

<b>Bessemer Trust Co. v Destino</b>
2020 NY Slip Op 32589(U)
August 5, 2020
Supreme Court, New York County
Docket Number: 657363/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **IAS MOTION 38EFM**

*Justice*

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BESSEMER TRUST COMPANY, as Preliminary  
Executor of the Estate of George S. Kaufman,

Plaintiff,

- v -

RALPH DESTINO, JR. and RALPH DESTINO III,

Defendants.

-----X

**INDEX NO.** 657363/2019

**MOTION DATE** 01/14/2020

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 15, 16, 17, 18 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Plaintiff Bessemer Trust Company, N.A. (“Bessemer”), as the preliminary executor of the Estate of George S. Kaufman (“Kaufman”), brings this action to recover on a promissory note executed by defendants Ralph Destino, Jr. and Ralph Destino III (together, “Defendants”) in favor of Kaufman.

**BACKGROUND**

On August 9, 2016, Kaufman loaned Defendants \$100,000.00, and Defendants executed a promissory note (the “Note”) (NYSCEF Doc. No. 5). The Note provided that Defendants agreed to pay Kaufman the principal sum of \$100,000.00, together with interest thereon at the rate of 5% per annum, with the rate computed on the basis of 360 days (the “Interest Rate”), at the earlier of: (a) the sale of certain properties (the “Properties”) as set forth in the Note; or (b) 18 months from the date of the Note (i.e., February 9, 2018) (the “Maturity Date”) (*id.*, Note, article 1). Defendants agreed that,

absent timely payment by the Maturity Date, interest thereafter would accrue at a default rate of 15% (*id.*). The Note also stated, in its first decretal paragraph, that “[r]eference is hereby made to that certain Letter Agreement, made as of August \_\_, 2016, by and between Q Management Properties, LLC . . . and [Defendants] . . . as related to [the Properties]” (“QT Management Letter Agreement”) (*id.*, Note at 1). Article 2 of the Note provided that Kaufman could take action upon Defendants’ default in repayment without notice or demand, and that Defendants waived such notice or demand (*id.*, Note, article 2). The Note stated that it may not be modified orally (article 5), and that it was

intended by the parties to be the final expression of their agreement and intended to be a complete and exclusive statement of the agreement and understanding of the parties . . . [and it] supersedes all prior agreements, term sheets, letters of intent, and understandings between the parties with respect to such subject matter.

(*id.*, Note, article 14). It further provided that all costs and expenses incurred by Kaufman in enforcing this Note shall be borne by Defendants (*id.*).

Bessemer avers that upon Kaufman’s death on February 20, 2018, it was granted preliminary letters testamentary on Kaufman’s goods, chattels and credits (NYSCEF Doc. No. 4). It further avers that the Properties were not sold prior to February 9, 2018, and, accordingly, that date was the Maturity Date of the Note (*see id.*, article 1).

Defendants have failed to remit payment of any amounts due under the Note (NYSCEF Doc. No. 3, affidavit of Michelle Orlowski, dated December 11, 2019 [Orlowski aff], para. 10). Several demands for payment have been made by letters to Defendants (NYSCEF Doc. Nos. 6 and 8). On October 15, 2018, defendant Ralph Destino, Jr. confirmed in an email that no payments have been made and requested an extension of

the Maturity Date (NYSCEF Doc. No. 7). No extension was agreed upon, and Defendants failed to remit payment of the amounts due and owing (NYSCEF Doc. No. 3, Orłowski aff, para. 11).

Bessemer states that as of August 31, 2019, a total of \$165,682.21 is due, setting forth the calculation of the \$100,000.00 principal, plus 5% interest of \$5,000 per year for 1.5 years (total \$7,500.00), plus 15% default interest of \$16,125.00 per year divided by 360 days (as provided in the Note) for \$44.49 per day for “1,299 days (2/10/16-8/31/19)” for a total default interest amount of \$58,182.21. It seeks summary judgment in lieu of complaint in this amount and summary judgment of liability on attorneys’ fees and costs in enforcing the Note with an inquest as to the amount of such costs and fees.

### **DISCUSSION**

The motion is granted in the principal amount of \$100,000.00, plus interest for 18 months of \$7,500.00, plus default interest at \$44.49 per day from February 9, 2018 through entry of judgment, and thereafter at the statutory rate of 9%; and summary judgment of liability is granted on Bessemer’s attorneys’ fees and costs in enforcing the Note, which shall be set down for an inquest as to the amount due for costs and fees.

CPLR 3213 was enacted to provide speedy and efficient relief on claims presumptively meritorious based on documentary evidence (*see Weissman v Sinorm Deli*, 88 NY2d 437, 443 [1996]). Under CPLR 3213, in an action based on an instrument for the payment of money only, a plaintiff may serve a summons and a notice for summary judgment in lieu of complaint with supporting papers (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 491

[2015]). A promissory note is an instrument for the payment of money only within the meaning of CPLR 3213, provided it contains the debtor's unconditional promise to pay the lender over a stated period of time (*Porat v Rybina*, 177 AD3d 632, 632 [2d Dept 2019]; *Lugli v Johnston*, 78 AD3d 1133, 1134 [2d Dept 2010]).

To establish its *prima facie* entitlement to such relief, the plaintiff must show the existence of the note, executed by the defendant, which contains an unequivocal and unconditional repayment obligation, and the defendant's failure to repay in accordance with the terms of the note (*Porat v Rybina*, 177 AD3d at 632; *Lugli v Johnston*, 78 AD3d at 1135). Once the plaintiff has established this, "the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" (*Porat v Rybina*, 177 AD3d at 632 [internal quotation marks and citation omitted]; see *Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789 [2d Dept 2011]).

Plaintiff Bessemer has established its *prima facie* case by submitting the Note that was executed by Defendants, which contained an unconditional obligation to repay the principal sum of \$100,000.00 plus 5% interest upon the Maturity Date, February 9, 2018, which has passed (NYSCEF Doc. No. 5, Note), and the affidavit of Michelle Orłowski, a principal of Bessemer, averring that Defendants had defaulted on the Note (see *Porat v Rybina*, 177 AD3d at 632). Thus, the burden shifts to Defendants to raise a triable issue of fact.

Defendants' contention that the Note's reference to the QT Management Letter Agreement defeats Bessemer's *prima facie* showing is rejected. First, this court is not required to consider extrinsic documents referenced in the Note which Defendants fail

even to submit (*see Bhatara v Futterman*, 122 AD3d 509, 510 [1st Dept 2014]; *Nordea Bank Finland PLC v Holten*, 84 AD3d 589, 590 [1st Dept 2011]). Moreover, Defendants fail to identify any obligation that might be required of them by the Note's reference to that letter agreement which Kaufman was not a party to (*see Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d 342, 342 [1st Dept 2002]).

Further, that reference serves only to describe the circumstances for the Note and does not create a circumstance where proof beyond the Note is necessary (*see Craven v Rigas*, 71 AD3d 1220, 1222-1223 [3d Dept 2010]). Defendants fail to make any showing that it altered the essential character of the Note as an instrument for the payment of money only and rendered the Note ineligible for CPLR 3213 treatment (*see GEM Invs. Am., LLC v Marquez*, 180 AD3d 513, 513 [1st Dept 2020] [separation agreement did not alter monetary nature of note]; *LaBoeuf v Saide*, 134 AD3d 515, 516 [1st Dept 2015]; *Bhatara v Futterman*, 122 AD3d at 510; *Embraer Fin. Ltd. v Servicios Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007] [CPLR 3213 appropriate even when note references another agreement]; *Solanki v Pandya*, 269 AD2d 189, 189 [1st Dept 2000]). The Note and the letter agreement are not inextricably intertwined (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *Embraer Fin. Ltd. v Servicios Aeros Profesionales*, 42 AD3d at 381; *Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d at 342).

Defendants' reliance upon *Technical Tape v Spray Tuck*, 131 AD2d 404 [1st Dept 1987]) is misplaced because that case is clearly distinguishable. In *Technical Tape, Inc.*, the promissory note was expressly made "subject to the terms and conditions" of a

separate, complex agreement of sale with a complicated formula for the calculation of the sales price (*id.* at 405). In contrast, the Note here clearly indicates the amount of the debt, and Defendants' obligation to repay by the Maturity Date, and there is no need to refer to the letter agreement.

Next, Defendants challenge the admissibility of the Note, urging that Bessemer, the estate representative, cannot authenticate the Note for admission into evidence because it was not a signatory and it lacked personal knowledge. According to Defendants' argument, once Kaufman as obligee on the Note died, it was unenforceable against them as the debtors. As Bessemer points out, the difficulty with this argument is that Defendants have already admitted executing the Note, receiving the consideration, defaulting and requesting an extension on the Maturity Date (*see* NYSCEF Doc. No. 7). Bessemer also submitted proof that it was appointed as preliminary executor for Kaufman, and was his agent for the collection of this debt (NYSCEF Doc. No. 4). This is sufficient (*see Van Loan v Jones*, 173 AD3d 1707, 1708 [4th Dept 2019]; *see also Moskowitz v Tory Burch LLC*, 161 AD3d 525, 526 [1st Dept 2018] [party admissions]). Defendants' reliance on *Aurora Loan Servs., LLC v Mercius* (138 AD3d 650 [2d Dept 2016]) and *US Bank Natl. Assn. v Madero* (125 AD3d 757 [2d Dept 2015]) is misplaced. Those cases involved mortgage foreclosure actions by mortgage assignees where the mortgagor challenged the assignee's standing, which is factually distinguishable from this promissory note action by the lender's executor where the debtor acknowledges the note and debt (*see Van Loans v Jones*, 173 AD3d at 1708). Similarly, *Citibank, N.A. v Cabrera* (130 AD3d 861 [2d Dept 2015]) is distinguishable because it involved the

bank's submission of the borrower's payment history without laying a proper foundation. Here, Bessemer submitted proof of Defendants' admission of the Note and their failure to pay.

Defendants' assertion that this action is barred by equitable estoppel is unpersuasive. They fail to even assert in what manner Kaufman might have misled them regarding the debt and its Maturity Date. Indeed, the Note clearly states when it would mature, it provides for no oral modifications, and contains a broad merger clause (NYSCEF Doc. No. 5, Note, articles 5 and 14). These provisions are enforceable and bar defendants' conclusory claims that they were misled by Kaufman's purported statements outside of the Note (*see e.g., Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599-600 [1997]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 9 [1st Dept 2012]; *Cornhusker Farms v Hunts Point Coop. Mkt.*, 2 AD3d 201, 203-204 [1st Dept 2003]).

Bessemer's request for summary judgment of liability on its costs and attorneys' fees in enforcing the Note is granted, and the issue of the amount of such fees and costs will be set down for an inquest. Article 14 of the Note provides, in relevant part:

All costs and expenses (including any court costs and attorneys' fees) incurred by Lender in connection with enforcement of this Note shall be borne by [Defendants]. All such costs and expenses incurred by Lender shall bear interest at the Interest Rate [5%] from the date of expenditure until such sums have been paid.

Defendants fail to raise any triable issue of fact regarding a defense to this provision.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint on the promissory note is granted against the defendants, jointly and severally, in the principal amount of \$100,000.00, plus interest of 5% for 18 months in the amount of \$7,500, plus default interest at the rate of 15% from the date of default of February 9, 2018 through to the entry of the judgment herein, and thereafter at the statutory rate of 9% until the date of satisfaction of judgment; and it is further

ORDERED that summary judgment of liability is granted to plaintiff against defendants, jointly and severally, on attorneys' fees and costs incurred by plaintiff in enforcing the promissory note underlying this matter, which shall be set down for an inquest to determine the appropriate amount due, and plaintiff shall file a Note of Issue, pay the appropriate fees, and the action shall be placed on the calendar for such assessment; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This shall constitute the decision and order of the court.

ENTER:

<u>8/5/2020</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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