶ 7). Guarantor believes that Lender's acceptance of payments after the maturity date was an oral modification of the loan terms (¶ 8) and that the parties "knew the loan would never be paid back" (¶ 9). Finally, Guarantor asserts that "deflation of the value of the medallions and the loss of income generated by the medallions is a risk that Plaintiff took" (¶ 13) and that Lender should, accordingly, "be relegated to accepting the value of the medallions in satisfaction of their claim" (¶ 7).

On reply, plaintiff submitted another affidavit from Munson (Dkt. 21), attaching a loan payment history record dated as of October 2, 2019 (Dkt. 22), reflecting no additional payments on the loan.

II. Discussion

A. Legal Standards

"When an action is based upon an instrument for the payment of money only … 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]). Any 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]), such as a promissory note (*see Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]) or an unconditional guaranty (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]).

"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*, 101 AD3d at 551). 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 of entitlement to summary judgment requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

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; *see SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). 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 (*John William Costello Assoc., Inc. v Standard 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 and Damages Under the Loan Documents

By way of the Loan Documents, the loan payment history and Munson's affidavit attesting to defendants' failure to fully repay the obligations thereunder, Lender established its prima facie entitlement to summary judgment in lieu of complaint against defendants (*Zyskind*, 101 AD3d at 551; *Navarro*, 25 NY3d at 492; *Bank Leumi Tr. Co. of New York v Rattet & Liebman*, 182 AD2d 541, 542 [1st Dept 1992]). Munson's affidavit of nonpayment is sufficient to carry plaintiff's burden on the motion (*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; *Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560, 560 [1st Dept 2012]; *Nordea Bank Finland PLC v Holten*, 84 AD3d 589, 590 [1st Dept 2011]; *Bank of Am., N.A. v Solow*, 59 AD3d 304, 304 [1st Dept 2009]). In opposition, defendants unsuccessfully argue that the as-written loan terms were unreasonable and unintended; that Lender failed to take required action; that defendants made post-maturity payments; that the loan was orally modified; and that Lender states the amount due incorrectly.

That the Loan Documents were unreasonable or failed to reflect some unwritten understanding of the parties is not a defense to their enforcement (*see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 [2002] ["if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"]; *Seifert, Hirshorn & Packman, Inc. v Ins. Co. of N. Am.*, 36 AD2d 506, 508 [1st Dept 1971] ["If the parties to a contract adopt a provision which contravenes no principle of public policy and is not ambiguous, the courts have no right to relieve one of them from disadvantageous terms by a process of interpretation"]; *see also Pimpinelo v Swift and Co., Inc.,* 253 NY 159, 162-163 [1930] ["Ordinarily, the signer of a deed or other instrument … is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material"]). The Note and Modification Agreement

unambiguously fixed the maturity date, the monthly payment amounts and balloon payment terms. Moreover, Guarantor's subjective belief that his liability was limited is fundamentally incompatible with his execution of an unconditional guaranty on two occasions.

Nor can a defense be found on any failure by Lender to send a notice of default to Borrower or Guarantor or to foreclose on the collateral, because the Loan Documents did not require those things. The record shows that, upon maturity, the loan was not paid, and Lender filed suit within two months thereafter. Lender was not obliged to resort to the collateral; indeed, the Note gave Lender "the right and option" to recover under the Note and against the collateral in whatever order Lender "shall deem in its best interest" (Dkt. 5 [Note] at 3). The unconditional Guaranty, moreover, simply required Borrower's default on its payment obligations (Dkt. 7 [Guaranty] at 8-9).

Summary judgment is not prevented by Guarantor's vague and unsubstantiated testimony of unspecified post-maturity payments of which Guarantor never attests to having first-hand knowledge (*see S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974]).[6] It is undisputed that the balloon payment was not made. And the court cannot consider evidence that is not before it: Guarantor does not attest to amounts or dates of the purported payments, much less propound his own calculation of amounts due under the loans (*see John William Costello Associates*, 99 AD2d at 229 ["facts appearing in the movant's papers, which the opposing party does not controvert, may be deemed to be admitted"]; *Mayer v McBrunigan Const. Corp.*, 105 AD2d 774, 774 [2d Dept 1984] [mere conclusory affidavits are insufficient]). Thus, defendants fail to raise an issue of triable fact as to the default or amounts due.

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[6] This testimony includes: "After the loan was made Our Cab Corp. paid all the monthly payments even going past the due date which plaintiff accepted" (Dkt. 19 ¶ 3); "all the payments that were remitted were accepted by Medallion without objection or notice that they were insufficient, or any notice whatsoever that there [w]as a default" (*id.* ¶ 6); "No explanation is given for the calculation of payments, or why principal was not being reduced as payments were made after the balloon date" (*id.*); "they accepted payments after the balloon payment day passed" (*id.* ¶ 8).

Defendants' conclusory assertions that they received oral assurances of an extension to the loan lack the necessary evidentiary details—e.g., when, where and by whom, or the substance of the conversations—to avoid summary judgment (*see Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 94 [1st Dept 2009], quoting *Apache–Beals Corp. v. International Adjusters, Ltd.,* 59 AD2d 1032, 1033 [4th Dept 1977]). The Loan Documents, moreover, prohibited oral modification (Dkt. 6 [Modification Agreement] at 3 ["Agreement may not be modified or terminated except by a writing signed"]; Dkt. 7 [Guaranty] at 9 ["no modification or amendment of this guaranty, shall be deemed to be made by the Lender unless the same shall be in writing, duly signed"]; *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"]). Defendants give no evidence of their own performance that is "unequivocally referable" to an oral agreement to modify, as would be required to enforce such an agreement (*see Rose v Spa Realty Assocs.*, 42 NY2d 338, 345 [1977]; *Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013]).[7] Nor can promissory estoppel be found in the absence of detrimental reliance on a promise (*see Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 [1st Dept 2015]).

No controverting evidence suggests that any 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"]). As defendants fail to demonstrate a triable issue of material fact, Lender is entitled to

[7] The cases cited by defendants do not support their position. In *Rose*, the court held that a partial performance of an oral modification was "unequivocally referable" to the modification because it was not "compatible with any option in the written agreement" (42 NY2d at 343-345). In *Calica v Reisman, Peirez & Reisman, LLP* (296 AD2d 367, 368-369 [2d Dept 2002]), an attorney's assistance of his former firm was "unequivocally referable" to an oral modification of a contract otherwise limiting his pay. Finally, *Marine Midland Bank, N.A. v Quality Exterior Corp.* (92 AD2d 662, 663 [3d Dept 1983]) did not involve a mere partial performance, but instead an "executed oral modification"—that is, one that was "acted upon to completion" (*Rose*, 42 NY2d at 343).

entry of summary judgment against defendants for (1) $1,100,981.38 in unpaid principal; (2) $2,140.79 in unpaid interest; (3) $909.64 in unpaid late fees; (4) $57,597.39 in deferred interest; (5) $125 in bounced payment fees; (6) $76.46 per diem interest from and after April 25, 2019 and (7) reasonable attorneys' fees. Accordingly, it is

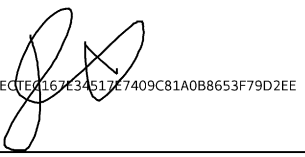
ORDERED the plaintiff Medallion Bank's motion for summary judgment in lieu of complaint against defendants Our Cab Corp. and David Bielski is granted; and it is further

ORDERED that within 14 days of resumption of e-filing in non-essential matters on NYSCEF, plaintiff shall e-file a letter to the court not to exceed five pages setting forth its claimed attorneys' fees, explaining why such fees are reasonable and attaching documentary proof thereof and a proposed order directing the Clerk to enter judgment, and defendants may e-file a five page letter in opposition within 14 days of plaintiff e-filing its submission; and it is further

ORDERED that if plaintiff fails to timely e-file its attorneys' fees letter, plaintiff shall be deemed to have waived its claims for attorneys' fees; and it is further

ORDERED that upon resumption of e-filing in non-essential matters on NYSCEF, plaintiff may expressly waive attorneys' fees and seek entry of judgment in accordance with this decision and order without further proceedings by e-filed letter to the court that attaches a proposed order directing the Clerk to enter judgment (in accordance with Part rules the letter, proposed order and e-filing confirmation shall be emailed to ekimmel@nycourts.gov); and it is further

ORDERED that within 10 days of resumption of e-filing in non-essential matters on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendants by overnight mail.



4/23/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

653374/2019 MEDALLION BANK vs. OUR CAB CORP.
Motion No. 001