

2025 Note Pool LLC v Rudich

2023 NY Slip Op 32093(U)

June 23, 2023

Supreme Court, New York County

Docket Number: Index No. 651721/2023

Judge: Melissa A. Crane

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minimis deviation from the face of the document” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; see *Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *affd* 2022 NY Slip Op. 00806 [1st Dept 2022]). Generally, an action on a guaranty is an action for payment of money only (see e.g. *Cooperative Centrale Raiffesisen-Boerenleenbank, B.A., “Rabobank Intl.,” N. Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]) (“*Cooperative Centrale*”). Additionally, “accelerated judgment under CPLR 3213 is appropriate where the plaintiff establishes a *prima facie* case by virtue of a note and a failure to make payments called for therein.” (*Warburg, Pincus Equity Partners, L.P. v O’Neill*, 11 AD3d 327 [1st Dept 2004], citing *DDS Partners v. Celenza*, 6 AD3d 347, 348 [2004]). Thus, a promissory note is a “typical example of an instrument within the meaning of [CPLR 3213]” (*DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004], citing *Weissman*, 88 NY2d at 444).

Further, the same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. The movant must make a *prima facie* case by submitting the instrument and evidence of the defendant’s failure to make payments in accordance with the instrument’s terms (see *Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]). “A guaranty may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, and the need to consult the underlying documents to establish the amount of liability does not affect the availability of CPLR 3213” (*Bank of Am., N.A. v Solow*, 19 Misc 3d 1123(A) [Sup Ct, NY County 2008]).

The unopposed motion is granted. Plaintiff has established its *prima facie* case and entitlement to summary judgment as a matter of law under the Promissory Note and the Guaranty, that are both instruments for the payment of money within the meaning of CPLR 3213. Plaintiff

has also established that its motion for summary judgment in lieu of complaint is timely under the rules governing CPLR 3213 (Docs 1, 2, 17-18).

Plaintiff demonstrates that, on August 15, 2019, it made a \$5,000,000 Mezzanine Loan to Elul, which Rudich owned, and that Elul executed a Promissory Note for \$5,000,000 to memorialize the Mezzanine Loan on that day. In Article I, the Promissory Note provided for monthly payments of \$40,000 towards principal and accrued interest on the Mezzanine Loan through July 1, 2020. The Promissory Note also provided that a final payment of \$4,908,735.86, for principal and interest, was due on the August 1, 2020 Maturity Date.

As additional security, Rudich also executed a Guaranty and agreed to be liable for the payment of all sums due under the loan agreements. Specifically, Section B(1) of the Guaranty states that Rudich

“assumes liability for, hereby guarantees to pay to [2025 Note Pool]...and hereby indemnifies [2025 Note Pool] from and against any loss, damage, cost, expense, liability, claim or other obligation incurred by [2025 Note Pool] (including attorneys’ fees, and costs reasonably incurred) arising out of or in connection with, the Guaranteed Obligations”

(Doc 7 [Guaranty Agreement]).

Further, the Guaranty defines the term “Guaranteed Obligations” as (a) payment of all “Debt” and (b) a “Recourse Debt Event” in the Mezzanine Loan Agreement and in Section B(2). The Guaranty provides that “[t]his is a guaranty of payment and performance and not of collection.”

Section 1.1 of the Mezzanine Loan Agreement defines “Debt” as “the outstanding principal amount set forth in, and evidenced by, this [Mezzanine Loan] Agreement and the [Promissory] Note together with all interest accrued and unpaid thereon and all other sums due under the [Promissory] Note, this [Mezzanine Loan] Agreement,...and any other Loan Document.” The

same section also defines a “Recourse Debt Event” as a borrower’s “[failure] to obtain Lender’s prior written consent to any indebtedness or voluntary Lien encumbering any Property, the Company Interests or any part thereof or the Pledged Collateral or any part thereof; and/or (ii) the occurrence of an Event of Default described in Section 7.1(a)(ii)” (Doc 4 [Mezzanine Loan Agreement] at 11). Further, Section 7.1(a)(i) provides that a failure to pay any portion of the Debt due on the Maturity Date constitutes an event of default (*id.*, at 38).

Plaintiff demonstrates that despite several demands, defendants failed to repay the bulk of the amounts due under the Promissory Note. Specifically, Elul only made the first five monthly payments, totaling \$200,000, and defendants have not sent any other payments to plaintiff since January 2020. Thus, Defendants did not pay the outstanding Debt on or after the Maturity Date (Doc 3 [Christensen Aff.] ¶ 24; Doc 9 [Notice of Default]; Doc 10 [Final Notice of Default]; Doc 13 [Principal and Interest Calculations]).

Finally, plaintiff calculates that defendants now owe \$7,322,718.42 with contractual default interest running through April 1, 2023. Section 1.1 of the Mezzanine Loan Agreement provides that regular interest accrues at a rate of 8% per annum (Doc 4 [Mezzanine Loan Agreement] at 7). Section 1.1 also provides that contractual default interest accrues “a rate per annum equal to the lesser of (a) the maximum rate permitted by applicable law or (b) five percent (5%) above the Interest Rate,” or 13% per annum (*id.* at 5). Plaintiff’s calculations explain that the 8% contractual interest, pursuant to Section 1.1 of the Mezzanine Loan Agreement, was initially applied on the amounts due up until the August 1, 2020 maturity date and that it began applying the 13% contractual default interest from the Maturity Date from then on afterwards (Doc 3 [Christensen Aff.] ¶ 32). Plaintiff further demonstrates that, after applying the applicable interest rates and accounting for the five payments Elul made in September, October, November, and

December of 2019, the amount defendants owe plaintiff through April 1, 2023 totals \$7,322,718.42, and that defendants have not paid any part of that amount (*see* Doc 3 [Christensen Aff.] ¶¶ 32-33).

Plaintiff has submitted the promissory note (Doc 6 [Promissory Note], the guaranty (Doc 7 [Guaranty]), the associated loan documents (Docs 1-2, 5-10 [Loan Documents]), the relevant affidavits of service (Docs 17-18 [Affidavits of Service]), the facts supporting its claim (Doc 3 [Christensen Aff.]), and its calculation of the unpaid principal together with all unpaid and accrued interest through December 1, 2023 (Doc 13 [Principal and Interest Calculations]). Individual defendant Rudich and entity defendant Elul have not objected to plaintiff's figures or submissions and have not opposed plaintiff's motion for summary judgment in lieu of complaint.

As such, the court grants plaintiff's motion for summary judgment in lieu of complaint and awards it \$7,322,718.42, representing the unpaid principal and all accrued and unpaid interest on the contractual rate of interest through April 1, 2023. However, the court denies plaintiff's request for costs, including attorneys' fees because plaintiff failed to provide any proof of attorneys' fees or costs that it may have incurred.

The court has considered the party's remaining arguments and finds them unavailing.


Accordingly, it is

ORDERED that plaintiff 2025 Note Pool LLC's unopposed motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, is granted to the extent set forth in this decision and order against defendants Moshe Rudich and Elul Holdings LLC; and it is further

ORDERED that the remainder of plaintiff's motion, including that part seeking an award of costs and attorneys' fees and costs, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment, in favor of plaintiff 2025 Note Pool LLC, and against defendants Moshe Rudich and Elul Holdings LLC, jointly and severally, in the sum of \$7,322,718.42, together with interest at the contractual default rate of 13% per annum, from April 2, 2023 until the date of this decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon a submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to mark this case disposed.

<u>6/23/2023</u>				
DATE			MELISSA A. CRANE, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
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"/>	DENIED
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE