SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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SIGNATURE FINANCIAL, LLC

Plaintiff

Index No. 650695/17

v

DECISION AND ORDER

SYMON GARBER

Defendant. MOT SEQ 002

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NANCY M. BANNON, J.:

I. BACKGROUND

In this action seeking recovery on a series of promissory notes executed in connection with the sale of taxi medallions, plaintiff Signature Financial, LLC (Signature) moves pursuant to CPLR 3212 for summary judgment on the first through the twenty-eighth causes of action of the complaint against defendant, Symon Garber, for breach of personal guaranty on each of 28 notes, totaling $33,945,868.50.

In support of its motion, Signature submits the pleadings, an affidavit from its Vice President and Deputy Chief Risk Officer Steven Ratner (the Ratner affidavit), an attorney's affirmation and the subject promissory notes and their riders, security agreements, and guaranty agreements. The Ratner affidavit states that, as of August 15, 2016, payments have not been made on the notes and that, pursuant to the acceleration clause, full payment and all accrued interest, including default interest under the rider, is due in an amount totaling, as of December 1, 2018, $33,945,868.50.

The borrowers fall into two groups - the first executed promissory notes in the principal amount of $1,250,00.00 - Barometer II Hacking Corp., Chicago Polo IX, Inc., Chicago Polo VII, Inc., Chicago Polo XVI, Inc., Lilly Cab Corp., Rainstorm II Hacking Corp., Scorpion Cab Corp., and SLSJETS V Cab Corp. The second group executed notes in the principal sum of $1,000,000.00 - Chicago Auction Cab Co., Inc., Chicago Polo V, Inc., Chicago Polo VI, Inc., Chicago Polo VII, Inc., Chicago Polo VII, Inc., Chicago Polo X, Inc., Chicago Polo XI, Inc., Chicago Polo XIII, Inc., Chicago Polo XIV, Inc., Chicago Polo XV, Inc., Chicago Polo XVII, Inc., Humidity II Hacking Corp., Moisture II Hacking Corp., Sienna Zone Cab Co., SLSJETS I Cab Corp., SLSJETS II Cab Corp, SLSJETS III Cab Corp., SLSJETS IV Cab Corp., Snowfall II Hacking Corp., Snowstorm II Hacking Corp., and Tyler Crazy About Chicago, Inc.

The notes, all dated June 25, 2015, and effective July 1, 2015, obligated the twenty-eight borrower corporations to repay Signature either $1,250,000 or $1,000,000, at a monthly interest rate of 250 basis points above the one-month LIBOR rate as calculated the day prior to the beginning of each month, in monthly installments over a three year period, with a balloon payment of all remaining unpaid principal, and any accrued interest, on July 1, 2018. The notes permit acceleration upon default, contain a merger clause, and require any modification to be in writing. All of the promissory notes are accompanied by a rider that supplements them by providing for a 24% default rate of interest and 10 day notice requirement for any event of default with the exception of non-payment, a security agreement

providing an interest in the taxicab vehicles, licenses, medallions and other property used in conjunction with the borrower's business, and a loan guaranty executed by Symon Garber, individually, irrevocably and unconditionally guaranteeing payment when due, by acceleration or otherwise, to Signature.

The plaintiff also seeks summary judgment dismissing the defendant's three counterclaims, alleging breach of contract, unjust enrichment/quantum meruit and promissory estoppel, dismissal of his affirmative defenses pursuant to CPLR 3211(b), and attorney's fees and costs.

Signature does not move on its twenty-ninth cause of action for breach of contract on a cross collateralization and cross default agreement seeking $56,886,188.24.

In opposition, the defendant submits his own affidavit, in which he does not dispute the debt but accuses the plaintiff of engaging in dishonest business practices which contributed to the collapse of the taxi medallion market. The defendant also submits an affirmation of counsel and a memorandum of law in which he argues that the parties had orally modified the terms of the promissory notes by a "telephonic discussion" so as to temporarily increase the borrowers' monthly payment obligation in exchange for a reduction of the payments thereafter and future vehicle financing. It is upon that purported oral modification that the defendant asserts his three counterclaims against the plaintiff. He submits no further proof of the purported modification. The defendant also argues that summary judgment would be premature as there is outstanding discovery.

The plaintiff's motion is granted.

II. DISCUSSION

It is well settled that the proponent of a motion for summary judgment establishes entitlement to that relief by tendering sufficient evidence to demonstrate the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once the movant meets this burden, it becomes incumbent upon the nonmoving party to demonstrate by admissible evidence the existence of a triable issue of fact. See CPLR 3212; Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Furthermore, "[w]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1991).

The plaintiff has established its prima facie entitlement to judgment as a matter of law against the defendant, having submitted the pleadings, the subject promissory notes, proof of default on the promissory notes for nonpayment as of August 15, 2016, and the personal guarantees on the notes executed by the defendant.

In opposition to the motion, the defendant submits his own affidavit, in which he does not dispute the nonpayment and subsequent default of the borrowers, nor the existence of the guaranty

agreements. Rather, he argues that summary judgment would be premature under CPLR 3212(f) as there is outstanding discovery not provided by the plaintiff. However, the court's prior orders belie this assertion. Indeed, the plaintiff filed a Note of Issue on July 30, 2019, representing that all discovery is complete, and the defendant did not move to strike the Note of Issue. The defendant "fails to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421 423 (1st Dept. 2015). The defendant fails to do so and it is well settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., supra; Kent v 534 East 11th Street, supra; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

The defendant also alleges wrongdoing on the part of Signature in that Signature failed to honor a purported oral agreement between the parties, refused to allow for reduced monthly payments and accelerated the loans or modify the loan agreements. Going beyond the facts of his own case, the defendant alleges that the plaintiff, as one of the largest taxi medallion lenders in the United States, artificially inflated medallion prices, by making unsustainable loans in an effort to capture as much of the market as possible from competing banks, and abruptly stopped lending and negotiating with borrowers, thereby

contributing to the collapse in the taxicab medallion market. The defendant also accuses the plaintiff of failing to take steps to stop competition from transportation companies such as Uber.

The terms of the subject guaranty are clear, unambiguous, absolute and unconditional, and the defendant has failed to establish any fraud, duress, or wrongful conduct by the plaintiff regarding the inducement of the guaranty. Although the defendant asserts claims of wrongdoing on the part of Signature generally, they are not addressed specifically to the guarantees and subsequent defaults at issue here, and are not supported by any evidence beyond the affidavit submitted by the defendant. To the extent that the defendant also alludes to coercion at the time of the signing, Signature has submitted a series of signed acknowledgment and waiver forms corresponding to the promissory notes stating that the defendant was advised to seek independent legal counsel to review the documents, and he chose not to do so. Therefore, Signature has demonstrated an absence of any triable issues of fact and its motion for summary judgment on the first through the twenty-eighth causes of action is granted. The defendant has not raised any triable issue warranting denial of the motion.

For the same reasons, the plaintiff is also entitled to summary judgment dismissing the defendant's first, second, and third counterclaims and dismissal of the affirmative defenses pursuant to CPLR 3211(b). The court also notes that the defendant expressly waived his right to interpose counterclaims in this action. He signed the guarantees in which he unequivocally and irrevocably waived any right

to assert a counterclaim. Therefore, the counterclaims must be dismissed as a matter of law. See e.g., LFR Collections LLC v. Blan Law Offices, 117 AD3d 486 (2014); Sterling Nat. Bank v. Biaggi, 47 AD3d 436 (2008).

Even if the waiver were invalid, the defendant's allegations contained in his affidavit in regard to the oral modification do not raise any triable issue of fact. Each note contains both a merger clause and a requirement that any modification to the note by the parties be in writing and the defendant fails to provide any evidence, beyond his own affidavit, suggesting that an oral modification to the notes was ever even contemplated and certainly not agreed upon by the parties.

Signature also moves for dismissal of the defendant's affirmative defenses. These affirmative defenses may bear upon the single remaining cause of action in this case, the twenty-ninth cause of action for breach of contract. Therefore, dismissal of the defendant's affirmative defenses under CPLR 3211(b) is not granted on this motion.

III. CONCLUSION

Accordingly, it is

ORDERED that the branch of the plaintiff's motion for summary judgment on its first through the twenty-eighth causes of action is granted against the defendant; and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment dismissing the defendant's first, second, and third counterclaims is granted; and it is further

ORDERED that the branch of the plaintiff's motion to dismiss the defendant's affirmative defenses is denied; and it is further,

ORDERED that the Clerk enter a judgment in favor of the plaintiff and against the defendant in the sum of $33,945,868.50, with interest thereon from December 1, 2018 at the rate of 24% per annum; and it is further,

ORDERED that the twenty-ninth cause of action, for breach of contract, is severed and shall continue, and it is further

ORDERED that the parties shall contact chambers to schedule a status/settlement conference on or before July 31, 2020.

This constitutes the Decision and Order of the Court.

Dated: May 22, 2020

ENTER :

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON