

OSK IX LLC v Frankie Cab Corp.
2021 NY Slip Op 32824(U)
December 29, 2021
Supreme Court, Kings County
Docket Number: Index No. 527928/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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OSK IX LLC,

Plaintiff, Decision and order

- against -

Index No. 527928/2021

FRANKIE CAB CORP. and RACHEL LEVINGER,

Defendants, December 29, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3213 seeking summary judgement in lieu of a complaint. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On January 21, 2015, the defendant Frankie Cab Corp., as borrower executed a promissory note to the plaintiff's predecessor in interest in the amount of \$925,000. The defendant Rachel Levinger guaranteed the debt. The agreement was amended and required monthly payments and a balloon payment on the maturity date of January 1, 2021. The defendants did not make the balloon payment due at maturity and on August 5, 2021 the plaintiff served a demand letter informing the defendants the full amount was now due and that they owed \$837,984.41. The plaintiff has instituted this lawsuit and has now moved seeking summary judgement concerning the note in the amount of \$797,577.58 plus accrued and accruing interest, fees, costs and disbursements as stated in the motion.

Conclusions of Law

It is well settled that in order to be entitled to judgement as a matter of law pursuant to CPLR §3213 the movant must demonstrate that the other party executed an instrument that contains an unequivocal and unconditional promise to repay the party upon demand or at a definite time and the party failed to pay according to the terms of the instrument (Mirham v. Awad, 131 AD3d 1211, 17 NYS3d 473 [2d Dept., 2015]). A promissory note is an instrument for the payment of money only and when sufficient evidence is presented concerning the circumstances upon which it was given then a §3213 motion is appropriate (Kim v. Il Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept., 2016]). Thus, the movant must establish the instrument is "facially incontestable" (J. Juhn Associates, Inc., v. 3625 Oxford Avenue Associates L.P., 8 Misc3d 1009(A), 801 NYS2d 778 [Supreme Court Nassau County 2005]). Therefore, where a defendant can raise questions of fact that the notes were not instruments for the payment of money only then summary judgement must be denied (Farca v. Farca, 216 AD2d 520, 628 NYS2d 782 [2d Dept., 1995]).

Therefore, where a party introduces evidence of the existence of a loan, personal guarantees and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept.,

2012])). In this case, the plaintiff submitted the affidavit of Ivan Feldman an asset manager of the servicer of the plaintiff who stated that he reviewed the bank's records in connection with the loans extended. He further stated that all the documents he reviewed were maintained in the regular course of business and all such records were made near their occurrence with someone who had knowledge at that time and that the bank's standard practice is to keep such records in the ordinary course of business. Thus, the plaintiff has established the admissibility of the records relied upon since Mr. Feldman had knowledge of the bank's practices and procedures (see, Cadlerock Joint Venture L.P. v. Trombley, 150 AD3d 957, 54 NYS3d 127 [2d Dept., 2017])). Further, Mr. Feldman states that as of the date of his affidavit the amount owed is \$871,168.66. Therefore, the plaintiff established its entitlement to summary judgement.

The defendants have not presented any evidence raising questions of fact whether the debt has been paid. Rather, the defendants challenge the precise amount owed noting that the papers submitted contain discrepancies. However, the plaintiff has sufficiently explained that no such discrepancy exists and that as of December 9, 2021 the amount owed is \$682,205.71 with interest accruing at the rate of \$169.11 each day. In addition, the defendants have not presented any affidavit with anyone possessing personal knowledge challenging the amounts sought by

the plaintiff.

Therefore, there are no questions of fact that have been raised which demand a denial of the motion seeking summary judgement. Consequently, the motion seeking summary judgement is granted for the amounts noted: \$682,205.71 with interest accruing at the rate of \$169.11 each day.

So ordered.

ENTER:

DATED: December 29, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC