SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE **PART** 60M

Justice

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TH HOLDCO LLC

Plaintiff,

- v -

LIPA RUBIN,

Defendant.

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INDEX NO. 650955/2023

MOTION DATE 07/06/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Plaintiff TH Holdco LLC ("Plaintiff" or "TH Holdco") filed this motion for summary judgment in lieu of complaint seeking recovery of $56,645,000[1] plus continuing interest and costs of collection pursuant to a September 19, 2019 conditional guaranty ("Guaranty") that Defendant Lipa Rubin ("Defendant" or "Rubin") entered into. For the following reasons, the court grants in part and denies in part Plaintiff's motion.

FACTUAL AND PROCEDURAL BACKGROUND

This litigation arises due to the failure of the owners of a hotel and residential building to pay debt that they incurred through a September 19, 2019 mortgage and security agreement ("Mortgage Agreement"). Pursuant to the Mortgage Agreement, mortgagors 85 Flatbush RHO Hotel LLC and 85 Flatbush RHO Residential LLC acknowledged their indebtedness to mortgagee 85 Flatbush Avenue 1 LLC in the amount of $70,000,000 (Mortgage Agreement, NYSCEF Doc.

[1] The Affidavit of Franco Famularo that Plaintiff filed in support of its motion states that the "total amount of the outstanding Debt is at least $56,645,000" (Famularo Aff., NYSCEF Doc. No. 3, ¶ 50). However, on its reply, Plaintiff states that they only seek $49,889,000 and "refer any dispute as to the amount of costs of collection or post-filing interest to a special referee" (Reply Memo., NYSCEF Doc. No. 36, p. 13).

No. 6, § B). The Mortgage Agreement additionally lists a number of events of default, including "if any portion of the Debt is not paid within five (5) days of when the same is due and payable . . . if any of the Taxes or Other Charges are not paid within five (5) days of the date when the same are due and payable . . . [and] if Borrower violates or does not comply with any of the provisions of Section 1(v) hereof with respect to the Additional Borrower Equity Contribution" (Mortgage Agreement, § 21).

In conjunction with the Mortgage Agreement, the lender and borrower[2] also entered into a consolidated, amended and restated note ("Note"), in which the borrower promised to pay "the principal sum of SEVENTY MILLION AND 00/100 DOLLARS ($70,000,000.00), together with interest thereon at the Interest Rate (as defined below) (or the Default Rate, as defined below, if applicable)" (Note, NYSCEF Doc. No. 5). The Note further specifies that interest would be due monthly, commencing on November 1, 2019 and running until the maturity date (*id.*, § B). The Note defines the "Maturity Date" as "October 1, 2021 . . . or [] such sooner date, by acceleration or otherwise, as may be applicable pursuant to the terms hereof, at which time the entire Debt shall become due and payable" (Note, § 1[k]). The Note defines the "Interest Rate" as the greater of (i) 6.5% per annum plus LIBOR or (ii) 8.8% per annum (*id.*, § 1[g]). Additionally, the Note states that "upon the occurrence of an Event of Default . . . Payee shall be entitled to receive and Maker shall pay interest on the **entire Debt** at the rate of twenty-four (24%) per annum or at the maximum rate of interest which Maker may by law pay . . . to be computed from the occurrence of the Event of Default until the actual receipt and collection of the Debt" (*id.*, § 17). The Note defines "Debt" as "all principal, interest and other sums of any nature whatsoever, which may or shall become

[2] The Guaranty refers to 85 Flatbush RHO Hotel LLC and 85 Flatbush RHO Residential LLC collectively as "Borrower" (Guaranty, NYSCEF Doc. No. 4). Therefore, the court refers to them collectively as well.

due to Payee in accordance with the provisions of this Note, the Mortgage or Other Security Documents" (*id.*, § 1[e]).

Pursuant to the Guaranty, the Guarantor, Lipa Rubin, "assume[d] liability as a primary obligor for, [and] [t]hereby unconditionally guarantee[d] payment to Lender of . . . any and all out-of-pocket liabilities, obligations, losses, [and] damages . . . actually imposed upon, incurred by or awarded against Lender as a result of" a series of circumstances related to the loan (Guaranty, § 1). The parties entered into the Guaranty in connection with both the principal debt and applicable interest described in the Note (*id.*, § 1[n] [defining "Debt" as "the principal sum evidenced by the Note and secured by the Mortgage, or so much thereof as may be outstanding from time to time, together with interest thereon at the rate of interest specified in the Note and all other sums other than principal or interest which may or shall become due and payable pursuant to the provisions of the Note, the Mortgage or the other Loan Documents"]). Further, the Guaranty specifically states that the Guarantor "shall [be] liable for the full amount of the Debt in the event that . . . any petition for bankruptcy, reorganization or arrangement pursuant to federal bankruptcy law, or any similar federal or state law, shall be filed . . . by[] Borrower" (Guaranty, § 1[n]).

The Guaranty additionally states that the Guarantor's liability is "absolute and unconditional irrespective of . . . the insolvency of, or voluntary or involuntary bankruptcy, assignment for the benefit of creditors, reorganization or other similar proceedings affecting, the Borrower or any of its assets . . . [or] any other circumstance which might otherwise constitute a defense available to, or a discharge of, the Borrower in respect of the Debt or of the Guarantor in respect of this Guaranty" (*id.*, § 2). Lastly, the Guaranty specifically states that "Guarantor acknowledges that this Guaranty is an '**instrument for the payment of money only**,' within the meaning of New York Civil Practice Law and Rules Section 3213. Thus, Lender is entitled to

move for summary judgment in lieu of complaint when enforcing this Guaranty" (*id.*, § 10[y] [emphasis in original]).

On April 2, 2020, counsel for the lender issued a notice of default letter to the borrower advising of the events of default of "Borrower's failure to deposit the sum of $1,212,146.35 . . . and [] failure to pay the monthly interest payment due on March 1, 2020 and April 1, 2020 in accordance with the Loan Documents (April 2, 2020 Notice of Default Letter, NYSCEF Doc. No. 7). The April 2, 2020 letter states that demand is "hereby made that Borrower cure the Existing Loan Defaults within 5 business days" and that "[i]nterest on this debt will continue to accrue on a daily basis at the Default Rate" (*id.*).

On July 22, 2020, the lender sent an additional letter referring to the prior April 2 and July 16 notices of default. The July 22, 2020 letter states that the borrower defaulted through "failure to deposit the sum of $1,212,146.35 . . . and [] failure to pay the monthly interest payment due on March 1, 2020 and all subsequent payments thereafter . . . and [] failure to pay real estate taxes due and payable with respect to the Property as of January 2020 and July 2020" (July 22, 2020 Acceleration Letter, NYSCEF Doc. No. 8). The July 22, 2020 letter states that, despite being advised of events of default in the prior notices, "[n]one of the Events of Default have been cured" and the "indebtedness of the Loan is hereby accelerated and demand is hereby made for immediate payment in full of all obligations of the Borrower to the Lender under the Loan documents" (*id.*). The letter also specifies that "interest continues to accrue at the Default Rate from the earliest occurrence of an Event of Default" (*id.*).

Ultimately, both 85 Flatbush RHO Hotel LLC and 85 Flatbush RHO Residential LLC filed for Chapter 11 bankruptcy on December 18, 2020 (*see* 85 Flatbush RHO Hotel Petition, NYSCEF Doc. No. 10; 85 Flatbush RHO Residential Petition, NYSCEF Doc. No. 9).

Subsequently, on January 13, 2022, the lender, 85 Flatbush Avenue 1 LLC, entered into a loan sale agreement ("Loan Sale Agreement") with Plaintiff TH Holdco in which the lender sold its "right, title, interest, and obligations in, to and under the Loan and the Loan Documents, including, without limitation, all of [the lender's] rights to principal, interest, fees, costs and expenses payable thereunder" to TH Holdco (Loan Sale Agreement, NYSCEF Doc. No. 11, §§ 1.2, 2.1).

Finally, on February 8, 2023, TH Holdco sent a letter to the Guarantor (February 8, 2023 Letter, NYSCEF Doc. No. 12). The February 8, 2023 letter refers to the provision of the Guaranty defining the borrower filing a petition for bankruptcy as an event of default and states that as a result of the December 18, 2020 bankruptcy filings, "at that time, the Debt was immediately due and payable pursuant to the Note" and the "Guarantor has been liable for the Debt since December 18, 2020" (*id.*). The February 8, 2023 letter describes that after TH Holdco made a successful $94,000,000 credit bid to purchase the collateral through the bankruptcy proceeding, there was remaining of the debt "at least $56,124,000 (excluding certain costs and fees), with interest and costs continuing to accrue" (*id.*).

TH Holdco then initiated this action by its motion for summary judgment in lieu of complaint on February 22, 2023.

DISCUSSION

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 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*, 217 AD3d 426, 426-27 [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"]; *Varadero Master Fund, L.P. v Gomez*, 2023 WL 6219385, *1 [1st Dept Sept 26, 2023]). 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]).

Here, TH Holdco has established prima facie entitlement to summary judgment in lieu of complaint based on Rubin's failure to pay the debt under the Guaranty after the borrower defaulted. Pursuant to the Guaranty, Rubin unequivocally agreed that he "shall [be] liable for the full amount of the Debt in the event that . . . any petition for bankruptcy, reorganization or arrangement pursuant to federal bankruptcy law, or any similar federal or state law, shall be filed . . . by[] Borrower" (Guaranty, § 1[n]). It is undisputed that the borrower filed Chapter 11 bankruptcy petitions on December 18, 2020, rendering Rubin liable for the "full amount of the Debt." Further, the Guaranty clearly defines "Debt" as the "principal sum evidenced by the Note and secured by

the Mortgage, or so much thereof as may be outstanding from time to time, together with interest thereon at the rate of interest specified in the Note" (*id.*).

Under the Note, the principal sum is $70,000,000 (Note, p. 1). Additionally, the default rate under the Note is 24% per annum "to be computed from the occurrence of the Event of Default until the actual receipt and collection of the Debt" (*id.*, § 17). While the borrower did not file for bankruptcy until December 2020, they were already in default under the Note as of December 19, 2019 because of their failure to deposit with the lender the "Additional Borrower Equity Contribution" by that date (Famularo Aff., ¶ 28). Therefore, after that point, the interest on the total debt accrued at 24% per annum.

TH Holdco shows on its reply that the total debt outstanding, other than enforcement costs and any interest accrued later, is at least $49,889,000 (*see* Reply Memo., p. 13). In order to support this figure, TH Holdco attaches to the Famularo reply affidavit a chart evidencing the calculation of the amount of interest based on the 24% default rate, beginning on December 19, 2019 and concluding on November 9, 2022 (Ex. A to Famularo Reply Aff., NYSCEF Doc. No. 31).[3] Ultimately, the chart reflects that the total amount of the debt prior to TH Holdco's successful credit bid was $140,546,000 (*id.*). This includes the principal balance of $70,000,000, the interest of $49,280,000, and the interest on interest of $21,266,000 (*id.*). TH Holdco explains that this amount was subsequently reduced by $94,000,000 based on its successful credit bid (Famularo Reply Aff., NYSCEF Doc. No. 30, ¶ 2). After TH Holdco reduced the debt by the amount of the credit bid, to a total of $46,546,000, that amount continued to accrue interest at the default rate of 24% until the chart's end date of February 22, 2023—the date TH Holdco filed this action (Ex. A

[3] Contrary to Defendant's position, Plaintiff was permitted to supplement its papers on reply with the calculation chart in response to Defendant's arguments (*see Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 486 [1st Dept 2013] [stating that "[t]here is no absolute rule that in a CPLR 3213 motion, a plaintiff cannot supplement its papers in response to a defendant's arguments, so as to establish its entitlement to summary judgment in lieu of complaint"]).

to Famularo Reply Aff.). Including accrued interest from the date of the credit bid until February 22, 2023, TH Holdco has shown that it is entitled to $49,889,000, plus accrued interest at the default rate from February 23, 2023. However, TH Holdco has not established that it is entitled to "enforcement costs" of $6,755,000, because it has failed to provide supporting documentation (Ex. A to Famularo Aff.). As such, that $6,755,000 amount is not included in the award.

The court rejects Defendant's argument that the Guaranty does not qualify for CPLR 3213 treatment because outside proof is required. First, the Defendant specifically agreed in the Guaranty that the "Guaranty is an '**instrument for the payment of money only**,' within the meaning of New York Civil Practice Law and Rules 3213" and that the lender is "entitled to move for summary judgment in lieu of complaint when enforcing this Guaranty" (Guaranty, § 10[y]). This contractual provision is unambiguous and should be enforced according to its plain meaning (*see 45 Broadway Owner LLC v NYSA-ILA Pension Trust Fund*, 107 AD3d 629, 631 [1st Dept 2013]; *Crown Wisteria, Inc. v Cibani*, 178 AD3d 524, 525 [1st Dept 2019]). In any event, the mere reference to other documents to establish the amount of the liability under the Guaranty does not render the Guaranty improper for CPLR 3213 treatment (*see GEM Investments America, LLC v Marquez*, 180 AD3d 513, 513 [1st Dept 2020]).

The court also rejects Defendant's argument that liability under the Guaranty would amount to a penalty in violation of public policy. A liquidated damages provision is an unenforceable penalty where it is "grossly disproportionate to the probable loss" (*Seymour v Hovnanian*, 211 AD3d 549, 553 [1st Dept 2022] [internal citations and quotation marks omitted]; *225 Fifth Ave. Retail LLC v 225 5th, LLC*, 78 AD3d 440, 442 [1st Dept 2010] [finding that defendant "failed to meet its burden of establishing that at the time the License Agreement was entered into, the amount of anticipated damages was easily ascertainable, or that the liquidated

amount was grossly disproportionate to the probable loss"]). Such a provision is enforceable "if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*Crown IT Services, Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]).

Default interest is not the same as liquidated damages. While the amount of damages that the Plaintiff claims under the Guaranty may be large, it does not constitute an unenforceable penalty. Liability under the Guaranty is directly related to the borrower's failure to pay. Thus, the amount is not "speculative or incalculable," but is simply based on what remains of the loan along with the accumulated default interest at the 24% rate (*see G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 42-43 [2d Dept 2012] [finding that guaranty did not amount to a liquidated damages provision imposing an unenforceable penalty because the loan agreement "only provides for the recovery of actual damages incurred by the lender, to wit, the debt remaining on the unpaid loan at the time of default, which is an amount fixed by the terms of the loan and is not speculative or incalculable"]). Further, it is "well settled that an agreement to pay interest at a higher rate in the event of default or maturity is an agreement to pay interest and not a penalty" (*Jamaica Sav. Bank, FSB v Ascot Owners, Inc.*, 245 A.D.2d 20, 20 [1st Dept 1997]). Additionally, the default rate is not unenforceable because the interest is compounded (*see Gutman v Savas*, 17 AD3d 278, 279 [1st Dept 2005] ["Compound interest . . . is recoverable where there is an express agreement between the parties."]).

Further, contrary to Defendant's argument, this does not amount to a double recovery because the $94 million credit bid specifically reduced the amount of outstanding debt by the value of the property (see NYSEF Doc 31). That there is so much debt remaining after that reduction is merely the result of borrower's and guarantor's failure to pay the debt for so many years.

Moreover, the borrower and the defendant **explicitly agreed** to pay this default rate of interest under the Note and the accompanying Guaranty.

In addition, the Guaranty specifically contains a waiver of defenses, stating that the Guarantor "hereby waives and agrees not to assert or take advantage of (as a defense or otherwise) . . . [a]ny principle or provision of law, statutory or otherwise, which is or might be in conflict with the terms and provisions of this Guaranty" (Guaranty, § 5[h]). Therefore, Defendant waived any argument that recovery under the unambiguous terms of the Guaranty would violate public policy (*see Weiss v Phillips*, 157 AD3d 1, 10 [1st Dept 2017] ["Courts have held that the waiver of the right to assert defenses, counterclaims or setoffs is enforceable and thus not violative as against public policy . . . Accordingly, waived defenses may not be maintained." [internal citation and quotation marks omitted]).

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

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is denied to the extent that that Plaintiff is not entitled to recover $6,755,000 for its "enforcement costs" without prejudice to a subsequent motion on proper papers; and it is further

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is otherwise granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff TH Holdco LLC and against Defendant Lipa Rubin in the amount of $49,889,000, together with interest at the contractual default rate of 24% from February 23, 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 the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to mark this case disposed.

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10/5/2023
DATE

MELISSA A. CRANE, J.S.C.

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