SIG CRE 2023 Venture LLC v Schwalbe
2025 NY Slip Op 30490(U)
February 7, 2025
Supreme Court, New York County
Docket Number: Index No. 654977/2024
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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SIG CRE 2023 VENTURE LLC,

Plaintiff,

- v -

FRED SCHWALBE, ROBERT SCHWALBE, JEREMY SCHWALBE, JAMES SCHWALBE, JASON SCHWALBE

Defendants.

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INDEX NO. 654977/2024

MOTION DATE 09/23/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

Plaintiff SIG CRE 2023 Venture LLC ("Plaintiff") moves pursuant to CPLR § 3213 for Summary Judgment in Lieu of Complaint against Defendants Fred Schwalbe, Robert Schwalbe, Jeremy Schwalbe, James Schwalbe, and Jason Schwalbe (collectively, "Defendants"), jointly and severally, in the amount of $3,268,810.00, plus accrued interest at the applicable contract rate from September 19, 2024 through the entry of judgment and at the post-judgment rate thereafter, including attorneys' fees and costs. Defendants oppose this motion. For the following reasons, Plaintiff's motion is denied.

Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is "based upon an instrument for the payment of money only or upon any judgment" (*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. v*

Wright Mach. Corp., 31 AD2d 136, 137 [1st Dept 1968]; *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). Likewise, a "guarantee qualifies as an 'instrument for the payment of money only' under CPLR 3213" (*Torres & Leonard, P.C. v Select Professional Realties, Ltd.*, 118 AD2d 467, 468 [1st Dept 1986]; *State Bank of India, New York Branch v Patel*, 167 AD2d 242, 243 [1st Dept 1990]).

Here, Plaintiff has established a *prima facie* case for summary judgment pursuant to 3213 by demonstrating that (i) on or about January 23, 2022, Signature ("Original Lender") agreed to make the Loan to non-party Borrower in the original principal amount of $3,892,000.00, evidenced by a Promissory Note with a maturity date of April 1, 2026, requiring that in addition to monthly payments of interest, Borrower would pay Quarterly Payments in the sum of $250,000, beginning on July 1, 2022 and continuing every January, April, July and October (NYSCEF 5 [the "Note"]), (ii) the Note was unconditionally guaranteed by Defendants (NYSCEF 8), (iii) that Plaintiff sent Borrower a Default Notice dated May 15, 2024, indicating that Borrower failed to make the regularly scheduled payment of interest with respect to the Loan on the December 1, 2023 due date as required by Section 4 of the Note, leading to an Event of Default pursuant to Section 10.a of the Note (the "Default Notice"), and (iv) Borrower failed to cure its Default and neither Borrower nor Defendants have since paid the entire amount due and owing on the Loan (NYSCEF 9–15; NYSCEF 3 ["Sandino Aff"] ¶¶28-35).[1]

[1] Plaintiff has further made a *prima facie* demonstration that it has standing to enforce the instrument by providing evidence that (i) on March 12, 2023, the FDIC was appointed as receiver for Original Lender, and by operation of law, the FDIC assumed all right, title, and interest in the loan documents, and FDIC assigned all right, title, and interest in the Loan Documents to Signature Bridge Bank, N.A.("SBB") (NYSCEF 6), and (ii) on March 20, 2023, SBB was closed by the Office of the Comptroller of the Currency, and FDIC was again appointed as its receiver, and on December 14, 2023, FDIC assigned all right, title, and interest

"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, Defendants argue have raised questions of fact regarding (i) the sufficiency and accuracy of the Default Notice, and (ii) defenses of partial performance, estoppel, and waiver based on an alleged Loan Modification entered into by Borrower and Signature Bridge Bank.

As to the Default Notice, Defendants assert that the Default Notice is factually inaccurate because the December 1, 2023 payment that allegedly missed was in fact paid, and it fails to provide Borrower adequate notice and, therefore, any meaningful opportunity to cure. Section 6 of the Loan provides:

> Borrower agrees that upon and following the occurrence of any Event of Default, the Loan shall bear interest from and including the date of such occurrence until paid in full at a rate per annum equal to the greater of the Prime Rate and the Interest Rate (in each case, as in effect on the date of the occurrence of such Event of Default which gives rise to the application of this paragraph) plus six percent (6.00%) and such interest ***shall be payable on demand made by Lender***; provided, however, in no event shall such default interest rate exceed the rate permitted by Applicable Law. Furthermore, if the entire amount of any principal or interest or both required to be paid pursuant to this Note is not paid in full ***within ten (10) days after the same is due***, Borrower shall further pay on demand made by Lender a late fee equal to five percent (5.00%) of the required payment.

(NYSCEF 5 § 6 [emphasis added]). The Default Notice provides:

> We write to notify you that on December 1, 2023 (the "Payment Date"), Borrower(s) failed to remit to Lender all amounts due and owing under the Loan Documents, including the regularly scheduled Payment Amount, as required by Section 4a. and 4b. of the Promissory Note. As a result, an Event of Default exists and has existed pursuant to Section 10a. of the Promissory Note executed in connection with the Loan since at least November 1, 2023 as a result of Borrower's (or Borrowers') failure to remit payment due and owing by the Payment Date (the "Payment Default") . . . .

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in the Note and related Loan Documents to Plaintiff (NYSCEF 7). Defendants do not dispute this.

> Demand is hereby made for immediate payment of the amounts due and owing on the Monthly Payment Date. Upon request by Borrower(s) specifying the date on which payment will be received by Lender, Lender will provide Borrower(s) with the amount which shall be due and owing under the Loan Documents as of that date, including, without limitation, Lender's attorney's fees and costs resulting from Borrower's (or Borrowers') default, together with Default Interest, all late charges as set forth in the Loan Documents, and any other charges and fees as set forth in the Loan Documents.

(NYSCEF 9).

Defendants aver and provide supporting evidence that Borrower made an interest payment on December 1, 2023 (NYSCEF 23 ["Schwalbe Aff"] ¶¶11–12; NYSCEF 27 [showing loan payments were withdrawn by Lender from Borrower's account in November and December 2023]).[2] In response, Plaintiff asserts that Borrower's December 1, 2023 payment was applied to pay down an *earlier* missed interest payment on the Loan, and Borrower has made no subsequent payments to cover the outstanding interest that was due and owing on December 1, 2023 (or any month thereafter) (NYSCEF 29 [Sandino Reply Aff"] ¶¶ 3–7). Nevertheless, Defendants have raised a legitimate question as to whether the Default Notice adequately acknowledges or explains the amounts due or how payments were applied (*see* NYSCEF 9). Nor does the Default Notice state how much is actually owed or must be paid to cure the default.[3] It states only that "[u]pon request by Borrower(s) specifying the date on which payment will be received by Lender, Lender will provide Borrower(s) with the amount which shall be due and owing" (NYSCEF 9). Considering the Default Notice is expressly based on the failure to make the December 2023 payment, and there is no dispute that a payment was made in December 2023—

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[2] Defendants submit that "[f]rom inception, Lender withdrew the monthly amounts due under the Loan from Borrower's bank account" (Schwalbe Aff' ¶7).

[3] While Plaintiff argues that section 6 does not provide an opportunity to "cure," it does provide the Borrower an opportunity to avoid a late fee.

and as discussed below, it is Defendants' position that payments were made consistent with a Loan Modification—Defendants have raised an issue of fact as to the sufficiency and accuracy of the Default Notice (*Hughes v Lenox Hill Hosp.*, 226 AD2d 4, 17 [1st Dept 1996] ["[T]he appropriate standard for assessment of the adequacy of notice is one of reasonableness in view of all attendant circumstances"]).[4]

More substantively, Defendants assert purported defenses of partial performance, estoppel, and waiver. Through the affidavit of Jeremy Schwalbe (principal of the Borrower), Defendants assert that on or about May 30, 2023, Borrower transmitted a letter to Signature Bridge Bank that stated, among other things, that due to the Covid-19 pandemic, Borrower was unable to remit the July 2023 quarterly payment of $250,000.00 and offered two "alternatives" including "Alternative 1 - Freeze all quarterly payments of $250,000.00 through July of 2025, and Borrower will continue the quarterly payments on July 1, 2025" (Schwalbe Aff ¶¶8–9). Mr. Schwalbe further avers that he "spoke with Lender on behalf of Borrower and, after discussions with Lender, the understanding was that Loan was modified by Lender not only accepting 'Alternative 1' but agreeing that, until July 2025 Lender would not withdraw any payments from Borrower's account for the months when the Quarterly Payments would otherwise be due" (*id.* ¶10). Defendants submit that Lender acted in accordance with the alleged modification for ten months afterwards: withdrawing only the monthly interest payment every month for almost a year, and not withdrawing any sum in months when the Quarterly Payments were otherwise

[4] Plaintiff's additional argument that that both the Note and Guaranty expressly waive any defenses based on notice, the Note clearly states that "Borrower hereby waives presentment, demand for payment, notice of protest, notice of dishonor, and any and all other notices or demands ***except as otherwise expressly provided for herein***" (NYSCEF 5 ¶ 17 [emphasis added]). Section 6 clearly requires a demand to be made, and there is no evidence that Borrower waived its right to notice of such a demand.

scheduled to be withdrawn under the Note. This argument appears to be consistent with the reply affidavit submitted by Plaintiff outlining the payments due and owing (Sandino Reply Aff ¶¶ 4–7).

"While General Obligations Law § 15-301 generally bars oral modification of an agreement which contains a merger clause, application of this section may be avoided by an executed oral modification, partial performance, or estoppel, if unequivocally referrable to the modification" (*Greenberg v Frey*, 190 AD2d 546, 546-47 [1st Dept 1993] [affirming denial of motion for summary judgment in lieu of complaint where defendant raised an issue of fact as to oral modification to the contract]; *AJ Holdings Group, LLC v IP Holdings, LLC*, 129 AD3d 504, 505 [1st Dept 2015] [same]). Defendants' argument that Lender acted in accordance with the alleged Loan Modification raises issues of fact as to whether such acceptance was a performance unequivocally referrable to the Loan Modification. While this alleged modification occurred prior to Plaintiff's acquisition of the loan, Defendants argue that even after Plaintiff acquired the Loan, Plaintiff continued to accept performance consistent with the Loan Modification as it still only withdrew the monthly interest payments and did not withdraw any sums in the months in which the Quarterly Payments were due (*City Natl. Bank v Morelli Ratner, P.C.*, 129 AD3d 425, 425 [1st Dept 2015]) [affirming denial of CPLR 3213 motion where there issues of fact as to "whether the parties had entered into an oral agreement to modify the loan documents, and whether defendants' payment of $250,000 constituted partial performance of the purported oral agreement and was 'unequivocally referable to the modification'"]).

Plaintiff's argument in response that "the failure to debit accounts is easily explainable by other reasons, including the prospect that Borrower simply failed to fund the account after telling Original Lender that it was 'unable' to do so" (NYSCEF 28 at 10) only highlights that there are

issues of fact precluding summary judgment in lieu of complaint. Moreover, Plaintiff's argument that "the Court need not consider the many alternate explanations for Borrower's payment defaults in January 2024 because the undisputed evidence is that Borrower has failed to make any payments toward the Loan after its account was debited on February 1, 2024" (*id.* at 11) overlooks the fact that, if there was a modification, there is an issue of fact as to when (if ever) an actionable default first occurred.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is **DENIED**; it is further

ORDERED that Plaintiff shall serve a complaint upon defendant's attorney within 20 days of service on Plaintiff's counsel of a copy of this order with notice of entry and Defendant shall answer or otherwise respond to the complaint within 20 days after service thereof; and it is further

ORDERED that the parties appear for a preliminary conference on February 25, 2025, at 10:30 a.m., with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference.[5]

[5] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Part3-Preliminary-Conference-Order.pdf), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.

This constitutes the Decision and Order of the Court.

2/7/2025
DATE

JOEL M. COHEN, J.S.C.

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