SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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NELSON BROTHERS WEST SENECA, LLC,NELSON BROTHERS WEST SENECA INVESTOR UNITS, LLC,NB-WEST SENECA TIC 1, LLC,NB-WEST SENECA TIC 2, LLC,NB-WEST SENECA TIC 3, LLC,NB-WEST SENECA TIC 4, LLC,NB-WEST SENECA TIC 5, LLC,NB-WEST SENECA TIC 6, LLC,NB-WEST SENECA TIC 7, LLC,NB-WEST SENECA TIC 8, LLC,NB-WEST SENECA TIC 9, LLC,NB-WEST SENECA TIC 10, LLC,NB-WEST SENECA TIC 11, LLC,NB-WEST SENECA TIC 12, LLC,NB-WEST SENECA TIC 13, LLC,NB-WEST SENECA TIC 14, LLC,NB-WEST SENECA TIC 15, LLC,NB-WEST SENECA TIC 16, LLC,NB-WEST SENECA TIC 17, LLC,NB-WEST SENECA TIC 18, LLC,NB-WEST SENECA TIC 19, LLC,NB-WEST SENECA TIC 20, LLC,NB-WEST SENECA TIC 21, LLC,NB-WEST SENECA TIC 22, LLC,NB-WEST SENECA TIC 23, LLC,NB-WEST SENECA TIC 24, LLC,NB-WEST SENECA TIC 25, LLC,NB-WEST SENECA TIC 26, LLC,NB-WEST SENECA TIC 27, LLC,NB-WEST SENECA TIC 28, LLC

Plaintiffs,

- v -

WAYNE KAPLAN, ROBERT BORSODY,

Defendants.

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**INDEX NO.** 656304/2022

**MOTION DATE** 07/27/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to DISMISS COUNTERCLAIMS.

Plaintiffs-Counterclaim Defendants Nelson Brothers West Seneca, LLC and its affiliates ("Plaintiffs") move (NYSCEF 11) to dismiss Defendants-Counterclaim Plaintiffs Wayne Kaplan and Robert Borsody's ("Defendants") counterclaims for (1) breach of contract and (2) attorney's fees ("Counterclaims"). For the reasons that follow, the motion is **GRANTED**.

**BACKGROUND**

Plaintiffs' Complaint (NYSCEF 1) concerns a Master Lease Agreement as amended ("Lease" [NYSCEF 2-3]) between Plaintiffs and non-party Eden Heights of West Seneca Operating, LLC ("Eden"). The Lease concerns 3030 Clinton Street, West Seneca, New York ("the Property").

The Complaint asserts a single cause of action against Defendants to recover on a guaranty ("Guaranty" [NYSCEF 5]) of the Lease. The Guaranty provides that it is "absolute and unconditional" and that "[t]o the fullest extent allowed by applicable law, Guarantors herby waive the benefit of all statutory protections or rights afforded to them under applicable law."

Defendants' Answer (NYSCEF 10) was filed on July 11, 2022. Defendants assert Counterclaims for breach of a note dated April 15, 2009 ("Premier Closing Note" [NYSCEF 16]) and for attorney's fees under both the Premier Closing Note and Lease.

Defendants claim to own non-party Premier Senior Living, L.L.C. ("Premier") which was offered, in 2009, the opportunity to purchase the Property but lacked the funds to do so (Answer ¶¶84-85). Plaintiffs allegedly agreed to raise funds to purchase the Property and then lease it to a to-be created subsidiary of Premier, ultimately Eden (Answer ¶86).

However, Plaintiffs failed to raise enough capital and borrowed $1,350,000 from Premier (Answer ¶¶87-88), as reflected in the Premier Closing Note, to complete the acquisition of the Property. Premier allegedly assigned the Premier Closing Note to Eden (Answer ¶89). Defendants' submissions in opposition include an undated, unsworn assignment from non-party "PSL Group, LLC" to Eden annexed to an August 2022 Assignment of Note from Eden to Defendants dated August of 2022 ("Assignment" [NYSCEF 23]).

Plaintiffs move to dismiss the Counterclaims based on documentary evidence, lack of standing, the statute of limitations, and failure to state a claim pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), (a)(6) and (a)(7). Defendants oppose.

**DISCUSSION**

The allegations in the Counterclaims are accepted as true on a motion to dismiss (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Dismissal is warranted because the Counterclaims under the Premier Closing Note are untimely; no setoff is available against the Guaranty; and there no viable independent cause of action for attorney's fees.

**A. The Counterclaims Under the Premier Closing Note are Time Barred**

A statute of limitations defense may be raised in a pre-answer motion pursuant to CPLR 3211(a)(5). "On a motion to dismiss a cause of action pursuant to CPLR § 3211(a)(5) as barred by the statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Services, LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020] *quoting Quinn v. McCabe, Collins, McGeough & Fowler, LLP*, 138 A.D.3d 1085, 30 N.Y.S.3d 288 [2d Dept. 2016]). Breach of contract claims may be dismissed on statute of limitations grounds when "the complaint, even accepted as true and viewed in the light most favorable to plaintiff," establishes that the claims were brought beyond the six (6) year period set forth in CPLR 213(2) (*Stewart v Amber*, 209 AD3d 513 [1st Dept 2022]).

The Premier Closing Note had a "Maturity Date" of April 15, 2010, with a unilateral option for Plaintiffs to extend the maturity date by a year to April 15, 2011, or for an automatic extension if there was a "Rent Default Event" under the Lease. Neither the Counterclaims nor Defendants in opposition to this motion assert that there was an extension or a Rent Default Event under the Lease. Accordingly, the relevant Maturity Date under the Note remains April 15, 2010.

The Premier Closing Note provides "[t]he right to plead any and all statutes of limitation as a defense to any demand on this Note is expressly waived by Maker and all sureties, guarantors and endorsers hereof to the full extent permitted by law" (Note ¶11). The Note is governed by New York law (Note ¶17). Relevant here, General Obligations Law § 17-103 provides, in relevant part:

> (1) A promise. . .not to plead the statute of limitation applicable to an action arising out of a contract. . .if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise.
>
> (3) A promise to waive, to extend, or not to plead the statute of limitation has no effect to extend the time limited by statute for commencement of an action or proceeding for any greater time or in any other manner than that provided in this section, or unless made as provided in this section.

Defendants do not dispute that the Premier Closing Note's waiver of the statute of limitations defense does not comply with Section 17-103 and that Plaintiffs therefore may assert a statute of limitations defense (*Sotheby's, Inc. v Mao*, 173 AD3d 72, 78 [1st Dept 2019]). Instead, Defendants argue that the "Maturity Date" provision is "ambiguous" and that CPLR 203(d) permits the Counterclaims to be asserted as a set-off to an eventual judgment (Opp. Brief

at 6-9 [NYSCEF 27]). Whether a contract is ambiguous is an issue of law for the Court to decide (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). The Court finds that the Maturity Date provision is unambiguous (*Tanger v 114 E. 32nd Realty Corp.*, 59 AD3d 248 [1st Dept 2009]). Any claims under the Premier Closing Note expired six years after the latest possible maturity date, in April of 2016, well before the instant action was commenced.

Accordingly, Defendants' First Counterclaim is time barred.

**B. CPLR 203(d) is Inapplicable and Defendants May Not Assert a Setoff Under a Collateral Agreement**

Defendants seek to revive their untimely counterclaim via CPLR 203(d), which provides in relevant part:

> A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

The provision "permits a defendant to revive as an affirmative defense or counterclaim that which would ordinarily be time barred. However, for the doctrine to apply, the defendant's counterclaim or affirmative defense must arise out of the same transaction or series of transactions that form the basis of, and must be sufficiently related to, the causes of action alleged in the plaintiff's complaint" (*182 Franklin St. Holding Corp. v Franklin Pierrepont Assoc.*, 217 AD2d 508, 509 [1st Dept 1995] [citations omitted]). Moreover, CPLR 203(d) can be invoked only as a "shield" and "does not permit the defendant to obtain affirmative relief" (*Favourite Ltd. V Cico*, 208 AD3d 99, 115 [1st Dept 2022]).

The Complaints seeks to recover on the Guaranty entered into by Defendants. Defendants, as assignees of the Premier Closing Note, hold only those rights of the assignor,

Eden (*Am. Alternative Ins. Corp. v Washington*, 60 Misc 3d 1222(A) [Sup Ct New York County 2018] [collecting cases]). Defendants cite no authority to suggest that Eden's stale claim can be transformed, by CPLR 203(d) or otherwise, into a viable one simply by assigning it to Defendants.

The Guaranty was entered into to protect against a default by Eden and may not be used to establish a setoff. Under "New York law, a guarantee agreement is separate and distinct from the contract between lender and borrower, and thus a party who enters into an unconditional guarantee of payment may not assert setoffs or defenses which arise independently from the guarantee" (*Marcus Dairy, Inc. v Jacene Realty Corp.*, 225 AD2d 528, 528-29 [2d Dept 1996] [collecting cases]).

The Complaint on the Guaranty does not depend on, relate to, reference or otherwise concern the Premier Closing Note. Therefore, Defendants may not assert a setoff (*Medallion Funding Corp. v Norrito*, 272 AD2d 218, 218 [1st Dept 2000] [*citing id.*]). While the documents may be related to the same Property, there is "no common thread. . .to warrant revival" of alleged claims under the Premier Closing Note that have been stale for more than five years (*Messinger v Mount Sinai Med. Ctr.*, 279 AD2d 344, 345 [1st Dept 2001]). Instead, the set-off sought by Defendants is entirely distinct from the relief sought under the Guaranty, making CPLR 203(d) inapplicable (*USI Sys. AG v Gliklad*, 176 AD3d 555, 557 [1st Dept 2019]).

Finally, the plain language of the Guaranty indicates that it is "unconditional" and that "all statutory protections or rights afforded to them under applicable law" are waived. The Guaranty's waiver is broad enough to preclude a setoff by assignment of the Premier Closing Note (*Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009] [collecting cases]). Defendants' attempt to revive a stale claim under the Premier Closing Note as a

counterclaim via the belated Assignment is insufficient to invoke CPLR 203(d) (*Nimkoff v Sharbat*, 69 Misc 3d 1216(A) [Sup Ct New York County 2020]).

Plaintiff have made a *prima facie* showing that dismissal of the Counterclaims based on the statute of limitations is warranted and Defendants have not shown that the limitations period imposed by CPLR 213(2) was tolled or is otherwise inapplicable (*Yang v Oceanside Union Free School Dist.*, 90 AD3d 649, 649 [2d Dept 2011] [citations omitted]).

Accordingly, Defendants' First Counterclaim is dismissed with prejudice.

**C. New York Does Not Recognize a Separate Cause of Action for Attorney's Fees**

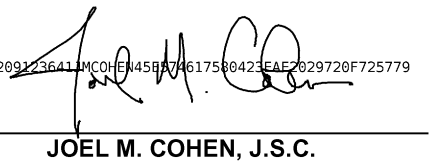
New York does not recognize a separate cause of action for attorney's fees (*PSC Ave. A LLC v Table 20 LLC* [Sup Ct, New York County 2021] *citing La Porta v Alacra, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]). Accordingly, Defendants' Second Counterclaim is dismissed without prejudice.

An award of attorney fees is incidental to litigation and may be awarded at the end of a case if it is authorized by statute or a contractual provision (*EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551, 553 [1st Dept 2019] [citations omitted]). If Defendants are successful on one or more claims in this litigation, they can, if applicable, seek fees as part of a judgment at that time.

* * * *

Accordingly, it is

**ORDERED** that Plaintiff's motion to dismiss Defendants' Counterclaims is **GRANTED**, and those claims are dismissed. This constitutes the Decision and Order of the Court.




12/9/2022
DATE

JOEL M. COHEN, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | | |
| | X | GRANTED | | DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | | REFERENCE |