Country Bank v East Harlem Estates LLC
2020 NY Slip Op 32060(U)
June 24, 2020
Supreme Court, New York County
Docket Number: 654305/2019
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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COUNTRY BANK,

Plaintiff,

- v -

EAST HARLEM ESTATES LLC, AVIGDOR FREUND

Defendants.

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INDEX NO. 654305/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2-10, 16, 19-31 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT .

Plaintiff Country Bank (Lender) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants East Harlem Estates LLC (Borrower) and Avigdor Freund (Guarantor). Defendants oppose. The motion is granted. By e-filed letter dated January 20, 2020 (Dkt. 29), plaintiff requests substitution. Plaintiff's unopposed request to substitute its successor-by-merger as plaintiff is also granted, pursuant to CPLR 1018.

I. Factual Background and Procedural History [1]

This action arises from a $1.9 million loan made by Lender, a New York bank, to Borrower, a New York LLC. This loan was secured by a mortgage on and assignment of leases and rents from Borrower's property located at 214 East 111th Street in Manhattan (Dkt. 5 [Mortgage]). In connection with the loan, Borrower executed a mortgage note to the order of Lender, dated October 7, 2016, with an initial maturity date of November 1, 2017 (Dkt. 4 [Note]). Guarantor signed the Note and Mortgage on behalf of Borrower as its sole member and personally guaranteed payment and performance on

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

the Note pursuant to a guaranty, also dated October 7, 2016 (Dkt. 7 [Guaranty, with Note and Mortgage, Loan Documents]).

The parties agreed to extend the maturity date of Borrower's loan twice: first to November 1, 2018 (Dkt. 6 at 2 [2017 Extension]), and then the following year, after Borrower paid down the principal loan balance by $500,000, to May 1, 2019 (Dkt. 6 at 3-4 [2018 Extension, with 2017 Extension, Extensions]). Guarantor signed both Extensions for Borrower as "Guarantor & Managing Member" (Dkt. 6 at 2, 4). Guarantor also signed the 2018 Extension on a separate "Guarantor" signature line (*id.* at 4).

New York law governs interpretation of the Note (Dkt. 4 at 9) and Guaranty (Dkt. 7 at 6). Before loan maturity, the Note obligated Borrower to pay Lender monthly payments of interest on the outstanding principle balance (Dkt. 4 at 5) at a per annum floating rate of Lender's prime rate plus 2.25% (*id.* at 3). Borrower also agreed to default interest at 24% per annum upon Borrower's failure to repay the loan in full on the maturity date (*id.* at 7). After loan maturity, the Note obligated Borrower to pay the outstanding principal balance, along with all unpaid interest (*id.* at 5). Finally, the Note obliges Borrower to pay collection and enforcement costs:

> In the event that it should become necessary for Payee to employ counsel to collect the Debt or to protect or foreclose the security therefor or to otherwise enforce its rights and remedies under this Note, the Mortgage or any Other Security Document, Maker also agrees to pay all reasonable fees and expenses of Payee, including, without limitation, reasonable attorneys' fees for the services of such counsel whether or not suit be brought (*id.* at 10).

Under the Guaranty, Guarantor "absolutely and unconditionally" guaranteed to Lender

> the prompt and unconditional payment of the said principal sum [$1.9 million] and the interest thereon, as the same shall become due and payable under the Note, and any and all sums of money which, at any time, may become due and payable under the provisions of the Note, the Mortgage or the Other Security Documents and the due and prompt performance of all of the terms, agreements, covenants and conditions thereof (collectively, the "Debt") (Dkt. 7 at 2).

Guarantor waived "notice of the acceptance hereof, presentment, demand for payment, protest, notice of protest, or any and all notice of non-payment, non-performance or non-observance, or other proof, or notice or demand" (*id.* at 3). Guarantor agreed that the Guaranty would remain in effect "as to any modification, extension or renewal of the Note, the Mortgage, or any of the Other Security Documents" (*id.* at 4). Guarantor also agreed to "reimburse Lender, to the extent that such reimbursement is not made by Borrower, for all expenses (including counsel fees) incurred by Lender in connection with the collection of the Debt or any portion thereof or with the enforcement of this Guaranty" (*id.* at 3). The Guaranty also states as follows:

> Guarantor hereby agrees and acknowledges that this Guaranty is an ***instrument for the payment of money***, and hereby ***consents that Lender***, at its sole option, in the event of a default by Guarantor in the payment of any of the moneys due hereunder, ***shall have the right to bring a motion and/or action under New York CPLR Section 3213*** (*id.* at 6).

Defendants did not repay the loan on the extended May 1, 2019 maturity date. By letter dated May 2, 2019, Lender notified defendants that "as a result of Borrower's failure to pay all sums due under the Loan Documents on the Maturity Date … a default exists under the Loan as of such date and all of the Obligations … due under the Note are immediately due and payable" (Dkt. 8 [letter]). The letter further stated that "there is now due and payable in full the outstanding principal sum of $1,400,000.00, together with all accrued and unpaid interest, default interest calculated at the default rate as set forth in the Note from the date of the Default, exit fee, late charges, attorneys' fees and expenses, in the aggregate amount of $1,465,794.55" (*id.* at 3). It also threatened legal action against Guarantor to recover the owed amounts (*id.*).

Lender commenced this action on July 26, 2019 by motion for summary judgment in lieu of complaint. With its moving papers, Lender submitted the Loan Documents, the notice of default (Dkt. 8), and an affidavit from William Mathews, a portfolio manager and a vice president of Lender (Dkt. 3 [Mathews Aff.]), attesting to the default and to the Loan Documents' authenticity. According to

Mathews, defendants failed to repay the outstanding principal and interest due and payable under the Note, with the following amounts remaining due and outstanding on the loan as of July 25, 2019: (1) $1.4 million in unpaid principal; (2) $44,002.77 in unpaid interest; and (3) default interest of $73,305.56 (*id.* ¶ 14). Finally, per diem default interest of $933.34 (at a rate of 24% per annum) continues to accrue after July 25, 2019 (*id.*).

On reply, Lender submitted another affidavit from Mathews (Dkt. 21), attaching a loan payment history record dated as of July 2019 (Dkt. 22 [History]). The History reflects unpaid principal, calculates unpaid non-default interest from March 1, 2019 at a rate of 7.75% per annum and calculates default interest from July 25, 2019 at a rate of 24% per annum. In his reply affidavit, Mathews attests that he is a Portfolio Manager at Country Bank, that he personally monitored Borrower's repayment under the Note, that he was personally involved in the bank deciding to enter the Extensions and that he was personally aware of Borrower's failure to repay the loan on the May 1, 2019 maturity date (Dkt. 21 ¶¶ 4-5).

Defendants filed opposition and surreply memoranda of law (pursuant to leave of court, *see* Dkt. 26 [Jan. 2, 2020 interim order]), but did not supply any affidavits or exhibits.

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]). An instrument qualifies for CPLR 3213 treatment "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 155 [1975]). An instrument containing "an unconditional promise to pay a sum certain over a stated period of time" is thus eligible for CPLR

3213 (*Lawrence*, 95 AD3d at 957, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). This includes promissory notes (*see Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]) and unconditional guaranties (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]).

"The existence of various clauses contained in a contractual agreement in addition to the unconditional promise to pay money does not necessarily disqualify the agreement as an instrument for the payment of money only" (*First Interstate Credit All., Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992]). Typically, so long as a "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," it does not defeat applicability of CPLR 3213 to an otherwise eligible instrument (*Stevens v Phlo Corp.*, 288 AD2d 56, 56 [1st Dept 2001]; *see Jute v Niewdach*, 26 AD3d 416, 417 [2d Dept 2006] ["assumption of the tenant's obligations in the lease did not constitute a bar to CPLR 3213 relief"]; *North Fork Bank & Tr. Co. v Cardiff Rose Enterprises, Inc.*, 104 AD2d 932, 933 [2d Dept 1984] [retail installment contract and security agreement was instrument for payment of money only]). Nevertheless, a guaranty of both payment and non-monetary performance, merged in a single document, cannot be enforced through the CPLR 3213 procedure (*see Punch Fashion, LLC v Merchant Factors Corp.*, 180 AD3d 520, 521 [1st Dept 2020]; *JFURTI, LLC v First Capital Real Estate Advisors, L.P.*, 165 AD3d 419, 421 [1st Dept 2018]; *PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017]; *Dresdner Bank AG. (New York Branch) v Morse/Diesel, Inc.*, 115 AD2d 64, 68 [1st Dept 1986]; *but see Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007] [incorporation by reference of companion sale agreement to "extent necessary for the enforcement of the note" did not make render note ineligible for summary judgment in lieu of complaint]).

"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]). 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 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 Note and Guaranty

As a threshold matter, defendants argue that the Guaranty is not eligible for CPLR 3213 treatment because it guaranteed "due and prompt performance of all of the terms, agreements, covenants and conditions" of the Mortgage (Dkt. 7 [Guaranty] at 2; *see* Dkt. 20 [Defs.' Opp. Br.] at 8 [citing provisions of the Mortgage regarding insurance, repairs and lien priority]). They point out that, in the First Department, a unified guarantee of both payment and non-monetary performance is generally ineligible for summary judgment in lieu of complaint under CPLR 3213 (*see Punch Fashion*, 180 AD3d at 521; *JFURTI*, 165 AD3d at 421; *PDL Biopharma*, 147 AD3d at 495; *Dresdner Bank*, 115 AD2d at 68).

Here, however, the sophisticated Guarantor's consent to the expedited CPLR 3213 procedure must be enforced as to his monetary obligations. Guarantor explicitly agreed that the Guaranty was "an instrument for the payment of money" and that Lender "***shall*** have the right to bring a motion and/or action under New York CPLR Section 3213" in the event of a monetary default (Dkt. 7 [Guaranty] at 6 [emphasis added]). He assented to the procedure in no uncertain terms (*see Smith v Shields Sales Corp.*, 22 AD3d 942, 943-944 [3d Dept 2005]; *see also Reilly v Insurance Co. of N. Am.*, 32 AD2d 918, 918 [1st Dept 1969] [parties may "chart their own procedural course through the courts"]). A contrary conclusion would deprive Lender of the benefit of its bargain by invalidating Guarantor's express agreement to the use of CPLR 3213 (*see 159 MP Corp. v Redbridge Bedford, LLC,* 33 NY3d 353, 358-359, 363-364 [2019], *rearg denied*, 33 NY3d 1136 [2019]; *see also id.* at

361 ["The fact that a contract term may be contrary to a policy reflected in the Constitution, a statute or a judicial decision does not render it unenforceable"]).

The Note and unconditional Guaranty, along with Mathew's affidavits attesting to defendants' failure to repay the Loan upon maturity, establish Lender's prima facie entitlement to summary judgment 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]). Mathew's attestation to defendants' non-payment carries Lender's burden on liability (*see Schirripa*, 108 AD2d at 684; *see also German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408, 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]). Defendants offer no controverting evidence, but argue that Mathews relies on inadmissible hearsay. The reply affidavit, to which defendants were afforded a chance to respond, demonstrates Mathew's personal knowledge of the default. Nor do Defendants raise any issue of fact regarding the amounts that Mathews attested are still owed on the Note based on his personal knowledge.[2] Lender is therefore entitled to summary judgment.

Lender is also entitled to its reasonable attorneys' fees expended in connection with this action and the bankruptcy proceeding, as the Note clearly and unmistakably allows Lender to recover them

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[2] Contrary to defendant's arguments, the History, submitted by Lender on reply, is an admissible business record (*see DeLeon v Port Auth. of New York and New Jersey*, 306 AD2d 146, 146 [1st Dept 2003]). Mathews testified that the History was "created in the regular course of Plaintiff's business," that the "practices and procedures of the bank's maintenance of its loans ... are best documented" by such payment histories, and that Lender's practice was to make entries to the loan history "at or around the time of the application of a payment" (Dkt. 21 ¶¶ 6-7). Defendants, incorrectly citing the standard applicable to statements of third-party bystanders, complain that Mathews failed to establish that any specified individual had "personal knowledge of the act, event or condition" and was under a business duty to contemporaneously report it (*see Matter of Leon RR*, 48 NY2d 117, 123 [1979]). This is not the standard applicable to computer records of mundane banking transactions. Moreover, it is the ***lack*** of a record of post-maturity payment that evidences defendant's default (*see Espriel v New York Downtown Hosp.*, 298 AD2d 165, 166 [1st Dept 2002] [testimony of lack of business record also admissible]).

(*see Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]). Lender submits affidavits and hourly billing statements from its counsel setting forth the amounts expended in connection with this action and the bankruptcy proceeding (Dkt. 10-11, 24-25). Defendants object to the claimed amounts, asserting that the number of legal professionals (two members of the law firm, two associates, and one paralegal) involved in collecting on the debt reflects an "unreasonable duplication" of work and effort and that Lender's counsel engaged in impermissible "block billing." Defendants, however, specify no entries that substantiate either of those assertions. As the claimed fees are supported by itemized statements and are reasonable, the court will award Lender's attorneys' fees of $14,507.69.

As defendants fail to demonstrate a triable issue of material fact, Lender is entitled to entry of judgment against defendants for (1) $1.4 million in unpaid principal; (2) $44,002.77 in unpaid interest; (3) default interest of $73,305.56; (4) per diem default interest of $933.34 (or 24% per annum on the $1.4 million principal balance) from July 26, 2019; and (5) attorneys' fees of $14,507.69.[3] Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that plaintiff's request (Dkt. 29) to substitute plaintiff is granted, and that OceanFirst Bank, National Association shall be substituted as plaintiff, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of OceanFirst Bank, National Association, as plaintiff in the place

[3] Lender waived the $38,000 exit fee in its reply papers (Dkt. 21 ¶ 10). Lender's motion papers do not calculate any late fees, so the court will not award them.

and stead of Country Bank, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "EFiling" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff OceanFirst Bank, National Association and against defendants in the amount of $1,517,308.33, together with interest on the $1,400,000.00 principal balance at the default rate of 24% per annum from the date of July 26, 2019, until entry of judgment, and thereafter at the statutory rate, as calculated by the Clerk, plus attorneys' fees, costs and expenses in the amount of $14,507.69; and it is further

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

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6/24/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER