SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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BANK OF HOPE,

Plaintiff,

- v -

LIVINGSTON ELECTRICAL ASSOCIATES, INC. and DANIEL LIVINGSTON,

Defendants.

INDEX NO. 654744/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 26, 27, 28, 29, 30, 31

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

In motion sequence number 001, plaintiff Bank of Hope (Bank) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants Livingston Electrical Associates, Inc. (Borrower) and Daniel Livingston (Guarantor).

On July 10, 2019, the Bank and Borrower entered into a loan transaction whereby the Bank agreed to extend the Borrower a $7.5 million line of credit. (NYSCEF 4, Promissory Note.) Upon Borrower's execution of the Promissory Note (Note), the Bank and Borrower executed a Commercial Security Agreement (Security Agreement) and Business Loan Agreement (Loan Agreement). (NYSCEF 5, Security Agreement; NYSCEF 7, Loan Agreement.) Guarantor executed a Commercial Guaranty unconditionally guaranteeing full and timely payments on the Note. (NYSCEF 9, Guaranty.) There were several modifications of the Note - August 27, 2020, December 31, 2020, March 30, 2021, June 30, 2021, December 31, 2021, March 31, 2022, and June 30, 2022. (NYSCEF 11, 12, 14-18, Change in Term Agreements [CITA].)

The final CITA, executed on June 30, 2022, extended the date that outstanding principal was due to August 10, 2022, changed the Note's interest rate to ""Wall Street Journal Prime Rate + 5.00%," and required Borrower to paydown the amount owed to $900,000 and pay off the loan by the maturity date. (NYSCEF 18, June 2022 CITA.) On October 31, 2022, the Bank sent Borrower a Notice of Default and Demand for Payment, demanding that

> "on or before November 10, 2022 (the 'Due Date'), Borrower (1) pay off the Loan by paying the entire Indebtedness to Bank (the 'Payoff') or (2) submit to Bank a written proposal and supporting financial documents, acceptable to Bank in its absolute and sole discretion, to pay Bank (a) $900,000.00 by November 30, 2022 and (b) the remaining amount of the Indebtedness by December 31, 2022, including, without limitation, default interest accruing from August 10, 2022, and attorneys' fees and disbursements (the 'Mitigation Proposal') (together, the 'Demands')." (NYSCEF 19, Demand Letter at 3-4[1].)

The approximate Indebtedness to the Bank as of that date was $2,981,346.96 (principal plus interest). (*Id*. at 4.) The Borrower did not cure its default. Thus, in December 2022, the Bank filed this action.

> "The prototypical example of an instrument within the ambit of [CPLR 3213] is of course a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time. CPLR 3213 is generally used to enforce some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness, so that a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 494 [1st Dept 2017] [internal quotation marks and citations omitted].)

The Bank has satisfied its burden on this motion submitting the Note, an instrument for the payment of money promising to pay a sum certain, signed and due, the Guaranty, and the Bank's record of money loaned and repaid, as well as

[1] NYSCEF pagination

the affidavit of its First Vice President and Special Assets Department Team Leader averring that defendants are in default and have failed to cure this default. (NYSCEF 4, Promissory Note; NYSCEF 9, Guaranty, NYSCEF 3, Jang aff ¶¶ 37-43.) Thus, the burden shifts to defendants to raise an issue of fact. (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004] ["(a) party utilizing this accelerated judgment procedure prevails if, upon all the papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment for the plaintiff. A defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact" (internal quotation marks and citation omitted)].)

Defendants, relying on *Weissman v Sinorm Deli*, 88 NY2d 437 (1996), assert that "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." (88 NY2d at 444 [citation omitted].) Specifically, defendants point to the seventeen documents that the Bank relies on in support of this motion to demonstrate the amount owed, asserting that Note and Guaranty merely establish that the Bank could advance up to $7.5 million to Borrower and do not establish a sum certain. Defendants also attack the payment history statement submitted by the Bank, arguing that it is unauthenticated and there is no evidentiary foundation for this document.

Here, "[t]here is no merit to defendant's contention that the note is not an instrument for the payment of money only within the meaning of CPLR 3213, containing, as it does, an unconditional promise to pay on a certain day the

current balance in defendant's line of credit," particularly where the amount owed is "readily ascertainable from plaintiff's bank records." (*European Am. Bank v Cohen*, 183 AD2d 453 [1st Dept 1992] [citation omitted]; *see also* NYSCEF 20, Payment History; NYSCEF 4, Note [Borrower "promises to pay to Bank of Hope … the principal amount of Seven Million Five Hundred Thousand & 00/100 Dollars ($7,500,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance. … Borrower will pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on July 10, 2020]; NYSCEF 18, June 2022 CITA ["The date on which all outstanding principal is due and payable (together with any accrued but unpaid interest thereon) ('Maturity Date') is hereby extended to August 10, 2022 from May 10, 2022"].) The fact that the court must look to the Bank's record of the Borrower's loan and payment history "does not bar the use of CPLR 3213." (*Punch Fashion, LLC v Merchant Factors Corp.*, 180 AD3d 520, 522 [1st Dept 2020] [citation omitted].)

The Bank's payment history record along with Jang's affidavit sufficiently establish the amounts borrowed and owed. "It is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files." (*DeLeon v Port Auth.*, 306 AD2d 146, 146 [1st Dept 2003]; NYSCEF 3, Jang aff ¶¶ 1, 44 [stating "I am fully familiar with the facts and circumstances of the commercial loan that is the

subject matter of this application to the Court. I am also familiar with the records BOH maintains in the ordinary course of its business concerning the administration of the loan which is the subject matter of the above action. All statements set forth herein are based on my personal knowledge and my review and analysis of BOH'S business records, unless otherwise stated"]; *compare Citibank, N.A. v Ahmad*, 2020 N.Y. Misc. LEXIS 14555, at *22-23 [Sup Ct, NY County Oct. 21, 2020, No. 654075/2019] [granting CPLR 3213 motion even though plaintiff stated the monies owed in a conclusory manner and ordering a proposed judgment specifying amounts owed].)

This is not a case where plaintiff merely concludes how the indebtedness was calculated. (*HSBC Bank USA v IPO*, LLC, 290 AD2d 246, 246 [1st Dept 2002] [holding that the prima facie case for [CPLR 3213] relief requires documentary evidence or an explanation of how the indebtedness is calculated, other than in the form of mere conclusory allegations"].)

Defendants do not contest the amount owed. In fact, defendants do not submit an affidavit of a person with knowledge; they only submit an attorney affirmation. (*Schwartz v Turner Holdings, Inc.*, 139 AD2d 458, 459 [1st Dept 1988] [noting "that the perfunctory affidavit of defendant's attorney made without knowledge of the facts fails to raise an issue sufficient to bar summary judgment"].) Rather, they attack the sufficiency of the Bank's proof, which the court finds to be adequate.

Defendants also assert that the Note and Guaranty require the defendants to comply with other obligations and conditions. "While a guarantee of both

payment and performance does not qualify as an instrument for the payment of money only under CPLR 3213," it will qualify as one for the payment of money only when it "require[s] no additional performance by plaintiff as a condition precedent to payment or otherwise ma[kes] defendants' promise to pay something other than unconditional." (*iPayment, Inc. v Silverman*, 192 AD3d 586, 587 [1st Dept 2021] [citation omitted] lv dismissed 37 NY3d 1020 [2021]; *see also 45-47-49 Eighth Ave. LLC v Conti*, 220 AD3d 473, 473 [1st Dept 2023] [holding that "[a]lthough defendant guaranteed both payment and certain performance obligations, this does not preclude summary judgment in lieu of complaint where, as here, performance is not a condition precedent to payment" (citation omitted)].) Here, both the Note and Guaranty contain an unconditional promise by defendants to pay the Bank; neither instrument requires additional performance by the Bank as a condition precedent to payment or otherwise made defendants' promise to pay something other than unconditional.

Defendants' argument that the following provisions create new and additional obligations beyond an unconditional promise to pay is clearly wrong and unsupported. Quoting the provisions without more is woefully insufficient.

> "Payment Default. Borrower fails to make any payment when due under this Note. (NYSCEF 4, Promissory Note at 1.)

Defining a default as a failure to pay is hardly novel. When one fails to pay a note, it is a default. It does not change the note into something else.

Defendants point to the Note's provision that Borrower's failure to comply with or perform any other "term, obligation, covenant or condition" in the Note, related documents, or any other agreement qualifies as an event of default.

(NYSCEF 4, Note at 1 [Other Defaults].) However, defendants do not explain how this evidences "additional performance by plaintiff as a condition precedent to payment" or makes "defendants' promise to pay something other than unconditional." (*iPayment, Inc.*, 192 AD3d at 587.) The same is true as to the language of the Guaranty – "guarantees full and punctual payment … and performance and discharge of all Borrower's obligations under the Note and the Related Documents." (NYSCEF 9, Guaranty at 1.) Defendants also point to the Borrowers' covenants pursuant to the Loan Covenants and Conditions document, including requirements to maintain a deposit account with Bank, automatic payment, a debt service coverage ratio of not less than 1.20x, and net income of $1.5 million. (NYSCEF 8, Loan Covenants and Conditions.) Again, defendants do not explain how this evidences "additional performance by plaintiff as a condition precedent to payment" or makes "defendants' promise to pay something other than unconditional." (*iPayment, Inc.*, 192 AD3d at 587.) Indeed, "additional" items are different ways to say or secure the same thing: pay the note. The fact that the Bank listed some of these obligations as defaults in a March 2021 Notice of Default and Forbearance Agreement (NYSCEF 13), does not alter whether the Note and Guaranty are instruments for the payment of money only. Those were the existing defaults in March 2021.

Finally, defendants argue that the Bank is charging defendants a usurious interest rate of 17%. "The maximum rate of interest provided for in section 5-501 of the general obligations law shall be sixteen per centum per annum." (Banking Law § 14-a [1].) However, General Obligations Law § 5-501 (6) (b) provides,

> "No law regulating the maximum rate of interest which may be charged, taken or received, including section 190.40 and section 190.42 of the penal law, shall apply to any loan or forbearance in the amount of two million five hundred thousand dollars or more. Loans or forbearances aggregating two million five hundred thousand dollars or more which are to be made or advanced to any one borrower in one or more installments pursuant to a written agreement by one or more lenders shall be deemed to be a single loan or forbearance for the total amount which the lender or lenders have agreed to advance or make pursuant to such agreement on the terms and conditions provided therein."

The loan at issue exceeds this amount. (*See Tides Edge Corp. v Cent. Fed. Sav., F.S.B.*, 151 AD2d 741, 742 [2d Dept 1989] [holding that "given the fact that the amount that respondent agreed to advance exceeded $ 2,500,000, the transaction is exempt, under General Obligations Law § 5-501 (6) (b), from the operation of any law regulating the payment of interest"].)

The court has considered all remaining arguments and finds them unavailing. Thus, based on the foregoing, the Bank's motion for summary judgment is granted. The Bank is also awarded attorneys' fees as provided for in the Note and Guaranty.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint herein is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Livingston Electrical Associates, Inc. and Daniel Livingston, jointly and severally, in the amount of $2,885,000.00, together with interest at the Note rate of 12%, plus default interest at the default rate of 5% accruing from August 10, 2022 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, 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 plaintiff is awarded attorneys' fees; and it is further

ORDERED that the issue of attorneys' fees is severed and a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court as to the amount of such award; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

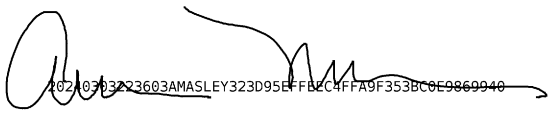
ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.



3/3/2024
DATE

ANDREA MASLEY, J.S.C.

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