

Arena Ltd. SPV, LLC v Goldstein
2021 NY Slip Op 32277(U)
October 26, 2021
Supreme Court, New York County
Docket Number: Index No. 650816/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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ARENA LIMITED SPV, LLC	INDEX NO. <u>650816/2021</u>
Plaintiff,	MOTION DATE <u>02/04/2021</u>
- v -	MOTION SEQ. NO. <u>001</u>
MICHAEL GOLDSTEIN,	
Defendant.	DECISION + ORDER ON MOTION – INCLUDES REFERENCE

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 18, 19, 20, 21, 22, 23

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

In this guarantor action concerning an underlying commercial loan obligation, plaintiff Arena Limited SPV, LLC (Arena) moves (Motion Seq. No. 001) (Doc No. 2)¹ for summary judgment in lieu of a complaint (CPLR 3213) against defendant Michael Goldstein (Goldstein) in an amount not less than \$13,140,481.75, plus \$4,917.51 interest per diem, together with costs and attorneys' fees.² For the reasons discussed below, plaintiff's motion is granted.

¹ References to "Doc No." followed by a number refers to documents filed in NYSCEF.

² Originally, plaintiff sought to recover \$16,743,372.48, plus interest in the amount of \$5,481.82 per diem, together with costs and attorneys' fees (see, Notion of Motion for Summary Judgment in Lieu of a Complaint) (Doc No. 2). Plaintiff asserts that a "credit bid" was submitted after the herein motion was interposed, and a credit was subsequently applied to the original outstanding amount due and owing (see Anchipolovsky Reply aff at ¶ 12) (Doc No. 20).

FACTUAL AND PROCEDURAL BACKGROUND

Vendian-Covenant Hospitality Partners, LLC (VCHP) is in the business of developing and managing hospitality properties. Ninety percent (90%) of VCHP is owned by Clearview Hospitality US, LTD (Clearview) and the remaining ten percent (10%) is owned by Covenant Capital USA, LLC (Covenant Capital). Defendant Goldstein is president of Covenant Capital.³

VCHP purchased three existing hotel properties in Neptune Beach, FL; Wichita, KS; and, Springfield, IL (collectively, the VCHP hotel ventures). These hotels would be redeveloped under the brand name Red Roof Inn (the project) and were to be managed and operated by Packard Hospitality Management, LLC (Packard) – an entity owned by defendant Goldstein (see Goldstein aff at ¶ 6) (Doc No. 18).

To finance the VCHP hotel ventures, VCHP obtained loans from plaintiff Arena (the Lender). On or about June 14, 2017 the Lender advanced a loan in the amount of \$5,580,000 to VCHP Neptune Beach, LLC (Neptune) for the project in Neptune, FL (the Neptune loan) (Doc No. 8); on or about October 6, 2017, the Lender advanced a loan in the amount of \$3,345,000 to VCHP Wichita, LLC (Wichita) for the project in Wichita, KS (the Wichita loan) (Doc No. 7); and, on or about June 14, 2017 the Lender advanced a loan in the amount of \$5,200,000 to VCHP Springfield LLC (Springfield) for the project in Springfield, IL (the Springfield loan) (Doc No. 4) (collectively, the VCHP loans). Goldstein, in his corporate capacity as president of Neptune, Wichita, and Springfield, executed the VCHP loans.

³ Twenty-five percent (25%) of Covenant Capital is owned by another Goldstein owned company, MGA Capital, LLC; twenty-five percent (25%) of Covenant Capital is owned by BAM 212, LLC (owned by Phil Hugh and others); and fifty percent (50%) of Covenant Capital is owned by Covenant Capital USA, Inc. (indirectly owned by Philippe Vienot, Mats Leander, and Brandur Ludwig).

On or about November 8, 2017, Goldstein, on behalf of Springfield, executed a \$5,200,000.00 Promissory Note (the Note) (Doc No. 5), wherein Springfield “unconditionally” promised to pay the Lender

“the principal sum of this Note and interest on the unpaid principal sum of this Note and all other amounts due under the Loan Agreement and the other Loan Documents from time to time outstanding at the rates and at the times specified in the Loan Agreement and the outstanding balance of the principal sum of this Note and all accrued and unpaid interest thereon and all other amounts due under the Loan Agreement and other Loan Documents shall be due and payable, in all events, on the Maturity Date.” (See the Note, Article 1 entitled, “PAYMENT TERMS.”)

A Portfolio Guaranty dated November 8, 2017 (Doc No. 6) was also executed by Goldstein on behalf of Springfield as the corporate “Guarantor” of the Note. Here, Springfield

“irrevocably and unconditionally guarantees to Lender and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise. Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor.”

Section 1.2 of the Portfolio Guaranty defined “Guaranteed Obligations” as “the timely payment and performance of all obligations under each ‘Portfolio Loan Agreement’ and each ‘Portfolio Loan Document’” which in addition to the Springfield loan, included the Neptune loan and the Wichita loan (see Schedule 1.2 of the Portfolio Guaranty).

In addition, in connection with the Note and the Portfolio Guaranty, the direct and/or indirect individual owners of Covenant Capital (10% owners of VCHP) - Goldstein, Philippe Vienot, Mats Leander, Brandur Ludwig, and Phil Hugh (collectively, the Individual Guarantors) - executed an Unsecured Guaranty (the Personal Guaranty) (Doc No. 9). Goldstein avers that he did not execute an unsecured guaranty for the Neptune loan or the Wichita loan (see Goldstein aff ¶ 16), but did personally guaranty the Springfield loan, along with the Individual Guarantors,

and agreed to be “collectively, jointly and severally” held “irrevocably and unconditionally” liable to the

“... Lender and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise. Each Guarantor hereby irrevocably and unconditionally covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor.” (see Personal Guaranty §1.1).

The “Guaranteed Obligations” referenced in the Personal Guaranty include, but is not limited to:

(a) losses, damages (including, without limitation, punitive or exemplary damages), costs, expenses, liabilities (including, without limitation, strict liability), claims, obligations, settlement payments, penalties, fines, assessments, citations, litigation, demands, defenses, judgments, suits, proceedings or other expenses of any kind whatsoever incurred or suffered by Lender (including reasonable attorneys' fees and expenses and court costs) to the extent arising out of or in connection with the following (but not to the extent arising out of Lender's gross negligence or willful misconduct): ...

(ix) failure to pay charges for Taxes, Other Charges, labor or materials or judgments that can create Liens on any portion of the Property, unless such charges are the subject of a fide dispute in which Borrower is contesting the amount or validity thereof in accordance with the terms the Loan Agreement, provided that Guarantor will not be liable under this clause (ix) to the extent that (a) the Property does not generate sufficient cash flow to pay such sums during the applicable period or (b) sufficient funds have been deposited in the applicable Reserve Account, Lender's access to such funds is not restricted (whether by court order or any actions of Borrower or Guarantor or otherwise), Lender is obligated to apply or make available such funds for such purposes and Lender does not apply or make available such funds for the payment of such charges or judgments, unless such charges were incurred in violation of the Loan Documents; ...

(xiv) any default occurs under that Subordination and Attornment Agreement of even date herewith by and among PACKARD HOSPITALITY MANAGEMENT, LLC, a California limited liability company, Lender and Borrower,

(b) the entire amount of the Debt in the event of: (A) Borrower filing a voluntary petition under the Bankruptcy Code or any other federal or state bankruptcy or insolvency law; (B) the filing of an involuntary petition against Borrower under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law, in which Borrower, any Guarantor or any Affiliate of Borrower or causes (for example, and without

limitation, by seeking the appointment of a receiver or filing a petition), consents to, aids, solicits, supports, or otherwise cooperates or colludes to cause such condition event; (C) Borrower, any Guarantor, or any Affiliate of Borrower or any Guarantor filing an answer consenting to or otherwise acquiescing or joining in any involuntary petition filed against Borrower, by other Person under the Bankruptcy Code or any other Federal or state bankruptcy or insolvency law such filing is done at the direction, request, consent, or on behalf of Lender); (D) Borrower, any or any Affiliate of Borrower or Guarantor consenting to or otherwise acquiescing or joining in an application for the appointment of a custodian, receiver, trustee, or examiner for Borrower or any portion the Property; (E) Borrower or any Guarantor (unless such action is done at the direction, request, consent on behalf of Lender) making an assignment for the benefit of creditors, or admitting, in writing or in any legal proceeding, its insolvency or inability to pay its debts as they become due; (F) Borrower failing to obtain Lender's prior written consent to any Indebtedness or voluntary Lien encumbering the Property to the extent such consent is expressly required by the Loan Agreement or the Security Instrument; (G) for a Permitted Transfer made in accordance with the Loan Agreement, Borrower failing to obtain prior written consent to any Transfer; or (H) Borrower failing to maintain its status as a Special Purpose Entity (unless such failure is de minimis and promptly cured), as required by, and in accordance with, the terms and provisions of the Loan Agreement and the Security Instrument which failure results in the substantive consolidation of the assets and liabilities of Borrower with any other Person in any or other proceeding. Notwithstanding anything to the contrary in this Guaranty or in any of the other Loan Documents, Lender shall not be deemed to have waived any right which Lender may have under Section 506(a), 506(b), 1111(b) or any other provisions of the Bankruptcy Code to file a claim for the full amount of the Debt or to require that all collateral shall continue to secure all of the Debt owing to Lender in accordance with the Loan Documents. Each Guarantor expressly waives any defense or benefits arising out of any voluntary or involuntary filing by or on behalf of Borrower for protection under any federal or state bankruptcy, insolvency, or debtor relief laws, including without limitation under Sections 364 or 1111(b)(2) of the Bankruptcy Code. ..." (see Personal Guaranty § 1.2).

There is no dispute that the Lender would not have extended the loan to Springfield unless a personal guaranty was executed (see Goldstein aff at ¶ 15). Specifically, ¶ B of the Personal Guaranty states that the:

"Lender is not willing to make the Loan, or otherwise extend credit, to [Springfield] unless each Guarantor unconditionally guarantees payment and performance to Lender of the Guaranteed Obligations (as herein defined)."

The Personal Guaranty further expressly provides:

“It shall not be necessary for Lender (and each Guarantor hereby waives any rights which such Guarantor may have to require Lender), in order to enforce the obligations of Guarantor hereunder, first to (a) institute suit or exhaust its remedies against Borrower [or] others liable on the Loan or the Guaranteed Obligations or any other Person, (b) enforce Lender’s rights against any collateral which shall ever have been given to secure the Loan, (c) enforce Lender’s rights against any other guarantors of the Guaranteed Obligations, (d) join Borrower or any others liable on the Guaranteed Obligations in any action seeking to enforce this Guaranty, (e) exhaust any remedies available to Lender against any collateral which shall ever have been given to secure the Loan, or (f) resort to any other means of obtaining payment of the Guaranteed Obligations. Lender shall not be required to mitigate damages or take any other action to reduce, collect or enforce the Guaranteed Obligations.” (See, Personal Guaranty § 1.6).

Elvin Anchipolovsky (Anchipolovsky), the vice president and asset manager of Arena Investors, LP - an entity responsible for servicing the Lender’s loans and assets - avers that Springfield “hasn’t made any payments to Lender” pursuant to the terms of the Springfield loan, the Note, or the Portfolio Guaranty (collectively, the loan documents) “since late 2018” (Anchipolovsky aff at ¶ 28) (Doc No. 3). As a result, in May 2019, the Lender commenced a foreclosure and sale action against Springfield, Packard and other “unknown owners and non-record claimants” (the Springfield Litigation), in the Circuit Court for the Seventh Judicial Circuit of Illinois, Sangamon County, Chancery Division (the Illinois Court).

Several months after the Springfield Litigation was commenced, on or about February 28, 2020, Springfield filed for bankruptcy before the United States Bankruptcy Court for the Middle District of Florida (the Bankruptcy Proceeding) (see, Goldstein aff at ¶ 20), triggering the Lender’s recourse for liability pursuant to § 1.2 (b) of the Personal Guaranty (Anchipolovsky aff at ¶ 29 and 30). Goldstein asserts that the Bankruptcy Proceeding was commenced at the insistence of the VCHP’s 90% owner, Clearview, because the VCHP hotel ventures underperformed (Goldstein aff at ¶ 19).

The Bankruptcy Proceeding was dismissed⁴ in September 2020 (*id.* at ¶ 20) and the Springfield Litigation resumed. On or about November 25, 2020, the Illinois Court entered a Judgment for Foreclosure and Sale against Springfield (the Illinois Judgment) (Doc No. 10) and determined that Springfield's obligations pursuant to the loan documents "were equal to not less than \$18,622,614.64 as of September 30, 2020, plus per diem interest on and after September 30, 2020 at a rate of \$5,481.82" (the Illinois Judgment at ¶ II A).

The Lender asserts that since September 30, 2020 it has "advanced additional sums as protective advances in accordance with the terms of the" loan documents (the Post-Judgment Protective Advances) "which sums have been used to, *inter alia*, pay overdue property taxes and other necessary expenses to preserve the value of the collateral securing the" Springfield loan (see Anchipolovsky aff at ¶ 37). "As of February 2, 2021, those Post-Judgment Protective Advances were equal to not less than \$746,111.96, for a total indebtedness of \$20,048,472.28 which indebtedness was reduced by credit bids of "\$3,300,000 on December 9, 2020, to purchase certain collateral located in Wichita, Kansas, securing the Loan," and \$5,100 "to purchase certain collateral located in Neptune Beach, Florida, securing the Loan." (*Id.* at ¶ 38). When this action commenced, the credit bids were applied to the outstanding debt with a remaining balance due of \$16,743,372.48, plus additional accrued amounts (*id.*), as demonstrated in the Consolidated Payoff Scheduled prepared by Anchipolovsky (Payoff Schedule #1) (Doc No. 11).

⁴ The Lender asserts that the Bankruptcy Proceeding was voluntarily dismissed because Springfield admitted that "no reorganization of its business was possible" (see plaintiff's Reply mem at ¶ 4) (Doc No. 23).

Pursuant to § 8.1.2 (a) of the Springfield loan, the Lender may exercise any and all its rights under the loan therein, including commencement of an action to enforce the Personal Guaranty. Section 8.1.2 (a) of the Springfield loan, entitled “Remedies,” states in pertinent part:

“Upon the occurrence of an Event of Default, all or any one or more of the rights, powers, privileges and other remedies available to Lender against Borrower under this Agreement or any of the other Loan Documents executed and delivered by, or applicable to, Borrower or at law or in equity may be exercised by Lender at any time and from time to time, whether or not all or any of the Debt shall be declared due and payable, and whether or not Lender shall have commenced any foreclosure proceeding or other action for the enforcement of its rights and remedies under any of the Loan Documents. Any such actions taken by Lender shall be cumulative and concurrent and may be pursued independently, singularly, successively, together or otherwise, at such time and in such order as Lender may determine in its sole discretion, to the fullest extent permitted by law, without impairing or otherwise affecting the other rights and remedies of Lender permitted by law, equity or contract or as set forth herein or in the other Loan Documents. To the fullest extent permitted by law or equity, without limiting the generality of the foregoing, Borrower agrees that if an Event of Default is continuing (i) Lender shall not be subject to any "one action" or "election of remedies" law or rule, and (ii) all liens and other rights, remedies or privileges provided to Lender shall remain in full force and effect until Lender has exhausted all of its remedies against the Property and the Security Instrument has been foreclosed, sold and/or otherwise realized upon in satisfaction of the Debt or the Obligations have been paid in full.”

On or about February 4, 2021, the Lender commenced the instant action by Summons and Notice of Motion for Summary Judgment in Lieu of a Complaint (the Complaint) (Doc Nos. 1 and 2, respectively) against defendant Goldstein as an Individual Guarantor to the Personal Guaranty. The Lender originally sought summary disposition of the dispute between the parties in the amount of \$16,743,372.48, plus interest in the amount of \$5,481.82 per diem, together with costs and attorneys’ fees pursuant to §1.9 of the Personal Guaranty which states, in pertinent part:

“Payment of Expenses. In the event that any Guarantor should breach or fail to timely perform any provisions of this Guaranty (after expiration of any applicable notice and/or cure periods, if any), each Guarantor shall, within ten (10) Business Days after written demand by Lender, pay Lender all reasonable out-of-

pocket costs and expenses (including actual out-of-pocket court costs and reasonable outside attorneys' fees) actually incurred by Lender in the enforcement hereof or the preservation of Lender's rights hereunder together with interest thereon at the Default Rate from the date Guarantor received such request until the date of payment to Lender. The covenant contained in this Section 1.9 shall survive the payment and performance of the Guaranteed Obligations."

The Lender avers that additional credit bids were submitted and subsequently applied to the outstanding original amount sought in the Complaint. Anchipolovsky prepared another Consolidated Payoff Schedule (Payoff Schedule #2) (Doc No. 21) reflecting these additional credit bids. The Lender now seeks judgment against Goldstein, pursuant to the terms of the Personal Guaranty, in an amount not less than \$13,140,481.75, plus \$4,917.51 interest per diem, together with costs and attorneys' fees (see Anchipolovsky Reply aff at ¶ 12) (Doc No. 20).

ARGUMENTS

Plaintiff contends that its application pursuant to CPLR 3213 must be granted against defendant Goldstein because: (1) this action is based upon an instrument for the payment of money only, namely, the Personal Guaranty; (2) Springfield failed to remit payment in accordance with the terms of the loan documents and therefore, pursuant to § 8.1.2 (a) of the Springfield loan, upon an event of default, the Lender has the right to commence this action; (3) Goldstein failed to cure his default under the Personal Guaranty by failing to satisfy Springfield's loan payment obligations; (4) pursuant to § 5.1.14 of the Springfield loan and § 1.9 of the Personal Guaranty, the Lender is entitled to an award of attorneys' fees and other costs incurred in enforcing its rights and remedies under the loan documents; (5) there are no triable issues of fact; (6) plaintiff complied with its obligations pursuant to the terms of the loan documents; (7) there are no defenses to this guarantor action; and (8) pursuant to § 1.7 of the Personal Guaranty, Goldstein expressly waived his right to assert counterclaims, or seek contribution,

indemnification or other form of reimbursement from Springfield or other party liable for payment of any, and all Guaranteed Obligations in connection with the Personal Guaranty.

In opposition, Goldstein argues that plaintiff's application pursuant to CPLR 3213 must be dismissed and the case must proceed as a plenary action because: (1) the Personal Guaranty is not an "instrument for payment of money only" because the Personal Guaranty (i) is a guarantee for "payment and performance of Guaranteed Obligations" as defined in § 1.2 (a) (i) – (xiv), and (ii) is "an irrevocable, absolute, continuing guarantee of payment and performance and not a guarantee of collection" (Personal Guaranty § 1.3); (2) the Lender is seeking to collect amounts due and owing on all the VCHP loans, not just the Springfield loan; (3) relief pursuant to CPLR 3213 is unavailable because the Court must refer to other real estate and financial transactions/documents to determine a default, liability and/or the amount claimed due and owing; (4) it is not clear that the Illinois Court considered the same documents presented to this Court as the Lender failed to submit a copy of the Springfield Litigation complaint or the mortgage referenced therein; (5) the Lender did not accurately calculate the amount actually due and owing, having failed to present any proof that payments under the loan documents were made and ceased in 2018; (6) the Payoff Schedules (Doc Nos. 11 and 21) include late fees and interest calculations, but does not explain how these amounts were determined; (7) the Lender failed to present proof of the "credit bid" amounts offered; (8) the "credit bids" may not have reflected the fair market value and in fact may have undervalued the hotel properties, as the bids were purportedly submitted during the height of the COVID-19 pandemic in 2020; (9) there are triable issues of fact necessitating a discovery "probe" respecting the Lender's (i) "credit bid" appraisals and (ii) "bad faith" motivations in bringing this action solely as against Goldstein for

his inability to cancel the Bankruptcy Proceeding filed by the majority owner of VCHP, Clearview.

DISCUSSION

CPLR 3213 governs summary judgment in lieu of a complaint and is an expedited procedure based upon “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’” (*Weissman v Sinorm Deli*, 88 NY2d 437, 443 [1996] [citation omitted]). “When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint” (CPLR 3213). An “instrument for the payment of money only” is an “unconditional promise to pay a sum certain” (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dept 2017], quoting *Weissman* at 444).

Guarantees qualify as an “instrument for the payment of money only” (CPLR 3213) and “fall within the parameters of CPLR 3213” (*SpringPrince, LLC v Elie Tahari, Ltd.*, 173 AD3d 544, 545 [1st Dept 2019]) because a guaranty is “an absolute and unconditional guaranty of payment” *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). To establish a prima facie entitlement to summary judgment in lieu of complaint based on a guaranty, a plaintiff must demonstrate “the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank*, at 492; see also *Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]).

There is no dispute the Lender advanced a loan to Springfield in the amount of \$5,200,000 pursuant to the terms of the loan documents. To secure the repayment of the Springfield loan, Goldstein along with other Individual Guarantors “unconditionally” guaranteed Springfield’s loan repayment obligations pursuant to the Springfield loan, the Note and the Portfolio Guarantee which included the Neptune loan and the Wichita loan. Springfield defaulted in its payment obligations on the subject commercial loan and that litigation was commenced against it, resulting in the Illinois Judgment awarding the Lender the outstanding loan amount due and owing, plus *per diem* interest.

Goldstein, having personally guaranteed Springfield’s debt, failed to pay it, and therefore defaulted pursuant to the terms of the Personal Guaranty. Here, the Lender established a prima facie case entitling it to relief, pursuant to CPLR 3213, by submitting copies of the loan documents, in addition to an affidavit from someone with personal knowledge of the facts attesting to the failure to perform under the loan documents and Personal Guaranty, a copy of the Illinois Judgment against Springfield based on a default in payments pursuant to the loan documents, and a copy of the Personal Guaranty executed by Goldstein (see, *27 W. 72nd St. Note Buyer LLC v Terzi*, 194 AD3d 630 [1st Dept 2021]; and, *Simon v Industry City Distillery, Inc.*, 159 AD3d 505 [1st Dept 2018]). Moreover, Goldstein does “not dispute the existence of the guaranties, the underlying debts or [his] failure to perform under the” Personal Guaranty and thus cannot establish that plaintiff failed to make out a prima facie case of entitlement to summary judgment in lieu of a complaint (*27 W. 72nd St. Note Buyer LLC* at 486).

The burden now shifts to Goldstein to present a triable issue of fact and/or a meritorious defense to the instant application warranting denial of the Lender’s requested relief pursuant to CPLR 3213 (*Northside Bank of Tampa v Self Defense Indus. of N.Y.*, 49 AD2d 869, 870 [1st

Dept 1975]). Goldstein argues that the Personal Guaranty contains performance terms beyond the payment of money only, and that factual disputes exist as to the Lender's calculated amount due and its "bad faith" in commencing this action solely as against Goldstein.

As previously noted, a guarantee is considered an "instrument for the payment of money only" for purposes of its applicability to relief pursuant to CPLR 3213. Generally, however, "a guarantee of both payment and performance, does not" qualify "as an instrument for the payment of money only" (*Punch Fashion, LLC v Merchant. Factors Corp.*, 180 AD3d 520, 521 (1st Dept 2020)), and the expedited relief under CPLR 3213 is unavailable where, in addition to a promise to pay, a "performance of some other condition" is required (*Dresdner Bank AG. [N.Y. Branch] v Morse/Diesel, Inc.*, 115 AD2d 64, 65-66 [1st Dept 1986]; and *JFURTI, LLC v First Capital Real Estate Advisors, L.P.*, 165 AD3d 419 [1st Dept 2018]).

Goldstein argues that the Lender improperly invokes CPLR 3213 relief because the Personal Guaranty lists, in § 1.2, fifteen "Guaranteed Obligations" along with the payment obligations therein. However, these "Guaranteed Obligations" are not "conditions" to the loan repayment obligations and the "essential character as an instrument for the payment of money only" was not altered (*Jinmei Yang v Shang Dai*, 193 AD3d 475, 476 [1st Dept 2021], quoting *Bhatara v Futterman*, 122 AD3d 509, 510 [1st Dept 2014]). The fact that the Personal Guaranty was identified as a "payment and performance" guaranty in § 1.1 and, in § 1.3 as "an irrevocable, absolute, continuing guaranty of payment and performance and not a guaranty of collection," does not disqualify the herein Personal Guaranty as an instrument for the payment of money only pursuant to CPLR 3213, because the additional "Guaranteed Obligations" were not a "condition precedent" to payment (*iPayment, Inc., v Silverman*, 192 AD3d 586, 587 [1st Dept 2021]), and

the term “Guaranteed Obligations” was defined in the Personal Guaranty and included, among other things, amounts due under the loan documents (*27 W. 72nd St. Note Buyer LLC* at 2).

Goldstein further contends that the Personal Guaranty is not a “standalone” document in that reference to documents outside this “instrument” is necessary to determine the parties’ obligation therein, including the alleged amount outstanding. Although “[a] document 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 a more than de minimis deviation from the face of the document” (*PDL Biopharma, Inc. v Wohlstadter*, at 495), it is permissible to review agreements between parties, such as the loan document, in order to determine the amount due under the Personal Guaranty and the amount of the obligations guaranteed (*GEM Invs. Am., LLC v Marquez*, 180 AD3d 513, 513] [1st Dept 2020]).

Moreover, “[a] guarantee may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain. The need to refer to the underlying promissory notes to establish the amount of liability does not affect the availability of CPLR 3213” (*Manufacturers Hanover Trust Co. v. Green*, 95 AD2d 737, 737 [1st Dept 1983], appeal dismissed 61 NY2d 760 [1984]; and *Punch Fashion, LLC v Merchant Factors Corp.*, 180 AD3d 520 [1st Dept 2020]). Additionally, the Illinois Judgment, which included *per diem* interest, is sufficient proof of judgment against Springfield, providing plaintiff to a prima facie entitlement to relief against Goldstein pursuant to the terms of the Personal Guaranty, because CPLR 3213 specifically permits relief upon presentation of “any judgment.” A determination for costs, expenses and attorneys’ fees equally would not bar enforcement of a guarantee by summary judgment in lieu of a complaint, as the Personal Guaranty makes Goldstein liable for such expenses (see *Simon* at 506).

Plaintiff avers that the “credit bids” are being applied once the foreclosure sales are approved by the Illinois Court (see Plaintiff Reply mem at 3 and 4) and that the Lender applied credits based on collateral claims sold after the instant action was commenced (see Anchipolovsky Reply aff, Doc No. 20). Goldstein failed to raise a factual dispute that Springfield defaulted pursuant to the terms of the loan documents and/or a challenge to the Illinois Judgment reflecting the amount due under the loan documents. Absent a presentment of a triable controversy by Goldstein respecting the application of the “credit bid” amounts to the outstanding debt owed, as attested by the Lender’s own loan servicing affiliate entity and supported by the prepared Payoff Schedule #2, the court must find that the amounts claimed due are accurately presented by plaintiff. These credits reduced the original amount sought in the Complaint. The reduced amount is not a “miscalculation” warranting denial of the within application for judgment against Goldstein, who failed to present any evidentiary proof to substantiate the self-serving statement that the debt amount is “inaccurate.”

Lastly, there is no admissible evidence presented by Goldstein to raise a factual dispute of the Lender’s purported “bad faith” where the Individual Guarantors agreed to be held “jointly and severally” liable under the Personal Guaranty. It is worth noting that Goldstein does not dispute his default under the terms of the Personal Guaranty. Goldstein’s contention that somehow the instant litigation was commenced “out of sheer ill will towards” him due to an alleged threat by unspecified persons that the Lender would commence the instant guarantor action if the Bankruptcy Proceeding was not canceled (see Goldstein aff at ¶ 23), fails to present a viable defense to this action – especially where it is undisputed that Goldstein agreed to the terms of the Personal Guaranty providing that the Lender was under “No Duty to Pursue Others” in order to seek relief against Goldstein (see Personal Guaranty § 1.6).

Where there is no factual dispute under a personal guaranty, entry of summary judgment must be entered against the guarantor pursuant to CPLR 3213 (see generally, *German Am. Capital Corp. v Oxley Dev., LLC*, 102 AD3d 408 [1st Dept 2013]; and *Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD 3d 447 [1st Dept 2009]). The court has considered any remaining arguments by the parties and find them unavailing, without merit and/or moot.

Accordingly, it is

ORDERED that the application by Arena Limited SPV, LLC for summary judgment in lieu of a complaint (CPLR 3213) is **granted**; and it is further

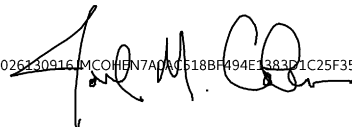
ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff, Arena Limited SPV, LLC and against defendant, Michael Goldstein, in the sum of \$13,240,481.76, with interest from April 20, 2021, at the statutory rate until entry of judgment, as calculated by the Clerk of the Court, with costs and disbursements, as taxed by the Clerk, together with interest at the default rate of \$4,917.51, *per diem*; and it is further

ORDERED that to the extent the plaintiff, Arena Limited SPV, LLC, receives payments from the date of this Decision and Order to the date of judgment, plaintiff Arena Limited SPV, LLC, shall subtract such amounts from the amount awarded and recoverable; and it is further

ORDERED that that portion of plaintiff Arena Limited SPV, LLC's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendant Michael Goldstein is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet⁵, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the Court.

<u>10/26/2021</u> DATE	 20211026130916JMC0HEN7AD0E518BF494E138371C25F35673E15 JOEL M. COHEN, J.S.C.			
CHECK ONE:	☒	CASE DISPOSED	☐	NON-FINAL DISPOSITION
	☒	GRANTED	☐ DENIED	☐ GRANTED IN PART
APPLICATION:	☐	SETTLE ORDER	☐	☐ OTHER
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	☒ REFERENCE
	☐		☐	☐ SUBMIT ORDER
			☐	☐ FIDUCIARY APPOINTMENT

⁵ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).