27 W. 72nd St. Note Buyer LLC v Terzi
2020 NY Slip Op 31431(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 654084/2019
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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27 WEST 72ND STREET NOTE BUYER LLC,

Plaintiff,

- v -

JACK TERZI,

Defendant.

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INDEX NO. 654084/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION & ORDER ON MOTION AND CROSS MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-6,9-24 were read on this motion for SUM JUDGT IN LIEU OF COMPLAINT & X MOT .

Plaintiff 27 West 72nd Street Note Buyer LLC moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint against defendant Jack Terzi (Guarantor) in the amount of $1 million, plus attorneys' fees. Guarantor opposes and cross-moves for dismissal pursuant to CPLR 3211(a)(4) and RPAPL 1301 or for a stay of this litigation pursuant to CPLR 2201 and 3211(a)(4). Plaintiff's motion is granted and Guarantor's cross-motion is denied.

I. Background [1]

This is an action to enforce a $1 million limited guaranty executed by Guarantor in connection with a $7 million loan (Loan) by Signature Bank (Lender) to JTRE W72nd Street LLC (Borrower), an LLC affiliated with Guarantor. The Loan was secured by, among other things, a mortgage (Mortgage) on Unit Commercial A located at 27/33 West 72nd Street and 22/26 West 73rd Street in Manhattan (Unit). On March 27, 2015, Borrower executed and delivered to Lender

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

a mortgage note evidencing the Loan (Dkt. 3 [Note]). Guarantor executed a limited guaranty of repayment of the first $1 million of outstanding principal on the Loan until Lender verifies that Borrower attained certain financial conditions (Dkt. 4 [Limited Guaranty]). An allonge signed by a representative of Lender and dated July 19, 2017 endorsed the Note to the order of plaintiff (Dkt. 3 at 9 [Allonge]). The Note bore an April 10, 2018 maturity date.[2]

Before bringing this action, plaintiff commenced a separate action on August 17, 2017 in Supreme Court, New York County, bearing index number 850183/2017 (Prior Action), against Borrower and Guarantor, among others, seeking foreclosure on the Mortgage (Prior Action, Dkt. 1 [Prior Action Complaint]).[3] The suit was based on Lender's notices of default and acceleration because Borrower failed to maintain a minimum balance in a specific bank account as required by the terms of the Mortgage. The Prior Action named Guarantor as a defendant for purposes of assessing and collecting any deficiency in proceeds following the contemplated foreclosure sale (Prior Action Complaint ¶ 21).

In the Prior Action, Borrower and Guarantor answered on March 7, 2018, and asserted claims against plaintiff and its principal, Michael Shah, for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) tortious interference with contract (Prior Action, Dkt. 38). The answer alleged a wrongful scheme to manufacture a default so that

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[2] The Note granted Borrower the option of extending the maturity date for one additional five-year term, subject to certain preconditions. Guarantor does not assert that option was exercised or that the preconditions were satisfied.

[3] Guarantor also mentions three other actions in New York County with similar facts related to a different property but does not use them to buttress his arguments for dismissal or stay. In *31 East 28th Street Note Buyer LLC v Terzi* (Index No. 654085/2019 [Sup Ct NY County] [Dkt. 29-31]), summary judgment was recently granted to plaintiff. The other two actions are *31 East 28th Street Note Buyer LLC v JTRE Park 28 LLC*, Index No. 850193/2017 (Sup Ct NY County) and *31 East 28th Street Note Buyer LLC v JTRE Park 28 LLC*, Index No. 850172/2019 (Sup Ct NY County).

Shah could purchase the Unit at a steep discount. Both sides moved for summary judgment on the foreclosure claim, and plaintiff moved for summary judgment dismissing the counterclaims. Plaintiff moved to appoint a receiver for the Unit.

On May 21, 2019, the court in the Prior Action granted Borrower's and Guarantor's cross-motion, dismissing the complaint and holding that Lender's failure to allot a 30-day cure period voided the claimed default on and acceleration of the Mortgage (Dkt. 19 [May 2019 Order (Prior Action, Dkt. 120)]). The court denied plaintiff's motion for summary judgment and rejected appointing a receiver. [4] The May 2019 Order disposed of the action and did not pass on the Borrower's and Guarantor's claims.

On June 20, 2019, plaintiff filed its notice of appeal in the Prior Action, seeking review of the portion of the May 2019 Order that "denied that portion of Plaintiff's motion for summary judgment seeking dismissal of the counterclaims" (Dkt. 21 [Notice of Appeal]). Plaintiff also moved for clarification that the counterclaims had been dismissed or for leave to reargue the portion of the Prior Order subject to the Notice of Appeal (Motion to Clarify).

On June 24, 2019, plaintiff demanded repayment from Borrower on the basis of the Loan's maturity (Dkt. 5 [demand letter to Borrower]). On July 2, 2019, Plaintiff demanded the $1 million due under the Limited Guaranty from Guarantor (Dkt. 6 [demand letter to Guarantor]).

On July 17, 2019, plaintiff commenced this action, seeking a summary judgment against Guarantor in the amount of $1 million, plus costs, expenses, disbursements and attorneys' fees.

[4] Guarantor's papers assert (Dkt. 17 at 19 n 7; Dkt. 24 at 7) that the original maturity date formed another basis for plaintiff's summary judgment motion in the Prior Action. The pages of the Prior Action record cited do not reflect this (Prior Action, Dkt. 84 at 7 and Dkt. 120 at 6). Regardless, the court in the Prior Action never ruled on the issue.

According to plaintiff, a principal balance of $6,813,370.11 remains on the note, for a total of $10,189,309.00 as of June 10, 2019, plus daily (default) interest accruing at $4,542.25 per day.[5]

On August 26, 2019, Borrower and Guarantor cross-moved in the Prior Action (Cross-Motion) (1) for an order pursuant to CPLR 602(a) consolidating the Prior Action with this one, (2) to compel plaintiff to provide a payoff statement and (3) to amend the answer to add counterclaims for injunctive and declaratory relief ordering plaintiff to provide a proper payoff statement and for malicious prosecution of the Prior Action. The Motion to Clarify and the Cross-Motion remain pending.

The Limited Guaranty states as follows:

> Guarantor hereby ***irrevocably and unconditionally guarantees*** to Lender and its successors and assigns the payment of the Guaranteed Obligations as and when the same shall be due and payable whether by lapse of time, by acceleration of maturity or otherwise. Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor (Dkt. 4 at 2 [emphasis added]).

The Limited Guaranty defines "Guaranteed Obligations" to include, "until the Lender has verified that the DSCR Conditions ... have been attained,[6] the repayment of the first $1,000,000.00 of the outstanding principal amount of the Loan" evidenced by the Note (*id.* at 3). The Limited Guaranty further describes itself as "an ***irrevocable, absolute*** continuing guaranty of payment [with respect to the Guaranteed Obligations]" that "may be enforced by Lender and any subsequent holder of

[5] In the Prior Action, in papers filed August 2019 opposing the Motion to Clarify, Borrower and Guarantor assert a proper payoff amount of $6,979,861.01 (Dkt. 15 at 21), including $6,841,863.19 of Loan principal (Prior Action, Dkt. 138 [payoff amount])

[6] The Limited Guaranty defines DSCR Conditions as when "the Lender has been provided with a copy of a signed lease for the Unit ... with the tenant in occupancy, open for business and paying rent and the Lender has confirmed that the debt service coverage ratio for the Unit is not less than 1.3 to 1.0" (Dkt. 4 at 4).

the Note and shall not be discharged by the assignment or negotiation of all or part of the Note" (*id.* at 4 [emphasis added]).

The Limited Guaranty expressly waives defenses, stating as follows:

> The Guaranteed Obligations and the liabilities and obligations of Guarantor to Lender hereunder, ***shall not be reduced, discharged or released because or by reason of any existing or future offset, claim or defense of Borrower or any other party***, against Lender or against payment of the Guaranteed Obligations, whether such offset, claim or defense arises in connection with the Guaranteed Obligations (or the transactions creating the Guaranteed Obligations) or otherwise (*id.* at 4 [emphasis added]).

The Limited Guaranty further states:

> Guarantor hereby ... agrees that ***Guarantor's obligations under this Guaranty shall not be released, diminished, impaired, reduced or adversely affected by*** any of the following and ***waives any common law equitable statutory or other rights*** (including without limitations rights to notice) which Guarantor might otherwise have as a result of or in connection with … [t]he ***invalidity, illegality or unenforceability of all or any part of the Guaranteed Obligations*** or any document or agreement executed in connection with the Guaranteed Obligations for any reason whatsoever including without limitation the fact that … (v) the ***Borrower has valid defenses (other than payment), claims or offsets (whether at law in equity or by agreement) which render the Guaranteed Obligations wholly or partially uncollectible from Borrower*** … it being agreed that Guarantor shall remain liable hereon regardless of whether Borrower or any other person be found not liable on the Guaranteed Obligations or any part thereof for any reason (*id.* at 6-7 [emphasis added]).

The Limited Guaranty also stated that its obligations were not to be adversely affected by

> [a]ny other action taken or omitted to be taken with respect to the Loan Documents, the Guaranteed Obligations, or the security and collateral therefor, whether or not such action or omission prejudices Guarantor or increases the likelihood that Guarantor will be required to pay the Guaranteed Obligations pursuant to the terms hereof, ***it is the unambiguous and unequivocal intention of Guarantor that Guarantor shall be obligated to pay the Guaranteed Obligations when due*** notwithstanding any occurrence. circumstance, event, action, or omission whatsoever whether contemplated or uncontemplated, and whether or not otherwise or particularly

> described herein, which obligations shall be deemed satisfied only upon the full and final payment and satisfaction of the Guaranteed Obligations (*id.* at 8 [emphasis added]).

Finally, the Limited Guaranty allows for recovery of attorneys' fees:

> In the event that Guarantor should breach or fail to timely perform any provisions of this Guaranty, Guarantor shall … pay Lender all out-of-pocket costs and expenses (including court costs and reasonable attorneys' fees) incurred by Lender in the enforcement hereof ... (*id.* at 5).

In support of its motion, plaintiff submits the Note, the Guaranty, an affidavit from Shah (Dkt. 2) and demand letters dated June 24, 2019 (Dkt. 5 [letter to Borrower]) and July 2, 2019 (Dkt. 6 [letter to Guarantor]). Shah attests, and Guarantor does not dispute, that the unpaid principal balance on the Note exceeds $1 million and that the DSCR Conditions were never attained so as to exclude the Note from the Guarantor's obligations under the Guaranty. Shah also attests that the original April 10, 2018 maturity date was not extended. In opposition, Guarantor submits his proposed amended answer in the Prior Action (Dkt. 14 [Proposed Answer]), which was verified by Guarantor on August 26, 2019. By way of the Proposed Answer, Guarantor attests that, in connection with the Prior Action, Lender and Shah wrongfully manufactured a default on and acceleration of the Mortgage, provided improper and inflated payoff statements and refused to accept a proper payoff.

II. Discussion

The court will address Guarantor's cross-motion for dismissal or a stay of the action before turning to plaintiff's motion for summary judgment in lieu of complaint.

A. Guarantor's Cross-Motion

Guarantor cross-moves for dismissal or a stay of the action under New York Real Property Law (RPAPL) § 1301, CPLR 3211(a)(4) and CPLR 2201. Guarantor asserts that the pendency of

the Prior Action warrants dismissal or a stay of this action. The court disagrees. Neither dismissal nor a stay of this action is appropriate.

RPAPL § 1301(3) "precludes a mortgagee who has elected foreclosure from commencing a separate action on the mortgage debt, without leave of the court" (*Rainbow Venture Assoc., L.P. v Parc Vendome Assoc., Ltd.*, 221 AD2d 164, 164 [1st Dept 1995]; *see* RPAPL § 1301[3] ["While the (foreclosure) action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought"]). However, once a final judgment of dismissal is entered for the foreclosure defendant, the statute no longer applies (*McSorley v Spear*, 13 AD3d 495, 496 [2d Dept 2004]). The statute is to be strictly construed (*see Bank of New York Mellon v Adam P10tch LLC*, 162 AD3d 502, 503 [1st Dept 2018]) and is intended to protect a mortgagor from the hassle of two separate legal actions at the same time over the same debt (*see Cent. Tr. Co. v Dann*, 85 NY2d 767, 772 [1995]). Thus, an inactive foreclosure case that was effectively abandoned is not "pending" for purposes of § 1301(3), even absent a formal discontinuance *(see U.S. Bank N.A. v Chait*, 178 AD3d 448, 448 [1st Dept 2019], citing *Old Republic Nat. Tit. Ins. Co. v Conlin,* 129 AD3d 804, 805 [2d Dept 2015]).[7]

The Prior Action is no longer a "pending" foreclosure action for RPAPL § 1301(3) purposes. Arguably, commencement of this or any action to collect on the Guaranty was precluded between August 17, 2017 and May 20, 2019 while plaintiff sought to foreclose on the Mortgage

[7] Even when a prior foreclosure action is pending at the time of filing, moreover, absent prejudice, the requisite leave of court or discontinuance of the foreclosure action may be obtained later on (*see 21st Mtge. Corp. v Ahmed*, 173 AD3d 951, 952 [2d Dept 2019] [affirming denial of motion to dismiss where leave was granted nunc pro tunc to the filing date]; *Wells Fargo Bank, N.A. v Irizarry*, 142 AD3d 610, 611 [2d Dept 2016] ["failure to comply with RPAPL 1301(3) should have been disregarded as a mere irregularity which did not prejudice a substantial right of any party"]).

securing the Loan (*see Federal Home Loan Mtge. Corp v Sierra*, 226 AD2d 283, 284 [1st Dept 1996]). The May 2019 Order, however, dismissed plaintiff's complaint and marked the Prior Action disposed. Plaintiff failed to seek review of the court's dismissal of the foreclosure claim by the deadline for filing its notice of appeal (June 20, 2019). Thus, Borrower no longer requires shielding from the "expense and annoyance of two independent actions at the same time with reference to the same debt" (*Dann*, 85 NY2d at 772). Indeed, it is Borrower, and not plaintiff, who continues to prosecute claims in the Prior Action. By abandoning its foreclosure claim (*see Chait*, 178 AD3d at 448; *Conlin*, 129 AD3d at 805)—having accepted the dismissal of the foreclosure claim without seeking appeal or reargument of that portion of the May 2019 Order—plaintiff clears the RPAPL § 1301(3) hurdle.

The cases cited by Guarantor for the proposition that the Notice of Appeal, Motion to Clarify and Cross-Motion render the Prior Action "pending" have no bearing on this analysis. The most arguably relevant cases held that rights created by final judgments do not vest until nondiscretionary appeals of the order directing their entry have been exhausted.[8] Here, however, the question is not whether plaintiff can enforce its rights under a favorable judgment but whether the mere pendency of counterclaims may be used to shield against an unconditional, absolute, irrevocable guaranty. Also, the dismissed foreclosure claim is not so "inextricably intertwined" with the Prior Action counterclaims that the appellate court must revive the dismissed foreclosure

[8] In *Peck v Hotchkiss*, 52 How Pr 226, 226 [Sup Ct NY County 1874], the court held that an action for wrongful attachment could not be maintained where the attachment order was not rendered in a final judgment (i.e., while the appeal was pending). In *Matter of Civil Serv. Bar Assn., Local 237, v City of New York*, 99 AD2d 264, 275 (1st Dept 1984), the court noted the parties' ability to settle the litigation while appeal was pending because "there are no vested rights in judgments of courts while they are subject to review." Cases deciding when an action is deemed "terminated" for purposes of the CPLR 205(a) six-month extension of the statute of limitations bear even less relevance (*see Malay v City of Syracuse*, 25 NY3d 323, 328 [2015]).

claim, unasked, to answer the questions raised (*see Castellon v Reinsberg*, 82 AD3d 635, 636 [1st Dept 2011]).[9] Dismissal under RPAPL 1301(3) is thus unwarranted.

Nor is dismissal or stay appropriate under CPLR 3211(a)(4), which vests the court with broad discretion to dismiss a later-filed action on grounds that another action is pending between the same parties arising out of the same subject matter (*see Shah v RBC Capital Markets LLC*, 115 AD3d 444, 444-45 [1st Dept 2014]). "[W]here another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction" (*White Light Productions, Inc. v On the Scene Productions*, Inc., 231 AD2d 90, 93 [1st Dept 1997]). The court may also consider whether plaintiff is merely forum shopping (*see Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005]). While the cases need not set forth identical theories or claims (*see Shah*, 115 AD3d at 444-45), they must seek similar relief (*see White Light Productions*, 231 AD2d at 94) and bear a "substantial … identity of parties" (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]).

While both this action and the Prior Action arise from enforcement of the Loan's terms and involve similar parties, the court is not required to dismiss this action, but has discretion to consider whether dismissal is warranted (*see Whitney v Whitney*, 57 NY2d 731, 732 [1982]). The court may issue—or decline to issue—a stay of this action pursuant to CPLR 3211(a)(4) or CPLR 2201 (*see*

[9] For the proposition that the plaintiff's foreclosure claim might be revived on appeal, Guarantor cites *Esquire Indus., Inc. v East Bay Textiles, Inc.*, 68 AD2d 845 (1st Dept 1979). In *Esquire Industries*, upon reversing the motion court's order compelling arbitration, the Appellate Division, First Department also reversed the motion court's earlier order, while not technically under a perfected appeal, that had stayed the litigation. In unstaying the action, the appellate court relied on the facts that the earlier order (1) remained subject to a separate, albeit non-perfected appeal, (2) was not a final judgment, and (3) had clearly been modified by the later order (68 AD2d at 846). That is not the case here.

Dietz v Linde Gas N. Am., LLC, 178 AD3d 469, 470 [1st Dept 2019]; CPLR 2201 ["the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just"]).

The court declines to stay or dismiss this action under CPLR 3211(a)(4). Because Guarantor waived all defenses raised by its operative or proposed pleadings in the Prior Action, none of them may shield against enforcement of the unconditional Guaranty. There is, accordingly, no risk of inconsistent rulings, nor any compelling reason to tie plaintiff to its previously selected forum after its foreclosure bid was denied and its appeal rights were abandoned, nor any reason to deprive plaintiff of the chance to seek summary relief on grounds arising after the commencement of the prior Action. Judicial economy is not served by a stay or dismissal where, as discussed below, plaintiff is plainly entitled to that relief. Similarly, "[u]pon due consideration of the goals of judicial economy, orderly procedure and the prevention of inequitable results" (*Belopolsky v Renew Data Corp.*, 41 AD3d 322, 322 [1st Dept 2007]), the court will not grant a stay pursuant to CPLR 2201. Guarantor's cross-motion is therefore denied.

B. Plaintiff's Motion

Having concluded that dismissal or stay of the action is not warranted, the court now addresses plaintiff's motion for summary judgment in lieu of complaint.

i. Legal Standard

"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]). "[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms'" (*Weissman v Sinorm Deli,*

Inc., 88 NY2d 437, 444 [1996], quoting *Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 155 [1975]). However, CPLR 3213 is unavailable "[w]here the instrument requires something in addition to defendant's explicit promise to pay a sum of money," thereby requiring "outside proof ... other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*id.*). CPLR 3213 may be thus used to collect on an 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 Dept 2016]). Moreover, a so-called "limited guaranty" with limits on the amount due thereunder remains eligible for CPLR 3213 treatment so long as no additional showing apart from the documents is needed to establish liability (*see Sullivan & Cromwell, LLP v Mark Ross Services Corp.*, 9 Misc 3d 1111(A) at *2 [Sup Ct NY County 2005], citing *Weissman*, 88 NY2d 437).

"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 enough 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]). However, plaintiff may

be allowed to correct omissions in response to defendant's arguments so long as defendant has an opportunity to address the merits of the supplementation (*see Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013]).

Once plaintiff establishes its prima facie entitlement to summary judgment, 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 the 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]).

ii. Plaintiff's Entitlement to Summary Judgment

By way of the Note, the unconditional Guaranty and the affidavit attesting to failure by Borrower and Guarantor to fully repay their obligations, plaintiff established its prima facie entitlement to summary judgment in lieu of complaint against Guarantor (*see Zyskind*, 101 AD3d at 551; *Navarro*, 25 NY3d at 492). No controverting evidence suggests 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"]). Nor has defendant raised a triable issue regarding liability on the Guaranty or damages—i.e., the $1 million balance now due on the Guaranty.

Guarantor unsuccessfully asserts that there are "numerous disputed questions of fact" requiring denial of plaintiff's motion, arguing that plaintiff's conduct nullified the Loan maturity date (an express term of the Note) and that plaintiff is subject to lender liability for bad faith and predatory conduct. Specifically, Guarantor alleges that Lender and Shah wrongfully manufactured a default on and acceleration of the Mortgage, provided improper and inflated payoff statements, refused to accept a proper payoff and maliciously prosecuted the Prior Action. Even if these defenses were viable as to Borrower, they are unavailable to Guarantor, who agreed to waive all defenses except payment.

Guarantor also asserts that because the parties dispute the amount due on the Mortgage in the Prior Action, the amount due under the Limited Guaranty is a disputed issue of fact. The dispute, however, is over whether default interest of 24% per annum should be charged on the Loan, and not whether the principal balance currently exceeds $1 million, which is undisputed. Therefore, plaintiff is entitled to a $1 million judgment against Guarantor. Plaintiff is also entitled to its reasonable attorneys' fees expended in connection with this action, as the Guaranty clearly and unmistakably allows plaintiff to recover them (*see Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]).

Accordingly, it is

ORDERED in the motion of plaintiff for summary judgment in lieu of complaint against defendant is granted and defendant's cross-motion for dismissal is denied; and it is further

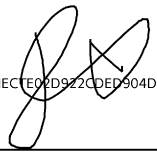
ORDERED that within 14 days of the entry of this order on NYSCEF, plaintiff's counsel shall e-file an affirmation to the court, not exceeding five pages, setting forth its claimed attorneys'

fees, explaining why such fees are reasonable and attaching documentary proof thereof, and defendants may e-file a five page letter in opposition within 14 days of plaintiff e-filing its submission, and the e-filing confirmation for any such submission shall be emailed to ekimmel@nycourts.gov; and it is further

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

ORDERED that 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 attaching a proposed court order directing the Clerk to enter judgment, and the proposed order in Microsoft Word format shall be emailed to ekimmel@nycourts.gov along with the e-filing confirmation; and it is further

ORDERED that within 10 days of entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendant by overnight mail.



5/8/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:
[X] CASE DISPOSED
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