

Citibank, N.A. v Ahmad
2020 NY Slip Op 33504(U)
October 21, 2020
Supreme Court, New York County
Docket Number: 654075/2019
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. CAROL R. EDMOND****PART****IAS MOTION 35EFM***Justice*

-----X

CITIBANK, N.A.,

Plaintiff,

- v -

HUSAM AHMAD,

Defendant.

-----X

INDEX NO. 654075/2019**MOTION DATE 9/24/2020****MOTION SEQ. NO. 001****DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26

were read on this motion to/for

JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

ORDERED that Plaintiff Citibank, N.A.'s motion for summary judgment in lieu of a complaint, pursuant to CPLR 3213 (motion seq. 001), is granted; and it is further

ORDERED that Plaintiff is directed to submit a proposed judgment within 14 days of entry of this decision onto NYSCEF by the court. Defendant Husam U. Ahmad will have 7 days from the date of submission of plaintiff's proposed judgment to submit an objection to plaintiff's calculations in its proposed judgment; and it is further

ORDERED that the portion of Plaintiff's motion which seeks attorneys' fees is severed and referred to a Special Referee to: (1) ascertain the reasonableness of the attorneys' fee sought, and (2) calculate and report with recommendations the total amount of attorneys' fees and costs due Plaintiff; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order along with notice of entry on defendant within twenty (20) days; and it is further

ORDERED that counsel for Plaintiff shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk 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 "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that that portion of the motion be held in abeyance pending receipt of the report and recommendation of the Special Referee and that upon the receipt of said report and recommendation Plaintiff may move, pursuant to CPLR 4403, for an additional judgment in said amount.

MEMORANDUM DECISION

In this commercial action, plaintiff Citibank, N.A. seeks an order pursuant to CPLR 3213 granting summary judgment in lieu of a complaint (motions seq. 001) on the ground that this action is based upon instruments for the payment of money only that are now due and payable.

BACKGROUND FACTS

Plaintiff and ATANE Engineers, Architects and Land Surveyors, D.P.C. (formerly HAKS Engineers, Architects and Land Surveyors, D.P.C.), ATANE Engineers, Architects and Land Surveyors P.C. (formerly HAKS Engineers, Architects and Land Surveyors, P.C.), ATANE Engineers, P.C. (formerly HAKS Engineers, P.C.), and ATANE Engineers, Inc. (formerly HAKS Engineers, Inc. (individually and collectively, Borrower) are parties to a December 12, 2017 original line letter (Line Letter) pursuant to which plaintiff agreed to provide Borrower with a borrowing base line of credit in the amount of \$15,000,000.00 and a term loan for \$5,000,000.00 (the Loan).

The loan is memorialized in the October 26, 2016 Commercial Note at the Eurodollar rate (the Note) and was guaranteed by defendant Husam U. Ahmad (Ahmad) by a December 5, 2011 Guaranty of All Liability (Guaranty). Pursuant to the terms of the Note, the loan was due on October 31, 2023 and the Atane Entities were required to repay the Note in 84 equal monthly installments of \$59,523.81 with interest calculated per the terms of the Note (Giannakopoulos affirmation, exhibit B). On or prior to December 18, 2018, the Borrower was in default under the Note. As a result of further negotiations between the parties, on or about December 18, 2018, plaintiff, Borrower, and Ahmad executed an agreement modifying certain terms of the original Line Letter and the Note (Loan Modification Agreement, and together with the Line Letter and the Note, Loan Documents). The modifications to the Loan and the Note included revisions to

the Loan's prime rate option and minimum interest rate terms. According to plaintiff, the Loan Modification Agreement, however, did not amend or in any way alter Ahmad's Guaranty or his obligations under the Guaranty and did not waive any defaults.

In support of its motion, plaintiff submits to the court the affidavit of Dimitrios Giannakopoulos (Giannakopoulos), a Senior Vice President with plaintiff. Giannakopoulos avers that the Line Letter, Loan and Note are guaranteed by Ahmad, and further states that on or prior to December 18, 2018, "Borrower had defaulted in respect of the Loan and under the Note," which led to the Loan Modification Agreement. That agreement revised "the Loan's prime rate option and minimum interest rate terms," but did not "amend or in any way alter Mr. Ahmad's Guaranty or his obligations under the Guaranty and did not waive any defaults." (Giannakopoulos aff, ¶ 6).

With respect to the default at issue on this motion, Giannakopoulos states only:

"There is an outstanding balance of \$3,066,672.99 due and owing under the Note as of July 16, 2019 with interest accruing in the amount of \$495.66 per day. Guarantor has paid nothing under the Guaranty. On June 25, 2019, Plaintiff provided Borrower and Guarantor with an acceleration notice, advising Borrower and Guarantor that all of the obligations in respect of the Loan and under the Note were due and payable, including the obligations of Guarantor" (*id.*, ¶¶ 8-9).

Pursuant to the Guaranty, Ahmad "unconditionally and irrevocably guarantee[ed]" payments to Plaintiff of all Borrower's obligations, including interest and "all fees, costs, expenses, and indemnity obligations" with respect to the Loan and under the Note. (Giannakopoulos affirmation, exhibit C at 1).

The Guaranty states:

"The Guarantor hereby unconditionally and irrevocably guarantees to the Bank the full and punctual payment by the Borrower, when due, whether at the stated due date, by acceleration or otherwise of all Obligations (as defined below) of the

Borrower, howsoever created, arising or evidenced, voluntary or involuntary, whether direct or indirect, absolute or contingent now or hereafter existing or owing to the Bank (collectively, the ‘Guaranteed Obligations’)
(Giannakopoulos affirmation, exhibit C at 1).

The Guaranty further states:

“The Guaranty is an absolute unconditional, continuing guaranty of payment and not of collection of the Guaranteed Obligations and includes Guaranteed Obligations arising from successive transactions which shall either continue such Guaranteed Obligations or from time to time renew such Guaranteed Obligations after the same has been satisfied” (*id.*).

Borrower and Ahmad agreed in the Loan Modification Agreement to the existence of a Specified Default (as defined therein), which constituted one or more events of default under the Line Letter and under the Note. (Giannakopoulos affirmation, exhibit D at 1).

On this point, the Loan Modification Agreement contains the following language:

“Exercise of Remedies. Lender shall have the option, in its sole discretion and without further notice to Borrower or Guarantor, to exercise all of its rights and remedies under the Loan Documents at any time from and after the Effective Date in respect of any Specified Default, and/or immediately if:
(a) an “Event of Default” under the Line Master Note (as the definition of the term “Event of Default” in the Line Master Note is amended hereby) or the Term Note, other than the Specified Default, occurs or has occurred . . .”
(Giannakopoulos affirmation, exhibit D at 1).

Under the Loan Modification Agreement, Borrower and Ahmad also waived claims, offsets, defenses or counterclaims arising from the Line Letter and Note or related transactions, whether known or unknown (*id.* at 7). On June 25, 2019, Plaintiff provided Borrower and Ahmad with an acceleration notice (Acceleration Notice), advising Borrower and Ahmad that all of the obligations with respect to the Loan and under the Note were due and payable, including the obligations of Ahmad. (Giannakopoulos affirmation, ¶ 9, exhibit E).

The acceleration notice begins with this language:

“As of the date hereof, certain Events of Default have occurred under one or more of the Loan Documents, including, without limitation, the Specified Default, and such Events of Default are continuing.

You are hereby notified that Lender has (on or prior to the date hereof) accelerated the obligations of the Obligors under or relating to the Term Note and the Term Loan (e.g., whether under the Term Note or under any of the other Loan Documents), and that all such obligations are due and payable by the Obligors (including, without limitation, the obligations of the Guarantors under the Guaranty relating thereto)”
(*id.*).

In its memorandum in support of its motion, as to the default at issue, plaintiff states:

“[a]t present, the amount due and owing to plaintiff is \$3,066,672.99, inclusive of interest as of July 16, 2019, accordingly in the amount of \$495.66 per day,” and “[a]s Guarantor, Mr. Ahmad has failed to abide by his promise to guarantee payments due Plaintiff in respect of the Loan and under the Note” (memo in support at 1).

According to Ahmad, the Acceleration Notice does not identify a specific default, but refers to general “Events of Default,” and, further, even though plaintiff notified the Borrower of this acceleration of the loan obligations, plaintiff continued to “withdraw, from an account maintained for the payment of the Note, the principal and interest due under the Note” (memo in opp at 5).

Ahmad states that each month after the execution of the December 18, 2018 Agreement, plaintiff withdrew monthly payments of principal of \$59,523.81 together with interest from an account created for that purpose. Further, according to Ahmad, both before and after the acceleration notice, prior to the notice, plaintiff withdrew monies on January 31, April 1, April 30, May 31, July 1, July 31 and September 3 of 2019 in the usual sum of \$59,523.81, and on July 1, 2019, a payment of \$15,664.43, and on July 31, 2019 a payment of \$14,842.33 were made towards interest. On September 3, 2019, a payment of \$15,627.01 was made towards interest.

According to plaintiff's submission, the amount due and owing to plaintiff is \$3,066,672.99, inclusive of interest as of July 16, 2019, accruing in the amount of \$495.66 per day.

DISCUSSION

Under CPLR 3213, plaintiff is entitled to summary judgment against Ahmad for nonpayment of the principal and interest owed under the Loan and Guaranty. A plaintiff may bring a motion for summary judgment in lieu of a complaint, pursuant to CPLR 3213, in any "action [that] is based upon an instrument for the payment of money only" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 491 [2015]; *Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231 [1st Dept 2008]). A plaintiff is successful on a motion under CPLR 3213, when establishing "a prima facie case via 'proof of the [instrument] and a failure to make the payments called for by its terms'" (*id.* at 231 [internal quotation marks and citations omitted]).

"This Court last spoke to the threshold requirement in *Interman Indus. Prods. v R. S. M. Electron Power* (37 NY2d 151, 154-155 [1975]), observing that cases within CPLR 3213 'have dealt primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness.' Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable. Put another way, a document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.' The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document [readily accessible interest rate]" (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996][internal citations omitted]).

Here, plaintiff argues that the Guaranty is for the payment of money only and requires no additional performance. Plaintiff argues that any reporting requirements set forth in the Loan Documents are not a part of the Guaranty, as the Guaranty was not "executed to ensure the Borrower's timely financial reporting" (memo in reply at 3). Plaintiff argues that the language of

the Guaranty defines it as an “absolute, unconditional, and continuing guaranty” for the “full and punctual payment by the Borrower” (*id.* at 4). According to Plaintiff, Ahmad’s argument that the Guaranty is more than a guaranty for the payment of money as it contains the language: “the payment and performance of all other obligations, liabilities, and indebtedness of the Borrower to the Bank under the Loan documents . . . ” is not a compelling argument as the Guaranty states that is for the “full and punctual payment by the Borrower” (*id.* at 4-5 [citing *Bank of America, N.A. v Solow*, 2008 WL 1821877, *4 [Sup Ct, NY County 2008]] “the application of CPLR 3213 ‘is not affected by the circumstance that the instrument in question was part of a larger transaction, such as the sale of business, as long as the instrument requires the defendant to make certain payments and nothing else’” [internal citations omitted]).

Finally, plaintiff argues that the issue of the Borrower’s default “is irrelevant for the purposes of this motion” (memo in reply at 8). According to plaintiff, under the Guaranty, Ahmad agreed to guarantee the Borrower’s debt “by acceleration,” irrespective of Borrower’s default. The relevant language in the Guaranty is: “The Guarantor hereby unconditionally and irrevocably guarantees to the Bank the full and punctual payment by the Borrower, when due, whether at the stated due date, by acceleration, or otherwise of all Obligations (as defined below) of the Borrower, howsoever created” Thus, based upon this provision from the Guaranty, “by acceleration” is a trigger for Ahmad’s guaranteed “full and punctual payment.”

In opposition, Ahmad argues that because the court has to reference documents external to the Guaranty to interpret the Guaranty, CPLR 3213 is not applicable. On this point, Ahmad relies on the principle that an instrument does not “qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make more than de minimis deviation from the face of the document” (*PDL Biopharma, Inc. v*

Wohlstadter, 147 AD3d 494, 495 [1st Dept 2017]). For this proposition Ahmad also cites to *Bonds Fin., Inc.*, in which the defendant allegedly defaulted on certain promissory notes and a guaranty and the Court held that because plaintiffs based their claim on “an acceleration clause in a revolving credit agreement,” resorting to an “external document to define an event of default under the note,” the plaintiffs were unable to make out a prima facie case (*id.*, 48 AD3d at 231). The Court further stated that the credit agreement “outlined several default events other than the mere failure to make payments . . .” (*id.*).

According to Ahmad, the language in the Guaranty states that obligations shall mean all obligations, liabilities, indebtedness . . . whether now existing or hereafter created. . . including without limitation, the Loan and the payments . . .” Ahmad argues that plaintiff has not included all of the required documents in its motion. Specifically, Ahmad states that plaintiff has not included the original October 26, 2016 letter agreement, which was referenced in the December 12, 2017 Letter Agreement and in the Guarantees executed by the HAKS entities, the predecessors of the Atane Entities and are currently co-guarantors. According to Ahmad, the December 18, 2018 Agreement states that the “term Loan” is evidenced by the October 26, 2016 Commercial Notes and the December 12, 2017 Letter Agreement describes the “Term Loan” as representing:

“ . . . the ‘term-out’ of the unpaid principal balance of the line of credit heretofore provided to the Borrower by the Bank to the extent of Five Million (\$5,000,000) Dollars. The Borrower agrees that all covenants, special requirements and agreements contained herein shall be incorporated by reference to the note that evidences that certain term loan indebtedness of the Borrower in the original principal amount of \$5,000,000.00 and such provisions hereof shall survive and remain in full force and effect notwithstanding the expiration, cancellation or termination of the Line”
(Giannakopoulos affirmation, exhibit A at 3).

Thus, according to Ahmad, “these documents are necessary as they are the foundation for each and every subsequent agreement . . . and are required to determine [Ahmad’s] obligations

under the Note. . .” (memo in opp at 14) and, therefore, the Guaranty is not an instrument that supports the application of CPLR 3213.

Plaintiff argues that “[e]nforcement of the Guaranty does not require reference to extraneous documents” (memo in reply at 5). Plaintiff argues that CPLR 3213 does not preclude the court from looking at other documents (citing *European Am. Bank v Cohen*, 183 AD2d 453 [1st Dept 1992]; *Solow*, 2008 WL 1821877, *4-5; *Boland v Indah Kiat Fin. (IV) Mauritius Ltd.*, 291 AD2d 342, 342-343 [1st Dept 2002]).

Ahmad further argues that the Guaranty is not an instrument for the payment of money only, but it additionally guarantees the performance of other obligations. Specifically, Ahmad states that the Guaranty obligates Ahmad beyond only payment, and guarantees:

“the performance of the Atane Entities obligations under all loan documents, including the Atane Entities’ obligations under the December 12, 2017 Letter Agreement and the December 18, 2018 Agreement. The Guaranty defines “Obligations” as ‘all obligations, liabilities and indebtedness . . . including, without limitation, the [Note] and the payment and performance of all other obligations, liabilities, and indebtedness of the Borrower to the Bank under the Loan Documents’”

According to Ahmad, the December 12, 2017 Letter Agreement “expressly obligates various “‘Financial Reporting Requirements’ in Section ‘8’” mandating, among other things, that the Borrower provide Citibank “with consolidated balance sheets, statements of income and retainer earnings, balance sheets and schedules of accounts receivable” (memo in opp at 11). Ahmad argues that the December 18, 2018 Agreement reiterates “performance-related” obligations with the language “and all other obligations. . .” (*id.* at 12).

In order to make out a prima facie case under CPLR 3213 on a guaranty, the plaintiff must prove: (1) the existence of the guaranty; (2) the underlying debt; and (3) the guarantor’s failure to perform (*see Davimos, v Halle*, 35 AD3d 270, 272 [1st Dept 2006]).

To meet its burden, Plaintiff has submitted to the court the Guaranty, which contains an unconditional promise by Ahmad to guarantee “to the Bank the full and punctual payment by the Borrower, when due, whether at the stated due date, by acceleration, or otherwise of all Obligations (as defined below) of the Borrower, howsoever created” Plaintiff has also submitted the acceleration notice and the Note. Here, the Guaranty and these accompanying documents clearly contemplate Ahmad’s duty to pay a sum certain upon the trigger of one of the events set forth in the above-quoted paragraph, including “by acceleration.”

On the question of what constitutes “an instrument for the payment of money,” the First Department has stated that it has “spawned ‘a plethora of irreconcilable caselaw’” (*Dresdner Bank A.G. (N.Y. Branch) v Morse/Diesel, Inc.*, 115 AD2d 64, 67 [1st Dept 1986]). The Court found that “[f]or the most part, the cases permitting use of the CPLR 3213 procedural device have dealt primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness” (*id.* at 67 [internal quotation marks and citation omitted]). “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 Alliance v Sokol*, 179 AD2d 583, 584 [1st Dept 1992]). “An agreement to pay money may meet the statutory criterion, even though it is part of a larger transaction and the obligor has covenanted to perform other acts under a ‘separate but contemporaneous contract executed as part of the same general transaction’” (*Desdner Bank A.G.*, 115 AD2d at 67).

Likewise, the First Department held that the instrument at issue in *Stevens v Phlo Corp.*, was not “disqualified from CPLR 3213 treatment by reason of the provision that gave defendant the option of twice extending the date of payment for specified periods of time upon condition

that it issue plaintiff warrants for the purchase of a specified number of its shares of stock” (*Stevens*, 288 AD2d 56, 56 [1st Dept 2001]. According to the Court, “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.*; see also *Juste v Niewdach*, 26 AD 3d 416, 417 [2d Dept 2006] [“The mere presence of additional provisions in the guaranty does not constitute a bar to CPLR 3213 relief, provided that the provisions do not require additional performance as a condition precedent to repayment, or otherwise alter the defendant's promise of payment”).

“An agreement to pay money may meet the statutory criterion, even though it is part of a larger transaction and the obligor has covenanted to perform other acts under a ‘separate but contemporaneous contract executed as part of the same general transaction’” (*Desdner Bank A.G.*, 115 AD2d at 67). The Second Department denied the CPLR 3213 motion in *Oak Rock Fin., LLC*, because neither the guaranty nor the underlying agreement relied upon by the plaintiff in support of its motion contained an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite future time (*Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1039 [2d Dept 2017]).

On the question of whether resort to other related documents affects a consideration of CPLR 3213, the First Department has ruled that

“the application of CPLR 3213 ‘is not affected by the circumstance that the instrument in question was part of a larger transaction, such as the sale of business, as long as the instrument requires the defendant to make certain payments and nothing else.’ *Torres & Leonard v Select Professional Realities*, 118 AD2d 462, 468 [1st Dept 1986]. A guaranty may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, and the need to consult the underlying documents to establish the amount of liability does not affect the availability of CPLR 3213” (*European Am. Bank v Cohen*, 183 AD2d 453, 453 [1st Dept 1992]; *Schwartz v Turner Holdings*, 139 AD2d 458 [1st Dept 1988]).

(*Bank of Am., N.A. v Solow*, 19 Misc 3d 1123(A), 2008 NY Slip Op 50830(U) *4 [Sup Ct, NY County 2008]).

In *Metal Mgt, Inc. v Esmark Inc.*, the First Department denied plaintiff's motion for relief under CPLR 3213, because of the way in which its claim, based on a guaranty, relied on external documents. The Court went through the chain of documents that made up the parties' transaction:

“the guarantor guaranteed the punctual payment when due of all payment obligations pursuant to each purchase order and payment of the guaranteed obligations strictly in accordance with the terms of each purchase order, and the purchase orders required that invoices be issued, that the goods furnished be of good quality, and that any discrepancies be resolved prior to invoicing”
(*id.*, 49 AD3d 333, 333 [1st Dept 2008]).

The Court concluded its decision by denying the motion on the additional ground that plaintiff had not established the amount due and owing: “In any event, despite all the documents submitted by plaintiff, a clear issue of fact exists as to the quantum of damages due under the guaranty, as to which plaintiff bears the burden of proof” (*id.*).

Here, the court finds that the Guaranty that plaintiff has submitted in support of its motion pursuant to CPLR 3213 is an instrument for the payment of money only. Plaintiff meets its prima burden of establishing the existence of the Guaranty, the underlying debts and the corresponding acceleration notice. The Guaranty, signed by Ahmad, contains a promise for the unconditional payment of monies due and owing by the Borrower. Although Ahmad might be correct that the Line Letter contains a reporting requirement, such requirement is not alleged to be a precondition for payment under the Guaranty. This requirement does not undermine the unconditional agreement by Ahmad to guarantee the payment of monies under the Note. Further, the Court finds that although the Guaranty is part of a larger transaction, it is clear in its purpose of requiring Ahmad to make payments on the Loan Documents. The need to consult

these underlying documents to establish the amount of liability does not affect the availability of CPLR 3213.

However, Plaintiff has not established the quantum of damages due under the guaranty. “The prima facie case for [a motion pursuant to CPLR 3213] requires documentary evidence or an explanation of how the indebtedness is calculated, other than in the form of mere conclusory allegations” (*HSBC Bank USA v IPO, LLC*, 290 AD2d 246, 246 [1st Dept 2002]). In its affidavit in support of plaintiff’s motion, Giannakopolous avers in a conclusory fashion that since the acceleration notice, there is an outstanding balance of \$3,066,672.99 due and owing under the Note as of July 16, 2019 with interest accruing in the amount of \$495.66 per day. Giannakopoulos further avers that Guarantor has paid nothing under the Guaranty. These are the same facts set forth in the memorandum in support of the motion.

In opposition, Ahmad argues that the affidavit of Giannakopoulos fails to meet this burden as it does not present the requisite documentary evidence to setting forth the calculation of the amount alleged due or an explanation as to the total amounts claimed to be due and owing under the Note. According to Ahmad, the affidavit in support of plaintiff’s motion states in conclusory fashion that \$3,066,672.99 is due. Further, Ahmad argues that there are questions of fact as to whether the Atane Entities failed to make any payments due under the Note. On this Ahmad states:

“the December 12, 2017 Letter Agreement does not change the maturity date of the Note. Further, the December 18, 2018 Agreement appears to modify only the terms of the Credit Line – not the terms of the Note. As stated in the affidavits of Mr. Ahmad and Mr. Hashmi, the Atane Entities have made all required payments of principal and interest, including those following the execution of the December 18, 2018 Agreement and even after Citibank purported to accelerate the amounts due under the Note. Citibank fails to identify any payment or amount that the Atane Entities failed to pay” (memo in opp at 19-20).

Ahmad states that each month after the execution of the December 18, 2018 Agreement, plaintiff withdrew monthly payments of principal of \$59,523.81 together with interest from an account created for that purpose. Further, according to Ahmad, both before and after the acceleration notice, Plaintiff withdrew monies on January 31, April 1, April 30, May 31, July 1, July 31 and September 3 of 2019 in the usual sum of \$59,523.81 and on July 1, 2019, a payment of \$15,664.43, and on July 31, 2019 a payment of \$14,842.33 were made towards interest. On September 3, 2019, a payment of \$15,627.01 was made towards interest.

Plaintiff has offered no documentation or any explanation of how the Borrower's indebtedness is calculated. In its reply, Plaintiff does not address the monthly payments identified by Ahmad in the opposition. Instead, Plaintiff reiterates in a conclusory manner that \$3,066,672.99 remains due as of July 16, 2019, plus contractual attorneys' fees incurred to date and interest, and attorneys' fees incurred hereafter.

There is likewise a question about the amount of outstanding attorneys' fees. The Loan Modification Agreement explicitly obligates Borrower and Ahmad to pay Plaintiff its reasonable attorneys' fees incurred to collect the amounts owed under the Loan, whether or not Plaintiff commenced a lawsuit, as follows:

Borrower and Guarantor each agree that it will be responsible for the payment of all of Lender's out-of-pocket expenses arising in connection with the preparation, administration, modification, amendment, interpretation, enforcement or review of this Agreement and/or any of the other Loan Documents, including, without limitation, the fees and expenses of outside legal counsel for Lender. (Giannakopoulos affirmation, exhibit D at 10).

Likewise, the Guaranty obligates Mr. Ahmad to pay Plaintiff its reasonable attorneys' fees incurred to collect the amounts owed under the Note, in the event the Borrower does not make these payments as follows:

The Guarantor agrees to pay all costs, expenses (including, without limitation, attorneys' fees and disbursements) and damages incurred in connection with the enforcement of the Guaranteed Obligations of the Borrower to the extent that such costs, expenses and damages are not paid by the Borrower pursuant to the respective Loan Documents.

(Giannakopoulos affirmation, exhibit C at ¶ 1 (c)).

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Plaintiff Citibank, N.A.'s motion for summary judgment in lieu of a complaint, pursuant to CPLR 3213 (motion seq. 001), is granted; and it is further

ORDERED that Plaintiff is directed to submit a proposed judgment within 14 days of entry of this decision onto NYSCEF by the court. Defendant Husam U. Ahmad will have 7 days from the date of submission of plaintiff's proposed judgment to submit an objection to plaintiff's calculations in its proposed judgment; and it is further

ORDERED that the portion of Plaintiff's motion which seeks attorneys' fees is severed and referred to a Special Referee to: (1) ascertain the reasonableness of the attorneys' fee sought, and (2) calculate and report with recommendations the total amount of attorneys' fees and costs due Plaintiff; and it is further

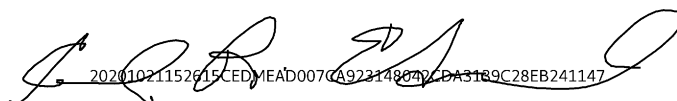
ORDERED that counsel for Plaintiff shall serve a copy of this order along with notice of entry on defendant within twenty (20) days; and it is further

ORDERED that counsel for Plaintiff shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date;

and it is further

ORDERED that such service upon the Special Referee Clerk 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 "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

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<u>10/21/2020</u> DATE		<u>CAROL R. EDMAD, J.S.C.</u>	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE