

**GLD Legacy Holdings, LLC v Legacy Educ. Alliance,
Inc.**

2023 NY Slip Op 32601(U)

July 27, 2023

Supreme Court, New York County

Docket Number: Index No. 651638/2023

Judge: Melissa A. Crane

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

GLD LEGACY HOLDINGS, LLC

Plaintiff,

- v -

LEGACY EDUCATIONAL ALLIANCE, INC,

Defendant.

INDEX NO. 651638/2023

MOTION DATE 06/07/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Plaintiff GLD Legacy Holdings, LLC (“GLD”) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against Defendant Legacy Education¹ Alliance, Inc. (“Legacy”) in the amount of \$624,121.50, plus interest (NYSCEF Doc. No. 2 [Notice of Motion]). Legacy cross-moves to dismiss Plaintiff’s CPLR 3213 action pursuant to CPLR 3211 (a)(3) and (8) based on, amongst other things, lack of capacity, standing, and jurisdiction (NYSCEF Doc. No. 13 [Notice of Cross Motion]). The court grants Plaintiff’s motion in its entirety and denies Defendant’s cross-motion in its entirety.

FACTUAL AND PROCEDURAL HISTORY

This action arises from Defendant’s alleged failure to pay debt that it incurred to Plaintiff and subsequently reaffirmed in a forbearance agreement.

I. The GLD Note

¹ The case caption erroneously refers to “Legacy Educational Alliance, Inc.” rather than “Legacy Education Alliance, Inc.”

Plaintiff GLD holds a 10% Senior Secured Convertible Debenture dated August 27, 2021 (the “GLD Note”) (NYSCEF Doc. No. 5 [GLD Note]). Pursuant to the GLD Note, GLD loaned Defendant Legacy the principal amount of \$500,000. Legacy, in turn, promised to pay back the loan on the earlier of a “Liquidity Event”² or the maturity date, August 27, 2026. Section 2(b) of the GLD Note states that the Company “shall pay interest to the Holder on the aggregate unconverted and then outstanding principal amount of this Debenture at the rate of 10% per annum” (GLD Note, § 2[b]). Under Section 2(c) of the GLD Note, interest “shall be calculated on the basis of a 360-day year, consisting of twelve 30 calendar day periods, and shall accrue daily commencing on the Original Issue Date until payment in full of the outstanding principal . . . has been made” (GLD Note, § 2[c]). Section 2(d) of the GLD Note indicates that “overdue accrued and unpaid interest . . . shall entail a late fee at an interest rate equal to the lesser of 18% per annum or the maximum rate permitted by applicable law . . . which shall accrue daily from the date such interest is due hereunder through and including the date of actual payment in full” (GLD Note, § 2[d]). Section 9(b) of the GLD Note, labeled “Absolute Obligation,” states:

“[e]xcept as expressly provided herein, no provision of this Debenture shall alter or impair the obligation of the Company, which is **absolute and unconditional**, to pay the principal of, liquidated damages and accrued interest, as applicable, on this Debenture at the time, place, and rate, and in the coin or currency, herein prescribed”

² The GLD Note defines a “Liquidity Event” as:

(a) the transfer of all or substantially all of the property or assets of the Company and its subsidiaries (other than LET and its successors and assigns) taken as a whole, (b) the merger or consolidation of the Company with another Person (other than a subsidiary of the Company) where the Company is not the surviving or successor entity, (c) a Change of Control shall occur, (d) the division, liquidation or winding up of the Company, or (e) the receipt by the Company or any of its subsidiaries of aggregate insurance proceeds received in connection with one or more related events under any property insurance policy or business interruption insurance policy or any award or other compensation received with respect to any eminent domain, condemnation of property or similar proceedings (or any transfer or disposition of property in lieu of condemnation), if the amount of such aggregate insurance proceeds or award or other compensation equals or exceeds the outstanding principal amount of this Debenture.

(GLD Note, § 9[b] [emphasis added]).

Finally, Section 9(d) of the GLD Note, titled “Governing Law,” provides:

“All questions concerning the construction, validity, enforcement and interpretation of this Debenture shall be governed by and construed and enforced in accordance with the internal laws of the State of New York, without regard to the principles of conflict of laws thereof. **Each party agrees that all legal proceedings concerning the interpretation, enforcement and defense of the transactions contemplated by this Debenture (whether brought against a party hereto or its respective Affiliates, directors, officers, shareholders, employees or agents) shall be commenced in the state and federal courts sitting in the City of New York, Borough of Manhattan (the “New York Courts”). Each party hereto hereby irrevocably submits to the exclusive jurisdiction of the New York Courts for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein, and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of such New York Courts, or such New York Courts are improper or inconvenient venue for such proceeding.** Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof via registered or certified mail or overnight delivery (with evidence of delivery) to such party at the address in effect for notices to it under this Debenture and agrees that such service shall constitute good and sufficient service of process and notice thereof.”

(GLD Note, § 9(d) [emphasis added]).

II. **The Intercreditor Agreement**

In connection with the GLD Note, the parties entered into the Intercreditor Agreement on August 27, 2021 (NYSCEF Doc. No. 20 [Intercreditor Agreement]). The Intercreditor Agreement acknowledged that Legacy and GLD had entered into the GLD Note and designated Barry Kostiner as the “sole and exclusive agent . . . to act on behalf of [GLD], subject to the terms of [the Intercreditor] Agreement, with respect to [] enforcing [GLD’s] rights and remedies, and [Legacy’s] obligations, under the [GLD Note]” (Intercreditor Agreement, ¶ 4). The Intercreditor Agreement additionally stated that:

“[n]o modification, rescission, waiver, forbearance, release or amendment of any term, covenant, condition or provision of [the Intercreditor] Agreement shall be

valid or enforceable unless made and evidenced in writing, expressly referring to [the Intercreditor] Agreement”

(*id.*, ¶ 11).

III. The Forbearance Agreement

On July 15, 2022, the parties entered into a Forbearance Agreement (NYSCEF Doc. No. 6 [Forbearance Agreement]). The Forbearance Agreement acknowledges that “GLD is the holder of a certain 10% Senior Secured Convertible Debenture dated August 27, 2021 (the ‘GLD Note’), whereby GLD made a loan to or for the benefit of [Legacy] in the principal amount of \$500,000” (Forbearance Agreement, p. 1). The Forbearance Agreement additionally accounts for interest on the GLD Note, stating that Legacy is “obligated to GLD under the GLD Note in the principal amount plus accrued and unpaid interest of \$553,675.74 (the ‘GLD Obligations’)” (*id.*). Under the agreement, GLD agrees to forbear from “exercising its rights against [Legacy] under the [GLD] Note until the earlier of (i) a default [under the Forbearance Agreement] or a new default under [the GLD] Note or (ii) October 15, 2022 (the ‘Forbearance Period’)” (*id.*, ¶ 4). Legacy, in turn, acknowledges “that it is indebted to GLD under the GLD Note in the amount of the GLD Obligations” and “waives all defenses, legal or equitable, it might have as to any action which might be commenced to enforce its obligations under the GLD Note” (*id.*, ¶ 2).

The Forbearance Agreement describes a number of different “Event[s] of Default,” including:

“(a) [t]he failure of [Legacy] to observe, or timely comply with, or perform any covenant or term contained in [the Forbearance] Agreement; (b) [a]ny warranty or representation made or deemed made by [Legacy] in [the Forbearance] Agreement is or shall be untrue in any material respect; [and] (c) [t]he failure of [Legacy] to observe, or timely comply with, or perform any covenant or term contained in the GLD Note (other than those subject to an event of default existing prior to the date of [the Forbearance] Agreement under the GLD Note, which shall not be deemed an event of default under [the Forbearance] Agreement)”

(*id.*, ¶ 11).

The Forbearance Agreement “shall be construed under and in accordance with the laws of the State of New York without reference to any conflict of laws evaluation,” and “[t]he parties [to the Forbearance Agreement] all consent to sole and exclusive jurisdiction for enforcing any claims under [it] to be enforced in the state courts of New York.” The parties also consented to statutory service or service “effected by use of any next day express delivery, such as Federal Express” (*id.*, ¶¶ 14-15). The Forbearance Agreement further provides that the “Notes and all other documents executed in connection therewith, shall remain in full force and effect and modified only as specifically provided for in [the Forbearance] Agreement” (*id.*, ¶ 16).

Additionally, the Forbearance Agreement requires Legacy to execute a Confession of Judgment in favor of GLD (*id.*, ¶ 12). The Forbearance Agreement unambiguously states that, “[u]pon the occurrence of an Event of Default hereunder, without notice, presentment or demand, the [Confession of Judgment] shall be released from escrow and judgment shall be entered against [Legacy]” (*id.*). On July 15, 2022, Barry Kostiner, Chief Executive Officer of Legacy, executed an Affidavit for Judgment by Confession (NYSCEF Doc. No. 7 [Confession of Judgment]). The Confession of Judgment states that Debtor “defaulted in payment due the CREDITOR on that certain 10% Senior Secured Convertible Debenture dated August 27, 2021,” and that Debtor “hereby confesses judgment for the unpaid balance in the amount of \$553,675.74, plus interest thereon at 18% per annum from the 15th day of July, 2022” (*id.*).

On March 31, 2023, GLD filed its motion for summary judgment in lieu of complaint, seeking \$624,121.50 (Notice of Motion). The Notice of Motion indicates that the motion for summary judgment in lieu of complaint is returnable on April 27, 2023, and the Notice of Motion requires that any answering affidavits or affirmations be served at least seven days before the return

date (Notice of Motion). While GLD failed to provide the court with an affidavit of service, Legacy acknowledged in its opposition having been served on March 31, 2023 (NYSCEF Doc. No. 14 [Opposition MOL] at 5). Counsel for Legacy also signed an “Acknowledgement of Service” on April 4, 2023 (NYSCEF Doc. No. 11 [Acknowledgement of Service]).³

In addition to attaching the GLD Note, Forbearance Agreement, and Confession of Judgment, GLD also attached to its motion a “Default Interest Calculation” document (NYSCEF Doc. No. 8 [Default Interest Calculation]). The Default Interest Calculation refers to the “Balance Due as of 7/15/2022” of \$553,675.74, a “Default Rate of Interest” of 18%, a “Per Diem Default Rate of Interest” of 0.000493151⁴, a “# of Days” of 258, an amount of “Default Interest” of \$70,445.76 and a “Total Balance as of 3/30/2022 [sic]” of \$624,121.50 (*id.*).

On April 24, 2023, Legacy filed its opposition to the summary judgment motion and cross-motion to dismiss the action pursuant to CPLR 3211(a)(3) and (8). On May 7, 2023, GLD filed its affirmation in opposition to the cross-motion and in further support of the summary judgment motion. The parties appeared before the court on June 27, 2023 for oral argument on both motions. For the following reasons, the court grants Plaintiff’s motion in its entirety and denies Defendant’s cross-motion in its entirety.

DISCUSSION

³ The court notes that Legacy has not raised an argument regarding service being untimely. In any event, Legacy was afforded an “adequate opportunity to respond before the motion [was] submitted” such that it did not suffer any prejudice from any potential lateness (*see Plaza 400 Owners Corp. v Resnicoff*, 168 Misc2d 837, 839-40 [Civ Ct, NY County Mar 18, 1996] [“[W]here the adverse party opposed on the merits, evidencing adequate notice, short service has been deemed waived.”]; *ICICI Bank UK PLC Antwerp Branch v Manilal*, 2020 WL 2747793, *5 [Sup Ct, NY County May 27, 2020] [finding that, even though the plaintiff failed to “strictly comply” with CPLR 3213’s time requirements, the court could disregard that because there was “no evidence that Manilal suffered any prejudice as a result of the short service”]).

⁴ This appears to have been calculated by dividing the default rate of interest by 365 days. The court notes that the GLD Note states in Section 2(c) that “[i]nterest shall be calculated on the basis of a 360-day year” (GLD Note, § 2(c) [emphasis added]). It is not clear if the 360-day year basis extends to calculating the 18% late fee. In any event, Legacy has not disputed the amount allegedly due.

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, “other than simple proof of nonpayment or a similar de minimis deviation from the face of the document” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *27 West 72nd Street Note Buyer LLC v Terzi*, 194 AD3d 630, 631-32 [1st Dept 2021]; *see also Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], *4 [Sup Ct, NY County Jan 20, 2021], *aff’d* 202 AD3d 464, 464-65 [1st Dept 2022]). Accelerated judgment under CPLR 3213 is appropriate where the plaintiff establishes the existence of a guaranty of payment and defendant’s failure to pay (*see Perlbinder Holdings LLC v Patel*, 190 NYS3d 341, 342 [1st Dept 2023] [finding that the plaintiff “demonstrated prima facie entitlement to summary judgment in lieu of complaint on its claim to recover on a guaranty that defendants signed, by submitting evidence of their failure to pay, including the guaranty, the underlying lease, the assignment to the commercial tenant, and the lease ledger stating the commercial tenant’s rent arrears”]; *Warburg, Pincus Equity Partners, L.P. v O’Neill*, 11 AD3d 327, *1 [1st Dept 2004], *citing DDS Partners v. Celenza*, 6 AD3d 347, 348 [2004]; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]). Once a plaintiff establishes prima facie entitlement to summary judgment in lieu of complaint, “the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense” (*Zyskind v FaceCake Marketing Technologies, Inc.*, 101 AD3d 550, 551 [1st Dept 2012]; *Navon v Zackson*, 191 AD3d 578, 578 [1st Dept 2021] [finding that plaintiff established entitlement to summary judgment in lieu of complaint and that defendant failed to raise a triable issue of fact in response]).

In general, a document will not “qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment” (*PDL Biopharma, Inc. v*

Wohlstadter, 147 AD3d 494, 495 [1st Dept 2017]; *see also Century City Mall, LLC v Waxman*, 193 AD3d 499, *1 [1st Dept 2021] [denying summary judgment in lieu of complaint where “proof outside the guaranty . . . was necessary to establish defendant’s liability”]). However, mere references to other agreements within an instrument do not render CPLR 3213 inapplicable (*see Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007] [finding CPLR 3213 applicable where instrument “incorporate[d] by reference the terms and conditions of the companion sale agreement only to the extent necessary for the enforcement of the note”]; *Boland v Indah Kiat Finance (IV) Mauritius Ltd.*, 291 AD2d 342, 342-43 [1st Dept 2002] [finding that the necessity of reference to an indenture on CPLR 3213 motion to “establish the amount of liability would not in any event affect the availability of CPLR 3213, because it would not alter the purely monetary nature of the obligation set forth in the note”]; *GEM Investments America, LLC v Marquez*, 180 AD3d 513, 513 [1st Dept 2020] [finding that promissory note was eligible for CPLR 3213 adjudication even though the note was “made pursuant to a separation agreement” because the terms of that agreement “did not alter the monetary nature of the note”]).

Here, GLD has established prima facie entitlement to summary judgment in lieu of complaint based on Legacy’s failure to pay what it owes GLD under the GLD Note. The GLD Note qualifies as an unconditional instrument for payment of money only pursuant to CPLR 3213. Section 9(b) of the GLD Note states clearly that Legacy has an “**absolute and unconditional** [obligation] to pay the principal of, liquidated damages and accrued interest, as applicable, on [the GLD Note]” (GLD Note, § 9[b] [emphasis added]). The GLD Note additionally sets forth the principal amount of \$500,000, the timeline for payment, the amount of interest on the principal, and the applicable interest fee in the event of a default (GLD Note, §§ 2[b], 2[d], 8[b]). Further,

the Forbearance Agreement reflects that Legacy was “obligated to GLD under the GLD Note in the principal amount plus accrued and unpaid interest of \$553,675.74 (the ‘GLD Obligations’)” (Forbearance Agreement, p. 1). Lastly, the Confession of Judgment reiterates the “unpaid balance” amount of \$553,675.74 and the applicable interest rate on that amount of 18 % (Confession of Judgment).

These documents together are appropriate for CPLR 3213 adjudication because they require “no additional performance by [GLD] as a condition precedent to payment” (*see iPayment, Inc. v Silverman*, 192 AD3d 586, 587 [1st Dept 2021] [internal citation and quotation marks omitted]). Indeed, the Forbearance Agreement describes an amount of money that Legacy is obligated to pay GLD by a date certain, or earlier if any event of default occurs (Forbearance Agreement, ¶¶ 4, 11). GLD has established that the Forbearance Period for Legacy to pay the amount owed—until October 15, 2022—has expired, and that Legacy has failed to pay that amount (NYSCEF Doc. No. 4 [Gordon Aff.], ¶ 13]). GLD has further provided calculations, inclusive of the GLD Obligations and the applicable 18% interest running from July 15, 2022 through March 30, 2023, which reflect a total amount due of \$624,121.50 [as of March 30, 2023] (*id.*; Default Interest Calculation). Therefore, GLD has met its prima facie burden under CPLR 3213.

In opposition, Legacy does not dispute the debt or amounts it owes GLD but argues that the motion should be denied because the documentary evidence does not show an unequivocal and unconditional promise to pay (Opposition MOL at 8). In particular, Legacy argues that because there are multiple potential triggering events within the GLD Note, the GLD Note is “equivocal and conditional” (*id.*). Legacy also argues that GLD lacks standing to bring this case because neither party is “at home” in New York, and the documents’ conflicting language fails to resolve the matter (*id.*, at 11-12). Legacy further argues that GLD lacks the legal capacity to sue, because

GLD waived it under the Intercreditor Agreement (*id.*, at 13-16). Specifically, Legacy argues that the only person permitted to bring a suit on behalf of GLD with respect to the GLD Note is Barry Kostiner, the person who the Lenders designated as their “sole and exclusive agent” under the Intercreditor Agreement (*id.*, at 15; Intercreditor Agreement, ¶ 4). Legacy also contends that the “mere existence of the Forbearance [Agreement] requires that this Court look outside of the four walls of the [GLD Note]” in contravention of CPLR 3213 (Opposition MOL at 8-9).

These arguments are unavailing. Contrary to Legacy’s argument, the GLD Note is not “equivocal.” Rather, Legacy unequivocally agreed to pay a principal amount plus interest without any further performance required by GLD (*see Bank of America, N.A. v Lightstone Holdings, LLC*, 2011 WL 4357491, **2-3 [Sup Ct, NY County July 14, 2011] [finding that CPLR 3213 applies where the agreement “does not require additional performance as a condition precedent to payment”]). Legacy then entered into the Forbearance Agreement, unequivocally agreeing to pay the GLD Obligations amount and also agreeing to pay further interest if it failed to do so by a certain date. Nor is there any question that GLD properly brought this action in this court, because the GLD Note explicitly confers exclusive jurisdiction related to the GLD Note “in the state and federal courts sitting in the City of New York, Borough of Manhattan” (GLD Note § 9[d]). Further, the Forbearance Agreement contains a forum selection clause stating that the parties “all consent to sole and exclusive jurisdiction for enforcing any claims under the [Forbearance] [A]greement to be enforced in the state courts of New York or federal courts located in in [sic] New York County, City of New York” (Forbearance Agreement, ¶ 14).

The court rejects Legacy’s argument that the need to refer to the Forbearance Agreement renders CPLR 3213 inapplicable. The Forbearance Agreement merely provides the mechanism for enforcing the GLD Note, and does not, despite Legacy’s contentions, alter the GLD Note’s

terms or monetary nature (*see GEM Invs. Am., LLC v Marquez*, 180 AD3d 513, 513 [1st Dept 2020] [finding that separation agreement did not alter monetary nature of note]; *LaBoeuf v Saide*, 134 AD3d 515, 516 [1st Dept 2015]; *Bhatara v Futterman*, 122 AD3d 509, 510 [1st Dept 2014]; *Embraer Fin. Ltd. v Servicios Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007] [finding CPLR 3213 appropriate even when note references another agreement]). *Solanki v Pandya*, 269 AD2d 189, 189 [1st Dept 2000]).

The court also rejects Legacy's arguments concerning GLD's standing and capacity to sue in this case. Pursuant to the Forbearance Agreement, Legacy "waive[d] all defenses, legal or equitable, it might have as to any action which might be commenced to enforce its obligations under the GLD Note" (Forbearance Agreement, ¶ 2 [emphasis added]). Therefore, it is irrelevant that the Intercreditor Agreement designates Barry Kostiner as the agent to act on behalf of the Lenders, because lack of standing is a defense that can be waived, and Legacy did so here (*see Padronizados v Ceagro Agricola LTDA*, 210 AD3d 585, 586 [1st Dept 2022] [finding that defense of lack of standing "does not implicate subject matter jurisdiction" and therefore "can be waived," and then finding that the defendants waived the defense of lack of standing in an agreement settling a prior action]; *see also Security Pac. Nat'l Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006] [finding that the "issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense"]).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted in its entirety, and the Clerk is directed to enter judgment in favor of Plaintiff GLD Legacy Holdings, LLC and against Defendant Legacy Education Alliance, Inc. in the amount of \$624,121.50,

together with pre-judgment interest at the 18% contractual rate from March 31, 2023 until entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further;

ORDERED that Defendant Legacy Education Alliance, Inc.'s cross-motion to dismiss pursuant to CPLR 3211(a)(3) and (8) is denied; and it is further

ORDERED that the Clerk mark this matter disposed.

07/27/2023
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE