

**Gems Global (Cayman) Ltd. v SL 4000 CT Member  
LLC**

2025 NY Slip Op 32228(U)

June 20, 2025

Supreme Court, New York County

Docket Number: Index No. 651299/2024

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M**

*Justice*

-----X

GEMS GLOBAL (CAYMAN) LTD.

Plaintiff,

- v -

SL 4000 CT MEMBER LLC,

Defendant.

-----X

INDEX NO. 651299/2024

MOTION DATE 03/11/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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

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

Upon the foregoing documents, it is

The plaintiff, GEMS Global (Cayman) Ltd. (“GEMS”) has moved for summary judgment in lieu of complaint against Defendant SL CT Member LLC (“SL”) pursuant to CPLR §3213. For the reasons set forth below, the motion is denied.

CPLR §3212 provides an accelerated procedure for actions “based upon an instrument for the payment of money only or upon any judgment.” This requirement is a stringent one and the prototypical example of an instrument within the ambit of the statute is a negotiable instrument for the payment of money—an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time (*see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). The expedited procedure of CPLR §3213 is only available where the right to payment can be ascertained from the face of a document (*see Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d 342, 343 [1st Dept 2002]). A document does not qualify if outside proof is needed, other than simple proof of nonpayment or a de minimis deviation from the face of the document (*see PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017]).

To prevail on such a motion, the plaintiff must provide proof of an agreement for money only and the defendants failure to pay in accordance with its terms (*see Bronson v Jacobs*, 195 AD3d 550, 551 [1st Dept 2021]). The burden then shifts to the defendant, to establish, by admissible evidence, a triable issue with respect to a bona fide defense (*see Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008]).

In 2016, a commercial property in Washington, D.C., jointly owned with an affiliated entity by SL 4000 Connecticut LLC (an entity in which defendant SL is an investor) was developed into a global school campus by an entity owned by H. Christopher Whittle. The school had serious financial difficulties from its onset and it eventually defaulted on its sublease

nine months after it opened. Mr. H. Christopher Whittle ("Whittle") was the principal of Whittle School and Studios (Washington), LLC (the "Whittle School"), the now-defunct sub-tenant that developed the commercial property. The Whittle School and its affiliated entities (collectively, the "Maker") executed a Demand Promissory Note for \$2,000,000 to the plaintiff. This Note was personally guaranteed by H. Christopher Whittle through a separate Guaranty" (the "Whittle Guaranty"). At the same time, defendant SL signed the Guaranty at issue in this case ("SL Guaranty"). The Maker never made any payments on the Note, which was due on June 30, 2022, leading to an Event of Default. The plaintiff is seeking to collect on the loan it made to the Whittle School via the SL Guaranty. The central legal issue in this case is whether the SL Guaranty qualifies as an instrument for the payment of money only. After reviewing the SL Guaranty and the arguments presented, the Court finds that it does not.

Section 2.2 of the SL Guaranty explicitly states that it "is an irrevocable, absolute, continuing guaranty of collection, and is not a guaranty of payment." A guaranty of collection requires that the lender exhaust certain remedies against the primary obligors before proceeding against the guarantor. This fundamental distinction, clearly articulated in the document itself, immediately raises questions about its suitability for CPLR 3213. The plaintiff acknowledges that it was required to exhaust all remedies against the Maker before proceeding against the SL Guaranty. The plaintiff has submitted an affirmation from Ruth Grigor, the general counsel of the plaintiff's holding company (the "Grigor Affirmation"). The Grigor Affirmation states that the plaintiff's counsel contacted a representative of the Maker of the note (presumably referring to Mr. Whittle or his representative) and was told by the representative that the Maker could not make any payments under the Note.

Attached to the opposition papers is an unsigned copy of the Whittle Guaranty. The Whittle Guaranty explicitly includes an "Asset Preservation" section (Section 6.1). This section stipulates that for as long as any sums from the Loan remain outstanding, **Whittle "shall not (a) pledge, mortgage, hypothecate, collaterally assign or otherwise encumber all or any portion of any of their assets listed on Exhibit A hereto, (b) transfer all or any portion of the assets listed on Exhibit A hereto, or (c) transfer for less than full and fair consideration all or any portion of its assets other than the assets listed on Exhibit A hereto."** (emphasis added). Exhibit A to the Whittle Guaranty lists Mr. Whittle's "11.7-acre parcel on Georgica Pond, East Hampton, New York" and "Shares in Whittle School & Studios LTD" as assets. SL claims and the plaintiff has not disputed that the plaintiff had previously sued Mr. Whittle and obtained a lien on the Georgica Pond property, which was later foreclosed upon. The papers do not indicate whether the plaintiff received any proceeds from the foreclosure sale. The SL Guaranty outlines conditions precedent to SL Defendant's obligation to make payments. Section 2.2 stipulates that SL Defendant "shall be obligated to make payments hereunder only after the Lender has reduced its claims with respect to the Loan against each Primary Obligor to judgment and execution has been returned unsatisfied, or after each Primary Obligor has become insolvent, or after it has become otherwise apparent after reasonable due diligence that it is useless for Lender to proceed against Primary Obligor." The argument made by the defendant SL is that the non-monetary terms of the Whittle Guaranty, including the asset preservation covenant, raises questions of fact as to whether the plaintiff could have obtained satisfaction of the loan through enforcement of the Whittle Guaranty prior to bringing suit under the SL Guaranty.

The Plaintiff argues that it has satisfied the conditions precedent by demonstrating that the Loan and Guaranteed Obligations were not paid for more than twenty-one days after demand and a second notice. However, a determination as to whether these conditions have been met, or whether it was "useless for Lender to proceed against Primary Obligors," requires looking beyond the bare SL Guaranty itself. The First Department has held that the availability of CPLR 3213 "can never depend upon the occurrence (or nonoccurrence) of any unrelated future event" and that the instrument must conform to the statutory definition when read immediately upon execution. (*Kerin v Kaufman*, 296 AD2d 336, 338 [1st Dept 2002]). Terms and conditions precedent that remain unresolved within the instrument itself cannot be satisfied by future events, the occurrence of which requires proof outside the agreement. (*Id.*; see also *Weissman*, 88 NY2d at 444; *A. Stanley Proner, P.C. v. Julien & Schlesinger, P.C.*, 134 AD2d 182, 184 [1st Dept 1987] ["Notwithstanding that the record appears to contain the requisite proof of plaintiff's performance of the condition, the use of the expedited procedures provided by CPLR 3213 is not available where, as here, the character of the instrument relied upon does not meet the express statutory requirement that it be "for the payment of money only.""]

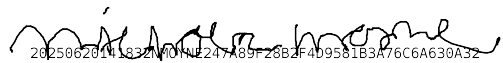
The plaintiff argues that what it calls the "de minimis procedural requirements" needed to allow it to collect on the SL guaranty do not take the instrument out of the ambit of the expedited procedure of CPLR §3213. There are several problems with this argument. In the first place, even if the plaintiff is correct that the notice requirements are minimal, the fact remains that the requirements go beyond providing simple proof of nonpayment. The Court would be required to determine if the notices were timely and properly sent and if they were sufficient to demonstrate after reasonable due diligence that it would be useless for the plaintiff to proceed against the Primary Obligors. The need for such extrinsic proof requires this Court to examine evidence and make determinations that require more than a "de minimis deviation from the face of the document." (see *Biopharma*, 147 AD3d at 495). The need for such extrinsic proof renders the instrument ineligible for accelerated summary judgment. (*Id.*)

Furthermore, the SL Guaranty explicitly states that SL Defendant "irrevocably and unconditionally guarantees to Lender the payment and performance of all Guaranteed Obligations". The term "Guaranteed Obligations" is defined to include not only monetary payments but also "the due and punctual performance of all covenants, agreements, obligations and liabilities of Borrower to Lender under the Note and of Primary Guarantor under the Primary Guaranty". The First Department, in the case of *Bank of America, N.A. v Filho*, 203 AD3d 594 [1st Dept 2022], affirmed the denial of a CPLR 3213 motion for a guaranty that similarly covered "payment and performance" and grouped both types of obligations under the defined term "Obligations". The *Filho* court held that "[f]or that reason, summary judgment in lieu of complaint is not appropriate, as CPLR 3213 allows actions based upon instruments for the payment of money only" (*Id.*). The First Department has consistently found that a guaranty of both payment and performance of covenants and agreements does not qualify as an instrument for the payment of money only (see *id.*; see also *ipayment Inc. v Silverman*, 192 AD3d 586, 587 [1st Dept 2021]; *Punch Fashion, LLC v Merchant Factors Corp.*, 180 AD3d 520, 521 [1st Dept 2020]; *Dresdner Bank AG v. Morse/Diesel, Inc.*, 115 AD2d 64, 68 [1st Dept 1986]). These cited cases are identical to the instant matter as the SL Guaranty contains language extending the guaranty to non-monetary performance obligations. While the plaintiff dismisses such

language as boilerplate, the caselaw is clear that it is in fact material and cannot be ignored or disregarded when determining the applicability of CPLR §3213.

It is also clear that reference to external documents is needed to ascertain the full extent of SL’s obligations under the SL Guaranty. In particular, there are issues of fact concerning the interplay between the SL Guaranty and Whittle Guaranty, which contains covenants regarding assets transfers and other obligations relating to Whittle that may or may not have been complied with. The necessity of consulting these outside documents to determine liability or the scope of the guaranteed performance prevents the SL Guaranty from qualifying as an instrument for the payment of money only. The presence of a merger clause in the SL Guaranty does not negate the need to interpret or confirm the conditions and obligations that are explicitly referred to within the SL Guaranty itself.

Accordingly, the motion for summary judgment in lieu of complaint is denied. The motion papers and opposition papers shall be treated as the operative pleadings in this now plenary action. The parties shall contact the part to schedule a status conference.



<u>6/20/2025</u> DATE					<u>NICHOLAS W. MOYNE, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART		
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	