SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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ASAF LERMAN

Plaintiff,

- v -

2211 THIRD AVENUE MAZAL HOLDINGS LLC,

Defendant.

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INDEX NO. 654567/2022

MOTION DATE 04/05/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 7, 8, 9, 10, 11 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Plaintiff's motion for summary judgment in lieu of complaint is granted.

Background

Plaintiff brings this action to recover on a $700,000 promissory note dated December 30, 2018. He explains that the maturity date was originally in December 2019 and that date was extended by the parties to December 2020. Plaintiff admits that defendant made payments totaling $210,000 in July 2019 and claims that $630,630 is now due (when including interest at the default rate from December 2020).

In opposition, defendant claims there are material issues of fact that should compel the Court to deny the motion. It acknowledges it made payments totaling $210,000 but claims that it was unable to repay the note in December 2020 due to the adverse effects of the pandemic. Defendant contends that the parties engaged in discussions throughout 2021 and 2022 about extending the maturity date again but that no agreement was put into writing.

Defendant contends it relied upon plaintiff's oral representations that he would extend the maturity date. It argues that it never received a written notice about the failure to pay the balance remaining on the note and questions how plaintiff calculated the default rate at 15%. It also claims that service was improper as the purported service on a David S. at defendant's office did not constitute proper service.

In reply, plaintiff emphasizes that there is no dispute that defendant defaulted by not paying what is owed. He insists he never agreed to another extension of the maturity date and that defendant did not make any other payments since July 2019. With respect to the notice, plaintiff claims that defendant has acknowledged that it is in default through its opposition papers. Plaintiff insists that service was proper and directs the Court to review the affidavit of service.

Discussion

As an initial matter, the Court finds that service was proper. The affidavit of service claims that service was effectuated by giving the papers to someone named David S., a clerk who allegedly stated he was authorized to accept service on behalf of defendant (NYSCEF Doc. No. 7).

Eran Polack, who submitted the affidavit in opposition, identifies himself as a member of HAP Development LLC, the sole member of 2211 Third Avenue Mazal Manager LLC, the manager of defendant (NYSCEF Doc. No. 9). He contends that service was made at the office of HAP Investments LLC and that David S is not a member, manager, or agent of defendant. Mr. Polack also claims that defendant does not have any employees named David S. or any clerks.

He adds that he has not authorized anyone to accept service on behalf of defendant other than the managing member of defendant (a corporate entity) or its registered agent (located in Delaware).

Defendant's opposition does not raise an issue of fact that compels the Court to deny the motion or order a traverse hearing. The Court observes that the promissory note identified defendant as having an address at "c/o HAP Investments, LLC" at the same address where plaintiff effectuated service (NYSCEF Doc. Nos. 4, 7). Notably, Mr. Polack does not claim that he has no idea who David S. is or, alternatively, submit anything to contradict the fact that David S. allegedly accepted service. In fact, Mr. Polack appears to have no relationship with HAP Investments, LLC (the location where plaintiff effectuated service); he only claims he is a member of HAP *Development* LLC. The fact is that plaintiff sent a process server to the office identified by the parties in the promissory note and someone there accepted service on behalf of defendant. Nothing is submitted from that person to contest that assertion nor is there anything submitted to discredit the claim that such a person works there.

The Court also rejects the argument in the opposition that the motion should be denied because plaintiff never gave proper notice. Paragraph 6 of the promissory note provides that plaintiff could declare the entire amount due via written notice to defendant (NYSCEF Doc. No. 4, ¶ 6). That is what he did when he commenced the instant action. Defendant understandably points to the definition of the phrase "Event of Default", which is defined as the failure to pay for fifteen days after written notice (*id*. ¶ 1). But the Court cannot construe that definition to require that this application be denied. Defendant does not claim it made any payments after receiving notice about this lawsuit or how its rights were hindered.

There is no dispute that defendant still owes plaintiff money under the terms of the note. Defendant's claim that there were oral modifications made about the maturity date is without merit as the note specifically states that it can only be amended in writing (*id.* ¶ 8).

The next question for the Court is the amount of interest. Defendant claimed in opposition that plaintiff did not establish any support for his claim of a 15% interest rate. To be sure, plaintiff stated in his moving papers that "In the course of conversations with Borrower preceding the execution of the Promissory Note, the Borrower agreed that the default interest rate would be fifteen percent (15%)" (NYSCEF Doc. No. 3, ¶ 7). Plaintiff, apparently realizing that this claim was without merit (because it is not reflected in the note itself), asks the Court in reply for a hearing to determine the amount of interest.

The Court sees no reason to hold such a hearing; if the parties did not agree on a default interest rate in writing, then there is no purpose for a hearing. The Court, therefore, grants interest at the statutory rate which is a presumptively reasonable amount (*Rodriguez v New York City Hous. Auth.*, 91 NY2d 76, 81, 666 NYS2d 1009 [1997]).

Therefore, the Court grants the motion to the extent that plaintiff is entitled to $490,000 (this amount includes the payments made by defendant) plus interest at the statutory rate of nine percent from the date this lawsuit was commenced, December 1, 2022. There is no dispute that the parties were discussing another extension of the maturity date in 2021 and 2022 and that plaintiff definitively declared the amount due by bringing this lawsuit.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the

amount of $490,000 plus statutory interest at nine percent from December 1, 2022 along with costs and disbursements upon presentation of proper papers therefor.

4/11/2023
DATE

ARLENE P. BLUTH, J.S.C.

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