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| <b>Arbor-Myrtle Beach PE LLC v Frydman</b>   |
| 2021 NY Slip Op 30223(U)   |
| January 20, 2021   |
| Supreme Court, New York County   |
| Docket Number: 657133/2019   |
| Judge: O. Peter Sherwood   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**ARBOR-MYRTLE BEACH PE LLC,**

**Plaintiff,**

**-against-**

**JACOB FRYDMAN,**

**Defendant.**

-----X

**O. PETER SHERWOOD, J.:**

**DECISION AND ORDER**

**Index No.: 657133/2019**

**Motion Sequence No.: 001**

Under motion sequence 001, plaintiff moves for summary judgment in lieu of complaint. For the following reasons, the motion shall be granted.

**I. BACKGROUND**

On May 21, 2014, plaintiff entered into an LLC Agreement with United Partnership (United), in which defendant Jacob Frydman is a principal, owner, and, for the purposes of this Agreement, the authorized signatory (Pl. Br. at 2 NYSCEF Doc. No. 14]). Under the terms of the Agreement, plaintiff Arbor-Myrtle Beach PE LLC, as an equity provider made a \$2,100,000 contribution in United for United to invest in, own, and develop certain property in Myrtle Beach, South Carolina (*id.*). Plaintiff also received an unconditional guaranty of its investment by Frydman (*see id.*; Caulfield Aff. ¶ 8, Ex. 1 [NYSCEF Doc. Nos. 3, 4]). Pursuant to the Agreement, United was obligated to pay plaintiff \$16,000 per month plus interest at the rate of 15% (*see* Caulfield Aff. ¶ 9, Ex. 1). If a “Change of Control Event” occurred, the interest rate would increase to 24%, plaintiff would be entitled to accelerate payment of the entire outstanding balance, and receive a 5% late fee (*see id.* ¶¶ 10–11). Under the terms of the Guaranty, Frydman agreed to “absolutely, irrevocably and unconditionally” guarantee to plaintiff the payment of the Guaranteed Obligations and waiving “any and all defenses to the performance” of his duties (*see* Pl. Br. at 3; Caulfield Aff. ¶ 13, Ex. 2 [NYSCEF Doc. No. 5]).

On April 6, 2018, United failed to make the required payment and defaulted on every required payment thereafter, thus constituting a Change in Control Event (*see* Pl. Br. at 4–5). Plaintiff claims it is entitled to accelerate payment of the \$880,000 outstanding balance on its PE Contribution, \$349,946.67 in interest, and \$26,088.00 in late fees for a total of \$1,256,034.67 excluding attorneys’ fees.

## II. LEGAL STANDARD

CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, “other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]). An action on a guaranty is an action for payment of money only (*see Cooperatieve Centrale Raiffesisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]) (“*Cooperative Centrale*”). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a *prima facie* case for summary judgment (*see Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]).

## III. ARGUMENTS

### A. Plaintiff’s Memorandum in Support

Plaintiff begins by reciting CPLR § 3213 which provides for summary judgment in lieu of complaint “when an action is based upon an instrument for the payment of money only”. Plaintiff argues that, to obtain summary judgment here, it need only present proof of the instrument and defendant’s failure to make payment according to its terms (*see Silver v Silver*, 17 AD3d 281, 281 [1st Dept 2005]; *see Blumenstein v Waspit Grp., Inc.*, 140 AD3d 620, 620 [1st Dept 2016]; *Bhatara v Futterman*, 122 AD3d 509, 510 [1st Dept 2014]; *DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]; *SCP, Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). The Guaranty here qualifies as an instrument for payment of money only and can be used as the subject of a summary judgment motion in lieu of complaint (*see Gard Entm’t, Inc. v Country in N.Y., LLC*, 96 AD3d 683, 683 [1st Dept 2012]; *Bank of Am., N.A. v Solow*, 59 AD3d 304, 304–05 [1st Dept 2009]; *Jason Trading Corp. v Lason Trading Corp.*, 303 AD2d 180, 180 [1st Dept 2003]; *First Interstate Credit Alliance, Inc. v Sokol*, 179 AD2d 583, 583 [1st Dept 1992]; *Manufacturers Hanover Tr. Co. v Green*, 95 AD2d 737, 737 [1st Dept 1983]; *Hess Corp. v Magnone*, 27 Misc3d 1220(A), 1220A [Sup Ct New York County 2010]). Plaintiff also argues that it has established a *prima facie* case to a right of judgment by presenting proof of the Guaranty and testifying as to defendant’s failure to make the required payments (*see Caulfield Aff.* ¶¶ 3, 14–15, 38–39; *see also Boland v Indah Kiat Financial (IV) Mauritius Ltd.*, 291 AD2d 342, 342–43 [1st Dept 2002];

*Banesto Banking Corp. v Teitler*, 172 AD2d 469, 469 [1st Dept 1991]). Defendant unconditionally guaranteed the payment obligations of United to plaintiff under the LLC Agreement and defendant failed to honor those terms as to the amounts owed (*see* Caulfield Aff. ¶¶ 3, 14–15). In view of the unexcused default on the Guaranty, summary judgment must be granted for the total amount due and owing plus attorneys’ fees (*see e.g. Beer Sheva Realty Corp. v Ponjnitayapanu*, 214 AD2d 352, 352 [1st Dept 1995]; *Council Commerce Corp v Paschalides*, 92 AD2d 579, 579 [2d Dept 1983]). Frydman is also required to pay plaintiff, upon demand, “all costs and expenses (including court costs and reasonable attorney’s fees) incurred by plaintiff in connection in the enforcement hereof or the preservation of plaintiff’s rights hereunder” (Caulfield Aff. Ex. 2 § 1.10; *see also id.* § 1.2). Plaintiff adds that courts routinely award attorneys’ fees and costs to plaintiffs seeking summary judgment pursuant to CPLR 3213 (*see DDS Partners*, 6 AD3d 347, 349; *Tars Uluşlararasi Dis Ticaret Turizm ve Sanayi Ltd., Sirketi v Leonard*, 26 AD3d 298, 299 [1st Dept 2006]; *Desiderio v Devani*, 24 AD3d 495, 497 [2d Dept 2005]). Consequently, the court should issue a judgment on the principal and interest owing, and separately direct an inquest be held to determine the amount of costs and expenses to be awarded to plaintiff (*see* Pl. Br. at 9–10).

#### B. Defendant’s Memorandum in Opposition

In opposition, defendant argues that CPLR 3213 is unavailable as the First Department has rejected the use of summary judgment in lieu of complaint pursuant to CPLR 3213 to recover alleged debts under an operating agreement between the parties (*see* Def. Br. at 2 [NYSCEF Doc. No. 20]; *see also e.g. Anstalt v Zoghby*, 170 AD2d 241 [1st Dept 1991]; *Grossman v Clarey*, 133 AD2d 443 [2d Dept 1987]; *Hirsch v Rifkin*, 166 AD2d 293 [1st Dept 1990]; *Tonkonogy v Seidenberg*, 63 AD2d 587, 588 [1st Dept 1978]). Defendant further argues that courts have denied CPLR 3213 summary judgment when the documents upon which the action is based raise triable issues of fact as to liability or damages (*see, e.g. City Nat’l Bank v Morelli Ratner, P.C.*, 129 AD3d 425 [1st Dept 2015]; *Eugenia VI Venture Holdings, Ltd. v AMC Inv’rs, LLC*, 35 AD3d 157, 159 [1st Dept 2006]; *Finkelstein v IABM Bakery Sys., Inc.*, 91 AD2d 922, 923 [1st Dept 1983]; *Times Square Assocs. v Grayson*, 333 NYS2d 155, 156 [1st Dept 1972]). A complaint and discovery in this matter are vital, in contrast to typical summary judgment in lieu of complaint actions in which a formal complaint is superfluous (*see HSBC Bank USA v IPO, LLC*, 290 AD2d 246 [1st Dept 2002]; *Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]).

Defendant also argues that accelerated relief is improper here because such actions must be based on an instrument for the payment of money only or a judgment and the transaction giving rise to defendant's guaranty involved the purchase of real property with mortgage financing (*see* Def. Br. at 4–5; *Weissman*, 88 NY2d at 443–44). Because defendant's Guaranty is not with respect to a promissory note or written instrument for money, and because of the complexity of the transaction, the court must deny plaintiff's motion (*see* Def. Br. at 5). The First Department has rejected motions under CPLR 3213 where the movant, like plaintiff here, relies on proof outside of the instrument to make a *prima facie* case (*see e.g. Bonds Fin., Inc. v Kestrel Techs., LLC*, 48 AD3d 230 [1st Dept 2008]; *Hirsch*, 166 AD2d at 293). The Guaranty only guaranteed payment of the "Guaranteed Obligations," and plaintiff cannot prove that the Guaranteed Obligations are not satisfied without referring to the LLC Agreement as well as "five exhibits and two schedules" (Def. Br. at 6). The terms included in the definition of Guaranteed Obligations requires an analysis of rights and obligations under the Operating Agreement beyond the scope of a CPLR 3213 motion (*see id.*). Courts have denied CPLR 3213 motions in cases similar to this (*see e.g. JFURTI, LLC v First Capital Real Estate Advisors, LP*, 165 AD3d 419, 421 [1st Dept 2018] [CPLR 3213 motion denied as documentary evidence was not "instruments for the payment of money only" where they require unidentified amounts of payment be made in the future]; *see also Montecalvo v Cat E., LLC*, 128 AD3d 783 [2d Dept 2015] [denying the motion where the promissory note referred to the operating agreement to define certain terms set in the note]). Defendant argues that plaintiff's suit is not based on an instrument for money only but, instead, on detailed contractual redemption and other provisions in the Operating Agreement, "Definitive Documents" incorporated by reference in the Operating Agreement, and a settlement agreement plaintiff made with United (*see* Def. Br. at 7–8). Because plaintiff's claim appears to have been based on a settlement with United as to which defendant was neither a party nor even aware, additional factual questions have been raised necessitating denial of the motion and the inclusion of additional parties (*see id.* at 8–9; *see also PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 496 [1st Dept 2017]; *Interman Indus. Prods., Ltd.*, 37 NY2d at 155).

Defendant argues further that United 945 82nd Parkway Fee LLC, United Realty Capital Operating Partnership, L.P, and Wells Fargo should be joined to this action as necessary parties (*see* Def. Br. at 9; CPLR § 1001; *see also 27th St Block Ass'n v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002] [holding that the possibility that a judgment rendered without

a non-joined party could have an adverse effect on that party is enough to indicate joinder]). Because it is impossible to calculate defendant's indebtedness without an evaluation of the performance of each of plaintiff, United LLC, and United Partnership with respect to the Agreement, United LLC and United Partnership should be joined to this action (Def. Br. at 9–10; *see Lindkvist v Honest Ballot Ass'n*, 932 NYS2d 761, 761 [Sup Ct New York County 2011]; *see also Coastal Sheet Metal Corp. v Dierks Hearing Co.*, 983 NYS2d 202, 202 [Sup Ct Kings County 2013]; *City of N.Y. v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]). As an alternative to granting mandatory joinder under CPLR 1001, defendant argues that permissive joinder under CPLR 1002 should be granted (*see* Def. Br. at 10; *see also Detection Control Sys. Inc. v Colliers Tri-State Mgmt. LLC*, 2019 NY Slip Op 33637(U) at 4 [Sup Ct New York County 2019]). Permission should also be granted to interplead Wells Fargo as United LLC currently has around \$900,000 in a reserve account at a Wells Fargo Bank branch in Myrtle Beach, South Carolina (*see* Def. Br. at 11).

### C. Plaintiff's Reply

In reply, plaintiff argues that it has successfully established its right to relief pursuant to CPLR 3213 as the Guaranty is an instrument for the payment of money only and CPLR 3213 does not bar extrinsic evidence to establish default or the amount owed (*see* Pl. Reply at 3, NYSCEF Doc. No. 23). Plaintiff asserts that unconditional guarantees, such as the one here, have been repeatedly qualified as instruments for the payment of money only for CPLR 3213 purposes (*see id.*; *see also Cooperative Centrale*, 25 NY3d at 492; *Rhodia, Inc. v Steel*, 300 NYS2d 1005, 1006 [1st Dept 2002]; *Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). CPLR 3213 does not bar the use of extrinsic evidence, such as the LLC Agreement here, to establish a *prima facie* claim of liability under a monetary instrument or to assess default and the amount of liability (*see Kirkwood v Nakhamkin*, 169 AD2d 693, 694 [1st Dept 1991]); *see also GSO RE Onshore LLC v Sapir*, 29 Misc3d 1234(A), 1234A [Sup Ct New York County 2020]; *DBI/ASG Advisors, LP v Palmer*, No. 650358/2012, 2013 WL 1178633, at \*2 [Sup Ct New York County 2013]; *Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737, 737 [1st Dept 1983]; *Bank Leumi Trust Co. v Rattet & Liebman*, 182 AD2d 541, 542 [1st Dept 1992]). The cases relied on by defendant either did not involve an unconditional guaranty or involved significant disputed issues of fact (*see e.g. Weissman*, 88 NY2d at 444 [claim based on stock purchase agreement]; *Interman Indus. Prods., Ltd.*, 37 NY2d at 156 [no written instrument by which defendant obligated itself to make required payments]; *Anstalt*,

170 AD2d at 241 [claim based on undated letter drafted by borrower in lieu of note]; *Grossman*, 133 AD2d at 444 [claim based on limited partnership agreements]; *Hirsch*, 166 AD2d at 293–94 [claim based on stock sale agreement]; *Tonkonogy*, 63 AD2d at 587 [claim based on bond]).

Plaintiff next argues that defendant has failed to raise an issue of fact precluding relief here (*see* Pl. Reply at 6–7; *see also Banco Popular N. Am. v Victory Taxi Mgmt*, 1 NY3d 381, 383 [2004]; *Interman Indus. Prods., Ltd.*, 37 NY2d at 155). Defendant has failed to offer evidentiary proof raising an issue of fact, instead merely arguing that the Guaranty’s reference to other documents and the modification of payment terms in an alleged “settlement agreement” to which defendant was not party takes plaintiff’s claim out of CPLR 3213 (*see* Pl. Reply at 7). The “settlement” was a simple modification of the LLC Agreement pursuant to which the successor in interest to United returned to plaintiff \$600,000 in principal in exchange for a reduction in the required monthly payments (*see id.*; *Caulfield Aff.* ¶ 25, Ex. 4). Plaintiff argues that, as of the date of this modification, it was owed \$1,020,000 in unpaid principal which amount defendant does not dispute (*see Caulfield Aff.* § 25, Ex. 4). The Letter Modification did not relieve or alter defendant’s obligation to pay the amount due as the Guaranty waived any defense based on modification of the LLC Agreement (*see id.* § 13, Ex. 2, §§ 1.4, 2.2). The *Caulfield Affidavit*, LLC Agreement, and Letter Modification clearly state the original principal amount (*see id.* ¶ 8, Ex. 1 at Ex. B), the required monthly principal payment (*see id.* ¶ 9, Ex. 1 at Ex. B; *id.* ¶ 25, Ex. 4), the required monthly interest payment (*see id.* ¶ 9, Ex. 1 at Ex. B; *id.* ¶ 12, Ex. 1 at § 8.23 (b), (c)), the applicable Late Fees (*see id.* ¶ 10, Ex. 1 at § 3.1 (e)), and plaintiff’s unqualified right to require United to redeem the entirety of plaintiff’s outstanding interest which triggered the default and a Change of Control Event (*see id.* ¶ 11, Ex. 1 at § 8.3). Plaintiff argues that defendant has failed to present anything that factually disputes these unambiguous provisions (*see* Pl. Reply at 8; *see also PDL Biopharma, Inc.*, 147 AD3d at 495 [plaintiff argues defendant’s cite here is inapposite as material factual issues existed in *PDL*, such as whether a default occurred, that are not present here]).

To the extent defendant asserts a defense to his liability under the Guaranty, Frydman explicitly waived such defenses in the Guaranty itself (*see* Pl. Reply at 9; *Caulfield Aff.*, Ex. 2 at Article 2, § 2.2). Plaintiff argues the Guaranty makes explicit that defendant waived any potential defenses to his obligation to pay amounts owed under the LLC Agreement, and consequently any purported defenses should fail as a matter of law (*see Caulfield Aff.*, Ex. 2 at § 1.4 [Guaranty cannot be revoked by him]; *id.*, Ex. 2 at § 1.6 [upon plaintiff’s demand, he shall immediately pay

outstanding amount owed]; *id.*, Ex. 2 at § 1.4 [increase or reduction of Guaranteed Obligations shall not discharge defendant's duty]; *id.*, Ex. 2 at § 1.7 [plaintiff has no duty to pursue others]; *id.*, Ex. 2 at § 1.8 [Guarantor waives notice of proof of non-payment or default by obligated parties]; *id.*, at Ex. 2 at Article II preamble, § 2.2 [Guarantor waives all defense to performance]; *see also United Orient Bank v Lee*, 223 AD2d 500 [1st Dept 1996]; *Gannett Co. v Tesler*, 177 AD2d 353, 353 [1st Dept 1991]; *American Trading Co. v Fish*, 42 NY2d 20, 26 [1977]).

Plaintiff concludes by arguing defendant cannot join any additional parties to this action as, pursuant to the Guaranty, section 1.7, Frydman waived any right to require plaintiff to institute a lawsuit against the obligated parties prior to enforcing the Guaranty or to join the obligated parties in any action to enforce the Guaranty (*see* Pl. Reply at 10; Caulfield Aff., Ex. 2 at § 1.7). Further, under the Guaranty, defendant is not entitled to institute an action against United or any other party to the LLC Agreement without plaintiff's consent or until plaintiff has been repaid in full (*see* Caulfield Aff., Ex. 2 at §§ 1.12, 4.4). Consistent with the Guaranty, a creditor need not proceed against the obligor, but may sue only the guarantor (*see* Pl. Reply at 10–11; *see also News Ltd. v Australis Holdings Party, Ltd.*, 293 AD2d 276, 277 [1st Dept 2002]; *accord Congress Factors Corp. v Meinhard Commercial Corp.*, 129 Misc2d 726, 728 [Sup Cty New York County 1985]; *Stonehill Inst. Partners, L.P. v Frac Diamond Aggregates LLC*, No. 654300/2013, 2014 NY Misc LEXIS 5020, at \*5 [Sup Ct Special Term New York County 2014]).

#### IV. DISCUSSION

CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, “other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document” (*Weissman*, 88 NY2d at 444; *Interman Indus. Products Ltd.*, 37 NY2d; at 155). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri*, 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a *prima facie* case for summary judgment (*see Weissman*, 88 NY2d at 444; *Matas*, 274 AD2d at 328 327).

Here, plaintiff's motion for summary judgment pursuant to CPLR 3213 is granted as plaintiff has presented the Guaranty which is an instrument for the payment of money only and

proof of United's default (*see* Caulfield Aff. ¶¶ 26–31; *id.*, Ex. 2). Although defendant argues that the guarantee is not an instrument for the payment of money only, courts have previously held that unconditional guarantees, such as the one presented here, are instruments for payment of money only within the meaning of CPLR 3213 (*see Cooperative Centrale*, 25 NY3d at 492; *Rhodia, Inc. v Steel*, 32 AD2d 753 [1st Dept 2002]; *Seaman-Andwall Corp. v Wright Machine Corp.*, 31 AD2d 136 [1st Dept 1968]). Defendant similarly has failed to show that an issue of fact exists, instead arguing there was a settlement to which defendant was not a party. The settlement, however, was a modification of the LLC Agreement which does not absolve defendant's liability here because in the Guaranty defendant waived defenses relating to modifications of the LLC Agreement (Caulfield Aff., Ex. 2, §§ 1.4, 2.2). Finally, defendant's request for joinder must be denied as he waived any right to initiate a suit against the obligated parties (*see id.*, Ex. 2, § 1.7).

As to damages, defendant does not dispute the amounts claimed except to state he was not privy to a settlement that resulted in a reduction of the amount outstanding and owed under the terms of the Guaranty (*see* Opp. Br. at 8, Doc. No. 20). Were the amount owed disputed, calculation could be referred to a special master (*see Allied Irish Banks, PLC v YMCA of Greenwich*, 36 Misc 3d 216, 224 (Sup Ct NY Cty 2012) *aff'd*, 105 AD3d 516 [1<sup>st</sup> Dept 2013]). The amount of damages, including interest, and late fees are set forth in the Caulfield Affidavit (*see* Doc. No. 3, ¶¶ 38-40). Plaintiff is also entitled to recover its reasonable attorney fees. Counsel shall meet and confer as to the amount to be added to the judgment for attorney fees. If the parties are unable to reach agreement, plaintiff may seek to have the issue severed and referred to a special referee to hear and determine. Plaintiff shall settle judgment on five (5) business days notice.

This constitutes the decision and order of the court.

**DATED: January 20, 2021**

**ENTER,**

  
**O. PETER SHERWOOD J.S.C.**