

Deutsche Bank Luxembourg S.A. v Lehner
2022 NY Slip Op 30739(U)
March 8, 2022
Supreme Court, New York County
Docket Number: Index No. 655899/2021
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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DEUTSCHE BANK LUXEMBOURG S.A.

Plaintiff,

- v -

ROBIN LEHNER,

Defendant.

INDEX NO. 655899/2021

MOTION DATE 11/15/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14

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

Plaintiff Deutsche Bank Luxembourg S.A. (“Plaintiff”) brings this action against Defendant Robin Lehner (“Defendant”), who is a partial Guarantor of an underlying Loan Agreement (“Loan Agreement” or “promissory note”) executed with Borrower Milos Andric (“Borrower”) (*see* NYSCEF Docs. 4 & 5 for the Loan Agreement and Guaranty Agreement, respectively). Borrower made a partial payment on the \$8 million loan, but €2,339,961 in principle plus accrued interest remains outstanding.

Plaintiff moves for summary judgment in lieu of complaint, pursuant to CPLR 3213, to collect on the guaranty for unpaid Loan Agreement obligations in the United States Dollar equivalent of €2,339,961, together with accrued interest at the specified rate of EURIBOR plus 1.5% per annum of €16,560.05 (NYSCEF Docs. 4 at § 12; 5 at § 1), plus pre-judgment interest pursuant to CPLR 5001 through the entry of the judgment, plus reasonable attorneys’ fees and

collection costs (NYSCEF Docs. 4 at § 24; 5 at § 1). This motion is unopposed by Defendant, who has failed to appear in this action.

BACKGROUND

Plaintiff and Borrower entered into the Loan Agreement on April 24, 2020, which was to mature and be fully due and payable on December 31, 2020—approximately eight-months from the execution of the Loan Agreement (*see* NYSCEF Doc. 4 at § 9). The purpose of the Loan Agreement was to provide Borrower “liquidity for investment purposes with the Lender and general liquidity needs for [Borrower’s] professional activities” (*id.* at § 7). The value of the money loaned to Borrower was €8,000,000 (*id.* at § 6). On that same date, Defendant Guarantor executed a personal guaranty in favor of plaintiff regarding Borrower’s Loan Agreement obligations (*see* NYSCEF Doc. 5). It “irrevocably and unconditionally” guaranteed Borrower’s “punctual payment and performance to [Plaintiff] of any and all present and future obligations and liabilities of Borrower to [Plaintiff], up to a total amount of EUR 3,000,000” and “unconditionally and expressly waive[d] . . . all defenses, counterclaims, rights of setoff, any requirement that [Plaintiff] first proceed against Borrower . . .” (*id.* at §§ 1, 5). Defendant also agreed to pay to Plaintiff all damages arising from Borrower’s default, including reasonable attorneys’ fees and disbursements (*id.* at § 1).

Borrower drew down the full amount of the facility—*i.e.*, €8,000,000—and then defaulted on his payment obligations by failing to repay the principal amount plus interest by December 31, 2020. Plaintiff notified *both* Borrower *and* Defendant of Borrower’s default on January 5, 2021, by sending both a default notice and payment demand letter (NYSCEF Doc. 6). The notice was sent to Defendant at the address Defendant had specified in the Guaranty (*see*

NYSCEF Doc. 5 at 10). Ten days later, on January 15, 2021, Plaintiff sent *both* parties another default notice and payment demand letter at the same addresses (NYSCEF Doc. 7).

On February 2, 2021, Borrower rendered a payment of €5,660,000, partially satisfying his obligations under the Loan Agreement and leaving an outstanding balance of €2,339,961 with accrued interest of €10,668.64 (Affirmation of Uwe Kaiser, NYSCEF Doc. 3 at ¶ 12).

Plaintiff responded by sending *both* Borrower and Defendant a letter informing the parties that Borrower's payment was only a partial satisfaction of his obligations under the Loan Agreement, that the outstanding amount owed to Plaintiff was a balance of €2,339,961 with accrued interest of €10,668.64, and that requested full payment of the outstanding balance (NSYCEF Doc. 8). Borrower failed to render any follow-up payments satisfying the obligations of the underlying Loan Agreement.

Plaintiff then sent a fourth letter on April 1, 2021 solely to Defendant at Defendant's address specified in the Guaranty Agreement, informing Defendant that Borrower had failed to satisfy full payment of the outstanding balance, relaying that the amount of money outstanding was €2,339,961 with accrued interest of €16,560.05, and requesting payment in full pursuant to the Guaranty Agreement "without undue delay, but in any event no later than 15 April 2021" (NYSCEF Doc. 9). Defendant has failed to pay the amounts demanded.

Plaintiff brought this action and seeks summary judgment in lieu of complaint against Defendant. In support of the motion, plaintiff submitted the affidavit of Uwe Kaiser, the Head of Lending Sales and an employee of Plaintiff (NYSCEF Doc. No. 3), who attaches copies of the underlying Loan Agreement, the Guaranty Agreement, and the four separate letters notifying Defendant of Borrower's default and Defendant's own obligations as Guarantor (NYSCEF Docs. 4 – 9). Furthermore, Plaintiff provides copies of their Notice of Motion with accompanying

documentation of the commencement of this action, an Affirmation of Service of Summons on Defendant, and proof of service of this documentation on Defendant via Federal Express (NYSCEF Docs. 12 – 14). As noted above, Defendant has not opposed this motion, and has not made an appearance in this action. For the following reasons, Plaintiff’s motion is **GRANTED**.

DISCUSSION

The summary procedures of CPLR 3213 are applicable to claims “based upon an instrument for the payment of money only or upon any judgment . . .” [CPLR 3213] [emphasis added]. This requirement is a “stringent” one, and “the prototypical example of an instrument within the ambit of the statute is . . . 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 – 45 [1996]; accord *Boland v Indah Kiat Fin. (IV) Mauritius Ltd.*, 291 AD2d 342, 343 [1st Dept 2002] [“CPLR 3213 is available ‘where a right to payment can be ascertained from the face of a document’”] [citation omitted]).

“CPLR 3213 is generally used to enforce ‘some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness,’ so that a ‘prima facie case would be made out by the instrument and a failure to make the payments called for by its terms’” (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 1st Dept 2017], quoting *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 154-155 [1975]). Furthermore, the instrument in question “must be . . . written” (*Technical Tape, Inc. v Spray Truck, Inc.*, 131 AD2d 404, 406 [1st Dept 1987] [emphasis added]). Accordingly, to prevail on a motion for summary judgment in lieu of complaint, the plaintiff must provide proof of an agreement for money only, and the defendant’s failure to pay in accordance with its terms (*SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]; accord *Banco Popular North America v*

Victory Taxi Mgt., Inc., 1 NY3d 381, 383 [2004]; *Bronson v Jacobs*, 195 AD3d 550, 551 [1st Dept 2021]). Thereafter, “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] [citation omitted]).

Plaintiff has established a prima facie case for summary judgment. Plaintiff has demonstrated that Borrower executed and delivered the Loan Agreement, which is an instrument for the payment of money only, and that Defendant executed and delivered the Guaranty Agreement, which obligates Defendant to satisfy Borrower’s default to payment of money only. Plaintiff further demonstrated that the Loan Agreement matured no later than December 31, 2020, that Borrower defaulted on his payment obligations under the Loan Agreement, and that Defendant is now liable for Borrower’s default. Defendant has not opposed this motion.

Accordingly, Plaintiff is entitled summary judgment in lieu of complaint (*see e.g. Bronson*, 195 AD3d at 551 [affirming grant of plaintiff’s motion for summary judgment in lieu of complaint, as plaintiff made “prima facie showing by proof of the parties’ agreement and defendant’s failure to make the payments called for thereunder”]; *German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408, 408 [1st Dept 2013] [“Plaintiff established its entitlement to judgment as a matter of law in this action to recover on a promissory note executed by borrower . . . Plaintiff submitted evidence, including the note, the loan agreement . . . and an affidavit of plaintiffs’ principal who attested to [borrower’s] failure to make payment on the loan at its maturity date”]; *Bank of America, NA v Tatham*, 305 AD2d 183, 183 [1st Dept 2003] [“Plaintiffs’ motion for summary judgment was properly granted upon proof of the loan documents . . . and failure to pay in accordance therewith”]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint under CPLR 3213 is **GRANTED**; it is further

ORDERED that Plaintiff submit via NYSCEF a proposed judgment for the Court's review within seven days of the date of this Decision and Order; it is further

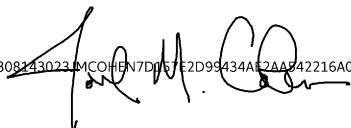
ORDERED the issue of the amount of attorneys' fees, costs, and expenses to which Plaintiff is entitled is referred to a Special Referee to hear and report with recommendations, except that in the event of and upon filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or other person designated by the parties to serve as referee, shall determine the aforesaid issue; it is further

ORDERED that this portion of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; 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 Sheet (copies are available on the Court's website and in Room 119 at 60 Centre Street) upon the Special Referee Clerk in the Motion Support office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date.

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 DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE