

Medallion Bank v Greek Star Taxi Inc.

2023 NY Slip Op 33415(U)

October 3, 2023

Supreme Court, New York County

Docket Number: Index No. 652057/2021

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

MEDALLION BANK,

Plaintiff,

- v -

GREEK STAR TAXI INC.,KISAVOS TAXI INC.,OLYMPIC
TORCH TAXI INC.,POLIGIROS LLC,JOHN GIOVANIS

Defendant.

-----X

INDEX NO. 652057/2021

MOTION DATE 11/25/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

The plaintiff, Medallion Bank, commenced this action against the defendants to recover damages for breach of certain promissory notes and guaranty agreements and replevin of the taxi medallions pledged as collateral for the notes. The complaint included ten causes of action seeking money damages and replevin of the taxi medallions pledged as collateral for the subject notes. The plaintiff subsequently withdrew the second, fifth and eighth causes of action seeking replevin. In their answer filed on May 4, 2021, the defendants interposed 22 affirmative defenses to the allegations in the complaint and three counterclaims for (1) declaratory judgment declaring that the defendants are not in default under the subject loans and that the defendants' obligations thereunder are discharged as a result of the COVID-19 pandemic, (2) negligent misrepresentation, and (3) breach of the implied covenant of good faith and fair dealing.

The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the remaining causes of action of the complaint; to dismiss or, in the alternative, sever the defendants' counterclaims; and for other related relief. The defendants oppose the motion. The motion is granted.

II. BACKGROUND

In support of its motion, the plaintiff submits, *inter alia*, the pleadings; the affidavit of the plaintiff's Assistant Treasurer, Thomas Munson; promissory notes, guaranty agreements, and security agreements between the parties; UCC-1 financing statements; demand letters sent to the defendants upon their defaults; and public auction notices, notices of sale, and bid records related to the public auction of the taxi medallions that served as the collateral for the subject loans. The plaintiff's submissions establish that, on December 28, 2018, the plaintiff made a series of three loans to defendants Greek Star Taxi Inc. ("Greek Star"), Kisavos Taxi Inc. ("Kisavos"), and Olympic Torch Taxi Inc. ("Olympic Torch") (collectively, the "Borrowers"), each in the principal sum of \$1,173,253.26 (collectively, the "Loans"). In connection with the Loans, each of the Borrowers executed promissory notes (the "Notes") in favor of the plaintiff. The Notes each provided that interest on the Loans would accrue at an annual rate of 3.25% and set a maturity date of December 28, 2023. The Borrower's payment obligations under the Notes were each guaranteed in full by defendant John Giovanis ("Giovanis"). The Borrower's payment obligations under the Notes were further guaranteed, up to \$3,000,000, by defendant Poligiros LLC ("Poligiros"). Pursuant to security agreements each also dated December 28, 2018, the Borrowers each agreed to secure their respective Loans under the Notes by, *inter alia*, interests in New York City Taxi Medallions Nos. 1M23, 1M24, 8M44, 8M45, 1M87 and 1M88 (the "Medallions"). The plaintiff duly perfected its security interest in the Medallions by filing UCC-

1 financing statements with the Secretary of State. The foregoing notes, guaranties, and security agreements comprise the Loan Documents.

The defendants defaulted on their obligations under the terms of the Loan Documents by failing to make monthly payments to the plaintiff when due. On March 3, 2021, the plaintiff sent the defendants demand letters advising that they were in default under the Loan Documents and that the full amounts due under the Loan Documents was immediately payable. The demand letters further advised that if payment was not made, the defendants were to immediately turn over to the plaintiff the Medallions securing the Loans. The defendants did not (and still have not) cured their default.

As a result, on or about October 28, 2021, the plaintiff issued notices of public auction to the defendants, among others, informing them that the Medallions would be sold by way of public auction on November 17, 2021. The plaintiff also published notices of sale in the Daily News on November 2, 2021, and November 9, 2021. The plaintiff thereafter conducted an auction of the Medallions on November 17, 2021. Except for the plaintiff's representative, no other bidders were present. The plaintiff purchased the Medallions for a total of \$477,000 and then resold them to third parties, crediting the net sale proceeds for the medallions of each of the Borrowers towards the amount due and owing by each Borrower under the Loan Documents.

As of October 26, 2022, about the time this motion was filed: (1) Greek Star owed \$985,081.40 under the applicable note, inclusive of interest and late fees; (2) Kisavos owed \$981,685.87 under the applicable note, inclusive of interest and late fees; and (3) Olympic Torch owed \$995,956.21 under the applicable note, inclusive of interest and late fees.

III. DISCUSSION

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

The plaintiff's submissions establish, *prima facie*, its entitlement to relief on the first, fourth, and seventh causes of action sounding in breach of the Notes, and the third, sixth, ninth, and tenth causes of action sounding in breach of the guaranties executed by Giovanis and Poligiros. Specifically, the plaintiff's proof demonstrates, with respect to each of the Notes, (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant signatory's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010); Flomenbaum v New York Univ., 71 AD3d 80 (1st Dept. 2009). Where, as here, a contractual obligation is a promissory note, a plaintiff meets its burden by proving the existence of the subject note and nonpayment according to its terms. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008). Moreover, "where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446–47 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1st Dept. 1991). The terms of the subject guaranties executed by Giovanis and

Poligiros are clear, unambiguous, absolute, and unconditional, and the plaintiff avers that the guaranties were duly and lawfully procured.

The defendants fail to raise a material issue of fact in opposition to the plaintiff's showing. The defendants' claims that the plaintiff is barred from recovering under the Loan Documents under the doctrines of estoppel and/or unclean hands, and that the defendants are entitled to contract rescission, are without merit. While the defendants aver that the plaintiff engaged in "dangerous and predatory lending practices" and "deliberate price inflation of the taxi medallions" securing the Loans, the defendants offer no factual proof to support their claims. The generalized discussions in news articles submitted by the defendants about the medallion lending industry's alleged exploitative practices fail to remedy this defect. Nor is this defect remedied by the defendants' discussion of the Notice of Claim filed by the New York State Attorney General against the New York City Taxi and Limousine Commission concerning alleged price inflation of taxi medallions, or by references to an SEC complaint filed against the plaintiff's parent company, there being no evidence presented that connects either the Notice of Claim or the SEC complaint to the case at bar.

Further, the defendants' assertions that they expected the plaintiff to restructure or extend the Loans prior to their maturity date, in accordance with the parties' purported practice in connection with prior loans, is flatly contradicted by specific, written provisions in several of the Loan Documents plainly stating that the plaintiff, upon a Borrower's default, may exercise all the rights and remedies available to it under the Loan Documents. Nowhere in the Loan Documents is there any provision obligating the plaintiff to restructure or extend the Loans to save the defendants from the risk of default. It is simply unreasonable for the defendants to argue that their defaults should be excused because the plaintiff, in the past, had agreed to restructure or

extend previous loans. Indeed, the defendants admit that “[f]or each of the prior loans, Defendants dutifully paid and honored their loan obligations each month[,]” *i.e.*, the defendants were *not* in default of their payment obligations when the plaintiff allegedly agreed to modify the terms of its prior loans. In sum, the defendants fail to introduce any evidence that they were fraudulently induced into entering any of the Loan Documents, or that the plaintiff engaged in any specified wrongful conduct sufficient to void the defendants’ obligations under the documents.

Further, the doctrines of frustration of purpose and impossibility are inapplicable to the facts at hand.

The frustration of purpose doctrine “offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract.” Structure Tone, Inc. v Universal Services Group, Ltd., 87 AD3d 909, 912 (1st Dept. 2011). “In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense.” Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34, 42 (1st Dept. 2020), quoting Warner v Kaplan, 71 AD3d 1, 6 (1st Dept. 2009). Importantly, frustration of purpose is not available “where the event which prevented performance was foreseeable and provision could have been made for its occurrence.” Id. at 43, quoting Warner v Kaplan, supra at 6. Moreover, economic hardship and reduced revenues alone, even if occasioned by an arguably unforeseeable circumstance such as a pandemic, do not warrant application of the frustration of purpose doctrine. See Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d 575 (1st Dept. 2021); 558 Seventh Ave. Corp. v Times Square Photo Inc., 194 AD3d 561 (1st Dept. 2021).

Impossibility is a defense to a breach of contract action “only when ... performance [is rendered] objectively impossible ... by an unanticipated event that could not have been foreseen or guarded against in contract.” Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987); see 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275, 281 (1968) (“[T]he excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law.”). The impossibility defense to contract performance must be applied narrowly, “due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances.” Kel Kim Corp. v Central Markets, Inc., supra at 902. “[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.” 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., supra at 281-82; see Valenti v Going Grain, Inc., 159 AD3d 645 (1st Dept. 2018); Urban Archaeology Ltd. v 2017 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009).

Notwithstanding that the inability of the defendants to generate sufficient profits from the Medallions to repay the Loans may constitute a difficulty outside of the defendants’ control, such circumstance does not meet the standard for frustration of purpose or impossibility under New York law. Neither the COVID-19 pandemic nor the failure of an industry due to competition from new business models, as the defendants allege here, are events that destroy the subject matter of a contract to loan money such that, had they been foreseen, the “transaction would have made little sense.” Moreover, neither render repayment on a loan “objectively impossible.” Rather, they constitute economic hardships, which are expressly excluded from the ambit of both the frustration of purpose and the impossibility doctrines.

Finally, the defendants' invocation of the defenses of laches and failure to mitigate are without merit for the reasons stated in the plaintiff's papers. The defendants' remaining affirmative defenses are deemed abandoned in light of the defendants' failure to oppose the plaintiff's arguments for their dismissal. Accordingly, the defendants present no factual issue as to whether their performance under the Loan Documents should be excused.

There is no merit to the defendants' argument that the plaintiff's motion is premature due to outstanding discovery, as they "fail[] to establish how discovery will uncover further evidence or material in the exclusive possession" of the plaintiff. Kent v 534 East 11th Street, 80 AD3d 106, 114 (1st Dept. 2010). "[T]he party invoking CPLR 3212(f) must show some evidentiary basis supporting its need for further discovery." Green v Metropolitan Transp. Auth. Bus Co., 127 AD3d 421, 423 (1st Dept. 2015). It is well-settled that mere hope or speculation that discovery may uncover evidence to defeat the motion is insufficient. See Reyes v Park, 127 AD3d 459 (1st Dept. 2015); Alcaron v Ucan White Plains Housing Dev. Fund Corp., 100 AD3d 431 (1st Dept. 2012); Kent v 534 East 11th Street, *supra*; Flores v City of New York, 66 AD3d 599 (1st Dept. 2009).

For the foregoing reasons, the branch of the plaintiff's motion seeking summary judgment on the first, third, fourth, sixth, seventh, ninth and tenth causes of action of the complaint is granted. The plaintiff is also entitled to dismissal of the defendants' counterclaims.

The first counterclaim, seeking a declaration that the defendants are excused from performing under the Loan Documents due to the COVID-19 pandemic, must be dismissed because, as explained above, the doctrines of impossibility and frustration of purpose are inapplicable here. The second counterclaim, sounding in negligent misrepresentation, fails because, as the court has stated, the defendants identify no specific, material misrepresentation or

omission made by the plaintiff to induce the defendants' execution of any of the Loan Documents. Further, to the extent the defendants claim, without specific evidence other than their assertion that it was the parties' prior practice, that the plaintiff promised to refinance the Loans at future dates, such claim is belied by the written Loan Documents the defendants executed without protest. As to the third counterclaim sounding in breach of the implied covenant of good faith and fair dealing, the defendants have not identified any behavior on the plaintiff's part that "would deprive the [defendants] of the right to receive the benefits of their agreement." 1357 Tarrytown Rd. Auto, LLC v Granite Properties, LLC, 142 AD3d 976, 977 (2nd Dept. 2016). Indeed, it is undisputed that the plaintiff conferred all benefits it was obligated to confer under the subject Notes by loaning the money promised. Any extra-contractual promise to refinance is, again, belied by and inconsistent with the written Loan Documents.

As to the plaintiff's request for an award of contractual attorney's fees, the subject loan documents expressly provide for attorney's fees and, in his affirmation, Kevin J. Etzel, Esq., details the legal work performed and billed, for a total of \$13,205.00. This sum can be divided in three to represent the work performed to enforce each of the three Notes and related documents at issue in this action. Such amount is further supported by a billing summary attached to Etzel's affirmation and, the court finds, constitutes a reasonable sum. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Matter of Freeman, 34 NY2d 1 (1974); Matter of Barich, 91 AD3d 769 (2nd Dept. 2012).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that the plaintiff's motion pursuant to CPLR 3212 for summary judgment on the first, third, fourth, sixth, seventh, ninth and tenth causes of action complaint and to dismiss the defendants' counterclaims is granted to the extent that the court awards summary judgment on those causes of action, plus contractual attorneys' fees and costs and disbursements, and the defendants' counterclaims are dismissed; and the complaint otherwise dismissed as withdrawn, and it is further

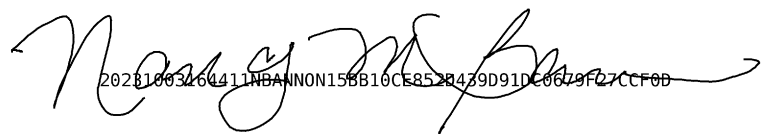
ORDERED that the Clerk shall enter a money judgment in favor of the plaintiff:

- (i) on the first cause of action against defendant Greek Star Taxi Inc. for breach of the Greek Star Note, and the third cause of action against defendant John Giovanis for breach of his associated guaranty, jointly and severally, in the principal sum of \$890,938.53, plus accrued interest through October 26, 2022, in the amount of \$93,372.38, plus late fees in the amount of \$770.49, plus accruing interest in the amount of \$80.43/per day from and after October 26, 2022 through the date of entry of judgment, plus attorney's fees in the sum of \$4,401.66, and costs and disbursements;
- (ii) on the fourth cause of action against defendant Kisavos Taxi Inc. for breach of the Kisavos Note, and the sixth cause of action against defendant John Giovanis for breach of his associated guaranty, jointly and severally, in the principal sum of \$887,323.44, plus accrued interest through October 26, 2022, in the amount of \$93,591.94, plus late fees in the amount of \$770.49, plus accruing interest in the amount of \$80.11/per day from and after October 26, 2022 through the date of entry of judgment, plus attorney's fees in the sum of \$4,401.66, and costs and disbursements;

- (iii) on the seventh cause of action against defendant Olympic Torch Taxi Inc. for breach of the Olympic Torch Note, and the ninth cause of action against defendant John Giovanis for breach of his associated guaranty, jointly and severally, in the principal sum of \$901,865.73, plus accrued interest through October 26, 2022, in the amount of \$93,319.99, plus late fees in the amount of \$770.49, plus accruing interest in the amount of \$81.42/per day from and after October 26, 2022 through the date of entry of judgment, plus attorney’s fees in the sum of \$4,401.66, and costs and disbursements;
- (iv) on the tenth cause of action against defendant Poligiros LLC for breach of guaranty, jointly and severally with the other defendants, for the principal, interest, late fees, attorney’s fees, costs and disbursements due on each of the Notes, as described in items (i), (ii), and (iii) above, up to the contractually agreed-upon sum of \$3,000,000.00; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



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10/3/2023
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE