Mt. Arlington BH Invs. LLC v Mt. Arlington Equity Invs. LLC
2025 NY Slip Op 30249(U)
January 17, 2025
Supreme Court, New York County
Docket Number: Index No. 653552/2024
Judge: Margaret A. Chan

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

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MT. ARLINGTON BH INVESTORS LLC,

Plaintiff,

- v -

MT. ARLINGTON EQUITY INVESTORS LLC and IRVING LANGER

Defendants.

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INDEX NO. 653552/2024

MOTION DATE 09/18/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS001) 2, 3, 8, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 28
were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

In this action arising out of an alleged default on a promissory note, plaintiff Mt. Arlington BH Investors LLC (Lender) brings a motion, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants Mt. Arlington Equity Investors LLC (Borrower) and Irving Langer (Langer, and together with Borrower, defendants) to collect the unpaid principal and interest owed by Borrower to Lender, which was personally guaranteed by Langer (NYSCEF #s 1-2). Defendants oppose the motion.

For the following reasons, plaintiff Lender's motion is granted.

Background

On May 10, 2017, Lender and Borrower entered into a Secured Convertible Promissory Note and Agreement (the May 2017 Note) (NYSCEF # 3 – Harow aff ¶ 4; NYSCEF # 4 – May 2017 Note). Pursuant to the May 2017 Note, Borrower promised to pay Lender, "[f]or value received," "the principal sum of ONE MILLION FIVE HUNDERED THOUSAND DOLLARS AND NO CENTS ($1,500,000.00), or such lesser amount as shall then equal the outstanding principal amount . . . , together with interest on the unpaid principal balance to accrue daily at a rate equal to ten percent (10%) per annum" (May 2017 Note at 1). The May 2017 Note was signed on behalf of Borrower by both Langer and non-party Ariel Fein (Fein) (*id.* at 13).

To induce Lender to make a loan to Borrower, Langer executed a Limited Personal Guaranty, dated May 10, 2017 (the Guaranty) (Harow aff ¶ 8; NYSCEF #

7 – Guaranty). Pursuant to the Guaranty, Langer "unconditionally, absolutely and irrevocably guarantee[d] to the Lender . . . prompt payment when due . . . [of] the Principal Amount outstanding in connection with that certain $1,500,000 loan to Borrower made by Lender" pursuant to the May 2017 Note (Guaranty at 1). Langer's "aggregate liability" was capped at "$1,500,000.00 plus reasonable costs incurred in enforcing" the Guaranty (Harow aff ¶ 13; Guaranty at 1). Upon executing the Guaranty, Langer acknowledged that his guaranty was made "[f]or valuable consideration, the receipt and sufficiency of which is acknowledged" (Guaranty at 1).

The original maturity date of the May 2017 Note was May 10, 2019 (May 2017 Note § 1.11). Through an Extension of Secured Convertible Promissory Note Agreement, dated May 10, 2019 (the May 2019 Extension), this maturity date was extended to May 10, 2020 (NYSCEF # 5 – May 2019 Extension ¶ 1). Later through the First Amendment to Secured Convertible Promissory Note and Agreement, dated July 2020 (the July 2020 Extension, and together with the May 2017 Note and May 2019 Extension, the Note), Lender and Borrower agreed to further extend the maturity date on the Note from May 10, 2020 to May 10, 2021 (Harow aff ¶ 9; NYSCEF # 6 – July 2020 Extension ¶ 1.2). Both the May 2019 Extension and the July 2020 Extension were signed on behalf of Borrower by Fein as "Authorized Signatory" and "Manager" (*see* May 2019 Extension at 5; July 2020 Extension at 3).

The Note provided for various "Events of Default" (*see* Harow aff ¶ 10; May 2017 Note § 7.1). One such "Event of Default" included "[t]he failure by [Borrower] to pay in full when due any principal, interest or fees payable" under the Note (May 2017 Note § 7.1[a]). Upon an Event of Default, "Lender may at any time thereafter accelerate the maturity of th[e] Note; whereupon this Note shall be immediately due and payable and accrue interest at a rate of 24% [i.e., $360,000 per year] from the date of the occurrence of the event of default" (the Default Rate) (Harow aff ¶ 10; May 2017 Note § 7.2).

Lender's managing member, Aaron Harow, affirms that, despite several demands made both in writing and orally, defendants have not made any payment on the Note or Guaranty (*see* Harow aff ¶ 9). Harow asserts that the current balance due by Borrower on the Note, inclusive of principal and interest, is $2,290,000.00 (*id.* ¶ 12). That balance includes the principal amount of $1,500,000.00, as well as outstanding interest of $790,000[1] that had accrued between the May 10, 2021, maturity date and July 9, 2024 (*id.* ¶ 11 & n.1). Meanwhile, the amount owed by Langer remains capped at $1,500,000.00 under the Guaranty (*id.* ¶ 13).

[1] Harow notes that, between May 10, 2021 and July 9, 2024, the total default interest owed by Borrower would have totaled $1,140,000.00, but Lender then received a $350,000 interest payment during this period (Harow aff ¶ 11 n.1).

For his part, Langer does not deny that he signed the May 2017 Note and Guaranty (*see generally* NYSCEF # 16 – Langer aff ¶¶ 1-9). He instead avers that "[d]espite diligent searching," he cannot find "any evidence of any funds advanced by" Lender to Borrower (*see id.* ¶¶ 3-6, 9). Specifically, Langer states that, despite "request[ing] records from closing attorneys[] and others," (1) he is "not aware of any bank account in the name of Mt. Arlington Equity," (2) he has no "records of any bank account ever being maintained by Mt. Arlington Equity," (3) he has "no record of Mt. Arlington Equity ever receiving the $1,5000,00 [loan] from [Lender]," and (4) he does not possess any "closing documents reflecting where the $1,500,000 went or to whom it was paid" (*id.* ¶¶ 3-5).

According to Langer, the only records he does possess indicate that Lender "was invoicing the wrong entity for loan interest payments" (Langer aff ¶ 6). That said, Langer also acknowledges that he does not currently have access to books and records for certain entities and business dealings, which he attributes to Fein's purported misconduct (*see id.* ¶¶ 7-8). Langer also notes that Lender has refused his counsel's request (made in connection with attempts to resolve this lawsuit) to provide evidence of any loan disbursements (*see id.* ¶ 9; NYSCEF #s 18-19).

Discussion

CPLR 3213 permits "actions based upon an instrument for the payment of money only to be commenced with a motion for summary judgment rather than a complaint" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004]). To establish entitlement to summary judgment in lieu of complaint, a plaintiff must make a prima facie showing that the instrument sued upon contains "an unconditional promise to pay a sum certain . . . due on demand or at a definite time" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]), and that defendant failed to pay in accordance with those terms (*Zyskind v FaceCake Mktg. Tech., Inc.*, 101 AD3d 550, 551 [1st Dept 2012] ["To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms"]). A guaranty qualifies as an instrument for the payment of money if it unconditionally promises payment (*see Bank of Am., N.A. v Filho*, 203 A.D.3d 594, 594 [1st Dept 2022]).

Here, to support its motion, Lender submits a copy of the Note, including applicable amendments, in which Borrower unconditionally promised to pay Lender a sum certain of $1,500,000.00, together with any unpaid interest, by the May 10, 2021, maturity date (May 2017 Note at 1; July 2020 Extension ¶ 1.2). Lender further submits a copy of the Guaranty, which sets forth Langer's "unconditional[], absolute[] and irrevocabl[e]" guaranty of the "prompt payment when due" of any outstanding principal remaining under the Note (*see* Guaranty at 1). Lender, through its Managing Member, then attests that, aside from an interest payment of

$350,000, neither Borrower nor Langer have made any payments on the Note (*see* Harow aff ¶¶ 10 & 11 n.1). Thus, Lender asserts, the current balance due from Borrower consists of the principal amount of $1,500,000.00 plus outstanding interest in the amount of $790,000 (which accounts for the aforementioned $350,000 interest payment), and the current balance due from Langer is $1,500,000.00 (as capped by the Guaranty) (*id.* ¶¶ 11-13). These facts—most of which are uncontested—sufficiently demonstrate Lender's entitlement to summary judgment on both the Note and Guaranty.

To avoid this outcome, defendants argue that the motion must fail because Lender did not set forth any proof of actually advancing funds to Borrower (NYSCEF # 15 – Opp at 7-8). But critically, and notwithstanding defendants' repeated assertions to contrary (*see id.* at 2, 8), Lender was "not required to demonstrate that there was adequate consideration for the note" in making its motion, and hence it did not have to "provide any evidence of the loan disbursement to defendant" (*see Neo Universe Inc. v Ito*, 147 AD3d 682, 682-683 [1st Dept 2017] [holding that plaintiff demonstrated its entitlement to summary judgment in lieu of complaint through "the introduction of the Loan Agreement, the Promissory Note (Note), and plaintiff's own testimony that defendant had not paid any portion of the debt owed under the Loan Agreement and Note"]). Hence, Lender's apparent failure to allege that it disbursed loan proceeds to Borrower does not alter the court's conclusion that Lender has demonstrated its *prima facie* entitlement to summary judgment.

Because Lender has made a prima facie showing of its entitlement to summary judgment in lieu of complaint, the burden shifts to defendants to raise a triable issue of fact with respect to a bona fide defense (*see Zyskind*, 101 AD3d at 551). Defendants argue that they have done so here because they have sufficiently established in their opposition that the Note lacks consideration (*see* Opp at 8-10; NYSCEF # 30 – Reply at 2-3). The court disagrees. The entirety of defendants' lack of consideration defense is premised on certain factual assertions made by Langer in his affirmation. But all Langer's affirmation does is speculate that because Langer cannot locate records regarding a loan disbursement, Lender may not have disbursed loan proceeds at the time Borrower executed the Note (*see* Langer aff ¶¶ 3-6, 9). Langer never actually asserts that Lender definitively failed to disburse any loan proceeds to Borrower under the Note, nor does he otherwise offer a cogent evidentiary basis to suggest that Lender failed to do so. To be sure, Langer insinuates that his lack of access to records may be due to some unspecified malfeasance on the part of Fein in connection with any loan disbursements (*see id.* ¶ 7). Yet even that assertion tacitly acknowledges that records reflecting a loan disbursement may, in fact, exist—Langer just does not know (*see id.* ¶ 8). At bottom, Langer's affirmation is largely self-serving, speculative, and conclusory, and, as a result, it fails to create a triable issue of fact regarding lack of consideration underlying the Note (*see Ehrlich v Am. Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970] ["It was essential for the defendants, in claiming

absence of consideration, to state their version of the facts in evidentiary form. 'Bald conclusory assertions, even if believable, are not enough'"]).

In any case, even if fully credited, Langer's representations also fail to overcome the factual record proffered by Lender that acknowledges the existence of a disbursed loan to Borrower. For example, as the evidence submitted by Lender reveals, (a) Borrower agreed to enter the Note "[f]or value received" (May 2017 Note at 1); (b) Borrower, through its other undisputed manager, Fein, executed two separate extensions of the Note's maturity date, one of which specifically acknowledged the existence of a loan to Borrower (*see e.g.* May 2019 Extension at 1 ["Lender is the owner and holder of a certain Secured Convertible Promissory Note in the original principal amount of $1,500,000.00 . . . made by Borrower in favor of Lender . . . evidencing a certain loan given by Lender to Borrower"]); (c) accrued interest under the Note in the amount of $350,000 had been paid prior to Lender commencing this action; and (d) Langer himself, in executing the Guaranty, explicitly agreed that his "unconditional[], absolute[] and irrevocabl[e]" guaranty to Lender was "[f]or valuable consideration, ***the receipt and sufficiency of which is acknowledged***" (Guaranty at 1 [emphasis added]). Succinctly stated, Lender has marshalled sufficient facts in support of its motion that plainly support a conclusion that the Note was executed for payment of an antecedent obligation, and defendants utterly fail to controvert that conclusion in their opposition (*see Navon v Zackson*, 191 AD3d 578, 578-579 [1st Dept 2021] [granting summary judgment in lieu of complaint where promissory note executed by parties "clearly and unambiguously recited that it was executed 'for value received,'" defendant failed to make any factual allegations disputing the existence of the antecedent debt, and defendant's allegations were directly contradicted by plaintiff's submissions]; *Bag Bag v Alcobi*, 129 AD3d 649, 650 [1st Dept 2015] [denying leave to amend pleading to add claim challenging lack of consideration where plaintiffs failed to submit "an affidavit controverting the agreement's recital of valuable consideration, receipt of which was acknowledged by all parties"]).

Defendants' reliance on the trial court's decision in *Guzzone v Masluf Realty Corp.* (43 Misc 3d 1205[A] [Sup Ct, Kings County, 2014]) does not compel a different conclusion. Indeed, the circumstances in *Guzzone* are entirely distinguishable from the facts of this case. It is true that in *Guzzone*, plaintiffs, like Lender here, apparently did not provide documentation about their disbursements of loan proceeds (*id.* at *3). But the defendants in *Guzzone* had already extensively alleged that they suspected the subject note was part of a fraudulent scheme carried out by plaintiffs and defendants' attorney, and that, as a result, they further suspected that plaintiffs never transferred any loan proceeds to defendants' attorney for defendants' benefit (*id.*). In further support of this defense, the *Guzzone* defendants also annexed documentary information confirming their suspicions about their plaintiffs' and their attorney's malfeasance, including the fact that their attorney had been disbarred and was the subject of numerous accusations of misappropriating client monies (*id.* at *4-6). Given this evidentiary background, the

Guzzone plaintiffs' failure to provide defendants with documentation of any such transfer merely served as an additional indicia of purported fraud that, in turn, supported defendants' bona fide defense of lack of consideration (*see id.* at *6). It did not, as defendants seemingly suggest, constitute the sole, or even primary, basis for defendants' lack of consideration defense (*see generally id.* at *3-6). Here, by contrast, defendants do not even allege any misappropriation of the purported loan disbursement by either plaintiffs or Fein. To the contrary, as explained above, Langer simply asserts in his affirmation that he cannot find any records of loan disbursements to Borrowers, and he otherwise vaguely insinuates that Fein's (but not Lender's) alleged misconduct may be preventing him from finding those records[2] (Langer aff ¶¶ 3-9).

In short, Lender has established its entitlement to summary judgment in lieu of complaint, and defendants have failed to rebut that showing to establish a triable issue of fact regarding its purported bona fide defense. Lender's motion is therefore granted.[3]

Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiff Mt. Arlington BH Investors LLC's motion, pursuant to CPLR 3213, for summary judgment in lieu of complaint is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mt. Arlington BH Investors LLC as against defendant Mt. Arlington Equity Investors LLC in the amount of $2,290,000.00, together with pre-judgment interest at the contractual default rate from the date of July 9, 2024 until the date

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[2] In their opposition brief, defendants theorize that "[t]here is good reason to believe that [p]laintiff may have advanced money, negligently or improperly, to Langer's former business partner, Ariel Fein" (Opp at 2). Defendants then assert that (1) "Fein's counsel (who purported to represent Langer previously) claims to have no records of any such advance to Borrower or even a settlement statement reflecting the supposed loan," and (2) "[a] management company that Langer employs has no trace of the funds ever being issued to [Borrower], or any account controlled by it" (*id.* at 4). These assertions, however, appear nowhere in Langer's affirmation and do not otherwise include any citation to the record. Consequently, they lack any evidentiary value and will not be considered by the court (*see e.g. Brown v Smith*, 85 AD3d 1648, 1649 [4th Dept 2011] ["a memorandum of law also has no evidentiary value"]; *Rogers v Krauss*, 2012 WL 10464762, at *4 [Sup Ct, NY County, Dec. 20, 2012] ["The facts stated in the memoranda of law submitted by both parties are merely unsworn statements not based on personal knowledge, and are not part of the record. They have no evidentiary value any more than facts stated in an attorney's affidavit"]; *Eden Rock Fin. Fund, L.P. v Gerova Fin. Group Ltd.*, 34 Misc3d 1205[A], at *5 [Sup Ct, NY County, 2011] ["The numerous factual assertions made by counsel for [defendant] in its memoranda of law, upon which its arguments are based, would lack any evidentiary value even on a summary judgment motion"]).

[3] The court declines to deny Lender's motion on the hyper-technical basis that Lender set forth its legal arguments through an attorney affirmation rather than a memorandum of law.

of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mt. Arlington BH Investors LLC as against defendant Irving Langer in the amount of $1,500,000.00, together with interest at the statutory rate from the date of this decision and order, as calculated by the Clerk and it is further

ORDERED that the above amounts shall be awarded together with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that that plaintiff shall submit a proposed judgment to the Clerk of the Court, together with a detailed affirmation demonstrating the contractual default interest rate and applicable benchmark rates under the relevant documents; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order, together with notice of entry, upon defendant and the Clerk of the Court within 10 days of this order.

01/17/2025
DATE

MARGARET A. CHAN, J.S.C.

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