

**Merced DIP Lender LLC v Sowels**

2025 NY Slip Op 31404(U)

March 31, 2025

Supreme Court, New York County

Docket Number: Index No. 659140/2024

Judge: Joel M. Cohen

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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

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MERCED DIP LENDER LLC

Plaintiff,

- v -

DAVID C SOWELS,

Defendant.

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INDEX NO.	659140/2024
MOTION DATE	11/19/2024
MOTION SEQ. NO.	001
<b>DECISION + ORDER ON MOTION</b>	

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 10 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Merced DIP Lender LLC (“Plaintiff” or “Lender”) seeks an award of summary judgment in lieu of complaint under CPLR 3213 against Defendant David C. Sowels (“Defendant” or “Guarantor”) in the amount of \$21,408,277.42 plus interest, fees and other costs accruing as set forth in the relevant agreements from November 1, 2024 through entry of judgment, plus post-judgment interest at the parties’ contractual default rate. For the reasons stated below, Plaintiff’s motion is **granted in part**.

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]). “On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty” (*Davimos v Halle*, 35 AD3d 270, 272 [1<sup>st</sup> Dept 2006]). “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 CPLR 3213 by demonstrating that (i) Compass Pointe Off Campus Partnership B, LLC (“Debtor”) executed the Loan Agreement and accompanying Construction Loan Note (“Note”) in an amount of up to \$24,375,000.000 in favor of Plaintiff (NYSCEF 3 at 9, 172 [Wren Aff. Ex. B, C]), (ii) the Note contains unconditional promises to repay Plaintiff in accordance with the Loan Agreement (NYSCEF 3 at 172 [Wren Aff. Ex. C]), (iii) Defendant executed a guaranty in favor of Plaintiff, which unconditionally and irrevocably guaranteed the punctual payment and performance of the Note (NYSCEF 3 at 181 [Wren Aff. Ex. D]), and (iv) the Debtor defaulted on the Note and Defendant has failed to repay the full amounts due under the Note and guaranty (NYSCEF 3 ¶¶ 21-28).

In opposition to this motion, Defendant avers that the amount Plaintiff seeks does not account for the balance of undrawn funds left in the account, and that Plaintiff caused the project delays that resulted in the default by imposing “extra requirements” for the release of funds (NYSCEF 10). Defendant does not assert that these “extra requirements” or refusals to fund certain expenses were in breach of any of the loan documents such that any default might be excused (*id.*).

As to the amount sought, the guaranty provides that if Lender forecloses on real property collateral pledged by Debtor, the amount of the debt shall be reduced by the sale price of the collateral, even if the collateral is worth more than the sale price (NYSCEF 3 at 186 [Wren Aff. Ex. D]). Lender foreclosed on the real property collateral and obtained a sale price of \$13,000,000.00 (NYSCEF 3 ¶ 22). As of November 1, 2024, Plaintiff asserts that the sum of the outstanding debt minus the foreclosure sale price was \$21,408,277.42, but Plaintiff does not provide an explanation of how this amount was calculated and whether this accounts for undrawn funds remaining (*id.* ¶ 25). Nor is that amount readily verifiable on the face of the documents submitted.

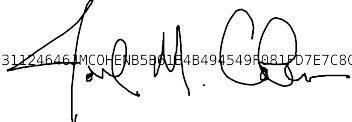
Accordingly, it is

**ORDERED** that Plaintiff’s motion for summary judgment in lieu of complaint is **granted in part** as to the issue of liability, but further proceedings are required with respect to damages as well as Plaintiff’s recoverable costs and expenses; it is further

**ORDERED** that the parties appear for a telephonic Preliminary Conference on April 15, 2025 at 11:00 a.m., with the parties to circulate dial-in information to [sfc-part3@nycourts.gov](mailto:sfc-part3@nycourts.gov), to establish a procedure and schedule to determine damages, including discovery if needed; and it is further

**ORDERED** that Plaintiffs shall serve this order with notice of entry on Defendant within 7 days of the date of this decision and order.

This constitutes the decision and order of the Court.

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**JOEL M. COHEN, J.S.C.**

3/31/2025  
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE