

**JPMorgan Chase Bank, N.A. v BVS Acquisition Co.
LLC**

2022 NY Slip Op 30241(U)

January 20, 2022

Supreme Court, New York County

Docket Number: Index No. 654705/2021

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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|---------------------------|-----------------------------------|---|
| JPMORGAN CHASE BANK, N.A. | INDEX NO. | <u>654705/2021</u> |
| Plaintiff, | MOTION DATE | <u>07/30/2021;</u> <u>01/19/2022</u> |
| - v - | MOTION SEQ. NO. | <u>001; 002</u> |
| BVS ACQUISITION CO. LLC, | | |
| Defendant. | DECISION + ORDER ON MOTION | |

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 16
JUDGMENT - SUMMARY IN LIEU OF COMPLAINT (001) and
were read on this motion to/for EMERGENCY ORDER TO SHOW CAUSE (002)

Plaintiff moves pursuant to CPLR 3213 for an order granting summary judgment in lieu of complaint respecting amounts owed under the Fixed Rate Term Note and the Amended and Restated Line of Credit Note (the Credit Note; both notes together, the Notes) (NYSCEF #s 4-5), together with costs, interest, and legal fees (motion sequence no. 001).¹ There is no opposition to the motion.

Plaintiff separately moves, by order to show cause, seeking (i) entry of judgment against defendant BVS Acquisition Co., LLC (BVS) on the amounts sought on its motion for summary judgment in lieu of complaint, less the amounts obtained for certain collateral pledged to plaintiff by BVS, and (ii) issuance of charging orders for limited liability company interests held by defendant (motion sequence no. 002).² Oral argument on the OSC was held today. Plaintiff and non-party judgment creditor, Jordan 520, LLC, appeared; BVS did not appear or submit papers opposing the motion. Although Jordan has no standing this case, it appeared to oppose plaintiff's OSC.

¹ On December 21, 2021, Justice Andrew Borrok granted plaintiff summary judgment in lieu of complaint against the signatories of the guaranty supporting the Notes in this present action (*JPMorgan Chase Bank, N.A. v Novicki, et al.*, Sup Ct, NY County, Index No. 654708/2021).

² Motion sequences nos. 001 and 002 are consolidated for disposition.

Background

The Fixed Rate Term Note provides that BVS “promises to pay to [plaintiff] the principal amount of \$22,790,000.00 together with interest...” (NYSCEF # 4 at 1) The Credit Note provides that defendant “promises to pay to [plaintiff] the principal amount of each loan made by [plaintiff] to [BVS] ... together with interest” (NYSCEF # 5 at 1).

In his affidavit plaintiff’s Vice President Garrett Milliken states that BVS has “failed to pay all amounts due and owing” to BVS under the Notes (NYSCEF # 3, ¶s 4-5), and that, as of July 15, 2021, \$556,042.86 and \$13,655,469.30 was owed under the Fixed Rate Term Note and the Credit Note, respectively (NYSCEF # 8, Ex E to Milliken Aff).

The affirmation of plaintiff’s counsel Zachary G. Newman in support of the order to show cause confirms that the “full amounts due and owing under the Notes remain unpaid” (NYSCEF # 18, ¶ 9). At the same time, he states that on January 4, 2022, plaintiff “liquidated certain collateral pledged to it by BVS as further security for the Notes, which reduced the amount due and owing thereunder” (*id.*, ¶ 10). Plaintiff attaches a “PRINCIPAL, INTEREST AND FEE CALCULATIONS” exhibit to its proposed judgment (NYSCEF # 21) indicating that the collateral liquidation raised \$2,466,178.77, and that \$556,755.62 of collateral was applied to the Fixed Rate Term Note and \$1,909,423.15 of collateral was applied to the Credit Note. That exhibit also indicates that the Fixed Rate Term Note has been paid off and that the Total Principal Balance of the Credit Note as of January 4, 2022 is \$12,474,388.17.

Discussion

A party seeking summary judgment in lieu of complaint must show that the defendant was served with the summons in accordance with the methods prescribed under the CPLR (*Cadle Co. v Ayala*, 47 AD3d 919, 920 [2d Dept 2008]); provided, however, that a defendant may by prior written agreement submit to the jurisdiction of the courts of this State and agree to be served with process other than by the method prescribed by the CPLR, including by certified mail, return receipt requested, which service is sufficient and effectively confers jurisdiction (*Nat’l Equip. Rental, Ltd. v Dec-Wood Corp.*, 51 Misc 2d 999, 1000 [2d Dept 1966]; *see also Alfred E. Mann Living Tr. v ETIRC Aviation S.a.r.l.*, 78 AD3d 137, 140 [1st Dept 2010]). Here, plaintiff has submitted proof that the motion was served by Registered Mail and Overnight Mail, with follow-up service by first class mail (NYSCEF # 12, ¶ 2; NYSCEF # 13), a method permitted under the Notes (NYSCEF # 4-Fixed Rate Term Note, § 10; Credit Note, NYSCEF # 5-Credit Note, § 11).

CPLR 3213 provides that a motion for summary judgment in lieu of a complaint may be served by the plaintiff “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment.” To establish that a written instrument qualifies for CPLR 3213 treatment, a plaintiff “must prove a prima facie case by the instrument and a failure to make the payments called for by its terms” (*Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19, 21 [1st Dept 1983]). “The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

Applying these principles, the court finds that the Notes qualify as instruments for payment of money only such that, service having properly been performed, plaintiff is entitled to summary judgment in lieu of complaint in the amounts sought in the proposed judgment submitted with the OSC.

Plaintiff also seeks attorneys’ fees and expenses. The Notes both allow plaintiff to recover expenses incurred, including reasonable attorneys’ fees, in exercising rights under the Notes (NYSCEF # 12, § 8; NYSCEF # 5, § 9). Summary judgment is thus granted as to liability on plaintiffs’ claim for attorneys’ fees and expenses, which claim is severed for determination by a Special Referee as to the amounts owed as directed below.

Plaintiff’s motion by emergency OSC for a charging lien pursuant to New York LLC Law § 607 and Delaware Code § 18-703 is denied without prejudice to renew upon proper showing of an entry of judgment.

Conclusion

Accordingly, upon the foregoing, it is

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is granted (motion sequence no. 001); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff JPMorgan Chase Bank, N.A. and against defendant BVS Acquisition Co. LLC, in the amount of \$12,474,388.17, plus contractual interest of \$4,214.19 per diem from January 4, 2022 through the date of the Judgment and thereafter at the statutory rate as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff have judgment against defendant BVS Acquisition Co. LLC as to liability for attorneys’ fees and expenses incurred by plaintiff in an amount to be determined; and it is further

ORDERED that the amount due and owing for expenses and reasonable attorneys' fees is severed and referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that plaintiff's motion by emergency OSC for entry of judgment and issuance of charging orders for LLC interests held by BVS Acquisition Co. LLC is denied without prejudice.

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 Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

01/20/2022
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

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| <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | | <input checked="" type="checkbox"/> | GRANTED IN PART | | |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> | SUBMIT ORDER | | |