

TVAE Invs. LLC v Cannetti

2024 NY Slip Op 31474(U)

April 17, 2024

Supreme Court, New York County

Docket Number: Index No. 656186/2023

Judge: Melissa A. Crane

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
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

-----X

INDEX NO. 656186/2023

TVAE INVESTORS LLC

MOTION DATE 12/07/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

NICOLAS JAMES CANNETTI,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12 were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

In this motion, plaintiff TVAЕ INVESTORS LLC (“TVAЕ”) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint as against defendant Nicolas James Cannetti (“Cannetti”).

Factual Background

I. The First Note

On or about 7/6/2020, TVAЕ and Cannetti agreed that TVAЕ would loan RENOED CONSTRUCTION LLC (“RENOED”), a company that Cannetti is a managing member of, \$500,000 for a period of two years (the “Loan”). On the same day, TVAЕ sent RENOED the funds through a wire transfer. In conjunction with the Loan, Cannetti executed a 7/6/20 dated Promissory Note, in the principal sum of \$500,000, payable to TVAЕ (the “First Note”). The signature block to the First Note listed “RENOED CONSTRUCTION, LLC By: Nicholas Cannetti, Manager”, under the heading “Borrower” (Doc 5 [First Note]). RENOED ultimately failed to repay the Loan by the 7/5/22 Maturity Date.

On or about 8/12/22, RENOED informed TVAE that it could not repay the Loan at the time and, instead, requested an extension of the deadline to repay through 12/31/22. TVAE ultimately agreed to RENOED's proposition and the extension. In late December 2022, RENOED again requested additional time from TVAE to repay the Loan. Specifically, RENOED requested until 7/27/23 to repay. TVAE ultimately agreed to this extension as well.

II. The Amended Note

On 12/28/22, TVAE sent Cannetti an Amended Note (the "Amended Note") that set forth a 7/27/23 Maturity Date. Cannetti returned an executed copy of the 12/28/22 dated Amended Note to TVAE, via email, on 1/2/23.

The Amended Note specifically names Cannetti as Borrower in place of RENOED:

Whereas, through Renoed Construction LLC, the undersigned Nicolas Cannetti ("Borrower") did jointly and severally enter an agreement July 6, 2020, thereby individually promised to pay TVAE Investors LLC ("Lender") the principal sum of Five Hundred Thousand Dollars and Zero Cents (\$500,000), together with interest thereon at the Interest Rate, as hereinafter defined, through a Maturity Date of July 5, 2022.

(Doc 6 [Amended Note] ¶ 1) (emphasis added)

Thus, Cannetti, by signing, bound himself individually and recognized he was jointly and severally liable on the First Note.

The signature block to the Amended Note does list "Nicholas Cannetti, President", under the heading "Borrower". Additionally, the Amended Note provided that: "Borrower does hereby promise to pay to Lender...the principal sum of Five Hundred Thousand Dollars and Zero Cents (\$500,000), together with interest thereon at the Interest Rate, as hereinafter defined, on the outstanding principal balance of this promissory note [] and any other amounts owing hereunder from the date hereof through the Maturity Date [] in the manner hereinafter set forth." (Doc 6 [Amended Note]).

The Amended Note defined the Maturity Date as 7/27/23. It further defined the applicable interest rates as 2.34%, from 7/6/20 through 7/5/22, and 5.20%, from 7/6/22 through 7/27/23. The Amended Note also provided that the “Borrower,” in this case, Cannetti, shall pay the “Lender,” here TVAE, the outstanding principal plus all accrued interest on the Maturity Date.

The Amended Note stated the following in the event of a default: “Upon the occurrence of an Event of Default, Borrower agrees to pay all reasonable collection and enforcement fees, charges, costs and expenses, including, without limitation, reasonable attorneys' fees, whether or not suit has been filed or any other action has been instituted or taken to enforce or collect under this Note.” Cannetti ultimately defaulted on the Amended Note.

On 7/27/23, after not having heard from Cannetti for a month despite having attempted to reach him numerous times, TVAE contacted Cannetti by email and asked when it could expect his payment on the Amended Note (Doc 4 [Hendel Aff] ¶ 18).

On 7/28/23, Cannetti responded, by email, indicating that he remained unable to repay what he owed TVAE on the Amended Note (Doc 4 [Hendel Aff] ¶ 19). He further stated that he would like to come to some sort of arrangement or payment plan (Doc 4 [Hendel Aff] ¶ 19).

Subsequent discussions between Cannetti and TVAE took place, as they attempted to negotiate a payment plan (Doc 4 [Hendel Aff] ¶ 20). However, no agreement was ever reached (Doc 4 [Hendel Aff] ¶ 20).

On 10/6/23, TVAE delivered Cannetti a written notice of his failure to repay under the Amended Note (Doc 4 [Hendel Aff] ¶ 21). Cannetti never cured the failure, and, to date, has never made any payment under the First Note or the Amended Note (Doc 4 [Hendel Aff] ¶¶ 21-22). RENOD has also never repaid the debt under the First Note or Amended Note either.

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 from the face of the document 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]; see *Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *affd* 2022 NY Slip Op. 00806 [1st Dept 2022]).

Additionally, accelerated judgment under CPLR 3213 is also appropriate where the plaintiff establishes a *prima facie* case by virtue of a note and a failure to make payments called for therein (*Warburg, Pincus Equity Partners, L.P. v O'Neill*, 11 AD3d 327 [1st Dept 2004], citing *DDS Partners v. Celenza*, 6 A.D.3d 347, 348 [2004]). Thus, a promissory note is a “typical example of an instrument within the meaning of [CPLR 3213]” (*DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004], citing *Weissman*, 88 NY2d at 444).

Further, the same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. The movant must make a *prima facie* case by submitting the instrument and evidence of the defendant's failure to make payments in accordance with the instrument's terms (see *Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]).

Here, plaintiff TVAE has demonstrated its *prima facie* entitlement to summary judgment as a matter of law under the relevant documents, specifically under the Amended Note. Defendant Cannetti has not raised an issue of fact.

Cannetti argues, in his late opposition papers, that he is not the borrower under either of the promissory notes and that the borrower under both promissory notes is RENOED (Doc 10

[Cannetti Aff] ¶¶ 5-6). He also argues that he executed the Amended Note in a representative capacity in connection with RENOED and not in an individual capacity (Doc 10 [Cannetti Aff] ¶ 13). Cannetti further contends that it was never his intention in executing the Amended Note to be personally bound by the note, that the note on its face reflects that intention, and that if he had an intention to be personally bound he would not have had the word “President” added after his name, which reflects a representative capacity (Doc 10 [Cannetti Aff] ¶ 14).

Cannetti’s arguments are unavailing. As stated earlier, the very first line of the Amended Note defines “Borrower” as “the undersigned Nicolas Cannetti” and “Lender” as plaintiff TVAE. Moreover, Cannetti agreed he, individually, was jointly and severally liable under the First Note.

Defendant Cannetti could not have changed the Borrower’s identity simply by adding the word “President” underneath his signature. “This Court has consistently held that where there is evidence that a person signed...as an individual and not on behalf of a corporation, the inclusion of “president” after his signature is merely descriptive” (*PNC Capital Recovery v Mech. Parking Sys., Inc.*, 283 AD2d 268, 271 [1st Dept 2001]; *see also Chemical Bank v. Masters*, 176 AD2d 591 [1st Dept. 1991] [addition of word “Pres” after signature merely descriptive, does not affect liability under personal guaranty]; *NCCMI, Inc. v Bersin Properties, LLC*, 2024 NY Slip Op 01161 [1st Dept Mar. 5, 2024]).

The court also rejects defendant Cannetti’s arguments that plaintiff TVAE has sued him on two promissory notes. It is undisputed that defendant Cannetti executed a prior note, the First Note (Doc 5 [The First Note]), on behalf of his company Renoed Construction LLC. The operative note that underlies plaintiff TVAE’s claims on this motion, the Amended Note, amended and restated the First Note. This is explained and referenced to in the Amended Note’s very own preamble. Specifically, the Amended Note expressly states the following:

Whereas the Borrower and Lender do hereby enter an amended and restated agreement December 28, 2022, to extend the Maturity Date to July 27, 2023.

(Doc 6 [Amended Note]).

I. Interest

The operative Amended Note, which is effective as of 12/28/22, provides the following with respect to the applicable interest rate:

"Interest Rate" shall mean the rate of two and thirty-four hundredths percent (2.34%), from July 6, 2020 through July 5, 2022. Thereafter, "Interest Rate" shall mean the rate of five and twenty hundredths percent (5.20%), from July 6, 2022 through July 27, 2023, in accordance with the requirements of IRS Section 7520 as of the date of this agreement.

(Doc 6 [Amended Note])

While the parties seemingly intended to carry over the interest from the First Note into the Amended Note, they did not do so successfully. The Amended Note states that:

"Borrower does hereby promise to pay to Lender, or its order, at such place as may be duly designated by Lender, in lawful money of the United States of America, the principal sum of Five Hundred Thousand Dollars and Zero Cents (\$500,000), together with interest thereon at the Interest Rate, as hereinafter defined, on the outstanding principal balance of this promissory note (the "Note") and any other amounts owing hereunder **from the date** hereof through the Maturity Date"

(Doc 6 [Amended Note] at 1).

The Amended Note's effective date was 12/28/22. Thus, affording the Amended Note's provisions their plain, unambiguous meaning, plaintiff waived all interest that accrued under the First Note prior to 12/28/22. The parties neither incorporated the First Note's interest as additional principal nor agreed that the interest accrual date would pre-date the Amended Note's effective date.

As such, the court awards interest at a rate of 5.20% per annum from 12/28/22 until entry of judgment and thereafter at the statutory rate.

II. Attorneys' Fees and Costs

Finally, the court denies the motion with respect to attorneys' fees and costs, as plaintiff failed to provide or otherwise submit any support or proof of any attorneys' fees or costs it may have incurred.

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

Accordingly, it is

ORDERED that plaintiff TVAE INVESTORS LLC's motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, is granted to the extent set forth in this decision and order; and it is further

ORDERED that the clerk is directed to enter judgment, in favor of plaintiff TVAE INVESTORS LLC, and as against individual defendant Nicolas James Cannetti, in the sum of \$500,000.00, together, with interest at a rate of 5.20% per annum, from December 28, 2022 until entry of judgment, and thereafter at the statutory rate, and as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon a submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

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

4/17/2024

DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT