

ConnectOne Bank v Family Taxi Corp.
2022 NY Slip Op 33338(U)
October 1, 2022
Supreme Court, New York County
Docket Number: Index No. 650731/2022
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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CONNECTONE BANK		INDEX NO.	<u>650731/2022</u>
	Plaintiff,	MOTION DATE	<u>06/21/2022</u>
	- v -	MOTION SEQ. NO.	<u>001</u>
FAMILY TAXI CORP.,			
	Defendant.		
		DECISION + ORDER ON MOTION	
-----X			

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 17, 18, 19, 20, 21
were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff, ConnectOne Bank (“ConnectOne”) seeks an award of summary judgment in lieu of complaint under CPLR § 3213, to recover of \$747,091.49, due as of December 31, 2021, together with per diem interest, costs and disbursements, based upon a promissory note executed and delivered by Family Taxi Corp. (“Borrower” or “Defendant”), in favor of taxicab medallion lending company The OSG Corp (“OSG”) and endorsed by OSG to Plaintiff in connection with a loan made to the Borrower in the original principal amount of \$750,000.00 (NYSCEF 4), secured by a Security Agreement dated December 15, 2017 (NYSCEF 5), executed and delivered by the Borrower.

The Loan is evidenced and secured by the following documents: a Promissory Note (NYSCEF 4), a Security Agreement (NYSCEF 5), a Loan Agreement (NYSCEF 6), an Affidavit of Confession of Judgment (NYSCEF 7), and a Rider Agreement (NYSCEF 8). OSG transferred and assigned all of its interests and rights under the loan documents to ConnectOne on December

15, 2017 pursuant to a Joint Participation Agreement (NYSCEF 9), which gave ConnectOne the right to all sums payable under the Promissory Note.

Plaintiff submits a copy of the loan history and payment record (NYSCEF 10) showing that Borrower has failed to make the required payments since March 2020 and remains in default under the Promissory Note by failing to pay in full all the amounts due and owing by the loan Maturity Date of January 1, 2021. For the reasons set forth below, Plaintiff's motion is **granted**.

Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is "based upon an instrument for the payment of money only or upon any judgment" (*Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1039 [2d Dept 2017]). An "instrument for the payment of money only" is one that "requires the defendant to make a certain payment or payments and nothing else" (*Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968]; *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

Here, Plaintiff has established a *prima facie* case for summary judgment pursuant to 3213 by demonstrating that (i) the Defendant executed the Promissory Note and Guaranty, (ii) the Promissory Note contains unconditional promises to repay Plaintiff at maturity; and (iii) Defendant failed to repay the full amounts due under the Loan in accordance with the terms of the Promissory Note (*see Pennsylvania Higher Educ. Assistance Agency v Musheyev*, 68 AD3d 736 [2d Dept 2009]).

The burden then shifts "to the defendant to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense" (*Quest Commercial, LLC v Rovner*, 35 AD3d 576 [2d Dept 2006]). In opposition, Defendant does not dispute Plaintiff's *prima facie* case, rather Defendant requests leave to raise affirmative defenses arising out of the COVID-19

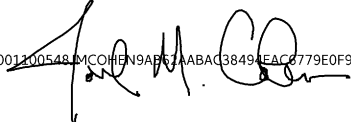
global pandemic, including the doctrines of impossibility of performance and frustration of purpose. Defendant maintains that the pandemic “severely impacted the industry” by “ceasing operations at times and/or operate at a significant lower capacity,” however, Defendant fails to cite any Executive Order or other regulation in support of its claim that as a taxi company, it was required to cease operations or operate a significantly lower capacity. Moreover, New York courts have consistently rejected attempts to assert the doctrines of frustration of purpose or impossibility of performance based on temporary and transitory government restrictions arising from the COVID-19 pandemic (*see City Natl. Bank v Baby Blue Distributions, Inc.*, 199 AD3d 559, 560 [1st Dept 2021] [“However, the pandemic did not destroy the subject matter of the contract, i.e., defendants’ loan from plaintiff. Defendants still possessed or made use of the loaned funds. Nor did the pandemic destroy the means of performance” (i.e., repayment of the loan)]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 562 [1st Dept 2021], *appeal dismissed*, 37 NY3d 1040 [2021] [Rejecting raised defenses where the tenant, an electronics store that was shuttered for a period because of pandemic-related executive orders but then reopened for curbside service, had failed to pay rent during the pandemic]). Accordingly, Defendant has failed to satisfy its burden to submit evidence to establish a triable issue of material fact.

Therefore, it is

ORDERED that the plaintiff’s motion for summary judgment in lieu of complaint is **granted**, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$747,091.94 as of December 31, 2021, plus per diem interest of \$51.39 thereafter until the date that judgment is entered, 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 shall serve this Order with Notice of Entry on Defendant within five (5) days of the date of this Order.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

10/1/2022
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE