

**Weisberg v Standard**

2023 NY Slip Op 34242(U)

November 28, 2023

Supreme Court, New York County

Docket Number: Index No. 651417/2022

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

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

-----X  
 JOSH WEISBERG,

Plaintiff,

- v -

GARY D. 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, and VANESSA STANDARD, as trustee of the Gary D. Standard Trust for Toby Standard dated December 21, 2012,

Defendants.  
 -----X

INDEX NO. 651417/2022

MOTION DATE 08/14/2023

MOTION SEQ. NO. (MS) 002

**DECISION + ORDER ON  
 MOTION**

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Plaintiff Josh Weisberg commenced this action by moving for summary judgment in lieu of complaint (MS 001) to recover sums allegedly owed by defendants (i) Gary D. Standard (Gary) and Toby Standard (Toby) as co-trustees of the Standard Living Trust dated October 14, 1999 (Living Trust), (ii) Joel Standard (Joel) as trustee of the Toby Standard Trust for Gary D. Standard dated December 21, 2012 (Toby Trust), and (iii) Vanessa Standard (Vanessa) as trustee of the Gary D. Standard Trust for Toby Standard dated December 21, 2012 (Gary Trust, collectively with Living Trust and Toby Trust, the Trusts) under a promissory note guaranteed by Gary in his personal capacity. By Decision and Order dated July 14, 2023, as amended on July 19, 2023, plaintiff's motion for summary judgment was granted on liability and denied as to the apportionment of liability among defendants (NYSCEF #s 42, 45 – Prior Decision).

Plaintiff now moves for reargument under CPLR 2221 and seeks summary judgment on liability and damages against Gary as guarantor (MS 002). All defendants except Vanessa oppose. For the reasons below, plaintiff's motion is granted in its entirety.

**Background**

The court assumes the parties' familiarity with the background of this case, which was detailed in the court's Prior Decision (NYSCEF #s 42, 45). In short,

plaintiff and Gary were both senior executives of WorldStage, Inc. (WorldStage), a company whose predecessor was founded by Gary (NYSCEF # 17, ¶¶ 3-7). In 2017, plaintiff resigned from WorldStage and agreed to sell his shares in WorldStage to the Trusts for \$10,205,571 (NYSCEF # 5 – Stock Purchase Agreement, Art 1.2 Sched 1.2). For this purpose, the Trusts collectively executed a Secured Promissory Note dated April 27, 2018, as amended by an Amendment Agreement, promising to pay plaintiff a principal amount of \$10,205,571 in five annual installments (NYSCEF # 4 – the Note, § 1.1; NYSCEF # 7 – the Amendment). The Note allocated the total liability of \$10,205,571 to the Trusts severally, with Living Trust severally liable for \$8,165,391.05, and the Toby Trust and Gary Trust each severally liable for \$1,020,089.98 (NYSCEF # 4, Sched I [“Several Responsibility”]). The Note is governed by New York law, and the parties agreed that the Note “is an instrument for the payment of money only for purposes of [CPLR] 3213” (*id.* §§ 4.8, 4.9).

Gary guaranteed the Note “fully and unconditionally” for “the outstanding amount of principal and interest owed under this Note, as well as all other amounts owed under this Note” (NYSCEF # 4, § 3.3 – the Guaranty). Further, “the Guaranty shall be directly enforceable against [Gary, as guarantor] without first resorting to [the Trusts] or exhausting any remedies against [the Trusts]” and “the Guaranty is an absolute and continuing guaranty and is independent of and in addition to any and all other remedies or recourse that [plaintiff] may now or hereafter have” (*id.*). Under the Guaranty, Gary waives (i) all defenses relating to the validity and enforceability of the Note and (ii) notice of any liabilities incurred under the Guaranty (*id.*). In the Amendment, Gary reaffirmed that he remains bound by the Guaranty (NYSCEF # 7, § 2).

When a payment installment of the Note became due on July 13, 2021, defendants failed to make the requisite payment of \$2,080,000 in principal and the interest that accrued in 2020 and 2021 (NYSCEF # 3 – Weisberg aff, ¶¶ 20, 21). On March 4, 2022, plaintiff notified Gary of the default (NYSCEF # 8 – Notice of Default). Defendants failed to cure their default by March 21, 2022 (NYSCEF # 3 ¶ 23), which triggered sections 1.3 and 2.2 (a) of the Note, thus (i) increasing the Note’s interest rate from 4.75% per annum to 12% per annum (NYSCEF # 4 § 1.3), and (ii) accelerating the whole sum of principal outstanding and interest accrued to become due immediately (*id.* § 2.2). As such, on March 22, 2022, plaintiff sent an acceleration notice to inform Gary that the entire outstanding principle of \$6,240,000 and the accrued interest had become due (NYSCEF # 9 – Notice of Acceleration).

On March 25, 2022, plaintiff commenced this action by moving for summary judgment in lieu of complaint pursuant to CPLR 3213 (NYSCEF #s 1-2). Plaintiff sought summary judgment against (i) Gary as guarantor and as co-trustee of Living Trust, (ii) Toby as co-trustee of Living Trust, and (iii) Joel and Vanessa as trustees of Toby Trust and Gary Trust respectively, for a principal amount of \$6,240,000, plus interest at a rate of 4.75% per annum from April 27, 2018 through March 21, 2022 and then at a rate of 12% per annum from March 22, 2022 through the date of

collection, plus plaintiff's reasonable attorneys' fees and expenses incurred to collect and enforce the Note (NYSCEF #s 2, 12 – MS 001 MOL).

All defendants opposed (NYSCEF # 16 – MS 001 Opp; NYSCEF # 28) even though defendants conceded their default under the Note and acknowledged that Gary personally guaranteed the Note (NYSCEF # 16 at 5, 7-8). Defendants argued that because the Trusts' liabilities under the Note are several—not joint and several, plaintiff could not seek the entire amount due under the Note against each of the Trusts (*id.* at 14-18). Defendants added that the Trusts had made partial payments of approximately \$4 million and questions of fact existed on how to apportion the remaining liability among the Trusts (*id.*).

In reply, plaintiff argued that despite the Trusts' several liability, Gary as guarantor was liable for the entire amount of the Note (NYSCEF # 33 – MS 001 Reply at 2-5). Defendants requested leave to file a sur-reply, alleging that plaintiff improperly argued for the first time in reply that the trustees of the Trusts were personally liable for the Note (NYSCEF # 34). Defendants' request to file a sur-reply was granted by order dated July 25, 2022 (NYSCEF # 36), and the sur-reply was filed on August 1, 2022 (NYSCEF # 37 – MS 001 Sur-Reply).

By the Prior Decision dated July 14, 2023, as amended on July 19, 2023, this court granted plaintiff's motion for summary judgment under CPLR 3213 with respect defendants' liability on the Note, while denying plaintiff's motion on the issue of damages, as defendants have raised an issue of triable fact related to “the apportionment of liability and damages among the Trusts and Gary, individually, as guarantor” (NYSCEF #s 42, 45). On July 19, 2023, plaintiff filed a note of issue, certifying that discovery in this action was completed (NYSCEF # 44 – Note of Issue, ¶ 7). Subsequently, plaintiff contemplated moving to reargue MS 001, and the court held a pre-motion conference on August 14, 2023 (NYSCEF # 59 – conf tr).

Plaintiff now moves to reargue the Prior Decision and seeks an order (i) granting plaintiff's summary judgment on damages against Gary as guarantor for the entire amount due under the Note (including the principal amount of \$6,240,000 plus interest and reasonable attorneys' fees) and (ii) severing the claims against the Trusts pursuant to CPLR 3212 (e) (NYSCEF # 55 – MS 002 MOL). In opposition, defendants Gary, Toby, and Joel aver that in MS 001, plaintiff's request for summary judgment against Gary as guarantor was improperly raised for the first time in reply, and therefore was not and should not be considered by the court (NYSCEF # 56 – MS 002 Opp).<sup>1</sup> Plaintiff disputes, counter-arguing that at the outset of MS 001, he sought a judgment against Gary as guarantor for the entire debt (NYSCEF # 60 at 1).

Defendants also oppose plaintiff's motion to reargue on the ground that in the interests of justice, Gary, as guarantor, should only be a “backstop” to relief and

<sup>1</sup> Defendant Vanessa, as trustee of Gary Trust, took no position respecting co-defendants Gary, Toby, and Joel's opposition to plaintiff's motion for leave to reargue, except joining Gary, Toby, and Joel in their request to vacate plaintiff's note of issue (NYSCEF # 57).

should not be held liable for the full amount of the Note before the several liabilities of the Trusts as primary obligors are determined through discovery and then enforced to the extent possible (NYSCEF # 56 at 5). In reply, plaintiff points to section 3.3 of the Note, which provides that “the Guaranty shall be directly enforceable against [the guarantor] without first resorting to [the Trusts] or exhausting any remedies against [the Trusts]” (NYSCEF # 60 at 3).

Additionally, defendants seek to vacate plaintiff’s note of issue filed on July 19, 2023 (NYSCEF # 56 at 6 n 3). Plaintiff argues that the note of issue should not be vacated as defendant’s request for vacatur is untimely, lacking a showing of good cause, and not supported by a formal motion to vacate (NYSCEF # 60 at 4-5).

### Discussion

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotation marks omitted]; see *Mendez v Queens Plumbing Supply, Inc.*, 39 AD3d 260 [1st Dept 2007]).

To establish prima facie entitlement to summary judgment in lieu of complaint under CPLR 3213, a plaintiff suing upon an instrument must show that the instrument is one “for the payment of money only” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]) and that there is “a failure to make the payments called for by [the instrument’s] terms” (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dept 2017]). If plaintiff establishes prima facie entitlement to summary judgment under CPLR 3213, “the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide 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]).

Applying these standards, here, plaintiff’s motion for leave to reargue MS 001 is granted. The Prior Decision overlooked the fact that while the Trusts are severally liable for the Note as borrowers, section 3.3 of the Note enables plaintiff to directly enforce the Guaranty against Gary as guarantor for the entire amount owing under the Note, without first resorting to the Trusts or exhausting any remedies against the Trusts (NYSCEF # 4, § 3.3). Upon reargument, the court finds that summary judgment under CPLR 3213 is properly granted on liability (NYSCEF #s 42, 45). However, summary judgment should have been granted on damages—for the entire amount due under the Note—against Gary as guarantor of the Note.

The unconditional Guaranty executed by Gary is an instrument for the payment of money only (NYSCEF # 4, § 3.3 [“Gary Standard . . . hereby fully and unconditionally guarantees” the Note]; *PDL Biopharma, Inc.*, 147 AD3d at 495 [“generally, an unconditional guaranty qualifies as an instrument amenable to

CPLR 3213 treatment”]). By not contesting plaintiff’s allegation that the Guaranty qualifies for CPLR 3213 treatment, defendants are deemed to have admitted that no question of fact exists on this point (NYSCEF # 12 at 3; *Esponda v Ramos-Ciprian*, 179 AD3d 424, 426 [1st Dept 2020] [a non-movant who fails to dispute facts asserted in a summary judgment motion is deemed to have admitted those facts and conceded that no question of fact exists]). Further, in MS 001, defendants expressly conceded that there is a default under the Note, which Gary guarantees “fully and unconditionally” (NYSCEF # 16 at 5, 7-8). Accordingly, plaintiff has established prima facie entitlement to summary judgment under CPLR 3213 on the Guaranty, to which defendants fail to raise a triable issue of fact.

The court disagrees with defendants’ claim that plaintiff only argued for summary judgment against Gary as guarantor for the first time in his reply. In fact, plaintiff indicated in his main brief in MS 001 that he sought to recover the entire sum from all defendants, including Gary as guarantor of the Note (NYSCEF # 12 at 1, 5). Also in the main brief, plaintiff argued for applying CPLR 3213 to the Guaranty (*id.* at 3-4). Hence, in MS 001, plaintiff did initially seek summary judgment against Gary as guarantor for the entire Note, and defendants have in fact opposed this branch of plaintiff’s motion arguing that plaintiff’s motion “for judgment against Defendant Gary Standard, as guarantor, fails” (NYSCEF # 16 at 2). Thus, defendants’ assertion that plaintiff did not seek to recover from Gary, as guarantor, until mentioning it in plaintiff’s reply is incorrect.

In any event, even if plaintiff only raised the relief he sought from Gary, as guarantor, for the first time in his reply in MS 001, defendants were afforded an opportunity to address it in their sur-reply (*Pizarro v Dennis James Boyle, Inc.*, 180 AD3d 596, 596 [1st Dept 2020] “[t]he motion court providently exercised its discretion in considering . . . arguments raised . . . for the first time in [plaintiff’s] reply papers, having given [defendant] the opportunity to respond . . . by way of a sur-reply”]; *see also 2023 Westchester Assoc., LLC v Ben Ave, LLC*, 190 AD3d 627 [1st Dept 2021]).

As such, the court considers plaintiff’s argument against Gary as guarantor of the Note and finds that plaintiff is entitled to summary judgment on liability and damages against Gary as guarantor for the entire amount due under the Note.

To be clear, the court enforces the Guaranty according to its plain terms, which permits plaintiff to directly recover the full amount of the Note from the guarantor without first resorting to the Trusts (NYSCEF # 4, § 3.3; *see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004] “[it is a court’s task to enforce a clear and complete written agreement according to the plain meaning of its terms”]). Further, as clearly and unambiguously specified by sections 1.2 and 1.3 of the Note, an interest rate of 4.75% per annum applies from April 27, 2018 through March 21, 2022—the date of the event of default, and an interest rate of 12% per annum applies from March 22, 2022 through the date when the Note “is satisfied in full” (NYSCEF # 4, §§ 1.2, 1.3; *see Bd. of Managers of 25th Charles St. Condominium v Seligson*, 126 AD3d 547, 549 [1st Dept 2015] “[a] contract rate

rather than the statutory rate governs the prejudgment interest to be paid”]; *see Retirement Accounts, Inc. v Pacst Realty, LLC*, 49 AD3d 846, 847 [2d Dept 2008] [enforcing a contractual interest rate post judgment “where there is a clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate until the judgment is satisfied”]; *compare Korea Resolution and Collection Corp. v Hyuk Kee Yoo*, 170 AD3d 485, 486 [1st Dept 2019] [enforcing a post-judgment interest rate of 24%, rather than the 9% statutory rate under CPLR 5004, as the terms of the loan were clear and unambiguous] *with IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.*, 83 AD3d 573, 575 [1st Dept 2011] [“[s]ince the guarantee does not contain a clear, unambiguous, and unequivocal expression that interest will be paid at the rate higher than the statutory rate until the judgment is satisfied, the statutory rate of interest will be applied”], *affd sub nom.*, 20 NY3d 310 [2012]).

Finally, defendants’ request to vacate the note of issue for discovery on the percentage each trust owes is denied without prejudice as the apportionment issue may be worked out post-note.

### **Conclusion**

In view of the above, it is hereby

ORDERED that plaintiff Josh Weisberg’s motion for reargument (MS 002) pursuant to CPLR 2221 is granted; and it is further

ORDERED that, upon reargument, plaintiff’s motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted on liability as against all defendants and on damages as against defendant Gary D. Standard in his capacity as guarantor, and denied with respect to the apportionment of several liability and damages amongst the Trusts as primary obligors; and it is further

ORDERED that plaintiff shall have judgment against defendant Gary D. Standard as guarantor in the amount of \$6,240,000, plus interest at a rate of 4.75% per annum from April 27, 2018 through March 21, 2022 and additional interest at a rate of 12% per annum from March 22, 2022 through the date of collection; and it is further

ORDERED that plaintiff shall have judgment against defendant Gary D. Standard as guarantor as to liability for reasonable attorneys’ fees and expenses incurred by plaintiff in connection with the collection and enforcement of the Note, in such an amount to be determined by the court upon plaintiff’s submission of invoices and an affirmation(s) from counsel regarding the basis for the fee charged and its reasonableness; and it is further

ORDERED that plaintiff’s claim against the Trusts as primary obligors for the Note is severed pursuant to CPLR 3212 (e); and it is further

ORDERED that that a status conference in the severed action against the Trusts shall take place via Microsoft Teams on January 9, 2024 at 2:30 p.m. or at such time as the parties may schedule with the court's law clerk.

11/28/2023  
DATE

  
MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
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"/>	REFERENCE