

**Bond St. Servicing LLC v Soda Entertainment, Inc.**

2022 NY Slip Op 30398(U)

January 31, 2022

Supreme Court, New York County

Docket Number: Index No. 651232/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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BOND STREET SERVICING LLC,
Plaintiff,

- v -

SODA ENTERTAINMENT, INC., and NISA AGUILAR,
JAIME GAMBOA,

Defendants.

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INDEX NO. 651232/2020
MOTION DATE 02/25/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

Upon the foregoing documents, it is hereby ordered:

Plaintiff's motion for summary judgment in lieu of complaint is denied based upon the following memorandum decision.

Background

In this action for breach of contract, plaintiff Bond Street Servicing, LLC ("plaintiff") moves for summary judgment in lieu of complaint, pursuant to CPLR 3213, against defendants Soda Entertainment, Inc. ("Soda"), Nisa Aguilar ("Aguilar"), and Jaime Gamboa ("Gamboa," and together with Aguilar, the "guarantors").

Pursuant to a Commercial Credit Agreement dated July 14, 2016, plaintiff lent Soda \$425,000, which Soda agreed to repay at a semi-monthly rate of \$7,451.63 beginning August 1, 2016 (NYSCEF Doc No. 4 at 1). All outstanding principal, unpaid interest, charges, fees, and penalties were due on July 16, 2019, set as the maturity date of the loan in the agreement (id.). The loan accrued interest at a yearly rate of 16%, increasing to 18% during any default by Soda

(*id.*). Upon any such default, including, *inter alia*, Soda’s failure to make any required payment, plaintiff could, without any notice or demand, require payment of the entire outstanding balance (*id.* at 3, Exhibit A at 6). The guarantors agreed to guarantee to plaintiff “the due and prompt payment of all obligations of [Soda] to [plaintiff] and . . . the due and prompt performance of the obligations of [Soda] to [plaintiff]” (*id.* at 2).

Plaintiff asserts that Soda defaulted on payments as of January 31, 2018 (NYSCEF Doc. No. 3, ¶ 24; NYSCEF Doc. No. 6). On July 15, 2019, shortly before the maturity date of the loan, plaintiff and Soda entered into a Modification Agreement, pursuant to which the parties agreed that Soda would make monthly payments of \$1,000 from August 2019 through January 20, 2020, after which the term of the original agreement would once again apply (NYSCEF Doc. No. 5). Plaintiff states that Soda defaulted on certain of the payments specified under the Modification Agreement (NYSCEF Doc. No. 3, ¶ 24; NYSCEF Doc. No. 6). Pursuant to a payment log provided by plaintiff, Soda has an outstanding balance of \$433,936.04, representing principal, interest, and late fees (NYSCEF Doc. No. 6). Plaintiff commenced the instant proceeding to recover the balance by filing a summons and notice of motion for summary judgment in lieu of complaint on February 25, 2020 (NYSCEF Doc. Nos. 1-7).

### Discussion

A grant of summary judgment under CPLR 3213 is available on “an instrument for the payment of money only or upon any judgment” (CPLR 3213). A plaintiff makes out a *prima facie* case for summary judgment where it can show that the instrument is a valid instrument for the payment of money only and that the defendant has failed to pay (*Nordea Bank Finland PLC v Holten*, 84 AD3d 589 [1st Dept 2011]). Once plaintiff establishes a *prima facie* case,

defendant must show a triable issue of fact to defeat summary judgment (*Banco Popular N. Am. v. Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004]).

Here, plaintiff has not met its burden on the motion. Plaintiff submits the Commercial Credit Agreement, the Modification Agreement, its payment log for Soda, and the affidavit of Benjamin Solomon, plaintiff's Chief Executive Officer, in support of the motion (NYSCEF Doc. Nos. 3-6). Solomon states that his knowledge of the facts is based on his "personal knowledge or [his] examination of plaintiff's records" (NYSCEF Doc. No. 3, ¶ 1). However, he did not aver that he had personal knowledge of plaintiff's record-keeping practices, that he had created the entries in the payment log, or that he could attest to how the payment log was created. Accordingly, Solomon's affidavit does not provide a sufficient foundation to admit the payment log as evidence in support of summary judgment (*Cadlerock Joint Venture, L.P. v Trombley*, 150 AD3d 957, 959 [2d Dept 2017] ["Here, the plaintiff's account officer did not allege that she was personally familiar with HSBC's record keeping practices and procedures, and thus failed to lay a proper foundation for the admission of records concerning the payment history under the note"]; *see also Aurora Loan Services, LLC v Komarovsky*, 151 AD3d 924, 926 [2d Dept 2017] ["Inasmuch as Nationstar's motion was based on evidence that was not in admissible form, it failed to establish its prima facie entitlement to judgment as a matter of law"]<sup>1</sup>).<sup>1</sup> Further, in their opposition to the motion, defendants submit email correspondence between plaintiff and Aguilar regarding whether the Modification Agreement cut off interest accrual on the outstanding balance (NYSCEF Doc. No. 18). Resolving this issue will require resort to evidence outside of the four corners of the agreement, an additional ground requiring denial of the motion (*Ippolito v*

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<sup>1</sup> To the extent that defendants object to the authenticity of the Commercial Credit Agreement, defendants inherently rely on the agreement in opposing the motion, and thus they have waived any objection to its admissibility (*Tomeo v Beccia*, 127 AD3d 1071, 1073 [2d Dept 2015]).

Family Medicine of Tarrytown and Ossining, LLP, 46 AD3d 752, 753 [2d Dept 2007] [“the Supreme Court should have denied the plaintiff’s motion for summary judgment in lieu of complaint because outside proof was needed to determine the amount due to the plaintiff”]; HSBC Bank USA v IPO, LLC, 290 AD2d 246 [1st Dept 2002]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant’s attorney within 20 days of service on plaintiff’s counsel of a copy of this order with notice of entry and defendant shall answer or otherwise respond to the complaint within 20 days after service thereof.

This constitutes the Decision and Order of the court.

Louis L. Nock

<u>1/31/2022</u>				<u>LOUIS L. NOCK, J.S.C.</u>	
	<b>DATE</b>				
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE