

**Les Mixed Use LLC v 75 Essex Equity LLC**

2025 NY Slip Op 30776(U)

March 6, 2025

Supreme Court, New York County

Docket Number: Index No. 654507/2024

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

-----X

LES MIXED USE LLC,

Plaintiff,

- v -

75 ESSEX EQUITY LLC, NECHEMIA WEINBERGER,  
ISRAEL EISNER, SHOLOM EISNER

Defendant.

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**INDEX NO.** 654507/2024

**MOTION DATE** 08/28/2024

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 21, 22, 23, 24, 25

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

Upon the foregoing documents, plaintiff’s motion is denied.

**Background**

In July of 2022, Les Mixed Use LLC (“Plaintiff”) gave 75 Essex Equity LLC (“Borrower Defendant”) a mortgage of nine million dollars, memorialized in a set of loan documents (the “Loan”). Borrower Defendant also executed a secured promissory note (the “Note”) for the loan. There was a guaranty (the “Guaranty”) for the loan signed by Nechemia Weinberger (“Weinberger”), Israel Eisner (“I. Eisner”), and Sholom Eisner (“S. Eisner”, collectively with I. Eisner the “Eisners”, and the Eisners collectively with Weinberger the “Guarantors”). The Eisner’s obligations under the Guaranty were expressly conditioned on either: 1) Weinberger owning less than 15% of the membership interests in Borrower Defendant; 2) the death or incapacity of Weinberger; or 3) the entry of a final, non-appealable judgment against Weinberger in excess of \$500,000 which remains unresolved for more than 30 days.

Plaintiff alleges that the Borrower Defendant has defaulted on the Loan by failing to cure certain building department violations and by failing to pay the entire indebtedness amount by the maturity date. They brought the present motion for summary judgment in lieu of complaint. In their Notice of Motion, they are seeking “the total amount of \$9,000,000.00, plus default interest”, late fees, attorneys’ fees, costs and disbursements as against all Defendants. In their Memorandum of Law in support of the motion for summary judgment in lieu of complaint, Plaintiff seeks summary judgment against Weinberger for interest on the nine-million-dollar principal plus interest, attorneys’ fees and costs, as well as summary judgment against the Eisners “absent Weinberger’s dismissal of the judgment for his Carry Guaranty Obligations within thirty (30) days of entry.” Defendants oppose.

### **Standard of Review**

CPLR § 3213 allows for a plaintiff to serve a notice of motion for summary judgment and supporting papers in lieu of a complaint “[w]hen an action is based upon an instrument for the payment of money only.” The purpose of this statute is to “provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous.” *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 443 (1996). A plaintiff can demonstrate entitlement to summary judgment by “establishing the existence of a guaranty and submitting an affidavit of nonpayment.” *Bank of Am., N.A. v. Solow*, 59 A.D.3d 304, 304 (1st Dept. 2009). But CPLR § 3213 is inapplicable when “the instrument requires something in addition to defendant’s explicit promise to pay a sum of money.” *Weissman*, at 444. A document that “contain[s] obligations beyond just the payment of money” is not an instrument for the payment of money only. *JFURTI, LLC v. First Capital Real Estate Advisors, L.P.*, 165 A.D.3d 419, 421 (1st Dept. 2018).

### **Discussion**

Plaintiff has provided the various agreements underlying the Note and the Guaranty and an affidavit of one of its managers, Thomas Hooker, attesting to the alleged default through his role as custodian of business records. Defendants oppose the motion on various grounds. At the outset, the Court notes that the nature of the relief sought and who it is sought against differs between the notice of motion and Plaintiff's papers. Additionally, the relief sought against the Eisners is premature and speculative, as it is not contested that the stated preconditions for their liabilities under the Guaranty have not yet occurred. Therefore, denial of this motion as to the Eisners is proper. For the reasons that follow, because the Note and Guaranty are not instruments for the payment of money only, denial of the motion as a whole is proper.

*The Note Is Not an Instrument for the Payment of Money Only*

Defendants argue that because the Note defines an event of default as “the occurrence of any Event of Default (as such terms in defined in the Mortgage or any of the Loan Documents) under any of the Loan Documents shall constitute an ‘Event of Default’ under this Note”, it is not an instrument for the payment of money only. When a note “specifically states that reference be made to [a] mortgage to define default”, it does not qualify as an instrument for the payment of money only. *Manufacturers Hanover Trust Co. v. Hixon*, 124 A.D.2d 488, 489 (1st Dept. 1986); *see also Bonds Fin., Inc. v. Kestrel Tech., LLC*, 48 A.D.3d 230, 231 (1st Dept. 2008) (holding that a note that requires resort to an external document to define an event of default fails to qualify as an instrument for the payment of money only).

Plaintiff argues that because the Note allows for a maturity date default that does not require recourse to the Mortgage, they have met their burden on a CPLR § 3213 motion. But they appear to be seeking interest based on a default date defined by failure to correct building code violations, a default event that requires recourse to the terms of the Mortgage. Summary

judgment under CPLR § 3213 is inappropriate when it is “founded on a document which, although calling for the payment of money, also requires performance of some other condition.” *Paine Webber Jackson & Curtis, Inc. v. Aronson*, 115 A.D.2d 355, 356 (1st Dept. 1985). Here, the performance of a condition other than the payment of money (the curing of building code violations) was clearly required, as Plaintiff’s notice of motion gives the default date as the date of the first building code failure. Although it is unclear from the totality of Plaintiff’s papers what relief they are seeking against the Borrower Defendant, the Note cannot form the basis of a motion for summary judgment in lieu of complaint against them because it is not an instrument for the payment of money only. Denial of the present motion as to the Borrower Defendant is therefore proper.

*The Guaranty Is Not an Instrument for the Payment of Money Only*

The issue then narrows to whether the Guaranty is an instrument for the payment of money only such that would form the basis for a motion for summary judgment in lieu of complaint as against Weinberger. Defendants argue that because the Guaranty only obligates Weinberger to pay interest that accrues under the Note, operating expenses and fees accrued by the Plaintiff in connection with the collection thereof, it cannot form the basis for a CPLR § 3213 motion. They argue that because Plaintiff must prove a default under the Mortgage, to prove a default under the Note, which triggers the obligations under the Guaranty, the Guaranty is not an instrument for the payment of money only.

A guaranty that requires reference to the “underlying promissory notes to establish the amount of liability does not affect the availability of CPLR § 3213.” *Manufacturers Hanover Trust Co. v. Green*, 95 A.D.2d 737, 737 (1st Dept. 1983). But when determining the liability of a defendant under a guaranty requires the court to construe other outside documents, denial of a

CPLR § 3213 motion based on such a guaranty is proper. *PDL Biopharma, Inc. v. Wohlstadter*, 147 A.D.3d 494, 496 (1st Dept. 2017); *see also Oak Rock Fin., LLC v. Rodriguez*, 148 A.D.3d 1036, 1039 (2nd Dept. 2017) (holding that CPLR § 3213 is inapplicable when “proof outside of the guaranty and the underlying agreement is required”). Here, Plaintiff is explicitly seeking interest from Weinberger based on the date of the first alleged failure to rectify a building code violation. This would require the Court to turn to public records and the terms of the Mortgage as well as the Note and the Guaranty, construing outside documents. The need to turn to a document outside the guaranty and the underlying note in order to determine the amount of the Guarantors’ obligations makes CPLR § 3213 inapplicable here.

Plaintiff points to the provision of the Guaranty that reads “Guarantor acknowledges that this Guaranty is an instrument for the payment of money only within the meaning of New York Civil Practice Law and Rules Section 3213. Thus, Lender is entitled to move for summary judgment in lieu of complaint when enforcing this Guaranty” and argues that this provision allows the Guaranty to form the basis of their motion. Defendants cite to *Alexander* and argue that an agreement cannot stipulate to a matter of law such as whether a document is an instrument for the payment of money only. *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 18 n. 6 (2024) (“Parties can stipulate to issues of fact, but they cannot by stipulation amend the law”). The issue then becomes whether parties can agree in advance to apply CPLR § 3213 to documents that are not otherwise instruments for the payment of money. In *Farca*, the Second Department noted that “[w]here relief pursuant to CPLR § 3213 is carelessly sought upon documents which are clearly not instruments for the payment of money only, delay results, contrary to the statutory purpose of CPLR 3213.” *Farca v. Farca*, 216 A.D.2d 520, 521 (2nd Dept. 1995). Ultimately, here Plaintiff has not adequately shown that the Guaranty is an

instrument for the payment for money only and has not met their burden on a CPLR § 3213 motion. Plaintiff asks the Court to convert the motion to a CPLR §3212 summary judgment motion, but this the Court declines to do. Accordingly, it is hereby

ADJUDGED that the motion for summary judgment in lieu of complaint is denied; and it is further

DECLARED that the plaintiff's moving papers are hereby deemed the complaint in this action and the defendant's answering papers are hereby deemed the answer.

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3/6/2025  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE