Brookhill Holdings Series ALLC v 6 W. Ct. Corp.
2025 NY Slip Op 35451(U)
January 17, 2025
Supreme Court, Nassau County
Docket Number: Index No. 617075-2024
Judge: Jerome C. Murphy

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

BROOKHILL HOLDINGS SERIES ALLC,

Plaintiff,

- against -

6 WEST COURT CORP. and POUYA TOOBIAN,

Defendants.

TRIAL/IAS PART 5
Index No. 617075-2024
Motion Date: 12-3-2024
Sequence No.: 001

DECISION AND ORDER

The following papers have been read on this motion:

Motion Sequence 001	NYSCEF DOC.
Notice of Motion, Affirmations, and Exhibits	2-8
Memorandum of Law in Support	9
Affirmation and Affidavit in Opposition	16-17
Reply Memorandum of Law in Further Support	18

PRELIMINARY STATEMENT

In Motion Sequence 001, plaintiff moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint in its in favor and against defendants, 6 West Court Corp. and Pouya Toobian, in the principal sum of $483,750.00, plus pre-judgment interest thereon through the date of entry of judgment, and post-judgment interest at the statutory rate, and to schedule an inquest to determine plaintiff's costs and expenses, including attorneys' fees, and for such other and further relief as this Court may deem just and proper. Opposition and reply have been submitted.

BACKGROUND

Plaintiff commences this action, pursuant to CPLR 3213, by motion for summary judgment in lieu of complaint. In a supporting affirmation, plaintiff's managing member, Igal Khorshidi, M.D., avers that on August 2, 2021, plaintiff extended an interest only loan to defendant 6 West Court

Corp. (hereinafter the corporate defendant) for the purpose of providing short term financing to allow the corporate defendant to finish a residential construction project, located at 43 Burnham Avenue, in Roslyn Heights (hereinafter the property), the terms of which were memorialized in a loan agreement, dated August 2, 2021 (*see* NYSCEF Doc. No. 3). Khorshidi further avers that monthly payments of $3,750 were owed on the loan and that the principal amount came due upon the closing of the sale of the property (*see id.*). According to Khorshidi, defendant Pouya Toobian executed a guaranty, dated August 2, 2021, pursuant to which Toobian guaranteed the payments owed to plaintiff under the loan agreement plus any costs incurred related to collection and enforcement (*see id.*).

Khorshidi avers that the sale of the property occurred on May 20, 2022 such that the principal amount became due that date but that the corporate defendant has failed and refused to pay the principal amount (*see id.*). Khorshidi also avers that the corporate defendant was obligated to pay $33,750 in interest from September 1, 2021 through the maturity date but only paid $30,000, and owes $105,000 in interest since the maturity date, plus the unpaid principal for a total of $483,750 (*see id.*).

Khorshidi avers that payment of the amount owed was demanded of Toobian, as guarantor, but Toobian has failed to tender payment in breach of the guaranty (*see id.*). Khorshidi also avers that, pursuant to the guaranty, plaintiff is entitled to its attorney's fees (*see id.*).

As exhibits to its motion, plaintiff annexes to Khorshidi's affirmation, documents entitled Security Agreement and Loan Agreement (*see* NYSCEF Doc. No 4), a check, in the amount of $11,250, dated June 30, 2022, made payable to plaintiff drawn on a Citibank account in the name of the corporate defendant, and separate checks, in the amount of $3,750, dated July 1, 2022, August 1, 2022, September 1, 2022, October 1, 2022, and November 1, 2022, each made payable to plaintiff drawn on a Citibank account in Toobian's name (*see* NYSCEF Doc. No. 5). As exhibits to its attorney's affirmation, plaintiff annexes a deed recorded on June 6, 2022, with respect to the property, between the corporate defendant and nonparties (*see* NYSCEF Doc. No. 7), and a letter from plaintiff's counsel, dated August 8, 2024, to defendants, demanding payment of the principal loan amount plus interest from August 2, 2021, plus costs, fees, and expenses (*see* NYSCEF Doc. No. 8).

DISCUSSION

Pursuant to CPLR 3213, "[w]hen an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." The purpose of CPLR 3213 is "to provide quick relief on documentary claims so presumptively meritorious that 'a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless'" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 443 [1996], *quoting* 1st Prelim Report of Advisory Comm. on Practice and Procedure, 1957 NY Legis Doc No. 6[b], at 91).

"The prototypical example of an instrument within the ambit of the statute is of course 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" (*Weissman v Sinorm Deli*, 88 NY2d at 444; *see Lawrence v Kennedy*, 95 AD3d 955, 957 [2nd Dept. 2012]["An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time."]). "Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable" (88 NY2d at 444). "[A] document comes within CPLR 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*id.* [internal quotation marks omitted]).

However, "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*id.*; *see Ro & Ke, Inc. v Stevens*, 61 AD3d 953, 953 [2nd Dept. 2009]; *Stallone v Rostek*, 27 AD3d 449, 450 [2nd Dept. 2006]). "A document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make a more than de minimis deviation from the face of the document" (*PDL Biopharma, Inc. v Wohlstadter*, 147 AD3d 494, 495 [1st Dept. 2017]). "Once a plaintiff has established its prima facie entitlement to judgment as a matter of law, 'the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense'" (*Porat v Rybina*, 177 AD3d 632, 632, *quoting Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789 [2nd Dept. 2011]; *see Lee v Nextcom Constr., Inc.*, 219 AD3d 937, 937-938 [2nd Dept. 2023]).

Here, annexed as Exhibit A to plaintiff's motion papers, is a document entitled "Loan

Agreement" which stated:

> "On the 2 day of August , 2021, hereinafter known as the 'Start Date', ________ [Borrower] of 6 West Court Corp [Mailing Address], hereinafter known as the 'Borrower', has received and promises to payback [sic] _____ [Lender] of Brookhill Holdings Series A LLC [Mailing Address], hereinafter known as the 'Lender', the principal sum of 375,000 US Dollars [$________], with interest accruing on the unpaid balance at a rate of 12 percent (%) per annum, hereinafter known as the 'Borrowed Money', beginning as of the Start Date. Said sum is intended to be used by Borrower to complete installation of fixtures and appliances at the property located at 43 Burnham Ave Roslyn NY [Property Address]. All sums due and payable under this agreement shall be due and payable in full on the earlier of _____ [Outside Date] or at the closing of the sale of the property located at 43 Burnham Ave Roslyn NY [Property Address]. The following payment and fees will be deducted from the loan amount at closing:

	PURPOSE/PAYEE	AMOUNT
1)	Toubian [sic] Ventures LTD	$375,000[1]"

(NYSCEF Doc. No. 4).

A signature appears over the line for "Borrower" but the signature is illegible and the document does not indicate who was signing on behalf of the borrower (*see id.*).

At the bottom of the "Loan Agreement", it states as follows:

> "I hereby unconditionally and irrevocably guarantee the full and punctual payment, when due, of all of the monetary obligations of Borrower arising out of the extension of this Loan Agreement pertaining to the Premises, whether such obligations arise out of late charges, expenses, fees or otherwise, together with any and all expenses, including attorney's fees, which may be paid or incurred by the Lender in securing the property, collecting such obligations and/or enforcing any rights hereunder" (*id.*).

Another illegible signature appears over the signature line for "Guarantor" and next to the date of "8/2/21" (*see id.*). The name of the guarantor is not set forth in the loan agreement (*see id.*).

At the bottom of the "Loan Agreement" document, it is stamped by a notary, as having been sworn before the notary on August 2, 2021, but the notary does not indicate who appeared before her and in what capacity (*see id.*).

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[1] The document provided nine blank lines numbered (2) through (10) for additional "purpose/payee" information (NYSCEF Doc. No. 4).

Also annexed as part of Exhibit A is a document entitled "Security Agreement" which was "made on this 2 day of August, 2021 between Brookhill Holdings Series A (Debtor), and 6 West Court Corp, (Secured Party)" (*see id.*). According to the "Security Agreement":

> "Debtor grants to Secured Party a security interest in all fixtures, equipment, appliances, furnishings, and inventory now or hereafter placed upon the premises known as ______, located at 43 Burnham Ave Roslyn NY (Premises) or used in connection therewith and in which Debtor now has or hereinafter acquires any right as the proceeds therefrom. The Security Interest shall secure the payment and performance of Debtor's promissory note of even date herewith in the principal amount of 375,000 dollars ($) and the payment and performance of all other liabilities and obligations of Debtor to Secured Party of every kind and description, direct or indirect, absolute or contingent, due or to become due now existing or hereafter arising" (*id.*).

According to the security agreement, the debtor covenanted that it would "not sell, dispose, or otherwise transfer the collateral or any interest therein without the prior written consent of Secured Party, and the Debtor shall keep the collateral free from unpaid charges (including rent), taxes, and liens" (*id.*). The security agreement provided that the debtor would be in default under it for, inter alia, "[a]ny non compliance with or non performance of the Debtor's obligations under the Note or this Agreement" (*id.*).

With respect to that branch of plaintiff's motion which is for summary judgment in lieu of complaint insofar as asserted against the corporate defendant, the evidence submitted by plaintiff does not establish its prima facie entitlement to judgment as a matter of law since it is necessary to look outside of the four corners of the loan agreement to determine when and if money is owed to it (*see Weissman v Sinorm Deli*, 88 NY2d at 444-445). Extrinsic evidence is required because the loan agreement does not contain an unconditional promise to pay that sum upon demand or at a definite time (*see Mirham v Awad*, 131 AD3d 1211, 1211-1212 [2nd Dept. 2015]; *Von Fricken v Schaefer*, 118 AD3d 869, 870 [2nd Dept. 2014]). The date that the principal amount of the subject loan was due depended on the occurrence of a future event which could or could not have happened, thus requiring additional evidence beyond the loan agreement (*see e.g. Vitol Americas Corp. v Targa Resources Partners LP*, 223 AD3d 421, 422 [1st Dept. 2024]; *Von Fricken v Schaefer*, 118 AD3d at 870; *Kerin v Kaufman*, 296 AD2d 336, 338 [1st Dept. 2002]).

With respect to that branch of the motion which is against Toobian, the guaranty portion of the loan agreement does not indicate who executed the guaranty. As a result, since outside proof is also required to determine who executed the guaranty and in what capacity, summary judgment pursuant to CPLR 3213 is not appropriate (*see Weissman v Sinorm Deli*, 88 NY2d at 445).

In light of the foregoing, the motion is denied without regard to the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Von Fricken v Schaefer*, 118 AD3d at 870-871). Consequently, this Court does not have to reach the issue of whether to consider the sur-reply papers submitted by defendants.

"Upon the denial of a plaintiff's motion for summary judgment in lieu of complaint, 'the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise'" (*Mirham v Awad*, 131 AD3d 1211, 1212 [2nd Dept. 2015], *quoting* CPLR 3213). Where "'the moving and answering papers do not satisfactorily define the issues'", the Court can direct formal pleadings to be served (*Mirham v Awad*, 131 AD3d at 1212, *quoting Commercial Bank of N. Am. v Employers Ins. of Wausau*, 33 AD2d 672, 673 [1st Dept. 1969]). The Court finds that, here, formal pleadings must be served within 30 days of the date of the e-filing of this decision and order for this action to proceed (*see id.*).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is DENIED; and it is further

ORDERED that plaintiff is to serve a formal complaint upon defendants within 30 days of the date this decision and order is e-filed.

This shall constitute the Decision and Order of the Court.

Dated: Mineola, New York
January 17, 2025

E N T ER:

Jerome C Murphy

HON. JEROME C. MURPHY, J.S.C.

ENTERED
Jan 27 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE