

Borough Park Multifamily LLC v 1337 49 St LLC

2020 NY Slip Op 31554(U)

March 27, 2020

Supreme Court, New York County

Docket Number: 655947/2019

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

BOROUGH PARK MULTIFAMILY LLC,

INDEX No.: 655947/2019

Plaintiff,

MOT. DATE: 12/4/2019

-against-

MOT. SEQ. No.: 001

1337 49 ST LLC and SHIMSHON MANDEL,

**DECISION + ORDER ON
MOTION**

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 12, 13 were read on this motion to/for SUMMARY JUDGMENT IN LIEU OF COMPLAINT

Plaintiff Borough Multifamily LLC (“Borough”) moves unopposed for summary judgment in lieu of complaint pursuant to CPLR § 3213 as against defendants 1337 49 St LLC (the “Borrower”) and Shimshon Mandel (the “Guarantor”) (Pl. Aff. [NYSCEF Doc. No. 3]).

On April 11, 2018, the Borrower executed an Amended, Restated and Consolidated Promissory Note (the “Note”) in the sum of \$1,800,000 (the “Loan”) in favor of Emerald Creek Capital 3, LLC (“Emerald”) (*id.* ¶ 7; Ex. A, Note [NYSCEF Doc. No. 4]). The Guarantor executed, acknowledged, and delivered to Emerald a Guaranty of Payment (the “Guaranty”) dated April 11, 2018 which guaranteed absolutely and unconditionally repayment of sums due under the Loan (Pl. Aff. ¶ 8; Ex. B, Guaranty [NYSCEF Doc. No. 5]). On June 13, 2018, Emerald assigned the Note to ECC FP SPE, LLC (“ECC”) as evidenced by an Allonge indicating ECC as the Note’s holder (the “ECC Allonge”) (Pl. Aff. ¶ 9; Ex. A [ECC Allonge attached]). On April 18, 2019, Borrower and Emerald executed and entered into a First Omnibus Loan Modification and Extension Agreement which modified the terms of the Loan to extend the Note’s April 10, 2019 Maturity Date to July 10, 2019 (the “Extended Maturity Date”) (Pl. Aff. ¶ 10; Ex. C, Loan Modification [NYSCEF Doc. No. 6]). Subsequent to the Loan Modification’s execution, on September 3, 2019, Mark Bahiri, Managing Member of Emerald, duly executed an Affidavit of Indebtedness (the “Bahiri Affidavit”), itemizing amounts shown to be due on the

Loan (Pl. Aff. ¶ 11; Ex. D, Bahiri Aff. [NYSCEF Doc. No. 7]). On September 4, 2019, ECC assigned the Note to plaintiff, evidenced by the BPM Allonge and Endorsement of Promissory Note (Pl. Aff. ¶ 12; Ex. A [BPM Allonge and Endorsement attached]). Section 2 of the Guaranty provides that “Guarantor unconditionally guarantees to [Emerald] (i) the prompt and unconditional payment of the Loan and the interest thereon, whether now or hereafter advanced, as the same shall become due and payable under the Note, whether at stated maturity, by acceleration or otherwise, and any and all sums of money that, at the time, may have become due and payable under the provisions of the Note . . . and (ii) payment in full of any and all expenses that may be paid or incurred by [Emerald] in the collection of all or any portion of the Guarantor’s obligations hereunder or the exercise or enforcement of any one or more of the other rights, powers, privileges, remedies and interests of [Emerald] under the Loan Documents . . .” (Pl. Aff. ¶ 13; Ex. B). Section 3 of the Guaranty provides that “[Emerald] shall have the right to proceed against Guaranty immediately upon any Event of Default . . . without taking any prior action to proceeding to enforce the Loan Documents or any of them or for the liquidation or foreclosure of any security [Emerald] may at any time hold pursuant thereto” (Pl. Aff. ¶ 14; Ex. B). Section 6 provides “Upon the occurrence of any of the following events (each a ‘Guarantor’s Event of Default’): (a) the Guarantor defaults under this Guaranty or any Loan Document or any other agreement with [Emerald] to which the Guarantor is a party . . . then, any or all of the obligations of Guarantor shall, at [Emerald]’s option, become immediately due and payable by the Guarantor, without demand or notice” (Pl. Aff. ¶ 15; Ex. B). Section 19 provides that “this Guaranty shall be binding upon and shall inure to the benefit of [Emerald] and Guarantor and their respective heirs, personal representatives, successors and assigns” (Pl. Aff. ¶ 16; Ex. B).

Plaintiff argues that defendants defaulted by failing to pay the Loan in full on or before the Extended Maturity Date, constituting an Event of Default (Pl. Aff. ¶ 17). In compliance with the Note, Emerald sent a notice of default to defendants advising them of the Event of Default (*id.* ¶ 18; Ex. E, Default Letter). Plaintiff argues defendants owe Borough the \$1,800,000 outstanding principal amount of the Note, plus regular interest at a 9.8% per annum rate from July 1, 2019 through July 10, 2019 in the amount of \$4,900, plus the default interest thereon at a rate of 24% from July 11, 2019 through October 8, 2019 in the amount of \$108,000, late charges in the amount of \$184,021.52, and reasonable attorneys’ fees and expenses of \$9,999.45 minutes a reserve balance of \$8,098.19, with interest continuing to accrue at the daily rate of \$1,200 (Pl.

Aff. ¶ 19–20; Bahari Aff.). In total, plaintiff argues it is entitled to summary judgment against defendants in the total sum of \$2,098,822.78 (Pl. Aff. ¶ 21).

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]). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a *prima facie* case for summary judgment (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 21A AD2d 327 [1st Dept 2000]).

A debtor’s right to extend the date of payment for specified periods of time does not preclude an action based on CPLR § 3213 (*see Stevens v Phlo Corp.*, 288 AD2d 56 [1st Dept 2001]). “Such provision does not require additional performance by plaintiff as a condition precedent to payment, or otherwise make defendant’s promise to pay something other than unconditional” (*id.*). Reference to an indenture to determine acceleration of balance in cases of default similarly do not bar such actions (*see Boland v Indah Kiat Finance (IV) Mauritius Ltd.*, 291 AD2d 342, 342 [1st Dept 2002]).

Here, plaintiff has provided sufficient proof of the Note signed by Emerald and defendant Borrower (Ex. A), proof of Allonges and Endorsements certifying the Note payable to plaintiff Borough (*id.*), proof of the Guaranty of the Note signed by Guarantor (Ex. B), and proof of the current amounts due and relevant interest rates (Ex. D). Defendants have not opposed plaintiff’s motion and plaintiff has provided sufficient proof of service on both defendants. Consequently, plaintiff’s motion is hereby **GRANTED**.

This shall constitute the decision and order of the Court.

3/27/2020
DATE


O. PETER SHERWOOD, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE