

<b>Murphy v PHG Funding LLC</b>
2022 NY Slip Op 32134(U)
July 5, 2022
Supreme Court, New York County
Docket Number: Index No. 656158/2021
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 KEVIN MURPHY,

Plaintiff,

- v -

PHG FUNDING LLC, PFIFEBRIDGE INC., JOHN THOMAS,  
 TODD JORN, STEVEN NIGRO

Defendants.

INDEX NO. 656158/2021

MOTION DATE 10/26/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
 MOTION**

-----X  
 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 40, 42

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOINDER)

Plaintiff moves for an order pursuant to CPLR 3213 granting him summary judgment in lieu of complaint against defendants in the amount of \$2,500,816.39, plus interest, costs, disbursements, and attorneys' fees. Except for defendant Steven Nigro, who is silent as to this motion,<sup>1</sup> the remaining defendants, oppose the motion.

**Background**

In this action, plaintiff Kevin Murphy seeks to recover monies allegedly owed to him from defendants under an amended and restated consolidated term note executed in his favor on April 1, 2012 (Note) in the principal amount of \$1,228,307.42, with a maturity date of December 31, 2017 (NYSCEF # 4-Note at 1). Defendants John Thomas, Todd Jorn, and Steve Nigro are principals of defendant PHG Funding LLC (PHG) and Pfffebridge, Inc. (Pfffebridge) (*id.* at 2).<sup>2</sup> Prior to this Note, plaintiff had loaned \$750,000 to PHG through the purchase of certain notes in 2009 (the original transaction) (*id.*). A dispute subsequently arose between the parties regarding the original transaction, including because PHG failed to pay plaintiff in accordance with the terms of the notes (*id.*). To resolve the dispute,

<sup>1</sup> Steven Nigro is a named defendant in the action, but plaintiff settled his claims against Nigro, filed a notice of voluntary discontinuance as to him, and subsequently amended its notice of motion to delete Nigro as a defendant. However, the remaining defendants oppose the discontinuance of the action against Nigro without their consent (NYSCEF #'s 41, 43).

defendants executed the Note in favor of plaintiff and also entered into an LLC Agreement and a guaranty agreement (*id.* at 3; NYSCEF # 31 -LLC Agreement; NYSCEF # 5-Guaranty).

The Note provided interest payments in semi-annual installments at a fix rate of 12% per annum and at a default rate of 15% per annum (NYSCEF # 4 at 4, ¶ II [A] and at 7 Art V [C]), and certain "Additional Amounts... due and payable... from the date hereof until payment in full" (*id.* at 1, 4, ¶ II[C]).

Additional Amounts under the Note are defined as:

In addition to all payments of interest due hereunder, Borrower shall, from time to time, pay to Lender upon demand by Lender, additional amounts (the "Additional Amounts") sufficient to compensate Lender for any loss (including, without limitation, lost Basic Interest), cost or expense incurred by Lender as a result of any payment or prepayment of all or any portion of the principal balance of this New Note (or any part or advance thereof), whether voluntary or involuntary (including, without limitation, any payment or prepayment resulting from an acceleration of this New Note). Lender's certificate as to any Additional Amounts which become due and payable by Borrower hereunder shall be conclusive with respect to the Additional Amounts described therein, absent manifest error. This Note shall not be deemed to have been paid and/or satisfied in full until all Additional Amounts payable hereunder shall have been paid.

(*id.* at 4, ¶ II[C]).

Plaintiff moves for summary judgment in lieu of complaint, and in support, submits the Note, the Guaranty, and emails from plaintiff to, among others, the individual defendants dated July 7, 2013, April 8, 2017, and January 6, 2018, regarding amounts remaining due and owing under the Note. Plaintiff avers that defendants defaulted under the Note by failing to make semi-annual interest payments between April 1, 2013 and April 4, 2016; failing to make interest payment at the default rate; and other than their first and last payment on April 16, 2016, of \$1,118,208.00 under the Note, defendants failed to pay the amount due under the Note when it matured on December 31, 2017, and failed to pay the default interest (NYSCEF # 11 – Aff of Pltf Kevin Murphy, ¶¶ 6-11).

Defendants counter that the Note does not constitute an instrument for the payment of money only since it does not provide an unconditional promise to pay a

sum certain (NYSCEF # 28 – Defts’ MOL in Opp. at 3). In this connection, defendants argue that plaintiff has not included various details of the parties’ settlement agreement that lead to the execution of the Note, including the LLC Agreement with non-party Phoenix Asset Recovery Services (Phoenix), a copy of which defendants submit in support of their opposition (*id.* at 4). Defendants also argue that that Phoenix and Steve Nigro, a former principal of PHG and Pfi febridge, are indispensable parties and must be joined, that discovery is required as to the events surrounding the settlement, and that the applicable six-year statute of limitations bars Murphy’s claims to the extent he seeks to recover interest installment payments accruing before October 26, 2015 (*id.* at 4-8).

In support of their opposition, defendants submit Jorn’s affidavit in which he describes plaintiff’s 2009 investment in a portfolio of insurance policies acquired by PHG and Pfi febridge, and the events leading to the settlement of the parties’ claims (NYSCEF # 29-Jorn Aff., ¶¶ 2-15). Specifically, Jorn avers that “to avoid litigation, the parties ultimately agreed to a settlement of plaintiff’s claims against the defendants and Nigro by pledging revenue to plaintiff resulting from the defendants and Nigro’s minority ownership interest in a separate portfolio of bundled life insurance policies, referred to as the Tiger Capital Assets” (*id.*, ¶ 11). He further avers that “as part of the settlement, plaintiff required Nigro, Jorn and Thomas to enter into the LLC Agreement and become members of Phoenix ...[and that] [u]nder the settlement documents defendants and Nigro were required to provide payment to plaintiff upon receipt of unrelated payments from the Tiger Capital Asset ” (*id.*, ¶¶ 12, 18).

In addition, according to Jorn, the amounts sought by plaintiff in his motion, fail to take into account plaintiff’s receipt of certain funds that he liquidated from his account, or an additional \$100,000 payment (*id.*, ¶¶ 19-21, 23, 25; NYSCEF # 35-Spreadsheet). Jorn also disputes that amounts sought by plaintiff for default interest after January 1, 2018, and asserts that no formal demand or calculations were provided for the amounts due.

In reply, plaintiff argues that because the LLC Agreement contains no pre-conditions to defendants’ obligation to pay under the Note, it does not preclude a grant of summary judgment in lieu of complaint. As for the amounts paid by defendants from Tiger Capital Assets, plaintiff argues that he appropriately credited the payment as “Additional Amounts” under paragraph II(A) of the Note (NYSCEF #38-Reply Aff., at 4).<sup>3</sup>

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<sup>3</sup> Defendants argue that Murphy was required to seek court permission prior to submitting a reply to their opposition (NYSCEF # 40). However, under the circumstances here, including that plaintiff does not submit any new evidence in reply, plaintiff’s arguments in reply will be considered.

## Discussion

“CPLR 3213 is intended to provide a speedy and effective means of securing a judgment on claims presumptively meritorious” (*Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]). To demonstrate that a written instrument qualifies for summary judgment under CPLR 3213, 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]; see also *PDL Biopharma v Wohlstadter*, 147 AD3d 494, 494-495 [1st Dept 2017]). If it is necessary to look outside the document for proof of the debt, then CPLR 3213 procedure is inapplicable (*id.* at 495). In other words, the defendant must explicitly acknowledge the indebtedness, and the fact of the debt must be apparent from the agreement alone (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

Under these standards, plaintiff has not demonstrated entitlement to relief under CPLR 3213 since he has not shown that the Note was an instrument for the payment of money only. The typical example of an instrument for the payment of money only 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, Inc.*, 88 NY2d at 444). Although the Note contains an unconditional promise to pay principal and interest on a date certain, the provision for payment of “Additional Amounts” bars plaintiff from obtaining relief under CPLR 3213. Specifically, to qualify as an instrument for payment of money only, there must be a promise to pay a sum certain over a specified period of time which cannot be based on extrinsic evidence (see *Ian Woodner Family Collection, Inc. v Abaris Books, Ltd.*, 284 AD2d 163, 164 [1st Dept 2001])[CPLR 3213 may not be utilized when “extrinsic evidence is required to determine the amount” due and where there is “no specific date by which payment in full had to be made”]; *Grossman v Clarey*, 133 AD2d 443, 443 [2d Dept 1987][an “agreement [which] obligates the defendants to extend certain advance payments or loans to the plaintiffs only in those months in which distributions pursuant to various limited partnership agreements do not reach a stated amount, and requires the plaintiffs to repay or give credit for these advances in those months when the limited partnership distributions exceed that stated amount... is not an instrument for the payment of money only”].

In this case the provision in the Note requiring defendants to pay “Additional Amounts... until payment in full” involves the payment during an undefined period of time based unspecified amounts to be paid to defendants in the future from a third-party entity. Under these circumstances, summary judgment in lieu of complaint must be denied (*Ian Woodner Family Collection, Inc. v Abaris Books, Ltd.*, 284 AD2d at 164; see also *Kerin v Kaufman*, 296 AD2d 336, 338 [1st Dept

2002][ “the availability of CPLR 3213 can never depend upon the occurrence (or nonoccurrence) of any unrelated future event”)].

As the Note does not qualify as an instrument of payment of money only, the court need not reach the parties’ additional arguments.


**Conclusion**

Accordingly, it is

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

ORDERED that plaintiff shall efile a formal complaint within 20 days of entry of this order and it is further

ORDERED that defendants shall answer or otherwise respond to the complaint within 20 days of e filing of the formal complaint.

<u>7/5/2022</u> DATE					 MARGARET CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE