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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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J-BAR REINFORCEMENT INC.,

Plaintiff,

DECISION/ORDER
Index No. 650404/2016

-against-

CREST HILL CAPITAL LLC, MANTIS FUNDING LLC

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, plaintiff J-Bar Reinforcement Inc. ("J-Bar" or "plaintiff") moves pursuant to CPLR 3213 for summary judgment in lieu of complaint against Crest Hill Capital LLC ("Crest Hill") and Mantis Funding LLC ("Mantis" and collectively with Crest Hill, "defendants"). Defendants oppose the motion and cross-move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

This action arises out of a loan that plaintiff made to defendants. Pursuant to a promissory note ("Note"), dated July 17, 2014, defendants promised to pay J-Bar $1,000,000, along with interest. Section 2.1 of the Note states,

> [t]he initial maturity date of this Note shall be January 16, 2016 (the "**Initial Maturity Date**") provided that the Initial Maturity Date shall be automatically extended continuously for additional six month terms (as so extended, the "**Extended Maturity Date**") unless the Lender shall provide a notice (a "**Non-Extension Notice**") six months prior to the Initial Maturity Date or the Extended Maturity Date, as applicable, that the then applicable Maturity Date (as defined below) shall not be extended. All principal and interest on the Note will be due and payable on either the Initial Maturity Date or the Extended Maturity Date as determined in accordance with the immediately preceding sentence (such date the "**Maturity Date**").

Section 6 of the Note also states that "[e]ach of the [defendants] and [plaintiff] agrees that the obligations under this Note are subject and subordinate to the obligations of the Borrowers to

DC CHMF I, LLC ['CHMF'] and Dominion Capital, L.L.C. ['Dominion'] pursuant to the terms of the Subordination Agreement attached hereto."

J-Bar executed a Subordination Agreement with Dominion and CHMF (collectively, "Existing Lenders") that states,

> [J-Bar] does hereby subordinate payment of the indebtedness of [defendants] to [J-Bar] . . . (collectively, the "**Subordinated Indebtedness**") to: (x) (i) the Obligations (as defined in the Loan and Security Agreement between [Dominion] and the [defendants] as the same may from time to time be or has been amended, restated, extended or supplemented . . .), (ii) the Obligations (as defined in the Loan and Security Agreement between [CHMF] and the [defendants] as the same may from time to time be or has been amended, restated, extended or supplemented . . .) and (y) all other current indebtedness of [defendants] to the Existing Lenders of every nature, howsoever evidenced, incurred or created ((x) and (y) collectively, the "**Obligations**").

The Subordination Agreement further states that

> [J-Bar] hereby acknowledges that the Subordinated Indebtedness is and shall be expressly subordinated in right of payment to the Obligations and [J-Bar] will not accept and [defendants] shall not make any payment in respect of the Subordinated Indebtedness until such time as the Obligations have been indefeasibly paid in full[.] [J-Bar] will not now or hereafter directly or indirectly (i) ask, demand, sue for, take or receive payment of all or any part of the Subordinated Indebtedness or any collateral therefor, and [defendants] will not be obligated to make any such payment, and the failure of [defendants] so to do shall not constitute a default by [defendants] in respect of the Subordinated Indebtedness . . . provided, however, so long as no Event of Default (as defined in any of the [loan agreements with Dominion or CHMF]) shall have occurred and be continuing or would occur after giving effect to such payment, [defendants] may pay and Creditor may receive regularly scheduled payments of principal and interest on the Subordinated Indebtedness as in effect on the date hereof.

Additionally, uploaded as the last page of the Subordination Agreement, pursuant to an Agreement Not to Pay Subordinated Indebtedness, "[defendants] . . . acknowledge[d] receipt of the above and foregoing Agreement and agree[d] not to pay any of the Subordinated Indebtedness except as expressly permitted therein."

Along with their moving papers, plaintiff submits the affidavit of Ray Bouderau ("Bouderau"), J-Bar's President, in which Bouderau states that around July 17, 2014, J-Bar wired $1 Million to Mantis in accordance with its duties under the Note. Bouderau also states that it sent

a Non-Extension Notice by letter from counsel, dated July 16, 2015. Finally, Bouderau states that defendants failed to pay the principal and interest due on January 16, 2016.

Plaintiff now moves for summary judgment in lieu of complaint. J-Bar argues that summary judgment should be granted because this is an action for the payment of money only, defendants failed to pay the principal plus interest on January 16, 2016, and defendants have no legitimate defense for failing to pay the amount due.

In opposition to J-Bar's motion and in support of its cross motion to dismiss, defendants argue that the Subordination Agreement, which it maintains it has standing to enforce, prohibits plaintiff from bringing this action, or, there is at least an issue of fact whether plaintiff could bring this litigation. It additionally argues that J-Bar's motion should be denied and its motion should be granted because the Non-Extension Notice that was sent was defective. It also argues that plaintiff's motion should be denied because equitable estoppel prevents J-Bar from relying on the Non-Extension Notice when defendants relied upon J-Bar's promise to extend the Note's maturity date. Finally, defendants argue that plaintiff's motion should be denied because it does not correctly state the amount due, or, in the alternative, defendants request that if I grant summary judgment as to liability, that I hold a trial on the amount defendants' owe J-Bar.

In further support of its motion for summary judgment in lieu of complaint and in opposition to defendants' cross-motion to dismiss, plaintiff argues that defendants lack standing to enforce the Subordination Agreement, that the Subordination Agreement does not bar this action or prohibit calling a default for defendants' nonpayment under the Note, that the Non-Extension Notice effectively put defendants on notice that it would not be extending the Note, and that defendants' equitable estoppel argument does not raise an issue of fact. Plaintiff also argues that, under the circumstances, its motion should not be denied because it did not state the amount of interest paid after its Non-Extension Notice was issued.

Discussion

Pursuant to CPLR 3213, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint."

> [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." The 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.

Weissman v. Sinorm Deli, Inc., 88 N.Y.2d 437, 444 (1996) (internal citations omitted). "Once the plaintiff submits evidence establishing [its prima facie case], the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense." *Zyskind v. FaceCake Mktg. Techs., Inc.*, 101 A.D.3d 550, 551 (1st Dep't 2012).

In analyzing a CPLR 3211(a)(7) motion to dismiss "where the task is to determine whether the pleadings state a cause of action, the complaint must be liberally construed, the allegations must be taken as true, and all reasonable inferences must be resolved in favor of the plaintiff." *Sterling Fifth Assocs. v. Carpentille Corp., Inc.*, 9 A.D.3d 261, 261 (1st Dep't 2004). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

i. Subordination Agreement

Defendants claiming that they are third-party beneficiaries to a contract must show

> "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost."

Mendel v. Henry Phipps Plaza W., Inc., 6 N.Y.3d 783, 786 (2006) (citation omitted).

Here, the Subordination Agreement is a contract duly executed by J-Bar and Existing Lenders. *See Mendel*, 7 N.Y.3d at 786. The Subordination Agreement was clearly entered into to benefit defendants, as the initial paragraph states, in part, that the purpose of the Subordination Agreement was "to induce [Existing Lenders] . . . now and from time to time hereafter to extend financial accommodations to, or otherwise extend or continue to extend credit to or for the benefit of [defendants]." *See id.*; *LaSalle Nat. Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108 (1st Dep't 2001) (internal citation omitted) ("A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary, and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract."). The Subordination Agreement also displays "'that the benefit to [defendants] [was] sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensation [them] if the benefit is lost.'" *See Mendel*, 6 N.Y.3d at 786 (citation omitted). Therefore, even if defendants were not parties to the Subordination Agreement, they are still third-party beneficiaries to that agreement.[1]

In support of its motion for summary judgment in lieu of complaint, plaintiff has submitted the Note and the Bouderau Affidavit stating that defendants failed to pay interest and principal by January 16, 2016. Therefore, J-Bar has made out its *prima facie* claim for summary judgment in lieu of complaint. *See Kornfeld v. NRX Techs.*, 93 A.D.2d 772, 773 (1st Dep't 1983) ("A prima facie case has been made by proof of the notes and the failure to make payment in accordance with their terms."), *aff'd* 62 N.Y.2d 686 (1984). Accordingly, "the burden shifts to the defendant to

[1] The Subordination Agreement does not vest Dominion with the exclusive right to enforce the Agreement. The only sections that J-Bar quotes related to exclusive enforcement are areas of the Subordination Agreement relating to Dominion and CHMF's exclusive right to enforce their *own* agreements with defendants (i.e., the Dominion Loan Agreement, CHMF Loan Agreement, and agreements related to those agreements, defined as "Ancillary Agreements" within their respective agreements).

submit evidence establishing the existence of a triable issue with respect to a bona fide defense." *Zyskind*, 101 A.D.3d at 551.

In opposition to plaintiff's motion, defendants first argue that the Subordination Agreement prevents this litigation. For the reasons stated on the record on June 15, 2016, I disagree, and find that the Subordination Agreement does not prevent enforcement of the Note.

ii. Non-Extension Notice

Defendants next argue that the Non-Extension Notice was defective. Pursuant to the Note, the Initial Maturity Date would automatically extend for six months unless J-Bar provided a Non-Extension Notice to defendants. In a letter, dated July 16, 2015 and with a subject of "Re: Promissory Note dated July 17, 2014, evidencing the loan of $1,000,000 by Ray Bouderau to Crest Hill Capital, LLC. (the 'Note')," Ron L. Meyers ("Meyers") wrote to Crest Hill, stating "I represent Ray Bouderau, the lender under the above-reference Note, and I write on his behalf." The letter further states, "[t]his letter shall serve as the Non-Extension Notice, pursuant to Section 2.1 of the Note. Accordingly, please be advised that full repayment of all principal, together with all accrued interest, under the Note [is due] on January 16, 2016." In the final paragraph, the letter states, "[p]lease contact me for any further discussion of this matter, particularly if for any reason you feel that this notice is not effective. Your receipt and acceptance of this notice will be assumed if I do not hear from you otherwise in the next ten days."

Defendants argue that the Non-Extension Notice was defective because Meyers, rather than plaintiff sent the notice; there was no showing that Meyers could speak on J-Bar's behalf; Meyers purported to represent Bouderau and not J-Bar; the notice was only addressed to Crest Hill and not Mantis; the notice was not received at the address listed in the Note; and the notice was not sent by certified mail.

J-Bar argues that the Non-Extension Notice, which defendants do not deny receiving, put defendants on notice that the Note would not be extended, and defendants negotiated with plaintiff after receiving the notice. Moreover, defendants' attorney did not contact Meyers denying the effectiveness of the Non-Extension Notice and therefore defendants signaled their acceptance of the Non-Extension Notice as sent. Moreover, based on a subsequent communication with Meyers, defendants' counsel knew that Meyers was acting on behalf of J-Bar.

I do not find defendants' alleged infirmities related to the mailing of the Non-Extension Notice persuasive. First, the Non-Extension Notice was sent to Crest Hill's address as listed in the Note—80 Pine Street, 32nd Floor, New York, New York.[2] Second, defendants argue that the Non-Extension Notice was required to be sent by certified mail. However, the only mention of certified mail occurs in Section 4.5 where the parties agreed that process in a suit or proceeding would be valid if served by certified mail. The Non-Extension Notice was not service of process.[3] The letter, dated July 16, 2015, sufficiently evidences "provi[sion] [of] a [Non-Extension Notice] . . . six months prior to the Initial Maturity Date" as to Crest Hill.

In the landlord/tenant context,

> a notice of termination signed by an agent or attorney who is not named in the lease as authorized to act for the landlord in such matters, and which is not authenticated or accompanied by proof of the latter's authority to bind the landlord in the giving of such notice, is legally insufficient to terminate the tenancy.

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[2] I do not find the Non-Extension Notice to be ineffective simply because the address on the letter omitted the zip code. While the defendants' memorandum of law states, "Defendants have never received copies of the Non-Extension Notice to their notice address by mail," the sections of the affidavits cited in support of this statement refer to receipt by certified mail. *See* Lovette Aff. ¶ 26; Marano Aff. ¶ 38.

[3] During oral argument, counsel for defendants argued that the Non-Extension Notice was not timely because "[u]nder the CPLR, if you mail something, it arrives at a different time than by certified mail." Tr. at 9. Defendants do not make this argument in their papers in opposition, and I am unsure of the point that defendants were trying to assert.

Siegel v. Kentucky Fried Chicken of Long Island, Inc., 108 A.D.2d 218, 220 (2d Dep't 1985), *aff'd* 67 N.Y.2d 792 (1986). "'[T]he [*Siegel*] rule has been applied to cases even in the absence of a landlord-tenant relationship.'" *Equator Int'l, Inc. v. NH St. Investors, Inc.*, 43 Misc.3d 251, 252 (Sup Ct, NY County 2014) (quoting *Arcadia Mgmt., Inc. v. Schillan*, 25 Misc.3d 498, 501 [Nassau Dist Ct 2009]).

Here, the Note requires that J-Bar send the Non-Extension Notice, and plaintiffs have highlighted no provision showing that Meyers had authority to act for J-Bar in sending the Non-Extension Notice. *See* Note (emphasis added) ("unless the *Lender* shall provide a notice"). *Cf. Equator*, 43 Misc.3d at 262 ("The parenthetical phrase, 'upon notice to the Borrower,' even read in conjunction with the rest of Section 2.02, does not require that the Registered Holder or any other specific person or entity give the notice."). Moreover, Meyers's letter does not contain evidence of his authority to act on J-Bar's behalf, and the letter only mentions Bouderau and not J-Bar. *See Siegel*, 108 A.D.2d at 220; *Mfrs. & Traders Trust Co. v. Korngold*, 162 Misc.2d 669, 671 (Sup Ct, Rockland County 1994) ("The notice of default sent by Midcoast not only fails to include any proof of Midcoast's agency, but in fact even fails to mention plaintiff.").

However, there is an issue of fact as to whether Crest Hill knew when it received the Non-Extension Notice that Meyers had authority to act for J-Bar. *See id.* (internal citation omitted) ("Whether plaintiff ever notified defendants Korngold that Midcoast had full authority to act as its agent, or whether circumstances were such that defendants Korngold acquired such knowledge by other means, is an issue of fact precluding summary judgment."); *see also 54-55 St. Co. v. Torres*, 171 Misc.2d 237, 238 (App Term, 1st Dep't 1997) (differentiating *Siegel*); *In re Royal Yard Dyeing Corp.*, 114 B.R. 852, 860 (Bankr. E.D.N.Y. 1990) ("If the tenant had specific knowledge that Mr. Brownstein, or his law firm, were authorized as the landlord's agent to provide such a notice, the *Siegel* rule may not be applicable.").

Despite plaintiff's contentions in its reply/opposition memorandum of law concerning a later communication between Meyers and defendant's counsel and that "[Meyers] . . . was the attorney on the original deal in July 2015," there is a disputed issue of fact as to when Meyers's letter was transmitted, the defendants knew of his authority to speak for J-Bar. This issue of fact, which may dispose of the action with respect to Crest Hill, shall be referred to a referee.

I am unpersuaded by plaintiff's argument regarding the effectiveness of his notice because his letter requested that Crest Hill identify infirmities as to the effectiveness of the notice, and counsel never received notice that his letter was ineffective. Should defendants have received a notice, not from plaintiff or an attorney listed in the Note, "but by another attorney with whom the [defendants] had never previously dealt," then "the [defendants] [were] entitled to ignore [the letter] as not in compliance with the [Note] provisions concerning Notice." *Siegel*, 67 N.Y.2d at 794.

Defendants are correct that the Non-Extension Notice is ineffective as to Mantis because Meyers's letter is only addressed to Crest Hill. Accordingly, pursuant to the Note, the maturity date for Mantis automatically extended, and this action, as against Mantis, is not yet ripe.

iii. Equitable Estoppel

Finally, defendants argue that equitable estoppel should prevent plaintiff from relying on the Non-Extension Notice because "Defendants detrimentally relied upon Plaintiff's promise to extend the maturity date of the Note and did not seek alternative financing with any urgency." Defs.' mem. in opp'n to mot. and in supp. of cross-mot. at 22. They alternatively argue that "[a]t the very least, Plaintiff's promise not to enforce the Maturity Date of the Note raises triable issues of fact that defeat a summary judgment motion." *Id.* Plaintiff denies that defendants' assertions are sufficient to defeat summary judgment.

> In order for estoppel to exist, three elements are necessary: "'(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which

> the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and in some situations, knowledge, actual or constructive, of the real facts.'"

BWA Corp. v. Alltrans Express U.S.A., Inc.,112 A.D.2d 850, 853 (1st Dep't 1985) (citations omitted). Additionally, "[t]he party asserting estoppel must show with respect to himself: '(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position.'" *Id.* (citation omitted).

In opposition to the motion and in support of the cross-motion, defendants submit the affidavits of Edward Lovette ("Lovette") and Michael Marano ("Marano"), defendants' managing members. In those submissions, the affiants state that in conversations with J-Bar, "Plaintiff promised that it would extend the principal another 12 months and not foreclose on the Note, provided that Plaintiff would make all interest payments required by the Note." Lovette Aff. ¶ 16; Marano Aff. ¶ 26. Subsequently, "[i]n direct reliance upon Plaintiff's promise to extend the Note, Defendants did not seek refinancing of the companies with any sense of urgency." Lovette Aff. ¶ 17; *see* Marano Aff. ¶ 27. However, the affiants allege that "[i]n December 2015, Plaintiff reneged on its promise and agreement not to foreclose on the Note so long as interest payments were received. Plaintiff demanded that the Defendants either repay the principal on January 16, 216 or renegotiate the terms of the Note to include both an increased interest rate and 'penalty interest' for extending the Maturity Date." *Id.* at ¶ 18; Marano Aff. ¶ 28 (internal citation omitted).

Here, defendants' self-serving claims concerning alleged forbearance on collecting on the Note, with no competent supporting evidence, are insufficient to raise an issue of fact. *See First N. Mortgagee Corp. v. Yatrakis*, 154 A.D.2d 433, 434 (2d Dep't 1989) (finding affidavit could not prevent summary judgment where "[t]he only evidence offered by the appellant of any such representation [by plaintiff] is the appellant's husband's affidavit which contained unsubstantiated and self-serving statements, based wholly on hearsay"). *Cf. Elmsford-Interstate Bldg. Material*

Corp. v. Elm Ridge Mgmt., Inc., 243 A.D.2d 675, 675 (2d Dep't 1997) (finding affidavit by defendant's president stating "that it possessed a viable counterclaim" could not bar summary judgment because "the bald, conclusory assertions submitted in opposition to the motion were insufficient to demonstrate the existence of genuine issues of material fact").

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint as to defendant Crest Hill Capital LLC is held in abeyance pending receipt of the report of the referee as set forth herein; and it is further

ORDERED that a hearing is directed to be conducted before a Special Referee in order to hear and report on the issue of whether defendants knew or reasonably should have known that Meyer had authority to send the Non-Extension Notice for plaintiff J-Bar Reinforcement Inc. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, the motion shall be disposed of in accordance with the results of the Special Referee's report and this decision.

ORDERED that defendants' cross-motion to dismiss is granted as to Mantis Funding LLC, the Clerk is directed to sever the action and enter judgment accordingly in favor of said defendant; and the motion is otherwise denied.

This constitutes the decision and order of the court.

DATE : 9/21/16

SALIANN SCARPULLA, JSC