

<b>Fisher Dev. Assoc. LLC v Murad</b>
2020 NY Slip Op 31579(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 657654/2019
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

-----X

FISHER DEVELOPMENT ASSOCIATES LLC, and  
TRAMZ LOAN PARTNERS, LLC,  
  
Plaintiffs,  
  
- v -

INDEX NO.	657654/2019
MOTION DATE	
MOTION SEQ. NO.	001

TARRUNUMN MURAD and REHAN MURAD,  
  
Defendants.

**DECISION + ORDER ON MOTION**

-----X

HON. BARRY R. OSTRAGER

Plaintiffs Fisher Development Associates LLC (“Fisher”) and Tramz Loan Partners, LLC (“Tramz”) commenced this action pursuant to CPLR § 3213 for summary judgment in lieu of complaint based on an alleged breach by defendants Tarrunumn Murad and Rehan Murad (together, “the Murads”) of two promissory notes by failing to pay the amounts purportedly due in July 2018. For the reasons stated below, the motion is denied and the action shall proceed as a plenary action.

**Background Facts**

The facts alleged by plaintiffs in support of their application are set forth in the affidavit of Michael D. Boxer, an authorized agent of Tramz, purportedly based on personal knowledge (NYSCEF Doc. No. 2). Boxer states that, beginning in November 2017, the Murads entered into negotiations with RCG Longview Holdings LLC (“RCG”) concerning a potential joint venture. In February 2018, while negotiations were ongoing, Fisher and RCG drafted a Promissory Note, allegedly at the request of the Murads “to assist them in satisfying certain personal financial obligations” (Aff., ¶ 8). That note, dated February 6, 2018, for \$345,300 in principal, was amended various times with a final note issued on June 30, 2018 in the principal amount of

\$649,890.62 naming the Murads as the Makers/Payors and Fisher and RCG as the Payees (“the June 30 Note”) (NYSCEF Doc. No. 3).<sup>1</sup>

As particularly relevant to this motion, the June 30 Note provides in ¶ 2 that the outstanding principal amount and accrued interest shall be payable in full:

on the earlier to occur of (x) the date that certain affiliates of Makers and Payees enter into a written and executed joint venture arrangement relating to the ownership and planned development of an AC by Marriott hotel property located in Jersey City, NJ, if applicable, and (y) July 25, 2018 (the Maturity Date). It is hereby understood and agreed that (i) clause (x) of the forgoing sentence shall not obligate any of the parties hereto, or any of their respective affiliates, in any manner to negotiate and/or enter into such formal joint venture arrangement and (ii) the failure of any of the parties hereto, or any of their respective affiliates, to negotiate and/or enter into such formal joint venture arrangement shall not be deemed to extend the Maturity Date in any manner.

On or about October 31, 2018, the Payees made a written demand for payment, claiming that all sums had become due on the July 25, 2018 Maturity Date because no joint venture agreement ever took effect. Plaintiffs assert the Murads are in breach of the June 30 Note as the sums due remained unpaid when this action was commenced on December 23, 2019.

According to Boxer, the Murads are also in breach of a second Promissory Note made on June 25, 2018 in the principal amount of \$67,187.50 (“the June 25 Note”) (NYSCEF Doc. No. 4). The Maturity Date for the June 25 Note was simply defined as 2:00 p.m. EST on July 10, 2018.<sup>2</sup> On or about October 31, 2018, the Payees made a written demand for payment, claiming that all sums had become due on the July 10, 2018 Maturity Date. Plaintiffs assert the Murads are in breach of the June 25 Note as the sums allegedly due remain unpaid.

---

<sup>1</sup> On or about July 11, 2019, by an Omnibus Assignment dated July 11, 2019, RCG assigned its 50% interest in the June 30 Note to plaintiff Tramz (NYSCEF Doc. No. 5). As a result, Tramz is now a “Payee” with Fisher under the June 30 Note in the place of RCG and is a plaintiff here.

<sup>2</sup> RCG also assigned its interest in the June 25 Note to Tramz in the Omnibus Assignment.

In his Affidavit in Opposition, Tarrunum Murad presents a far more complex picture (NYSCEF Doc. No. 13). He explains that he and co-defendant Rehan Murad together owned a now-bankrupt corporate entity named Statue of Liberty Harbor North Redevelopment Urban Renewal, LLC (“SLHN”), which owned an undeveloped lot in Jersey City, NJ (“the Property”). In 2016 SLHN obtained a land loan in the amount of \$10,750,000.00 from lender Titan Capital ID, LLC (the “Titan Loan”) secured by the Property. The Maturity Date for the Titan Loan, as extended, was February 25, 2018.

Significantly, in 2013, about three years before the Titan Loan was obtained, SLHN sold an interest in the Property to Michael Boxer and Brian Fisher. At or about that same time, SLHN entered a Declaration of Covenants with the municipality of Jersey City regarding the SLHN portion of the Property (NYSCEF Doc. No. 16). The Declaration included a job creation obligation imposed by 24 C.F.R. 570.208(a)(4)(i), which states: “For an activity that creates jobs, the recipient must document that at least 51 percent of the jobs will be held by, or will be available to, low- and moderate-income persons.” The Declaration was executed by Murad on behalf of SLHN with an address c/o Tramz.

Murad attests in his affidavit, and documents with emails, that counsel for SLHN and counsel for Fisher communicated in January 2013 about the job creation obligation (see NYSCEF Doc. Nos. 14 and 15). Therefore, plaintiffs cannot, and do not, reasonably dispute that they were well aware of the municipal requirements relating to the proposed redevelopment of the Property from the very beginning of 2013.

Beginning in or about September 2017, the parties began negotiating a joint venture agreement for the development of the Property as an “AC by Marriott” Hotel. Because of the restrictions on the redevelopment of property imposed by the Jersey City municipality, the negotiations were complex. Murad attests that the parties had a meeting on September 25, 2017

at the offices of Fisher and Boxer. At the meeting, Fisher and Boxer represented that the parties would enter into a Joint Venture Agreement whereby Fisher's company, Fisher Associates, LLC, and Boxer's company, RCG Longview Holdings, LLC, would fund the development of the Property.

Murad further asserts that Fisher and Boxer represented that following the execution of the JV Agreement, the parties would apply for Fisher's company or an affiliate to be designated as the redeveloper of the Property with the Jersey City Redevelopment Agency ("JCRA"). Once the company was so designated by the JCRA, the JV Agreement would be in full force.

According to Murad, Fisher and Boxer represented that once the redevelopment had been completed, SLHN would have the opportunity to purchase the developed project from the joint venture entity. The parties signed an eight-page Letter of Intent dated October 20, 2017 drafted by Fisher, with a closing date to occur in January 2018, about one month before the Titan Loan was scheduled to mature (NYSCEF Doc. No. 17).

Murad claims the parties also agreed that Fisher Associates and RCG would fund part of the interest payments that SLHN owed on the Titan Loan until the final Joint Venture Agreement was executed. According to Murad, Fisher Associates and RCG, as part owners of the Property secured by the Loan, created the Promissory Notes at issue here to fund their portion of the interest payments on the Titan Loan, and they represented that the loans would be converted to equity once the JV Agreement was executed and released from escrow. Murad further claims the Notes were never intended to be a personal debt but instead were intended as a corporate loan to SLHN that would later be converted to equity. The monies were therefore deposited into the SLHN corporate account when received.

In the meantime, Boxer negotiated an extension of the Titan Loan Maturity Date to May 25, 2018, and the parties purportedly executed a JV Agreement on April 30, 2018 to redevelop

the Property that was held in escrow pending the approvals needed from Jersey City authorities. Murad claims that even though the arrangements with the Jersey City municipality related to the job creation obligations were ultimately resolved, and even though plaintiffs were fully aware of the obligation for years and even assisted in the drafting of the Declaration in January 2013, Fisher and Boxer ultimately declined to proceed with the JV Agreement purportedly based on the job creation obligation (see emails at NYSCEF Doc. Nos. 18, 20-22). Plaintiffs then declared a maturity default on the Notes and commenced this suit. The Murads claim they would never have entered into any of the Notes or the JV Agreement with plaintiffs had they known of plaintiffs' fraudulent intent to default the Murads and foreclose on the Property.

Boxer in his Reply Affidavit disputes nearly every point. He insists the Notes were personal loans, not corporate loans, and that there was no intent to convert the Notes to equity. He claims the JV Agreement, while executed and dependent on certain third-party actions, is a "red herring" and irrelevant because the Notes include a fixed Maturity Date irrespective of the joint venture. And, of course, he vigorously denies any misrepresentations or fraud.

### **Discussion**

The law governing motions for summary judgment in lieu of complaint is well-established and acknowledged by both parties in their papers. CPLR § 3213 provides an accelerated procedure to obtain a judgment in an action expressly based upon an "instrument for the payment of money only." A promissory note that clearly and unequivocally provides a date certain when the payments are due, or provides for payments on demand, typically qualifies as an instrument for the payment of money only, and a prima facie case is established by the production of such a note and an affidavit on personal knowledge attesting to nonpayment on the maturity date. *German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408 (1st Dep't 2013). Once a plaintiff has established its prima facie case, the burden shifts to the defendant to

establish, by admissible evidence, that a triable issue of fact exists with respect to a bona fide defense that does not lie outside the making of the note and the obligations thereunder. *Id.*, 102 AD3d at 408, citing *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 (1st Dep't 1968), *affd* 29 NY2d 617 (1971).

Plaintiffs assert they have satisfied these criteria because the Promissory Notes contain definite Maturity Dates that specify when payments are due, irrespective of the Joint Venture Agreement. The Murads counter that the Notes must be construed in the context of the Joint Venture Agreement because the documents are inextricably intertwined. They further assert that plaintiffs fraudulently induced them to obtain the Notes for funds needed by SLHN to avoid a default on the Titan Loan, which was secured by the Property that was the subject of the Joint Venture Agreement. They insist the Notes are corporate loans convertible to equity upon the implementation of the JV Agreement. The Murads add that plaintiffs then withdrew from the Joint Venture on false pretenses in an attempt to secure control of the Property for themselves.

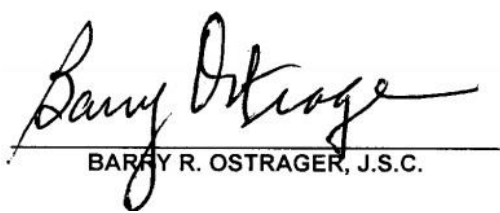
In sum, the Murads assert in opposition that issues of fact related to their fraudulent inducement claim preclude summary judgment in lieu of complaint. *See Denjonbklyn, Inc. v Rojas*, 154 AD3d 734 (2nd Dep't 2017) (the defendant raised a triable issue of fact as to whether he was induced to execute the guaranty by certain fraudulent representations made by the plaintiff's president). In reply, plaintiffs reiterate their position that the Notes are clear on their face, the joint venture is irrelevant, and the fraudulent inducement claim is not supported by the evidence. They also attempt to distinguish *Denjonbklyn* on the facts.

While plaintiffs may well have established a prima facie case under CPLR § 3213 based on the Notes as instruments for the payment of money only, the Murads have raised issues of fact that preclude summary judgment via the accelerated procedure made available by the statute. The parties have an extended history of dealings spanning years of negotiations resulting in

agreements related to the ownership and development of the Jersey City Property. The Note must be viewed in light of the complex allegations of bad faith related to the parties' joint venture negotiations and the issuance of the Notes, not the least of which are the allegations of fraudulent inducement leading to the execution of the Notes and plaintiffs' bad faith withdrawal from the joint venture. In sum, this case is about far more than the collection of monies allegedly due under two Promissory Notes, and the Court finds that, considering all the circumstances, plaintiffs' application does not qualify for expedited relief under CPLR § 3213.

Accordingly, it is hereby ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is denied, the action is converted to a plenary action, and defendants shall file their Answer by June 12, 2020. Counsel shall then draft a Preliminary Conference Order using the form available on the Part 61 website <http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml> with a compliance conference set for September 10, 2020 at 9:30 a.m. and a Note of Issue deadline 22 months after the completion of the PC Order.

Dated: May 14, 2020

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE