SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

----------X

LEXON INSURANCE COMPANY,

Plaintiff,

- v -

SANARE ENERGY PARTNERS, LLC, THOMAS CLARKE, ANA CLARKE

Defendants.

INDEX NO. 654170/2020

MOTION DATE 08/31/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 12, 15, 16, 17, 18, 19, 20, 21

were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Lexon Insurance Company ("Plaintiff") seeks summary judgment in lieu of complaint under CPLR 3213 based on Defendants' alleged breach of a Promissory Note and Guaranty. For the reasons set forth below, the motion is granted.

BACKGROUND

This case involves two related instruments for the payment of money. Defendant Sanare Energy Partners, LLC ("Sanare"), then operating as Northstar Offshore Ventures LLC ("Northstar") (together, the "Borrower"), executed a promissory note in favor of Plaintiff dated July 31, 2018 (the "Promissory Note") (Affidavit of Jeremy Sentman ["Sentman Aff."], ¶¶4, 7 [NYSCEF 2]; *see* NYSCEF 3). Under the Promissory Note, Borrower "promise[d] unconditionally" to pay Plaintiff a total sum of $2,799,915.64 "for value received" (NYSCEF 3 at 1, §1). Borrower agreed to make monthly installment payments from September 2018 to December 2020, together with interest accruing from July 2018 onward until the Promissory Note is fully paid, at a fixed per annum rate of 3.0% (Sentman Aff., ¶9). The Promissory Note

defines an "Event of Default" as occurring upon, inter alia, "[Borrower]'s failure to make any payment when due under the terms of this Note" (NYSCEF 3 §6). The Promissory Note further provides that upon the occurrence of an Event of Default, "all principal and other amounts owed under this Note will become immediately due and payable without any action by [Plaintiff], [Borrower], or any other person" (NYSCEF 3 §7).

The second instrument at issue is a Personal Guaranty of Payment (the "Guaranty") executed by Defendants Thomas M. Clarke and Ana M. Clarke (collectively, the "Guarantors"). The Guaranty expressly provides that, "[f]or value received," the Guarantors "irrevocably and unconditionally" guarantee to Plaintiff the payment of any sums due under the Promissory Note, and that the Guarantors are jointly and severally liable for such sums (Sentman Aff., ¶15). In addition, the Guaranty provides that the Guarantors also "irrevocably and unconditionally" guaranteed to Plaintiff all expenses – including attorney's fees – incurred in collecting the amounts due under the Promissory Note as well as in enforcing the Guaranty (*id.*, ¶16).

From September 1, 2018 to March 1, 2020, Borrower made its obligated payments under the Promissory Note (*id.*, ¶19). But Plaintiff did not receive a payment from Borrower on April 1, 2020, triggering an Event of Default under the Promissory Note (*id.*, ¶20). Plaintiff issued a Default Notice to Borrower on May 6, 2020, but did not receive a response (*id.*, ¶22). To date, Borrower has failed to make any payments due under the Promissory Note since March 1, 2020 (*id.*, ¶21). Moreover, the Guarantors have not paid Plaintiff any part of the amounts due under the Promissory Note (*id.*, ¶23).

As a result, Plaintiff brought this action seeking to recover the following amounts alleged to be outstanding under the Promissory Note and Guaranty: (i) a principal amount of $1,769,821.04, (ii) interest at a fixed annual rate of 3% from March 1, 2020, and (iii) under the

Guaranty only, the expenses incurred by Plaintiff in collecting the amounts due under the Promissory Note and in enforcing the Guaranty (*id.*, ¶25).

DISCUSSION

CPLR 3213 provides that "[w]hen an action is based upon an instrument for the payment of money only … the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." This provision "was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 491-92 [2015] [internal quotation marks and citation omitted]). A moving party is entitled to summary judgment under CPLR 3213 where such party "prove[s] a *prima facie* case by the instrument and a failure to make the payments" (*Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19, 21 [1st Dept 1983]).

It is well-established that promissory notes are "instruments for the payment of money only" that fall within the scope of CPLR 3213 (*see, e.g.*, *Bonds Fin., Inc. v Kestrel Techs., LLC*, 48 AD3d 230, 231 [1st Dept 2008] [affirming that a promissory note "qualifies as an instrument for [CPLR 3213] purpose[s]"]; *DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004] [holding that a plaintiff was entitled to summary judgment in lieu of complaint to enforce a promissory note]). The same holds true with respect to guaranties of payment (*see, e.g.*, *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.*, 25 NY3d at 492 ["An unconditional guaranty is an instrument for the payment of 'money only' within the meaning of CPLR 3213."]; *Bank of Am., N.A. v. Solow*, 59 AD3d 304, 305 [1st Dept 2009] ["Recourse to CPLR 3213 was appropriate, since the guaranty was 'an instrument for the payment of money only'"]).

Under CPLR 3213, a plaintiff makes out a prima facie case for summary judgment in lieu of a complaint by proof of an instrument and the defendant's failure to make payment according to its terms (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137-38 [1st Dept 1968], *affd sub nom. Seaman-Andwall Corp v Wright Mach. Corp.*, 29 NY2d 617 [1971]). The burden then shifts to the defendant to establish, by admissible evidence, the existence of a triable issue of fact in order to avoid enforcement (*id.* at 137).

Plaintiff has established its prima facie case for summary judgment against Borrower under the Promissory Note by submitting evidence showing the existence of the Promissory Note, which contains an unconditional promise to pay the principal amounts due plus interest, and Borrower's failure to pay such amounts (*see* Sentman Aff., ¶¶19-24). Under the Promissory Note, Defendant Sanare owes $1,769,821.04 in principal, in addition to interest thereon at a fixed per annum rate of 3% from and after March 1, 2020 (*id.*, ¶25).

Likewise, Plaintiff has established its prima facie case for summary judgment against the Guarantors (*see, e.g.*, *Solow*, 59 AD3d at 304 ["Plaintiff demonstrated its entitlement to summary judgment [under CPLR § 3213] by establishing the existence of a guaranty and submitting an affidavit of nonpayment."]). The Guaranty expressly provides that, "[f]or value received," the Guarantors "irrevocably and unconditionally" guarantee to Plaintiff the payment of any sums due under the Promissory Note, and that the Guarantors are jointly and severally liable for such sums (Sentman Aff., ¶15). In addition, the Guaranty provides that the Guarantors also "irrevocably and unconditionally" guaranteed to Plaintiff all expenses – including attorney's fees – incurred in collecting the amounts due under the Promissory Note as well as in enforcing the Guaranty (*id.*, ¶16). Neither of the Guarantors has paid Plaintiff any part of the amounts due and payable by

Borrower under the Promissory Note, or any expenses incurred in either collecting the amounts due under the Promissory Note or enforcing the Guaranty (Sentman Aff., ¶23).

With the burden shifted to them, Defendants fail to establish, by admissible evidence, the existence of a triable issue of fact in order to avoid enforcement of the two instruments (*Seaman-Andwall Corp.*, 31 AD2d at 137-38 ["Execution and default having been conceded, it was incumbent on defendants to come forward with evidentiary proof sufficient to raise an issue as to the defenses."]).[1] In his affidavit, Clarke makes several claims on behalf of Defendants about the factual circumstances surrounding the instruments. According to Clarke, "Lexon provided $3,000,000 in the summer of 2017 to protect its own interests" (Affidavit of Thomas M. Clarke, ¶3 ["Clarke Aff."] [NYSCEF 16]). Lexon had issued over $20 million in Northstar bonds, but the bonds were "under-collateralized," so "Lexon needed someone to buy [Northstar's] assets" to avoid the bondholders calling the bonds (*id.*, ¶7). Clarke maintains that, "[a]s an accommodation to Lexon," he formed Sanare and used Lexon's $3 million in order to buy Northstar's assets (*id.*, ¶¶8-9). And it was not until a year later that Lexon approached Sanare, Clarke, and his wife about executing the Promissory Note and Guaranty relating to the $3 million provided to Sanare (*id.*, ¶11). Lexon allegedly "needed an executed Promissory Note and Guaranty to satisfy their own creditors and auditors" when they examined Lexon's accounting books (*id.*, ¶12).

The "conclusory, self-serving" statements in the Clarke Affidavit are insufficient to defeat summary judgment (*Conn. Nat'l Bank v Hack*, 186 AD2d 387, 388 [1st Dept 1992]; *Hackensack Cars, Inc. v Beverly*, 140 AD2d 254, 254 [1st Dept 1988] [granting summary judgment in lieu of complaint where defendant's "self-serving parol evidence varie[d] the plain

[1] The Court notes that Defendants' opposition does not include a memorandum of law or, for that matter, any legal arguments or citations to case law.

and unambiguous terms of the notes"]). Even accepting as true Clarke's statements about why Lexon gave Sanare $3 million, his affidavit does not provide grounds to second-guess the clear and unconditional terms of the Promissory Note and Guaranty (Clarke Aff., ¶¶12-16). To begin with, Clarke does not dispute – and therefore concedes – entering into the Promissory Note and Guaranty with Lexon and then defaulting under those agreements (Clarke Aff., ¶¶12-16). Although he now claims Lexon "indicated [it] would not enforce the Promissory Note or the Guaranty even if Sanare failed to make a monthly payment under the Promissory Note" (*id.*, ¶13), Clarke offers no details to substantiate this representation. Nor does he explain why, in that scenario, Sanare made 19 payments to Lexon under the Promissory Note (Sentman Aff., ¶19).[2]

Next, Clarke asserts that "Lexon provided no consideration to [them]" (*id.*, ¶16). On this argument, the evidentiary burden falls on Defendants: "[P]laintiff was not required to demonstrate that there was adequate consideration for the note" as part of its prima facie case, so "the burden then shift[s] to [D]efendants to demonstrate lack of consideration as a defense" (*Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]). And the defense fails where, as here, Defendants concede the note was fully funded (*i.e.*, Lexon provided $3 million) and "is 'clear, complete and unambiguous' on its face and recites that it was executed for value" (*id.* at 656-57; Sentman Aff., ¶19). "[C]ourts avoid an interpretation that renders a contract illusory and

[2] What's more, the Promissory Note expressly bars any oral waiver or modification of its terms (NYSCEF 3 §11 ["No amendment, modification or waiver of, or consent with respect to any provision of this Note shall in any event be effective unless the same shall be in writing and signed and delivered by [Borrower] and [Plaintiff]"]; *see CrossLand Sav., FSB v Loguidice-Chatwal Real Estate Inv. Co.*, 171 AD2d 457, 457 [1st Dept 1991] [affirming grant of summary judgment in lieu of complaint where "the defendants' parole evidence, in the form of uncorroborated affidavits purporting to establish oral promises by plaintiff . . . was directly contradicted by the unambiguous terms of the parties' mortgage documents"]).

therefore unenforceable for lack of mutual obligation and prefer to enforce a bargain where the parties have demonstrated an intent to be contractually bound" (*Curtis Properties Corp. v Greif Companies*, 212 AD2d 259, 265-66 [1st Dept 1995], citing *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88 [1917]).

In light of the undisputed facts, the Court will not invalidate the agreements for lack of consideration (*Millman LLC v Greenman*, No. 650161/2019, 2020 WL 3890935, at *8-9 [Sup Ct, New York County July 10, 2020]; *Tonche v Cohen*, No. 104452/2008, 2008 WL 4860156, at *6-*7 [Sup Ct, New York County Oct. 31, 2008] [rejecting lack of consideration defense because "Defendants[']very own signature on a note containing the terms 'for value received' contradicts their assertion," and "defendants made regular monthly payment[s] on the note (having made a total of twenty-five (25) payments) that they now claim lacks consideration"]).[3]

Finally, Defendants note that Lexon "apparently did not sign the Promissory Note," while the Guaranty "is not dated" (Clarke Aff., ¶¶14-15). Neither of these defects, however, raise genuine issues of material fact. The Promissory Note was signed by Clarke on behalf of Borrower, the party against whom enforcement is sought (NYSCEF 3 at 3). Defendants do not dispute signing the Promissory Note, do not dispute that Plaintiff was the counterparty on the Promissory Note, and do not dispute receiving $3 million from Plaintiff (*see* Clarke Aff., ¶¶3,

[3] In addition, "New York law does not require separate consideration for a guaranty. The consideration underlying the primary obligation is sufficient" (*Abrams v Malhotra*, No. 0603114/2007, 2008 WL 2413032 [Sup Ct, New York County June 02, 2008]). Here, Lexon asserts – and Defendants concede – that the Guaranty was executed by the Guarantors "[i]n connection with and as an inducement for [Lexon] to agree to the Promissory Note" (Sentman Aff., ¶14). This is sufficient to show that the Guaranty is supported by valid consideration and enforceable by Lexon (*see Liberty Nat'l Bank v Gross*, 201 AD2d 467, 468 [2d Dept 1994] ["Although the [promissory note and the guaranty] may not have been executed on the same date, they were clearly part of the same transaction, and there was no need for new or additional consideration to make the guarantee valid and enforceable"]).

12-13). Defendants' undisputed signature on the instrument, paired with subsequent performance, is sufficient (*see Blumenstein v Waspit Group, Inc.*, 140 AD3d 620, 620 [1st Dept 2016] ["Plaintiff established his entitlement to summary judgment in lieu of complaint by submitting a promissory note executed by defendants and proof of defendants' failure to make payments according to its terms"]). Defendants' observation about the undated Guaranty is similarly unavailing, since Defendants do not dispute signing the instrument (Clarke Aff., ¶15; *Sunbelt Rentals, Inc. v N.Y. Renaissance*, No. 152106/2012, 2013 WL 6683666, at *1, n.5 [Sup Ct, New York County Dec. 16, 2013] [Defendants' "claim that the . . . [G]uaranty is undated is insufficient to raise an issue of fact, as [Defendants] do[] not deny that said guaranty 'bears [their] signature[s]'"]).

The Court has considered Defendants' remaining arguments and finds them to be without merit.

* * * *

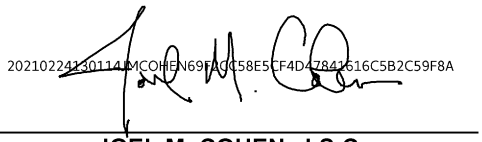
Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is Granted.

The Clerk of the Court is directed to enter judgment in favor of Plaintiff Lexon Insurance Company and against Defendant Northstar for the amount of $1,769,821.04, plus interest thereon at a fixed per annum rate of 3% from and after March 1, 2020 to the date of entry of judgment; against each of Thomas M. Clarke and Ana M. Clarke, jointly and severally with Northstar and with each other, for the amount of $1,769,821.04, plus interest thereon at a fixed per annum rate of 3% from and after March 1, 2020 to the date of entry of judgment as calculated by the Clerk,

together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court.



2/24/2021
DATE

JOEL M. COHEN, J.S.C.

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