

Barry Indus. LLC v Barry St. Holdings LLC

2024 NY Slip Op 30986(U)

March 25, 2024

Supreme Court, New York County

Docket Number: Index No. 655440/2023

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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 03M

-----X	
BARRY INDUSTRIAL LLC,	INDEX NO. <u>655440/2023</u>
Plaintiff,	MOTION DATE <u>11/01/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>
BARRY STREET HOLDINGS LLC, STEPHEN WERDIGER	DECISION + ORDER ON MOTION
Defendants.	
-----X	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38
 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Barry Industrial LLC (“Plaintiff”) seeks an award of summary judgment in lieu of complaint under CPLR § 3213, against Defendants Barry Street Holdings LLC and Stephen Werdiger (collectively, “Defendants”), in the amount of \$3,599,572.89, plus default interest at the rate of 9.48% from May 1, 2023 through and after the entry of the Judgment, a late fee of 6% on the unpaid principal amount, and reasonable attorney’s fees and costs and disbursements, based on promissory note executed by Barry Street Holdings and secured by a guaranty executed by Stephen Werdiger. Defendants oppose and cross-move pursuant to CPLR 3211(a)(3), to dismiss the action because Plaintiff lacks standing to foreclose. For the reasons set forth below, and in consideration of the arguments made at oral argument on March 25, 2024, Plaintiff’s motion is granted and Defendants’ cross-motion is denied.

Pursuant to CPLR 3213, a plaintiff makes out a *prima facie* case for summary judgment in lieu of a complaint by submitting proof of an instrument “for the payment of money only or

upon any judgment,” and the defendants’ failure to make payment according to its terms (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968]; *Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036, 1039 [2d Dept 2017]).

An “instrument for the payment of money only” is one that “requires the defendant to make a certain payment or payments and nothing else” (*Seaman-Andwall Corp.*, 31 AD2d at 137; *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). “It is well settled that a promissory note, as an instrument for the payment of money only, is entitled to the expedited procedure detailed in CPLR 3213” (*R-H-D Const. Corp. v Miller*, 222 AD2d 802, 803 [3d Dept 1995]). Likewise, a “guarantee qualifies as an ‘instrument for the payment of money only’ under CPLR 3213” (*Torres & Leonard, P.C. v Select Professional Realities, Ltd.*, 118 AD2d 467, 468 [1st Dept 1986]; *State Bank of India, New York Branch v Patel*, 167 AD2d 242, 243 [1st Dept 1990]). “Once the plaintiff submits evidence establishing its prima facie case, the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue of fact with respect to a bona fide defense.” (*Griffon V. LLC v 11 East 36th, LLC*, 90 AD3d 705, 707 [2d Dept 2011]).

Here, Plaintiff has established a *prima facie* case for summary judgment pursuant to 3213 by demonstrating that (i) the Defendant Barry Street Holdings executed the Promissory Note and Defendant Stephen Werdiger executed the Guaranty, both in favor of Sterling National Bank (the “Original Lender”) (NYSCEF 6 [the “Promissory Note”]; NYSCEF 7 [the “Guaranty”]), (ii) the Promissory Note (as modified by the Fifth Allonge) contains unconditional promises to repay the Original Lender on or before May 1, 2023, and the Guaranty irrevocably and unconditionally guaranteed the punctual payment and performance of the Promissory Note; (iii) the Promissory Note and Guaranty was duly endorsed the in favor of Plaintiff by Webster Bank, successor by

merger to Original Lender (Promissory Note at 25); and (iv) Defendants failed to repay the full amounts due under the Loan in accordance with the terms of the Promissory Note as amended (*see* NYSCEF 3 [“Hooker Aff”] ¶¶27-29; NYSCEF 4 [“Burke Aff”]).

In opposition, Defendants fail to establish by admissible evidence the existence of a triable issue of fact to avoid enforcement of the Promissory Note and Guaranty. Defendants admit the existence and validity of the Note, Guaranty and Mortgage and that the Loan’s stated maturity date as amended was May 1, 2023 (*see* NYSCEF 17 [“Tress Aff”] at ¶¶ 5-6; NYSCEF 2 [“Werdiger Aff”] at ¶ 6). Furthermore, Defendants do not dispute their failure to pay the entirety of the indebtedness on or before May 1, 2023, nor do they claim there was a written modification of that agreed upon maturity date.

Rather, Defendants first argue that Plaintiff lacks standing to bring this action. “To establish standing, plaintiff must prove that it is the holder or assignee of the underlying note at the time the action is commenced” (*5AIF Sycamore 2, LLC v 201 EB Dev. III*, ___AD3d___, 202 [1st Dept 2024]). “Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff. The indorsement must be made either on the face of the note or on an allonge ‘so firmly affixed thereto as to become a part thereof’” (*Wells Fargo Bank, N.A. v Lafayette 199, LLC*, 2023 NY Slip Op 31085[U], *3 [Sup Ct, NY County 2023], quoting UCC § 3-202[2]).

Plaintiff submitted that on or about September 15, 2023 (prior to the commencement of this Action on November 1, 2023), Original Lender assigned the Note to the Plaintiff, which is evidenced by an Allonge attached to the Promissory Note (*see* Hooker Aff ¶ 17; Promissory Note at 25 [“It is intended that this Allonge be attached to and made a permanent part of the

above referenced Note.”]). Unlike in *One Westbank FSB v Rodriguez* (161 AD3d 715, 716 [1st Dept 2018]) (triable issues of fact because the indorsement “was written on a separate sheet of paper, was written in blank, was undated, and does not reference the note”), upon which Defendants rely, here the Allonge references the Promissory Note, it is signed by both parties, and is dated “September __, 2023,” which while not as specific as it could be is also not so vague as to be unenforceable or ambiguous as to creating a binding obligation.

Moreover, Plaintiff’s standing is separately demonstrated by the written Assignment recorded with the New York City Register’s Office, which assigned both the Note and the Mortgage from Original Lender to Plaintiff (NYSCEF 34; *US Bank N.A. v Ezugwu*, 162 AD3d 613, 614 [1st Dept 2018]; *Deutsche Bank Natl. Trust Co. v Eshaghpour*, 2024 NY Slip Op 30202[U], *2 [Sup Ct, NY County 2024]). Accordingly, Defendants’ cross-motion seeking dismissal of the Complaint based on Plaintiff’s purported lack of standing is denied.

Next, Defendants submit an affidavit claiming that their broker told them that someone at Plaintiff’s predecessor intended to apply \$200,000 from a cash reserve account setup in connection with an entirely separate loan to cover interest payments on the instant loan (*see Tress Aff* at ¶ 14). Defendants contend that it was “relayed” to them that the reason for applying funds from this separate account was to lay the groundwork for extending the loan (*see id.* at ¶¶ 15-16). Defendants further claim that in reliance on the loan being extended, “Barry Street continued to make all taxes and insurance payments on the Burnett Property” (*see id.* at ¶ 16).

The “conclusory, self-serving” statements in the Tress Affidavit are insufficient to defeat summary judgment (*Lexon Ins. Co. v Sanare Energy Partners*, 2021 NY Slip Op 30692[U], *5

[Sup Ct, NY County 2021]). Even accepting as true that a \$200,000 payment was made¹ and was intended to facilitate an agreement to extend the loan, the “affidavit does not provide grounds to second-guess the clear and unconditional terms of the Promissory Note and Guaranty” (*Lexon Ins. Co.*, 2021 NY Slip Op 30692[U], *6), which both expressly require that any modification must be in writing. Pursuant to Section 17 of the Note, “This Note may not be changed orally or in any manner unless such change is in writing and signed by the Lender and Borrower.” (*see* Promissory Note at § 17). This point is restated in Section 8.11 of the Guaranty (*see* Guaranty at § 8.11).

The record is undisputed that the parties extended the maturity date of the Promissory Note on five separate occasions, each one as a written “Allonge to the Promissory Note” and signed by the parties. On this motion, Defendants failed to submit any documentary evidence, let alone a written agreement between the parties, that substantiates their contention that the Original Lender and Defendants entered into a binding modification of the Note pursuant to which the Maturity Date was extended beyond May 1, 2023. Any purported oral agreement to extend the maturity date (and much less so steps taken in purported anticipation of such an agreement) is insufficient to raise a triable issue of fact.

The Court has considered Defendants’ remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment in lieu of complaint is **GRANTED**; it is further

¹ Defendants fail to submit any evidence of a \$200,000.00 payment made in April 2023. The Payment History annexed to the Burke Affidavit shows only a \$180,000.00 payment made on April 11, 2023 (Burke Aff at Exhibit A).

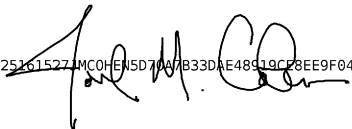
ORDERED that Defendants' Cross-Motion is **DENIED**; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of Plaintiff Barry Industrial LLC and against Defendants Barry Street Holdings LLC and Stephen Werdiger, jointly and severally, in the amount of \$3,599,572.89, plus interest thereon at the rate of 9.48% from May 1, 2023 to the date of entry of judgment as calculated by the Clerk, plus a late fee of 6% on the unpaid principal amount, together with reasonable attorney's fees and costs and disbursements, to be taxed by the Clerk upon submission of an appropriate bill of costs.

Plaintiff shall submit its application for attorney's fees with supporting documentation within fourteen (14) days of the date of this Order; any objections by Defendants must be filed within seven (7) days thereafter.

IT IS FURTHER ORDERED that the parties upload a copy of the transcript of the proceedings to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court.

202403251615271MCOHENSD70A7B33DAE48919CF8EE9F04C5CE13


JOEL M. COHEN, J.S.C.

3/25/2024
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: