SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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JOSH WEISBERG,

Plaintiff,

- v -

GARY STANDARD, as guarantor and as co-trustee of the Standard Living Trust dated as of October 14, 1999, TOBY STANDARD, as co-trustee of the Standard Living Trust dated as of October 14, 1999, JOEL STANDARD, as trustee of the Toby Standard Trust for Gary D. Standard dated December 21, 2012, VANESSSA STANDARD, as trustee of the Gary D. Standard Trust for Toby Standard dated December 21, 2012,

Defendant.

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INDEX NO. 651417/2022

MOTION DATE 03/25/2022

MOTION SEQ. NO. 001

AMENDED DECISION + ORDER

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41
were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND)

Plaintiff Josh Weisberg moves for summary judgment in lieu of complaint, against defendants Gary D. Standard (Gary), as guarantor and co-trustee of the Standard Living Trust, dated as of October 14, 1999, Toby Standard (Toby), as co-trustee of the Standard Living Trust, dated as of October 14, 1999, Joel Standard (Joel), as trustee of the Toby Standard Trust for Gary D. Standard, dated December 21, 2012, and Vanessa Standard, as trustee of the Gary D. Standard Trust for Toby Standard, dated December 21, 2012 (Vanessa and, together with Gary, Toby, and Joel, defendants) based upon defendants' default on a promissory note dated as of April 27, 2018, as amended (the Note), as an instrument for the payment of money only, pursuant to CPLR 3213. Defendants oppose plaintiff's motion.[1]

Background

Plaintiff is a resident of Kings County, New York (NYSCEF # 3 - Weisberg aff, ¶2). In 1982, Gary founded a company called Video Applications in California, which "provided audio/visual services in a range of live events" (NYSCEF # 17 –

[1] The Standard Living Trust, the Toby Standard Trust for Gary D. Standard, and the Gary D. Standard Trust for Toby Standard, are collectively referred to herein as the "Trusts," and their trustees as the "Trustees."

Standard aff, ¶ 3). According to Gary, around 2007, Video Applications merged with a "New York-based audio/lighting and live event company" named Scharff Weisberg, of which plaintiff was an owner (*id.* ¶ 4). Initially, the companies were under common ownership, but operated publicly under separate names, with Gary serving the merged company as Chief Executive Officer and plaintiff serving as President and Chief Operating Officer (*id.* ¶¶ 5-6).

In 2011, the merged company rebranded under the name of "WorldStage," and WorldStage, Inc. (WorldStage) was formed (see *id.* ¶ 7). In July 2017, plaintiff resigned from WorldStage, which triggered Gary's contractual right to purchase plaintiff's shares in WorldStage (*id.* ¶ 9). Following negotiations, plaintiff and Gary agreed that plaintiff would sell his 3,204 voting shares and 6,996,796 non-voting shares in WorldStage to the three familial trusts named as defendants herein, for the purchase price of $10,205,571, with the Standard Living Trust purchasing certain shares for $8,165,391.05, the Toby Standard Trust for Gary D. Standard purchasing certain shares for $1,020,089, and the Gary D. Standard Trust for Toby Standard purchasing the remaining shares for $1,020,089 (NYSCEF # 5 - Stock Purchase Agreement, Art 1.2 Sched 1.2).

As part of this transaction, the Standard Trust, the Toby Standard Trust for Gary D. Standard, and the Gary D. Standard Trust for Toby Standard, collectively, as "Maker," executed the Secured Promissory Note dated as of April 27, 2018 (NYSCEF # 4 - Note), promising to pay plaintiff, as "Payee," the principal amount of $10,205,571.00, in five annual installments, the first in the amount of $1,885,571.00, due on July 13, 2018, with subsequent installments in the principal amounts of $2,080,000 due on the four anniversaries of the first installment date (Principal Payment Dates) (*id.* § 1.1).

The first paragraph of the Note specifies that the Trusts' promises to pay under the Note are made "severally in accordance with Schedule I." Schedule I indicates that, of the Note's original principal amount of $10,205,571.00, the Standard Living Trust bears "Several Responsibility" for $8,165,391.05, and the Toby Standard Trust for Gary D. Standard and the Gary D. Standard Trust for Toby Standard are each severally responsible for $1,020.089.98.[2]

The Note also provided that simple interest accruing on the outstanding principal amount of the Note, at 4.75% per annum, based on actual days elapsed in a 360-day year, payable on the Principal Payment Dates (*id.* § 1.2), and that, upon an "Event of Default," interest on the unpaid principal would accrue at the rate of 12% per annum, based on a 360-day calendar year, from the date of the Event of

[2] These Schedule I amounts total one cent more than the original principal amount.

Default until the Note is satisfied in full (*id.* § 1.3).[3] In addition, the Note also provided that:

> upon the occurrence of an Event of Default, . . . [t]he whole sum of principal and accrued interest, and all other amounts, outstanding hereunder of all of the Makers in the aggregate shall become due and payable after Maker's receipt of written notice thereof from Payee. . . .

(*id.* § 2.2 [a]).

The Note further provides that

> Gary Standard (A) hereby fully and unconditionally guarantees and promises to pay to or for the benefit of Payee on written demand upon after the occurrence or existence of an Event of Default, in lawful money of the United States of America, the outstanding amount of principal and interest owed under this Note, as well as other amounts owed under this Note[4] (such obligations collectively the "Guaranty"), (B) agrees that the Guaranty shall be directly enforceable against him without first resorting to the Maker or exhausting any remedies against Maker, (C) acknowledges the Guaranty is an absolute and continuing guaranty and is independent of and in addition to any and all other remedies or recourse that the Payee may now or hereafter have, (D) waives any and all defenses including, without limitation, any defenses relating to the validity and enforceability of this Note, and (E) waives notice of the creation of any and all liabilities incurred under this Guaranty and further waives presentment for payment, protest, dishonor or notice of dishonor

(*id.* § 3.3[ii]).

Finally, the Note states, in pertinent part, that:

> Maker acknowledges that this Note is an instrument for the payment of money only for the purposes of Civil Practice Laws & Rules § 3213 and waives and agrees not to raise as a defense in connection with Payees [sic] exercise of his rights and remedies under this Note that this Note is not an instrument for the payment of money only

(*id.* § 4.9) and that

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[3] The Note defined an Event of Default to include, among other things, "the failure of the Maker to pay any principal amount of, or interest on, this Note within ten (10) business days after Maker's receipt of written notice from Payee of such failure to pay such amount when due and payable under Section 1.1 or 1.2 above" (*id.* Section 2.1[a]).

[4] For example, Section 2.2(b) of the note makes provision for Payee's recovery of attorneys' fees and other costs of collection, defined as "Collection Costs" in addition to the outstanding principal and interest due.

> Maker and any endorsers severally waive presentment, protest and demand, notice of protest, demand and of dishonor and non-payment of this Note, and expressly agree that this Note, or any payment hereunder, and may be extended by Payee from time to time without in any way affecting the liability of Maker and any endorsers hereof.

(*id.* § 4.10).

The parties subsequently entered an Amendment Agreement (NYSCEF # 7) which, among other things, amends the Note by setting forth new schedules for the repayment of outstanding principal and interest, with final payments of each due and payable on July 13, 2023. It also provided that, by executing the Amendment Agreement, Gary reaffirmed his guaranty in Section 3.3(ii) of the Note.[5]

Plaintiff e-filed his summons and notice of motion for summary judgment in lieu of complaint on March 25, 2022, pursuant to CPLR 3213. Defendants Gary, Toby, and Joel e-filed their papers in opposition to plaintiff's motion on June 11, 2022. Also on June 11, 2022, counsel for defendant Vanessa e-filed his notice of appearance (NYSCEF # 27), and a letter on her behalf, stating that she joined in her co-defendants' opposition to plaintiff's motion (NYSCEF # 28). Plaintiff e-filed reply papers on July 8, 2022. On July 22, 2022, defendants requested leave to file sur-reply papers, pursuant to Commercial Division Rule 18. On July 25, 2022, the court issued an interim order granting defendants' request to file a sur-reply, limited to addressing the issue plaintiff raised in reply as to whether the trustees could be held liable under the Note in their personal capacities (NYSCEF # 36). On August 1, 2022, defendants filed their sur-reply.

Discussion

To commence an action based on an instrument for payment of money only, a plaintiff can serve a summons with notice of motion for summary judgment in lieu of complaint and supporting papers. "[A] document comes within [the scope of] CPLR 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996] [internal quotation marks and citation omitted]). A plaintiff makes a prima facie showing of entitlement to a CPLR 3213 judgment as a matter of law "by showing that the defendant executed the subject instrument, the instrument contains an unconditional promise to repay the plaintiff upon demand or at a definite time, and the defendant failed to pay in accordance with the instrument's terms" (*Von Fricken v Schaefer*, 118 AD3d 869, 870 [2d Dept 2014], citing *Weissman*, 88 NY2d at 444). If the plaintiff establishes a *prima facie* entitlement to summary judgment under 3213, "the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide

[5] This Amendment Agreement is undated, and the copy submitted as an exhibit here annexes only the signature page counterpart executed by plaintiff, as creditor.

defense" (*Cooperatieve Centrale Raiffeisen Borrenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015] [internal quotation marks and citation omitted]).

Plaintiff argues that he is entitled to summary judgment under CPLR 3213 because the Note is an instrument for the payment of money only that he and defendants duly executed, and that defendants have defaulted on the Note. In opposition, defendants do not deny that the Note is an instrument for the payment of money only, within the meaning of CPLR 3213. They also do not deny that they failed to make payments required under the Note as they fell due. Plaintiff has therefore met his burden of establishing a *prima facie* entitlement to summary judgment under 3213 to liability.

Defendants nonetheless assert that plaintiff cannot be granted summary judgment because questions of fact exist as to plaintiff's liability for his alleged breach of the Noncompetition and Nondisclosure Agreement, which was entered ancillary to the Note and the Stock Purchase Agreement. On this point, the general rule is that a "breach of a related contract cannot defeat a motion for summary judgment on an instrument for the payment of money only unless it can be shown that the contract and instrument are intertwined and that the defenses alleged to exist create material issues of triable fact" (*Chervinsky v Rezhets*, 132 AD3d 713, 714 [2d Dept 2015] [citation and internal quotation marks omitted]).

Here, plaintiff's alleged breach of the noncompetition and nondisclosure agreement is "separate from [defendants'] unequivocal and unconditioned obligation to repay the monies [they owe under the Note]. To the extent that the breach of contract defense may amount to a viable claim, it may be asserted in a separate action" (*German Am. Capital Corp. v Oxley Dev. Co.*, 102 AD3d 408, 409 [1st Dept 2013] [citations omitted]). Accordingly, plaintiff's purported breach of the Noncompetition and Nondisclosure Agreement does not preclude granting plaintiff's motion.

Next, defendants allege that summary judgment cannot be granted against Gary, as guarantor, because he was never served with a "written demand," as required by Section 3.3 of the Note. Assuming, without deciding, that the written notice of acceleration, dated March 22, 2022 (NYSCEF Doc No. 9), sent to Gary, by e-mail, overnight courier, and certified mail, which "declare[d] that all sums due and owing under the Note to be immediately due and payable," pursuant to Section 2.2(a) of the Note, did not constitute a demand for guarantor's payment, defendants' argument fails because under Section 3.3 of the Note, Gary nevertheless "waive[d] any and all defenses including, without limitation, any defenses relating to the validity and enforceability of this Note. . . ." (NYSCEF # 4). Furthermore, defendants' reliance on *First Natl. Bank of Waterloo v Story* (200 NY 346 [1911]) is misplaced, as the guaranty in that case did not involve a waiver of defenses.

Finally, defendants argue that plaintiff's motion fails, first, because their liability under the Note as Trustees is several, meaning that the joint and several liability sought by plaintiff's motion is unavailable. Plaintiff partially concedes this point in his reply papers, citing, *inter alia*, *Medical Arts-Huntington Realty LLC v Meltzer Rosenberg Dev., LLC* (149 AD3d 824 [2d Dept 2017], to argue that the proper result would to be grant judgment against the Trusts, as primary obligors,[6] making them severally liable for the amounts of principal and interest remaining unpaid under the Note.

Defendants also argue that, even if plaintiff had sought to impose only several liability upon them, it would be improper to grant plaintiff summary judgment because discovery is required to determine the proper apportionment of liability remaining between the Trusts. Specifically, in their opposition, defendants point to evidence of partial payments of approximately $4 million and question how the funds were apportioned, to reduce their respective balances due for principal and interest due under the Note. In reply, plaintiff submitted a detailed affidavit, with supporting documents, outlining his calculations and the reductions in each Trusts' several liabilities upon the receipt of such funds. It would, however, be improper to consider such factual allegations first raised in reply papers (*John Galliano, S.A. v Stallion, Inc.*, 62 AD3d 415, 415 [1st Dept 2009]).

Considering the parties' arguments and respective concession, plaintiff's motion is granted with respect to the issue of defendants' liability on the Note. The court, however, concludes that defendants have met their burden of raising an issue of triable fact related to the apportionment of liability and damages among the Trusts and Gary, individually, as guarantor. As a result, the court grants plaintiff's motion for summary judgment is denied on the issue of damages.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is granted with regard to liability on the Note and denied with respect to the apportionment of several liability and damages amongst defendants; and it is further

ORDERED that the moving and answering papers shall be deemed the complaint and answer pursuant to CPLR 3213; and it is further

ORDERED that plaintiff shall, serve a copy of this Amended Decision and Order with notice of entry on defendants within 20 days.

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[6] The court accepts defendants' arguments on sur-reply that there is no basis to hold the Trustees personally liable for debts owed by the Trusts.

07/19/2023
DATE

MARGARET A. CHAN, J.S.C.

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