West Loan Acquisition Holdings, LP v MWF Realty, Inc.
2013 NY Slip Op 33325(U)
December 12, 2013
Sup Ct, Suffolk County
Docket Number: 62374-13
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

INDEX No. 62374-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/2/13
ADJ. DATES 11/15/13
Mot. Seq. # 001 - MotD
Hearing/Trial on Counsel Fees
Scheduled for: 2/21/14
CDISP: No x Y

WEST LOAN ACQUISITION HOLDINGS, LP, Plaintiff, -against- MWF REALTY, INC., MULKI AMAN, NEW J-A ENTERPRISES, INC. and DA PETRO, INC., Defendants.	GREENBERG TRAURIG, LLP Attys. For Plaintiff 200 Park Ave. New York, NY 10166 RONALD D. WEISS, ESQ. Attys for Defs. MWF Realty & Aman 734 Walt Whitman Rd. Melville, NY 11747

Upon the following papers numbered 1 to 8 read on this motion by the plaintiff for summary judgment in lieu of complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ____; Answering papers 4-5; Reply papers 6; Other 7 (memorandum); 8 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for summary judgment in lieu of complaint in this action to recover sums due under a promissory note and written guarantees and for an award of counsel fees is considered under CPLR 3213 and is granted with respect to all claims except the claim for an award of counsel fees; and is further

ORDERED that the plaintiff's claims for a money judgment against each of the defendants in the principal amount of $480,000.00, unpaid interest of $119,787.26, late fees in the amount of $6,938.56, together with an award for contractual interest from October 1, 2011 through August 12, 2013 at 14.78% are granted and such claims are hereby severed from the plaintiff s claim for an award of counsel fees; and it is further

ORDERED that the plaintiff is hereby granted leave to forthwith settle a judgment, upon a copy of this order, reflecting the severance of the sum certain claims herein directed and awarding judgment on these severed claims; and it is further

ORDERED that the plaintiff is awarded partial summary judgment as to the issue of the defendants' liability for cost, including reasonable counsel fees, incurred in connection with the plaintiff's collection efforts, the amount of which is determinable only after proof thereof is adduced at a hearing or "immediate trial" of the type contemplated by CPLR 3212(e), which shall be held on Friday, **February 21, 2014** at 9:30 a.m. in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, New York 11901, provided that the plaintiff files a note of issue, upon a copy of this order, on or before **February 3, 2014.**

The plaintiff commenced this action to collect amounts allegedly due under the terms of a promissory note in the principal amount of $480,00.00 executed by the corporate defendant on May 22, 2006, in favor of Bank of the West [hereinafter "lender"] in connection with such defendants' purchase of a convenience store in Bay Shore, New York. Also executed on that day was a business loan agreement and three separate, continuing guarantees of the payment and performance obligations of the corporate defendant under the terms of the "Note and the Related Documents" that were executed by the other named defendants (*see* Exhibits D and J attached to the moving papers). The note called for the payment of monthly installments of principal and of interest at variable rates until the maturity date of May 23, 2031, at which time all unpaid principal amounts and interest was due and payable. In both the note and the guarantees the corporate defendant and its guarantors [hereinafter collectively referred to as "obligors"], agreed to pay the costs incurred in collection, including attorneys fees.

Following one or more defaults in payment that occurred prior to March 30, 2010, the obligors and the lender entered into a Forbearance Agreement dated March 30, 2010 (*see* Exhibit D attached to moving papers). Therein, the obligor defendants admitted the existence of defaults in payment of principal, interest and late fees under the note and that the lender had made a demand for immediate payment in full of all amounts due under the "Loan Arrangement", which was described as follows; the Business Loan Agreement dated May 22, 2006; Promissory Note dated May 22, 2006; Mortgage dated May, 22 2006 encumbering the business premises at 164 E. Main Street, Bay Shore, New York; Assignment of Rents dated May 22, 2006 and the three separate written guarantees executed by defendants Aman, New J-A Enterprises and DA Petro, Inc. The Loan documents were described as the foregoing documents except for the guarantees. The indebtedness to which the obligors admitted their joint and several liability totaled $606,725.82 and was computed in the March 30, 2010 Forbearance Agreement as follows: Principal: $480,000; Interest: $119,787.26; and Late Fees: $6,938.56.

The obligors also acknowledged that due to the defaults in payment, the lender "has and had the right to commence enforcement of its rights and remedies under the Loan Documents" (*id.*, at page 2). The lender then agreed to forebear its remedies provided that the obligors, made an immediate payment of $4,000.00 and five consecutive monthly payments in said amount beginning on April 1, 2010 through August 1, 2010, after which, all remaining unpaid amounts due under the note as accelerated, were due and payable on September 1, 2010. The Forbearance Agreement expressly provided that upon any default in payment of the agreed upon forbearance payments, all obligations would become due and payable without demand, notice or protest, as these were expressly waived, and that the lender was free to enforce its rights and remedies under the Loan Documents (*id.*, at page 5). In addition, the Forbearance Agreement contained a no-oral modification clause, a no-waiver clause in favor of the

lender of any defaults under the Loan Documents then existing or existing in the future, a disclaimer of reliance upon any representations by the obligors together with a ratification of the loan documents (*id.*, at pages 5-7). Two subsequent letter amendments to the March 30, 2010 Forbearance Agreement were executed by the obligors and the lender. The first of such amendments was dated, "effective as of September 1, 2010" and it modified the Forbearance Agreement of March 30, 2010 so as to extend the monthly installments and forbearance period through the date of March 1, 2011, at which time all amounts owing were due and payable. A second amendment was executed on April 1, 2013 which extended monthly installment through September 1, 2011, and forbearance period through October 1, 2011 at which time all unpaid amounts under the note were due and payable.

On May 4, 2012, the lender assigned to the plaintiff the note and other loan documents including the forbearance agreement and the two written modifications thereof. On June 21, 2012, the plaintiff's loan servicer and the obligors entered into a pre-negotiation letter in which they agreed to engage in discussions regarding a possible resolution to the non-performing loan. Express disclaimers regarding the non-binding effect of any such discussions or any of the terms advanced therein absent a writing fully executed, a non-waiver of any defaults or remedies clause and an express reservation of all rights possessed by the lender were prominently set forth in such letter. In addition, the parties agreed that all such discussions were confidential in the manner afforded to "settlement negotiations" and thus not for use in litigation.

On December 18, 2012, the plaintiff's counsel issued a letter to the obligors advising of the plaintiff's willingness to consider a "discounted payoff" in the amount of $300,000.00, as a way of resolving the loan. A demand was made for the production of financial documentation by the obligors on or before December 21 2012. The obligors were further advised that a failure to provide such documentation would result in a termination of the offer and resort to all legal remedies available to the plaintiff. A non-waiver clause and a reservation of all rights belonging to the plaintiff was included.

On August 8, 2013, this action was commenced by the filing of the summons, notice of motion for summary judgment in lieu of complaint containing an October 2, 2013 return date and supporting papers. The supporting affidavit of the plaintiff's principal alleges that a MWF Realty, the borrower, "failed to make all of the monthly payments required by the Forbearance Agreement, as amended by the First Amendment and the Second Amendment" and that "[t]he borrower also failed to make the balance due under the Promissory Note on or before October 1, 2011" (*see* ¶ 26 of the affidavit of Andres Miramontes submitted in support of motion). Continuing, Mr. Miramontes states that "[a]s of the end of the forbearance period on October 1, 2011, the amount due under the Promissory Note exceeded the amount due at the commencement of the period (*i.e.*, $606,725.82) because (a) the amount due under the Forbearance Agreement as amended ($4,000.00) were less than the amount of interest accruing on the original principal debt each month ($4,336.66); and (b) Borrower did not even make all the payments required by the Forbearance Agreement" (*see id.*, at ¶ 27). Mr. Miramontes goes on to assert that a separate, non-monetary default occurred on April 27, 2011 when the "Borrower was dissolved by proclamation or annulment of authority" as evidenced by the print-out of the webpage of the New York Department of State (*see id.*, at ¶ 28). The claims against the guarantor defendants, which rest upon their written guarantees of the obligations of defendant MWF Realty, are separately advanced by Mr. Miramontes in paragraphs 32-34 of his affidavit.

In this action, the plaintiff demands recovery of the exact amounts of principal ($480,000.00), interest ($119,787.26) and late fees ($6,938.56), which the obligors admitted was due and owing under the note in the March 30, 2010 Forbearance Agreement, together with an award of interest at the contract rate of $14.78% from the extended default date of October 1, 2011 through the August 12, 2013 date of the moving papers. Also demanded is an award of reasonable counsel fees and costs incurred in collection to which the obligors defendants agreed to pay under the terms of the note and written guarantees. The plaintiff claims an entitlement to summary judgment under CPLR 3213 against defendant MWF Realty under the promissory note and against the guarantor defendants under the written guarantees, all of which are characterized as instruments for the payment of money only (*see* plaintiff's Memo of Law in Support of Motion, pages 1-4).

Defendants, MWF Realty, Inc. and guarantor, Mulki Aman, appeared herein in response to the process served upon them. By affirmation of their counsel and the submission of an affidavit by defendant Aman, they oppose the plaintiff's motion on both procedural and substantive grounds. The procedural claim is premised upon allegations that the action "is not just one based upon a written instrument" as required by CPLR 3213 since additional writings and purported oral agreements are involved. The answering defendants' substantive challenges to the plaintiff's entitlement to the summary judgment demanded rest upon traditional defenses such as estoppel, waiver, breach of implied covenant, contract of adhesion, defective assignment and lack of good faith negotiations.

In reply, the plaintiff attempts to rebut these challenges and defenses by relying first upon the no-oral modification clauses contained in the Loan Agreement, the written guarantees, the Forbearance Agreement of Mach 30, 2010, the Pre-Negotiation Letter of June 21, 2012 and the statute of frauds set forth in GOL §15-301 which requires a writing to modify a writing that prohibits executory oral modifications (*see* Reply Memo of Law 4-6). The plaintiff further relies upon the no-waiver clauses set forth in the Loan Agreement, the written guarantees and the Pre-Negotiation Letter to rebut the waiver defense [id., at 6-9). As to the remaining defenses, the plaintiff relies upon appellate and other case authorities regarding the absence of any obligation to negotiate a loan modification, the lack of any contract of adhesion and the absence of any defect in the assignment of the loan documents (*see id.*, at 9-11).

A motion for summary judgment brought in lieu of a complaint is based on an "instrument for the payment of money only or upon any judgment." (CPLR 3213). The statute allows a plaintiff an expedited procedure for entry of a judgment by the filing and service of a summons and a set of motion papers that contain sufficient evidentiary detail for the plaintiff to establish its entitlement to summary judgment (*see* ***Sea Trade Maritime Corp. v Coutsodontis***, ___ AD3d ___, 2013 WL 6014987 [1st Dept 2013]). The plaintiff is thus charged with the initial burden of establishing that the instrument sued upon is suitable for disposition under CPLR 3213 and its entitlement to judgment as matter of law against the defendant or defendants who are in default under the terms of such instrument (*id.*, at page *2). As in the case of a post-commencement motion for summary judgment under CPLR 3212, the failure to make such a showing requires a denial of the motion, irrespective of the sufficiency of the opposing papers (*see id.,* ***Goodyear Tire & Rubber Co. v Azzaretto***, 103 AD3d 880, 962 NYS2d 220 [2d Dept 2013]). Where, however, such a showing is made, the burden shifts to those opposing the

motion to demonstrate questions of fact exist due to the existence of bona fide defenses (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ; ***Verela v Citrus Lake Dev., Inc.***, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]).

"[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" (***Weissman v Sinorm Deli***, 88 NY2d 437, 444, 646 NYS2d 308 [1996], *quoting* ***Interman Indus. Prods. v R.S.M. Electron Power***, 37 NY2d 151, 155, 371 NYS2d 675 [1975]; ***Lawrence v Kennedy***, 95 AD3d 955, 957 944 NYS2d 577 [2d Dept 2012]; ***Diversified Investors Corp. v DiversiFax, Inc.***, 239 AD2d 231, 657 NYS2d 642 [1st Dept 1997]). The expedited remedy is foreclosed if the liabilities and obligations can only be ascertained by resort to evidence outside the instrument or if more than simple proof of nonpayment or a de minimis deviation from the face of the document is involved (*see* ***Weissman v Sinorm Deli***, *supra*).

CPLR 3213 has been held available to those seeking recovery of loan debts secured by mortgages (*see* ***Staten Is. Sav. Bank v Bayview Assoc.***, 251 AD2d 320, 320–21, 673 NYS2d 1017 [2d Dept 1998]; ***Gallagher v Kazmierczuk***, 245 AD2d 418, 666 NYS2d 212 [2d Dept 1997]; ***Gregorio v Gregorio***, 234 AD2d 512, 512–13, 651 NYS2d 599 [2d Dept 1996]), and it also allows for the enforcement of guaranties where the proof shows the underlying debt is due (*see* ***Weissman v Sinorm Deli***, *supra*; ***Goodyear Tire & Rubber Co. v Azzaretto***, *supra*). A note which does not provide for an automatic acceleration of the debt under a note upon a default, but merely authorizes the holder to "declare the full amount of the Note due immediately [upon the defendant's] failure to pay, when due, any amount payable on any of * * * [his] obligations under * * * this Note", constitutes an "instrument for the payment of money" for purposes of suit under CPLR 3213 (***Gregorio v Gregorio***, 234 AD2d 512, *supra*; *cf.* ***Kerin v Kaufman***, 296 AD2d 336, 745 NYS2d 22 [1st Dept 2002]). Reference to other loan documents executed at the time of the execution of the note do not render the note unsuitable for CPLR 3213 disposition except where those documents "require additional performance by the holder of the note or otherwise alters the defendants' repayment obligation" (***East New York Savings Bank v Bacaray***, 214 AD2d 601, 625 NYS2d 88 [2d Dept 1995]; *see* ***New York Community Bank v Fessler***, 88 AD3d 667, 930 NYS2d 601 [2d Dept 2012]; ***Premium Assignment Corp. v Utopia Home Care***, 58 AD3d 709, 871 NYS2d 724 [2d Dept 2009]; ***Juste v Niewdach***, 26 AD3d 416, 809 NYS2d 563 [2d Dept 2006]; ***Neyhaus v McGovern***, 293 AD2d 727, 741 NYS2d 436 [2d Dept 2002]; *see also* ***Gittleson v Dempster***, 148 AD3d 578, 539 NYS2d 46 [2d Dept 1989], [*other documents did not alter or qualify the defendants obligation to pay*]). Where the plaintiff's claims are predicated upon the express terms of the note and/or guarantee , without resort to any other agreement, the prima facie case for relief under CPLR 3213 is made (*see* ***Diversified Investors Corp. v DiversiFax, Inc.***, 239 AD2d 231, *supra*; ***East New York Savings Bank v Bacaray***, 214 AD2d 601, *supra*).

Here, the plaintiff's claims for recovery of amounts due under the defaulted accelerated debt are directly discernible from the terms of the promissory note and the written guarantees of the obligations of the corporate borrower thereunder. Resort to none of the other agreements executed by the parties at the time of the execution is necessary to make out the claim. Nor is resort to the terms of the subsequent Forbearance Agreement or its two amendments necessary as none of the terms thereof imposed additional terms of performance by the plaintiff or altered the defendants' repayment

obligation. But for the claim of contractual interest that accrued from the termination of the forbearance period on October 1, 2011 to the August 12, 2013 date of the moving papers, the amount of the recovery demanded in the moving papers is the same as those admitted to by the obligor defendants in the Forbearance Agreement of March 30, 2010, as the plaintiff has waived its claims for recovery of protective advances and interest that accrued during the forbearance period. The moving papers established defaults in payment on the part of the borrower defendant, MWF Realty, and the failure of the guarantors to perform as called for under the instruments sued upon, namely, the promissory note and guarantees executed by the obligor defendants on May 22, 2006. The court thus finds that the plaintiff established its prima facie entitlement to summary judgment on its claims for the recovery of the sums due under the note executed by defendant, MWF Realty, and the unconditional and continuing guarantees executed by the remaining defendants. The plaintiff further established, prima facie, its entitlement to an award of partial summary judgment on its claim for recovery of the collection costs incurred by the plaintiff, including reasonable attorney's fees, which the defendants agreed to pay under the terms of the note and guaranty. This award is limited to the issue of the obligor defendants' liability as the amount due from the defendants is not a sum certain.

It was thus incumbent upon the answering defendants to demonstrate that a question of fact exists with respect to the plaintiff's claims or with respect to some bona fide defense possessed by such defendants. A review of the moving papers reveals, however, that no such question of fact was raised. All of the asserted defenses have either been waived in writing by the answering defendants (*see* ***JPMCC CICB Bronx Apts., LLC***, 84 AD3d 613, 922 NYS2d 779 [1st Dept 2011]; ***Inland Mtge. Capital Corp. v Realty Equities NM LLC***, 71 AD3d 1089, 900 NYS2d 79 [2d Dept 2010]; ***North Fork Bank v Computerized Quality Separation Corp***., 62 AD3d 973, 879 NYS2d 575 [2d Dept 2009]); ***Red Tullip, LLC v Neiva,*** 44 AD3d 204, 842 NYS2d 1 [2007]), or require a further writing which has not been produced (*see* GOL §15-301[1]; ***Mishal v Fiduciary Holdings, LLC***, 109 AD3d 885, 971 NYS2d 334 [2d Dept 2013]; ***Martin v Liberty Mut. Ins. Co.***, 92 AD3d 729, 939 NYS2d 75 [2d Dept 2012]; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***B. Reitman Blacktop, Inc. v Missirlian***, 52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]; ***Bank of Smithtown v Boglino***, 254 AD2d 319, 678 NYS2d 640 [2d Dept 1998]); or are simply too vague and conclusory to raise any genuine question of fact requiring a trial on either liability or damages (*see* ***Allied Irish Banks, P.L.C. v Young Men's Christian Ass'n of Greenwich***, 105 AD3d 516, 961 NYS2d 920 [1st Dept 2013]; ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009] "*a defense that merely pleads conclusions of law without supporting facts is insufficient and fatally deficient*"). Also lacking merit are the defendants' challenges to the validity of the assignment of the note and the loan documents to the plaintiff as the answering defendants are not a signatories to those documents and thus lacks standing to challenge them (*see* ***In re Holden***, 271 NY 212, 218 2 NE 631 [1936]; [*only assignors, not non-parties to a written assignment, may question the validity of a written assignment*]; ***Hypo Holdings Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]; *see also* ***Premium Mtge. Corp. v Equifax, Inc***., 583 F3d 103 [2d Cir. 2009]).

In view of the foregoing, the instant motion is granted to the extent that the plaintiff is awarded summary judgment on its claims for recovery of amounts due from the defendants who are jointly and severally liable to the plaintiff for the principal amount of $480,000.00, unpaid interest of $119,787.26 and late fees in the amount of $6,938.56, together with an award of contractual interest from October

1, 2011 through August 12, 2013 at 14.78%. These claims are hereby severed from the plaintiff's claim for an award of counsel fees and the plaintiff may forthwith settle a judgment, upon a copy of this order, reflecting the severance directed herein and awarding judgment on the severed claims. The plaintiff is further awarded partial summary judgment on the issue of the defendants' liability for the plaintiff's collection costs including, reasonable attorneys fees. The amount of such recovery shall be determined only after proof thereof is adduced at the hearing scheduled above.

DATED: 12/12/13

THOMAS F. WHELAN, J.S.C.