SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

SANTANDER BANK, N.A.,

Plaintiff,

- v -

SAFETY GROUP LTD. and JOSEPH ALBUNIO,

Defendants.

----------X

INDEX NO. 153587/2019

MOTION DATE 10/08/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion of plaintiff Santander Bank, N.A. ("Plaintiff") for summary judgment against defendants the Safety Group Ltd. (the "Safety Group") and Joseph Albunio ("Albunio") is granted in part and to the extent set forth in the following memorandum decision.

Background

Plaintiff commenced this action to recover amounts owed by Defendants to Plaintiff as a result of three commercial loans (together, the "Loans") made by Plaintiff to the Safety Group and guaranteed by Albunio. On September 13, 2017, in connection with a line of credit, the Safety Group executed a Business Loan Agreement for a revolving line of credit loan (the "RLOC Loan") (verified complaint, exhibit A; NYCEF Doc No 2) and a Revolving Line of Credit Note in the original maximum principal amount of $500,000.00 (the "RLOC Note") (*id.*,

exhibit B; NYCEF Doc No 3).[1] On October 4, 2018, the parties entered into a Modification Agreement whereby Plaintiff extended the maturity date of the RLOC Note from September 13, 2018 to December 13, 2018 (the "Modification Agreement") (*id*., exhibit C; NYSEC Doc No 4). On September 13, 2017, in connection with the extension of a commercial term loan (the "2017 Term Loan"), the Safety Group executed a Business Loan Agreement (*id.*, exhibit D; NYSCEF Doc 5) and a Promissory Note in the principal amount of $1,000,000 (the "2017 Term Note") (*id.*, exhibit D; NYSCEF Doc 6). On March 26, 2018, in connection with the extension of another commercial term loan (the "2018 Term Loan") the Safety Group executed a Business Loan Agreement (*id.*, exhibit F; NYSCEF Doc 7) and a Promissory Note dated March 26, 2018 in the principal amount of $100,000 (the "2018 Term Note") (*id.*, exhibit G; NYSCEF Doc 8). Finally, in conjunction with the Loans, the Safety Group executed three Commercial Security Agreements, one for each Loan (the "Security Agreements"), granting Plaintiff a Security Interest in all of the Safety Group's assets and property (the "Collateral") (verified complaint, exhibits H-J; NYSCEF Doc Nos 9-11). In connection with the Loans, Albunio executed three commercial guarantees (the "Guarantees"), whereby he personally guaranteed each of the Loan obligations (verified complaint, exhibits L-M; NYSCEF Doc Nos 13-15).

As set forth in the affidavit of Mario D. Tehlikian, a Vice President of Plaintiff, submitted in support of Plaintiff's motion, the Safety Group defaulted on the RLOC Note, as amended by the Modification Agreement, by failing to make payments due December 18, 2018, the maturity date of the Loan, which triggered a cross-default under the 2017 Note, the 2018 Term Note, and the Guarantees. Defendants then requested that the maturity date of the RLOC Note be extended until March 13, 2019 (verified complaint ¶ 27; NYSCEF Doc No 1). Plaintiff agreed, and the

[1] Albunio executed all of the agreements involved in this action as President of the Safety Group.

parties entered into a Forbearance Agreement dated December 18, 2018 (the "Forbearance Agreement") (*id*., exhibit O; NYSCEF Doc No 16), by which, *inter alia*, Defendants reaffirmed the obligations under the Loan documents; the maturity date of the RLOC Note was extended to March 13, 2019; and the maturity dates of the 2017 Term Note and the 2018 Term Note were amended to March 13, 2019 (*id.* at 4 § [1][a]). As consideration for the Forbearance Agreement, Defendants were required to pay a Forbearance Fee in the amount of $3,250.00 (*id.* at 3 § 7). The Forbearance Agreement was also personally guaranteed by Albunio (*id.* at 10).

After execution of the Forbearance Agreement and during the period of forbearance, Safety Group failed to remit payment on the 2017 Term Note (Tehlikian aff ¶ 36). Pursuant to the terms of the Forbearance Agreement, this constitutes an event of termination of the agreement, as set forth in the Forbearance Agreement as follows:

> 4. Forbearance Termination Events. The occurrence of any of the following shall terminate Lender's obligations to forbear under this Agreement (each a "Forbearance Termination Event"):
> (a) Any additional Event of Default under the Loan Documents;
> (b) Any failure of Obligor to comply with the terms of this Agreement, including without limitation a failure by Borrower to make the any of the Forbearance Payments when due . . . .
> (e) The failure of Obligor to comply with any term or condition of any other agreement, document or instrument evidencing any other indebtedness to the Lender.

Plaintiff notified Defendants by letter dated January 30, 2019 that the Loan Documents and the Forbearance Agreement were in default, (complaint, exhibit P; NYSCEF Doc No 17), and Plaintiff's counsel sent an additional letter dated April 5, 2019, demanding payment of all outstanding amounts due and owing (complaint, exhibit Q; NYSCEF Doc No 18).

On April 5, 2019, Plaintiff commenced this action to recover amounts owed under the various agreements, including $514,981.36 for the RLOC Loan; $707,127.11 for the 2017 Term Loan; and $76,339.59 for the 2018 Term Loan; plus additional amounts for interest, late fees,

reasonable attorneys' fees, other charges, and costs and expenses associated with this action. To this end, the complaint asserts causes of action for breach of the various agreements, account stated, unjust enrichment, breach of the guaranties, and replevin to recover the Collateral. Defendants appeared in the action on June 6, 2019 by filing an answer that asserts five affirmative defenses, including failure to mitigate damages, that Defendants were "forced against their will to enter into the Forbearance Agreement," that the payment requirements set forth in the Forbearance Agreement are unlawful, that the Forbearance Agreement is a contract of adhesion and the terms are unconscionable, and that Defendants made payments to Plaintiff in reliance upon Plaintiff's agreement to forbear with the understanding that such payments would allow for additional time to pay the debt (answer ¶¶ 33-37; NYSCEF Doc No 23).

Plaintiffs now move for summary judgment for the relief sought in the complaint. Defendants oppose the motion on the grounds that Plaintiff acted in bad faith and in a manner that injured the Safety Group's ability to properly conduct its business, and taking advantage of Safety Group's "weak and vulnerable position" (Simoni affirmation in opposition ¶¶ 9-11; NYSCEF Doc No 54). In opposition to the motion, Defendants submits an affidavit of Robert Simoni, the Chief Financial Officer of the Safety Group, who attests to actions of Plaintiff that Defendants contend constitute bad faith. Among these, Simoni asserts that funds from the RLOC Loan could only be accessed by virtue of "an antiquated online platform" that worked in conjunction with a checking account to move funds into and out of the line of credit and that this system "involved a manual approval process by our bank representative for wires and other fund transfers" which caused delays that were detrimental to Defendants. By way of example, Simoni explains that "in December of 2017 the lack of automation and [the representative's] vacation

caused a wire not to go out on time," which "resulted in a delay in [Safety Group's] month end payroll, which was disruptive and costly to our business and our employees" (*id.*).

Simoni also alleges that the checking account was regularly charged with high monthly fees and that requests to Plaintiff regarding same went unanswered, that Safety Group never received checks from Plaintiff for the checking account despite requests for same, and that Defendants were dissatisfied with the length of time it took to clear deposits to the account and make those funds available for use (*id.*). Despite Safety Group's dissatisfaction with Plaintiff's actions, it sought an extension of its line of credit in early 2018, but was denied, and Plaintiff instead offered the 2018 Term Loan (*id.* ¶ 8). Simoni asserts that the bank representative for the account expressed disappointment with the loan terms and told him "that the bank was setting us up to fail but advised us to take it while she worked on repackaging everything, such repackaging never transpired" (*id.*). Nevertheless, Defendants accepted the loan and terms.

With respect to the Forbearance Agreement, Simoni attests that, in December 2018, the account was transferred to a representative at Plaintiff's Business Banking Workout Unit, which sent Simoni the Forbearance Agreement, "which [Defendants] had to sign to prevent them from sending our file to their Park Avenue law firm who [the representative] said 'wouldn't treat us as nice'" (*id.* ¶ 11). Simoni also asserts that an issue arose in connection with the Forbearance Agreement whereby the Forbearance Fee was not paid due to deficient funds in the account. Simoni states that the account was deficient because "Plaintiff had transferred funds to cover a negative balance in our other account that was cause by oppressive bank fees" (*id.*). Thereafter, additional funds were deposited into the checking account to pay the Forbearance Fee, but Plaintiff later advised that the Forbearance Fee was returned for insufficient funds (*id.*). With respect to these events, Simoni asserts that at the time in question, he "had no idea what was

going on with this account because I was not able to access the account online. I believe that as an act of bad faith the Plaintiff had prevented me from such access" (*id.*). Finally, Simoni asserts that Defendants made various proffers of settlement to Plaintiff's counsel prior to commencement of the litigation, but that Defendants have "not receive a response to our fair proposal" (*id*. ¶ 12).

Standard of Review

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

Discussion

A. Breach of the Promissory Notes, Guarantees, and Forbearance Agreement

To establish a *prima facie* entitlement to judgment as a matter of law in an action to recover on a promissory note, a plaintiff must submit proof of the promissory note and of the

failure to make payment in accordance with its terms (*see H & H Custom Homes, Inc. v Kossoff*, 96 AD3d 445, 445 [1st Dept 2012]). Here, the Plaintiff's submissions, which included copies of the RLOC Note, the 2017 Term Note, the 2018 Term Note, and the Forbearance Agreement, all executed by Defendant, and the Tehlikian affidavit, which attests to Defendants' default thereunder, is sufficient to satisfy Plaintiff's *prima facie* burden (*see Takeuchi v Silberman*, 41 AD3d 336, 336-337 [1st Dept 2007] ["plaintiffs established a prima facie right for recovery [on promissory notes] with proof of defendant's execution of the notes and default in payment"]). These submissions also satisfy Plaintiff's *prima facie* burden on the guaranty, because "[a] prima facie right to recover under a guaranty agreement is established by showing the execution thereof and a failure to pay in accordance therewith" (*Samsung America, Inc. v Noah*, 209 AD2d 367, 367 [1994]).

Plaintiff having met its *prima facie* burden, the burden shifts to Defendants to submit evidence establishing the existence of a triable issue with respect to a *bona fide* defense. The evidence proffered by Defendants in opposition to the motion is insufficient to fulfill this requirement. First, the majority of allegations set forth in the Simoni affidavit are barred by waivers and releases contained in the Forbearance Agreement. Paragraph 11 of the Forbearance agreement states as follows:

> 11. Release of Lender. By execution of this Agreement, Borrower and any guarantor jointly and severally acknowledge and confirm that they do not have any offsets, defenses or claims against [Plaintiff], or any of its officers, agents, directors or employees whether asserted or unasserted. To the extent that they may have such offsets, defenses or claims, Borrower and any guarantor and each of their respective successors, assigns, parents, subsidiaries, affiliates, predecessors, employees, agents, heirs, executors, as applicable, jointly and severally, release and forever discharge [Plaintiff], its subsidiaries, affiliates, officers, directors, employees, agents, attorneys, successors and assigns, both present and former (collectively the "Lender Affiliates") of and from any and all manner of action and actions, cause and causes of action, suits, debts, controversies, damages, judgments, executions, claims and demands whatsoever,

> asserted or unasserted, in law or in equity which against the Lender and/or Lender Affiliates they ever had, now have or which any of the Borrower's or Guarantor's successors, assigns, parents, subsidiaries, affiliates, predecessors, employees, agents, heirs, executors, as applicable, both present and former ever had or now has, upon or by reason of any manner, cause, causes or thing whatsoever . . . .

(Tehlikian aff in support, exhibit Q at 4 § 11). The Forbearance Agreement also contains an acknowledgment of the debts and waiver of any defense to the repayment of the debt, as set forth in paragraph 5 of the agreement, as follows:

> 5. Ratification of Existing Agreements. All of [Defendants'] obligations, indebtedness and liabilities to [Plaintiff] as evidenced by or otherwise arising under the Loan Documents, except as otherwise expressly modified in this Agreement upon the terms set forth herein and therein, are, by [Defendants'] execution of this Agreement, ratified and confirmed in all respects by [Defendants]. Each [Defendant] acknowledges that all of [Defendants'] obligations, indebtedness and liabilities to [Plaintiff] under the Loan Documents are joint and several. In addition, by [Defendants'] execution of this Agreement, [Defendants] represent and warrant that no counterclaim, right of set-off or defense of any kind exists or is outstanding with respect to such obligations, indebtedness and liabilities . . . .

(*id.* at 6 § 5). Absolute and unconditional waivers of this type are valid and enforceable (*JFURTI, LLC v Singal*, 171 AD3d 611, 611 [1st Dept 2019] ["The promissory note and guaranties are absolute and unconditional and the language sufficiently specific to constitute valid waivers of defenses"], *citing Red Tulip, LLC v. Neiva*, 44 A.D.3d 204, 209, 842 N.Y.S.2d 1 [1st Dept. 2007], *appeal dismissed* 10 N.Y.3d 741, 853 N.Y.S.2d 283, 882 N.E.2d 896 [2008]). Defendants have thus waived any defenses arising from events that occurred prior to the execution of the Forbearance Agreement.

Furthermore, although the answer alleges that Defendants were "forced" to enter into the Forbearance Agreement, they have failed to demonstrate facts sufficient to support this defense. The only evidence that Defendants proffer to support this allegation is Mr. Simoni's statement that a representative of the Plaintiff threatened to send the matter to "their Park Avenue law

firm" who "wouldn't treat us as nice" (Simoni aff ¶ 11; NYSCEF Doc No 55). Economic duress exists where a party is compelled to agree to terms set by another party because of a wrongful threat by the other party that prevents it from exercising its free will (*Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc.*, 167 AD3d 100, 105 [1st Dept 2018], *citing* (*805 Third Ave. Co. v M.W. Realty Associates*, 58 NY2d 447, 451 [1983]). As a matter of law, the exercise or threatened exercise of a legal right does not amount to duress (*C & H Engineers, P.C. v Klargester, Inc.*, 262 AD2d 984, 984 [4th Dept 1999], *citing 805 Third Ave,* 58 NY2d at 451). Moreover, because the personal guaranty is absolute and unconditional, Albunio may not raise a defense of duress (*Punch Fashion, LLC v Merchant Factors Corp.*, 180 AD3d 520, 522 [1st Dept 2020]). Thus, Plaintiff's threat to take legal action to enforce its rights under the Loans did not amount to cognizable duress and does not raise a material question of fact regarding this defense.

Defendants allegations regarding payment of the Forbearance Fee are similarly unavailing. Pursuant to the terms of the Forbearance Agreement, Plaintiff agreed to "Forbear from taking present action to exercise its rights under the Loan Documents to collect the full amount due under the Loan in connection with [the RLOC Loan] for a period of three (3) months" and "to accept monthly payments from [Defendants] in accordance with the terms of the respective Notes" (Tehlikian aff, exhibit Q at 3 § 7 [a], [d]; NYSCEF Doc No 43). The section of the Forbearance Agreement titled "Obligations of the Obligor" also requires that Defendants "Pay the Forbearance Fee to [Plaintiff] in immediately available funds on or before the date of this Agreement and *pay each Forbearance Payment to Lender when due*" (*id*. at 4 § 2 [a] [emphasis added]). In sum, Plaintiff agreed not to pursue available remedies for the prior default, but the agreement did not obviate Defendants' obligation to continue making monthly payments

during the pendency of the Forbearance Agreement. Although the recitation of the relevant facts is somewhat convoluted, Simoni alleges, in essence, that Plaintiff's charging of "egregious bank fees" caused the balance in the checking account to have insufficient funds to pay the Forbearance Fee. Defendants do not, however, assert that the fees in question were unlawful or prohibited by any contractual provision, statute or by common law. More significantly, Defendants do not deny that they defaulted on the obligation to pay the $22,826.82 required monthly payment under the 2017 Term Note or that the alleged bad faith caused the default. Thus, Defendants defaulted under the terms of the 2017 Term Note and the Forbearance Agreement regardless of any delay in implementation of the Forbearance Agreement. Defendants' allegations regarding the Forbearance Fee, therefore, do not raise a question of material fact sufficient to defeat the motion for summary judgment.

Defendants' allegations regarding Plaintiff's purported refusal to accept Defendants' offers of settlement also fail. Plaintiff's refusal to settle its claims does not constitute a defense to this action because there is no such requirement set forth in any of the agreements at issue, nor does any such requirement exist at law. Overall, Defendants fail to produce evidentiary proof sufficient to require a trial of any material questions of fact regarding any of their defenses (*see S.J. Capelin Associates, Inc. v Globe Manufacturing Corp*, 34 NY2d 338, 343 [1974] [Affirmative defenses that contain "[b]ald conclusory assertions, even if believable, are not enough to defeat summary judgment"]). In light of the foregoing, the court grants Plaintiff's motion for summary judgment as to liability against the Defendants on the first cause of action for breach of the RLOC Loan, the 2017 Term Loan, the 2018 Term Loan, and the Forbearance Agreement, and on the fourth cause of action for Breach of the Guaranties.

B. Accounts Stated

An account stated exists when bills, invoices or statements evidence a party's indebtedness and that party does not object within a reasonable time (*Russo v Heller*, 80 AD3d 531 [1st Dept 2011]; *see also Ryan Graphics, Inc. v Bailin*, 39AD3d 249 [1st Dept 2007]). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails (*Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412 [1st Dept 1995]). On the issue of damages, Plaintiff relies solely on Mr. Tehlikian's representation regarding the amounts owed, which is supported only by a "payoff" statement for each loan. No accounting or other account statements are provided. Plaintiff also moves for an award of attorneys' fees, which it is permitted to do under the terms of the various agreements, but has not submitted any invoices or identified the amount of legal fees it seeks. As such, Plaintiff has not met its *prima facie* burden on its cause of action for an account stated or established the amount of its money damages. Therefore, summary judgment is denied with respect to the second cause of action for accounts stated, and this matter will be set down for an inquest on damages.

C. Unjust Enrichment

Unjust enrichment arises when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analystics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] *citing Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]). Seeing as there is no question of fact regarding the existence of enforceable agreements in this action, Plaintiff's

motion with respect to the third cause of action for unjust enrichment is denied and the third cause of action for unjust enrichment is severed and dismissed.

D. Replevin

Whereas outstanding questions of fact remain regarding the amount of Plaintiff's damages, the motion for summary judgment is denied as to the cause of action for replevin of collateral.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is granted in part, and Plaintiff is awarded summary judgment as to liability on its first and fourth causes of action for breach of the RLOC Loan, the 2017 Term Loan, the 2018 Term Loan, and the Forbearance Agreement, and on the fourth cause of action for Breach of the Guaranties; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied as to the third cause of action for unjust enrichment and the third cause of action for unjust enrichment is severed and dismissed; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied as to the second cause of action for accounts stated and the fifth cause of action for replevin; and it is further

ORDERED that this matter is hereby referred for assignment to a Special Referee for an accounting of damages including principal, late fees and other charges, accrued interest from the date of January 31, 2019, reasonable attorneys' fees, and costs and expenses of this action; and it is further

ORDERED that, pursuant to CPLR 4317 (a), a Special Referee shall be designated to hear and determine the amount of Plaintiff's damages, and the powers of the Special Referee shall not be limited beyond the limitations set forth in the CPLR;

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter at the initial appearance to an available Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that Plaintiff shall serve a proposed accounting within 24 days from the date of this order and the Defendants shall serve objections to the proposed accounting within 20 days from service of Plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

12/11/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE