

Sanghvi Diamonds LLC v Agadjani
2022 NY Slip Op 30738(U)
March 8, 2022
Supreme Court, New York County
Docket Number: Index No. 652445/2021
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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SANGHVI DIAMONDS LLC	INDEX NO.	<u>652445/2021</u>
Plaintiff,	MOTION DATE	<u>05/06/2021</u>
- v -	MOTION SEQ. NO.	<u>001</u>
MAKSUD AGADJANI,		
Defendant.	DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

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

Plaintiff Sanghvi Diamonds LLC (“Plaintiff”) seeks an award of summary judgment in lieu of complaint under CPLR 3213, based on a Personal Guaranty Agreement (the “Guaranty”) entered with Defendant Maksud Agadjani (“Defendant”). For the reasons set forth below, Plaintiff’s motion is **denied**.

Under CPLR 3213, a motion for summary judgment in lieu of complaint may be served by a plaintiff “when an action is based upon an instrument for the payment of money only.” “The prototypical example of an instrument within the ambit of [CPLR 3213] 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*, 88 NY2d 437, 444 [1996]). And “[a]n unconditional guaranty is an instrument for the payment of money only within the meaning of CPLR 3213” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]).

“CPLR 3213 is available ‘where a right to payment can be ascertained from the face of a document’” (*Boland v Indah Kiat Fin. (IV) Mauritius Ltd.*, 291 AD2d 342, 343 [1st Dept 2002]). It “is not available where there are other issues and considerations presented by the writing,” for example “if the liabilities and obligations can only be ascertained by resort to evidence outside the instrument, or if more than simple proof of nonpayment or a de minimis deviation from the face of the document is involved (*Kerin v Kaufman*, 296 AD2d 336, 337 [1st Dept 2002] [denying summary judgment in lieu of complaint], citing *Weissman*, 88 NY2d at 437; *Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1039-40 [2d Dept 2017] [“Since proof outside of the guaranty and underlying agreement is required to establish the amount of Platinum's obligation to the plaintiff pursuant to the agreement, the plaintiff's motion for summary judgment in lieu of complaint should have been denied”]).

To demonstrate entitlement to summary judgment in lieu of complaint based on a personal guaranty, the plaintiff must show (1) the existence of a guaranty, (2) the underlying debt, and (3) the guarantor's failure to perform under the guaranty (*see, e.g., Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). Once the plaintiff has done so, “the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense” (*Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008] [internal quotations and citations omitted]; *SCP (Bermuda) Inc.*, 224 AD2d at 216).

Here, Plaintiff fails to make a prima facie case under CPLR 3213 because the amount of the underlying debt cannot be established without resorting to evidence outside of the Guaranty and the underlying documentation (*Kerin*, 296 AD2d at 337; *Oak Rock Fin.*, 148 AD3d at 1039-40). To begin with, Plaintiff is correct that the Guaranty represents an absolute and

unconditional promise to pay TraxNYC's debts (NYSCEF 4 at 1 [Defendant "unconditionally guarantees" payment to Plaintiff and agrees that "[t]he liability hereunder . . . shall be direct, immediate and absolute"]). But the Guaranty, on its face, does not establish the amount of Defendant's indebtedness. Nor does the Guaranty refer to any underlying agreement that would conclusively establish Defendant's – or TraxNYC's – obligations to Plaintiff (*Weissman*, 88 NY2d at 444 ["Plaintiff's action falls far short of satisfying the 3213 threshold requirement" where "[t]here is no written instrument by which the individual shareholders explicitly obligated themselves to make a required payment of a sum certain"]; *compare with, e.g., Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007] [instrument for payment of money only "establishes as a matter of law defendant's absolute, unconditional obligation to pay the sum . . . and incorporates by reference the terms and conditions of the companion sale agreement"]).

Plaintiff seeks to establish the amount due under the Guaranty by submitting approximately 1,000 pages of "Memorandums" and "Invoices" dating back to 2018 (*see* NYSCEF 5-6), along with some evidence about the parties "course of dealing" (NYSCEF 12 at 11 [Pl.'s mem. of law]). That is not the kind of simple, direct proof of indebtedness conducive to CPLR 3213 treatment. The Memorandums, for example, do not set out terms for payment, or even for sale. As Defendant points out, the reverse side of the Memorandums (which Plaintiff omitted) indicate they are consignment agreements (NYSCEF 27 ["The merchandise described on the reverse side is received by you, the Consignee . . . only for examination and inspection by prospective purchasers"]). As for the Invoices, there is a fact dispute over whether Defendant received them (*see* Agadjani aff. ¶ 4; Stanescu aff. ¶ 6), and since the Invoices are not signed, there are further disputes over whether the Invoices are enforceable under the Statute of Frauds

and, if so, whether for each transaction an oral or implied contract for sale existed. Again, this is hardly the kind of “de minimis” undertaking for establishing indebtedness envisioned by CPLR 3213.

For all that, the difference between the parties’ respective positions appears to be narrow: Defendant acknowledges owing \$832,000.00 to Plaintiff, about 80% of the amount Plaintiff is seeking here (Agadjani aff. ¶ 54; Stancescu aff. ¶ 67).¹ In resolving that difference, the parties are urged to chart a practical course through litigation. That may include expedited discovery targeting specific transactions in dispute, or alternative dispute resolution procedures, either through the court system or private mediation.

Therefore, it is

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

ORDERED that Plaintiff’s moving papers are hereby deemed the complaint in this action and Defendant’s answering papers are hereby deemed the answer; and it is further

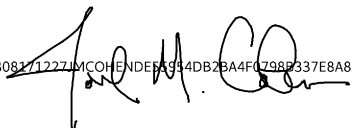
ORDERED that the parties appear for a preliminary conference on **March 29, 2022 at 11:30 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference date.²

¹ In some cases, disagreement over the amount of indebtedness is “insufficient to defeat” a motion for summary judgment in lieu of complaint (*Wyassup-Laurel Glen Corp. v Morales*, 2020 WL 547646, *2 [Sup Ct, New York County 2020] [granting motion for summary judgment in lieu of complaint and ordering an inquest on damages]). But here, the question of damages is tied up with the question of liability because each transaction represented a distinct contract for sale.

² If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

3/8/2022
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

online), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.