

I.B.I Volcano Invs. LLC v Apex S. Creek IB, LLC

2026 NY Slip Op 31638(U)

April 10, 2026

Supreme Court, New York County

Docket Number: Index No. 655364/2025

Judge: Melissa A. Crane

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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. MELISSA A. CRANE PART 60M

Justice

I.B.I VOLCANO INVESTMENTS LLC, WEST 4 CAPITAL LP
Plaintiff,

INDEX NO. 655364/2025
MOTION DATE 09/09/2025
MOTION SEQ. NO. 001

- v -

APEX SOUTH CREEK IB, LLC,
Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT .

Plaintiffs I.B.I Volcano Investments LLC ("Volcano") and West 4 Capital, LP ("West") move pursuant to CPLR 3213 for Summary Judgment in Lieu of Complaint against Defendant Apex South Creek IB, LLC ("Apex"). Defendant opposes the motion.

BACKGROUND

On November 18, 2022, Apex executed three promissory notes: first with Volcano for \$25,000,000 (Doc 4 [Volcano Note]; Doc 27 [Muhlon Aff.], ¶6); then with lender Comrit Investments 1, LP ("Comrit") for \$11,000,000 (Doc 5 [Comrit Note]; Doc 27, ¶6); and lastly with West for \$6,000,000 (Doc 13 [West Note]; Doc 27, ¶6). On July 3, 2023, Comrit assigned its rights and obligations under the Comrit Note to Volcano (Doc 6 [Comrit Assignment]; Doc 3 [Sapir Aff.], ¶7).

Interest accrued at 12% per annum (Docs 4, 5 & 13, § A), and in the event of a default, Apex agreed to pay interest at the default rate [14% per annum] (id., § E). Apex also agreed to pay late charges, equal to 5% of any installment which is not paid within ten calendar days after

the due date (*id.*, § G[2]). Additionally, Apex agreed to pay certain other fees, costs and expenses, including lender's reasonable attorneys' fees (*id.*, § P[6]).

DISCUSSION

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *see Arbor-Myrtle Beach PE LLC v Frydman*, 2021 NY Slip Op. 30223[U], 2 [Sup Ct, NY County 2021], *aff'd* 2022 NY Slip Op. 00806 [1st Dept 2022]). The same standards that apply to motions for summary judgment under CPLR 3212 apply to CPLR 3213 motions. Movant must make a prima facie case by submitting the instrument and evidence of the defendant's failure to make payments in accordance with the instrument's terms (*see Weissman*, 88 NY2d at 444-445; *Matas v Alpargatas S.A.I.C.*, 274 AD2d 327, 328 [1st Dept 2000]).

Here, plaintiffs established their prima facie entitlement to summary judgment in lieu of complaint under the loan documents. The unconditional promissory notes qualify as an instrument for the payment of money only, and plaintiffs established that defendant failed to make payments in accordance with the Notes' terms. The Notes state that:

"If any of the following (each, an "Event of Default") occur, at Lender's option, exercisable in its sole discretion, all sums of principal and interest under this Note shall be accelerated and become immediately due and payable without notice... Borrower fails to pay (a) any principal amount of the Loan when due; or (b) interest or any other amount due and owing hereunder when due and, in either case, if such failure continues for five (5) calendar days" (Doc 4, §K1; Doc 5, §K1; Doc 13, §K1).

It is undisputed that Apex has not made interest payments under any note since November 2023 (Doc 3, ¶ 11; Doc 12 [Eliot Aff.], ¶ 9; Doc 27, ¶ 9 [Apex admits it has not made any full monthly payments since November 2023]). Instead, defendant argues that

“Plaintiffs cannot meet their burden for summary judgment that Borrower has been in default since November 2023 . . . because Borrower was not then in default. . . . Plaintiffs’ Motion conveniently ignores the extensions the Parties agreed to in writing, under which Borrower assumed substantial additional costs—origination fees totaling at least 3% of the principal of the loans plus Lenders’ legal fees—in exchange for multiple extensions of the maturity dates”

(Doc 30 at 8 [mem opp]).

Defendant is incorrect about not being in default since November 2023. Plaintiffs served default notices on defendant in June 2023. On April 5 and April 10, 2024, plaintiffs and defendant signed amendments extending the Loans’ maturity dates to 5/18/24 (Doc 7, §1a [Amendment to Volcano & Comrit Notes]; Doc 14, §1a [Amendment to West Note]). However, these extensions were conditioned “[u]pon payment by the Borrower to the Lender of an origination fee” (*id.*).

Defendant concedes that it did not pay the origination fees required under the Amendments (Doc 27, ¶¶ 16-17 [“Apex has not paid the extension fee and other payments set forth in the April 2024 Extension Agreements in May 2024”]). Thus, the maturity date extensions contemplated in the Amendments did not take effect, and defendant does not raise a triable issue of material fact regarding the default date for the Notes. Therefore, plaintiffs establish, *prima facie*, that defendant defaulted on the Notes by failing to pay all outstanding principal, late fees, and interest amounts on the 11/18/23 maturity date.

The court rejects defendant's argument that plaintiffs cannot satisfy CPLR 3213 because they rely on impermissible extrinsic evidence. The affirmations submitted by plaintiffs' representatives' are appropriate evidence for this CPLR 3213 motion (*see e.g. German Am. Cap. Corp. v. Oxley Dev. Co., LLC*, 102 A.D.3d 408, 408 [1st Dep't 2013] [finding that plaintiff established its entitlement to judgment as a matter of law where plaintiff "submitted evidence, including the note, the loan agreement . . . and an affidavit of plaintiff's principal who attested to [defendant's] failure to make payment on the loan at its maturity date"]).

The court next rejects defendant's contention that plaintiffs expressly or impliedly waived defendant's default, and plaintiffs' right to accelerate the debt and apply default interest rates. Although plaintiffs agreed to waive certain periods of default interest in the Amendments, and agreed in the Amendments that "there is no [current] Default or Event of Default under any of the Loan Documents" (*see Docs 7 and 14, § 3a[iii]*), defendant is not entitled to the benefits of the Amendments because it breached its obligations under these agreements (*see e.g. Segovia v Equities First Holdings, LLC*, 2008 WL 2251218, at *23 [Del Super Ct May 30, 2008] ["The concept of cancelling contracts upon a material breach is well-settled in Delaware law: ['] [A] party may terminate or rescind a contract because of substantial nonperformance or breach by the other party.'], quoting *DeMarie v Neff*, 2005 WL 89403, at *4 [Del Ch Jan. 12, 2005] [additional citations omitted]). Defendant breached the Amendments by failing to pay the origination fees, and these breaches are material and substantial because the requirements were conditions precedent for the extensions.

In their reply, plaintiffs concede that they are only entitled to recover unpaid origination fees that were due before the Amendments were signed. That is, the only

unpaid extension fees that plaintiffs seek for the original three extensions that placed the maturity dates on 11/18/2023. Thus, plaintiffs seek just \$382,922 for unpaid extension fees. This is proper because the Amendments' extensions were not effective due to defendant's breaches of those agreements.

In conclusion, plaintiffs are entitled to summary judgment in lieu of complaint for all the outstanding principal, late fees and interest on notes through 11/18/23, plus default interest on the unpaid principal balances from 11/18/23 to the date of this decision and order. Plaintiffs are also entitled to recover \$382,922 for the unpaid portions of the first three extensions.

The court denies the part of plaintiffs' motion that seeks an award for attorneys' fees and other expenses. While plaintiffs may be entitled to recover these costs and fees under the loan documents, there is no support in the record for plaintiff's actual, reasonable attorneys' fees or expenses. Thus, plaintiffs shall be awarded \$37,484,924.00 [outstanding principal on all three Notes], plus \$266,269.00 [unpaid late fees], plus \$382,922 [unpaid extension fees], for a total of \$38,134,115. Plaintiffs shall also recover pre-judgment interest at the contractual default rate from 11/18/23.

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

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted in part, and the Clerk is directed to enter judgment in favor of plaintiffs against defendant in the amount of \$38,134,115, together with contractual pre-judgment interest at the rate of 14% per annum from 11/18/2023 until the date of this decision and order, as calculated by the Clerk, and with interest thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the court denies the plaintiffs' motion for attorneys' fees without prejudice to a new motion, to be made upon proper papers; and it is further

ORDERED that the Clerk shall mark this case disposed.

4/10/2026

DATE



MELISSA A. CRANE, 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