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| TD Bank, N.A. v JLS Indus. Inc. |
| 2018 NY Slip Op 31377(U) |
| June 27, 2018 |
| Supreme Court, New York County |
| Docket Number: 652652/2011 |
| Judge: Robert D. Kalish |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

**TD BANK, N.A. successor by merger to COMMERCE
BANK, N.A.,**

INDEX NO. 652652/2011

MOTION DATE 1/8/18

Plaintiff,

MOTION SEQ. NO. 004

- v -

JLS INDUSTRIES INC. and JOHN LOVERDE,

Defendants.

NYSCEF Doc Nos. 77-104 and 107-135 were read on this motion for summary judgment.

Upon the foregoing documents, it is ORDERED that the branch of the motion by Plaintiff TD Bank, N.A., successor by merger to Commerce Bank, N.A. ("TD Bank" or "Lender") pursuant to CPLR 3212 for summary judgment in favor of Plaintiff and against Defendants JLS Industries Inc. ("JLS" or "Borrower") and John LoVerde ("LoVerde" or "Guarantor") on the complaint is granted. The branch of the motion pursuant to CPLR 3211 (b) to strike Defendants' answer and affirmative defenses is resolved as academic.

BACKGROUND

TD Bank commenced the instant action on September 28, 2011 by e-filing a summons and verified complaint. (Mastrogiacomo affirmation, exhibit 1 [Complaint].) The Complaint alleges, in sum and substance, that TD Bank, as Lender, entered into agreements with JLS, as Borrower, and LoVerde, as Guarantor, for a certain line of credit ("LOC") and term loan ("Term Loan"), that Defendants have defaulted on their obligations under the agreements, and that principal plus interest in an amount over \$1,000,000 is due and owing to Plaintiff. TD Bank alleges nine causes of action:

1. against JLS for breach of contract on the LOC;
2. against JLS for account stated on the LOC;
3. against JLS for unjust enrichment on the LOC;
4. against JLS for breach of the term note on the Term Loan;
5. against JLS for account stated on the Term Loan;
6. against JLS for unjust enrichment on the Term Loan;
7. against JLS for possession of the collateral under the LOC security agreement;
8. against LoVerde for breach of the LOC guaranty; and
9. against LoVerde for breach of the Term Loan guaranty.

On December 19, 2011, Defendants filed a verified answer, dated November 3, 2011, and an amended verified answer, dated December 7, 2011, which was accompanied by two affirmative defenses and a counterclaim. (Mastrogiacomo affirmation, exhibit 4 [Amended Answer].) The affirmative defenses refer to “Defendant.” (*Id.* ¶¶ 30–39.) The first paragraph of the first affirmative defense states that “Defendant paid Plaintiff quarterly payments for the term loan in 2008 and in 2009. In July of 2009, Plaintiff advised Defendant that the scheduled payments were improperly and incorrectly set by Plaintiff and subsequently and wrongfully demanded payment of the remaining three quarterly payments to be made immediately.” (*Id.* ¶ 30.) The first affirmative defense next alleges that “Defendant” is not in default and that “Plaintiff’s error should be remedied by a new schedule for payments.” (*Id.* ¶¶ 31, 32.)

The first affirmative defense then alleges that, in the third quarter of 2009, a certain home equity loan and a certain loan consolidation, extension, and modification agreement were contemplated by Plaintiff and “Defendant” but were not consummated. The first affirmative defense alleges that Plaintiff withdrew its home equity loan offer on August 29, 2009, about a month and a half after the offer was made by a commitment letter on July 16, 2009, and “failed to execute” the loan consolidation, extension, and modification agreement, which it had offered on September 30, 2009. (*Id.* ¶¶ 33–35.)

The second affirmative defense alleges that “Defendant was not unjustly enriched since Defendant has made substantial payments and continues to take steps to make additional payments to Plaintiff.” (*Id.* ¶ 38.) The second affirmative defense also alleges that “Defendant applied for a first mortgage loan on his primary residence and tendered \$350,000 to Plaintiff which constituted almost two more quarterly payments under the term loan.” (*Id.* ¶ 37.) The second affirmative defense also alleges that “Defendant has pursued additional construction projects to make additional payments to Plaintiff” and that Plaintiff was aware of a certain “construction DoITT¹” bid “which will enable Defendant to make additional and substantial payments to Plaintiff.” (*Id.* ¶¶ 36, 39.)

Defendants’ counterclaim in their Amended Answer appears to have been for attorney’s fees based upon that “Plaintiff has forced Defendant to retain counsel and expend unwarranted and unnecessary time and monies to defend the instant action, which was pre-maturely commenced.” (*Id.* ¶ 40.) On November 29, 2011, Plaintiff replied to the counterclaim in the answer, which is identical to the counterclaim in the Amended Answer, but the paragraph number changed from 37 in the original answer to 40 in the Amended Answer. (Mastrogiacomo affirmation, exhibit 3.)

On January 19, 2012, TD Bank filed a motion pursuant to CPLR 3212 for summary judgment on the Complaint and counterclaim and pursuant to CPLR 3211 (a) and (b) (7) to strike

¹ Based upon statements elsewhere in the motion submission, it appears to the Court that the acronym “DoITT” refers to the New York City Department of Information Technology & Telecommunications, which, according to its website, “provides for the sustained, efficient, and effective delivery of IT services, infrastructure, and telecommunications to enhance service delivery to the City’s residents, businesses, employees, and visitors.” (NYC Information Technology and Communications, <http://www1.nyc.gov/site/doitt/about/who-we-are.page/> [last accessed June 6, 2018].)

Defendants' answer and affirmative defenses and to dismiss the counterclaim. (NYSCEF Doc No. 7.) In a decision and order dated July 11, 2012, the Hon. Anil C. Singh, J.S.C., denied TD Bank's motion in its entirety. (Mastrogiacomo affirmation, exhibit 5.) In an affidavit submitted in opposition to TD Bank's motion, LoVerde had asserted that "plaintiff erred in calculating the payment schedules" (*id.* at 2), that an agreement was made over email between TD Bank and LoVerde whereby Plaintiff agreed to revise "the loan," (*id.*), and that "this agreement was made upon plaintiff's discovery of the mistake in the payment schedules" (*id.* at 3). LoVerde had also asserted that he had obtained a certain mortgage and paid \$375,000.00 to TD Bank on January 5, 2011, "in consideration of the modification and extension of the loan and or restructuring the payment schedule," which TD Bank allegedly took and after which TD Bank allegedly did not execute the related agreements. (*Id.*) The motion court found that "the sworn affidavit of John Lo[V]erde is sufficient to demonstrate th[e] existence of a genuine issue of material fact as to whether plaintiff miscalculated the payment schedules." (*Id.*)

On March 13, 2013, TD Bank filed a motion pursuant to CPLR 2221 to reargue its summary judgment motion. (NYSCEF Doc No. 30.) On April 8, 2013, TD Bank filed a notice of appeal of the motion court's July 11, 2012 decision and order on the summary judgment motion.² (NYSCEF Doc No. 42.) On January 22, 2014, the motion court granted TD Bank's motion to reargue only with respect to the branch of TD Bank's first motion seeking dismissal of the counterclaim and, upon reargument, dismissed the counterclaim, which the motion court interpreted as having been for attorney's fees. (Mastrogiacomo affirmation, exhibit 6.)

At some point over the next 20 months, the instant action was reassigned to this Court. A preliminary conference was held in this action on October 26, 2015, at which the Court ordered that "[a]ny dispositive motion(s) shall be made on or before . . . 60 days from [the] filing [of the note of issue]." (NYSCEF Doc No. 50.) Subsequently, the parties engaged in discovery, and on March 29, 2017, TD Bank filed the note of issue.³ (Mastrogiacomo affirmation, exhibit 7.)

On May 30, 2017, TD Bank filed the instant motion pursuant to CPLR 3212 for summary judgment in favor of Plaintiff and against Defendants on the Complaint and pursuant to CPLR 3211 (b) to strike Defendants' answer and affirmative defenses.

TD Bank submits two affidavits in support of its motion. One of the affidavits is by Divyesh Kothari, a vice president and commercial workout officer at TD Bank. Mr. Kothari states that he is one of TD Bank's employees principally responsible for managing the LOC and the Term Loan (collectively, the "Loans"). Mr. Kothari further states that the Loans were granted to JLS and were guaranteed by LoVerde pursuant to various written continuing, absolute unconditional guaranties of payment. Mr. Kothari then states that the Loans are in default for failure of Defendants to pay the outstanding balances due and owing on the Loans on their stated maturity dates.

² It appears to the Court that the appeal was never perfected and/or was withdrawn.

³ On July 5, 2017, this Court denied Defendants' motion seq. 003, which sought to strike the note of issue, and granted Plaintiff's cross-motion to restore the matter to the non-jury calendar.

Mr. Kothari states that, on June 8, 2005, TD Bank granted JLS the LOC, in the maximum amount of \$750,000.00, pursuant to the terms of a business loan agreement, dated June 8, 2005 (the "LOC Agreement"). The LOC Agreement, which is submitted as exhibit A to Mr. Kothari's affidavit, lists JLS as Borrower and TD Bank (as Commerce Bank, N.A.) as Lender. The LOC Agreement lists a Loan Date of June 8, 2005, a "Maturity" of June 8, 2006, and a "Principal" of \$750,000.00. The LOC Agreement is signed by LoVerde as "President of JLS Industries Inc."

Mr. Kothari then states that JLS executed and delivered to TD Bank a promissory note, dated June 8, 2005, in the principal amount of \$750,000.00 (the "LOC Note"). The LOC Note, which is submitted as exhibit B to Mr. Kothari's affidavit, lists the same borrower, lender, loan date, maturity date, principal amount, and loan number as the LOC Agreement and is signed by LoVerde in his capacity as President of JLS. The LOC Note states an initial 6.000% interest rate.

Mr. Kothari further states that, as partial collateral security for, and as an inducement to TD Bank granting, the LOC to JLS, LoVerde freely executed and delivered to TD Bank a commercial guaranty, dated June 8, 2005 (the "LOC Guaranty" and, together with the LOC Agreement and the LOC Note, the "Initial LOC Documents"). The LOC Guaranty, which is submitted as exhibit C to Mr. Kothari's affidavit, states that it is a "continuing unlimited guaranty," the amount of which is "unlimited," by LoVerde, as Guarantor, with JLS as Borrower and TD Bank (as Commerce Bank, N.A.) as Lender. The LOC Guaranty further states, in a paragraph titled "Indebtedness Guaranteed," that

"[t]he indebtedness guaranteed by this Guaranty includes any and all of Borrower's indebtedness to Lender and is used in the most comprehensive sense and means and includes any and all of borrower's liabilities, obligations and debts to Lender, now existing or hereinafter incurred or created, including, without limitation, all loans . . . and liabilities of Borrower . . . and any present or future judgments against Borrower . . . ; whether Borrower may be liable individually or jointly with others"

(Aff of Kothari, exhibit C, at 1.) The next paragraph, titled "Duration of Guaranty" states that

"[t]his Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or Borrower, and will continue in full force until all indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full. If Guarantor elects to revoke this Guaranty, Guarantor may only do so in writing. Guarantor's written notice of revocation must be mailed to Lender, by certified mail, at Lender's address listed above or such other place as Lender may designate in writing. . . ."

(*Id.*) The LOC Guaranty then states that LoVerde agrees to provide TD Bank regularly with his personal annual statements, including a balance sheet and income statement, and tax returns. The LOC Guaranty further states, in a paragraph titled "Guarantor's Waivers," that

“[e]xcept as prohibited by applicable law, Guarantor waives any right to require Lender (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including . . . notice of any action or nonaction on the part of . . . Lender . . . in connection with the creation of new or additional loans or obligations”

(*Id.*) The LOC Guaranty is signed by LoVerde.

Mr. Kothari states that, on June 23, 2006, pursuant to the terms of a change in terms agreement and other related documents, dated June 23, 2006 (collectively, the “First Modification Documents”), the LOC was modified, among other things, to increase its maximum amount to \$1,000,000.00, to extend the maturity of the LOC to July 8, 2007, and to increase the principal amount of the LOC Note to \$1,000,000.00. The First Modification Documents, which are submitted as exhibit D to Mr. Kothari’s affidavit, also state, among other things, that the initial interest rate was raised to 8.000%. The First Modification Documents are signed by LoVerde on behalf of JLS.

Mr. Kothari then states that, on July 16, 2007, pursuant to a second change in terms agreement and other related documents, dated July 16, 2007 (collectively, the “Second Modification Documents”, and, together with the Initial LOC Documents and the First Modification Documents, the “LOC Documents”), the LOC was further modified, among other things, to extend the maturity date of the LOC to July 8, 2008 (the “LOC Maturity Date”). The Second Modification Documents, which are submitted as exhibit E to Mr. Kothari’s affidavit, also state, among other things, that the initial interest rate was changed to 7.826%. The Second Modification Documents are signed by LoVerde on behalf of JLS.

Mr. Kothari states that, on July 11, 2007, pursuant to the terms of a loan and security agreement, dated July 11, 2007 (the “Term Loan Agreement”), TD Bank advanced the Term Loan to JLS in the principal amount of \$2,000,000.00. Mr. Kothari then states that, similarly to the LOC, the Term Loan Agreement was accompanied by a term loan note, dated July 11, 2007, in the principal amount of \$2,000,000.00 (the “Term Note”) and a surety and guaranty agreement, dated July 11, 2007 (the “Term Loan Guaranty” and, together with the Term Loan Agreement and the Term Note, the “Term Loan Documents”, and, together with the LOC Documents, the “Loan Documents”). The Term Loan Agreement, Term Note, and Term Loan Guaranty have been submitted as exhibits F, G, and H, respectively to Mr. Kothari’s affidavit. The Term Loan Documents are fully executed and are signed by LoVerde. The Term Loan Guaranty states that LoVerde’s “execution and performance of this Surety and Guaranty Agreement shall not [] violate or result in a default or breach (immediately or with the passage of time) under any contract, agreement or instrument to which [LoVerde] is a party or by which [LoVerde] is bound.” (Aff of Kothari, exhibit H, at 1.)

Mr. Kothari states that, pursuant to paragraph 2.1 (c) of the Term Loan Agreement, JLS agreed to repay the Term Loan in accordance with the following:

“Interest only payments are due for the first six (6) months of the Loan. Thereafter, monthly payments of interest only will be due in addition to minimum quarterly payments of principal in the amount of Two Hundred Fifty Thousand and No/Dollars (\$250,000.00) commencing on February 1, 2008 and continuing each quarter thereafter.[] Payments of interest shall commence on August 1, 2007, and continue on the first (1st) day of each month thereafter. A final balloon payment of all unpaid principal and all accrued and unpaid interest outstanding under the Term Loan shall be due and payable on the Term Loan Maturity Date.”

(Aff of Kothari, exhibit F, at 10.) “Term Loan Maturity Date” is defined as “Twenty-four (24) months from the closing date.” (*Id.* at 9.) The “closing date” is defined as the date upon which the Term Loan shall be made available as may be mutually agreeable to the parties contemporaneously with the execution of the Term Loan Agreement. (*Id.* at 18.) Mr. Kothari states that “[t]he closing date for the Term Loan was July 11, 2007; thus, making the Term Loan Maturity Date July 11, 2009.” (Aff of Kothari at 5 [¶ 15].)

Mr. Kothari states that JLS defaulted under the terms of the LOC Documents by failing to pay the balance due on the LOC on the LOC Maturity Date. Mr. Kothari further states that JLS also defaulted under the terms of the Term Loan Documents by failing to pay the balance due on the Term Loan on the Term Loan Maturity Date. Mr. Kothari further states that JLS has failed to cure its default and that, as of May 25, 2017, \$1,305,056.36 was due and owing to TD Bank from Defendants on the LOC (representing \$872,671.66 in outstanding principal and \$432,384.70 in interest, late fees, and charges) and that \$188,206.56 was due and owing to TD Bank from Defendants on the Term Loan (representing \$125,000.00 in outstanding principal and \$63,206.56 in interest, late fees, and charges). (*See* aff of Kothari, exhibits J and K [LOC and Term Loan Histories].)

Mr. Kothari states that, on or about January 26, 2010, the Loans had been transferred to TD Bank’s workout division, and that discussions were had with Defendants concerning possible workout scenarios, but that no workout ever was consummated and, accordingly, no written documentation evidencing a modification of the Loans was ever signed by TD Bank and Defendants.

The other of the affidavits submitted by TD Bank in support of its motion is by Christina L. Uleano, a vice president and senior commercial relationship manager at TD Bank. Ms. Uleano states that in her prior capacity as a commercial lending offer she was one of TD Bank’s employees principally responsible for managing the Loans. Ms. Uleano further states that she was advised that, in opposition to the prior summary judgment motion, Defendants asserted that TD Bank erred in structuring the payment schedule of the Term Loan and that, as a consequence, JLS was required to pay the balance of the Term Loan sooner than required.

Ms. Uleano then states that she was further advised that, in support of this assertion, Defendants relied on a series of emails between Ms. Uleano and LoVerde to substantiate their claim that there was an error in the repayment schedule of the term loan. Ms. Uleano further

states that Defendants also contended that those emails evidenced an agreement by TD Bank to modify the terms of the LOC Documents and the Term Loan Documents.

The e-mail thread in question is attached to Ms. Uleano's affidavit as exhibit A and are Bates stamped as TD0001393–TD0001395. The first email in the thread is from LoVerde to Ms. Uleano, is dated July 7, 2009, at 9:28 a.m. AST, and bears the subject "ARC Loans." LoVerde allegedly states, "Christina, Have you heard about ARC Loans for Small Business? Is TD involved in this program? Thanks[,] John."

Ms. Uleano allegedly replies, on July 7, 2009, at 3:03 p.m., "I don't know[,] I have never heard of this program[.]" Ms. Uleano then allegedly states, "On a separate note, it appears the way the term loan was structured, it actually matures in a few days (I guess it was done for 2 yrs total)[.]" Ms. Uleano continues, "I am holding off doing anything as far as restructure, since I know your intention is to pay it off with proceeds from the home equity." Ms. Uleano continues, "Just want to be sure the appraisal has been scheduled, and you order title insurance (I understand someone left you a vm on this). I can assist with the title insurance if you need[.]"

LoVerde allegedly replies, on July 7, 2009, at 3:11 p.m. AST, "appraisal is Thursday; I have called Mark Slama to see if he can get the title insurance reissued. What happens if they don't approve the HELOC? John." Ms. Uleano, allegedly replies, on July 7, 2009, at 3:25 p.m., "We will re do the term loan[,] Just holding off for now." LoVerde allegedly replies, on July 7, 2009, at 3:34 p.m., "Ok thanks[.]"

Ms. Uleano argues in her affidavit that it is untrue that there was an error in the payment schedule of the Term Loan. The term sheet, dated May 31, 2007, was allegedly issued by TD Bank and agreed to and accepted by JLS and is attached as exhibit B to Ms. Uleano's affidavit. Ms. Uleano then states that the term on the term sheet was 24 months from closing and that the closing date was July 11, 2007.

Ms. Uleano then argues that her statements in the emails refer to the Term Loan, only, and that there was no mention of or discussion regarding the LOC. Ms. Uleano argues that any claim made by Defendants that the emails demonstrated an agreement to modify the terms of the Loans is false. Ms. Uleano then states that, for the several months following the emails, efforts were undertaken by TD Bank to underwrite an extension of the maturity date of the Term Loan, but that due to JLS's continued deteriorating financial condition, such an extension was not approved and never occurred. After these efforts, the Loans were transferred to the workout division in an attempt to fashion an acceptable repayment plan, but all such attempts failed.

Plaintiff argues in support of its motion for summary judgment that it has shown prima facie entitlement to judgment as a matter of law by means of the affidavits of Mr. Kothari and Ms. Uleano. Plaintiff further argues that Defendants' answer admits that JLS was granted the LOC but that the answer denies that the LOC Documents were signed. Plaintiff then cites to LoVerde's EBT, excerpts from which were annexed to the affirmation in support of the motion as exhibit 8, wherein LoVerde confirmed that the signatures on the LOC Agreement, LOC Note,

and First Modification Documents were his. Plaintiff then argues that Defendants' answer admits that LoVerde executed the Term Loan Documents.

Plaintiff then argues, in sum and substance, that TD Bank did not improperly and incorrectly schedule the quarterly payments due on the Term Loan or erroneously demand payment on the Term Loan. Plaintiff argues that the Term Loan Maturity Date was July 11, 2009. Plaintiff further argues that a Term Loan Closing Statement, annexed to the moving papers as exhibit I to Mr. Kothari's affidavit, states that the closing date was July 11, 2007, states that the Term Loan Maturity Date was July 11, 2009, and is signed by LoVerde on behalf of JLS.

Plaintiff further argues that the commitment letter from Plaintiff regarding the home equity loan, annexed to the moving papers as exhibit 9 to the affirmation in support, states unequivocally that TD Bank reserves the right to revoke the commitment at any time. Plaintiff then argues that the Loan Documents required a signed writing to modify their terms and that no such modification was made to the Loan Documents extending the maturity dates of the LOC or the Term Loan beyond July 8, 2008, and July 11, 2009, respectively.

Defendants argue in their opposition papers that the Court should not consider the instant motion because Plaintiff is attempting to resubmit virtually the same summary judgment motion that had been previously denied in 2012. Defendants further argue that Plaintiff has not submitted any new evidence that was not available at the time of the prior summary judgment motion. Defendants further argue that issues of fact remain regarding whether Plaintiff erred in formulating the payment schedule, and Justice Singh's initial July 11, 2012 finding of an issue of fact is the law of the case. Defendants then argue that \$500,000.00 was due on July 11, 2009, instead of the regular quarterly payment of \$250,000.00 and that a certain home equity loan and a certain loan consolidation, extension, and modification agreement were contemplated by Plaintiff and Defendants to resolve this issue but were not consummated.

Defendants cite to an email, dated March 31, 2008, allegedly from LoVerde to Ms. Uleano, stating that JLS's "first loan repayment of \$250,000.00 is due to Commerce today" and seeking to make arrangements to transfer funds to cover the payment due. Ms. Uleano then allegedly replies to the email stating "I will handle it for you [a]nd thanks for the payment!" (Cucco affirmation, exhibit E.) Defendants argue this shows there was a mistake because the first payment was not made on February 1, 2008. Defendants then cite to the July 7, 2009 emails allegedly between LoVerde and Ms. Uleano for the propositions that TD Bank acknowledged their mistake, offered a home equity loan to rectify the scheduling error, and stated that they would revise the Term Loan. Defendants next cite to the commitment letter as an "offer and approval of the home equity line of credit" ("HELOC"). (Affirmation of Cucco at 10.)

Defendants then cite to an email, dated July 14, 2009, allegedly from LoVerde to Ms. Uleano with the subject "JLS Loans." (Cucco affirmation, exhibit I.) LoVerde allegedly stated that he did not see the interest for either the LOC or the Term Loan deducted and asked to be advised. Ms. Uleano allegedly replied, "Correct, I will call u this afternoon to explain, All good." Defendants next cite to the payment of \$375,000.00 to TD Bank, on January 5, 2011, as creating an issue of fact as to whether the payment and TD Bank's acceptance thereof constitutes a

waiver and serves as consideration for an extension of the loan term or the amended and restated term loan note. (Cucco affirmation, exhibit J.) Defendants last cite to unexecuted loan modification documents in support of their argument that TD Bank prevented Defendant's timely performance and allowed Defendants to rely on resolutions that were promised, stalled, and never implemented. (Cucco affirmation, exhibit K.)

Defendants argue, in sum and substance, that Defendants relied to their detriment on solutions from TD Bank that never materialized, but that both sides intended to implement, while allowing interest to accrue on the Loans, ultimately leading to the commencement of this action.

Plaintiff argues in its reply papers that Defendants have made no argument as to their default on payment of the amount due and owing to TD Bank from Defendants on the LOC. Plaintiff further argues that even if the payment schedule on the Term Loan required two payments in close proximity in time in advance of the Term Loan Maturity Date, this was not an error. Plaintiff further argues that no modification was made to the Loan Documents regardless of Plaintiff's willingness at one time or another to accommodate a new payment schedule. Plaintiff then argues that Defendants' new submission consists only of an attorney affirmation.

Plaintiff argues, in sum and substance, that the instant motion is not duplicative of the prior summary judgment motion and is substantively valid based upon the affidavits of Mr. Kothari and Ms. Uleano. Plaintiff further argues that the denial of its pre-discovery motion for summary judgment should not preclude consideration of the instant motion based upon the law of the case doctrine. Plaintiff argues that now, after discovery has been completed, no evidence has been submitted to show that there was a payment schedule associated with the LOC or that the Term Loan Maturity Date was not July 11, 2009, or that the full amount was not due and owing to TD Bank from Defendants as of that date by means of a final balloon payment. Plaintiff then argues that it was within its rights when it revoked the HELOC offer due to JLS's diminished payment ability, as evidenced by Ms. Uleano's affidavit. Plaintiff further argues that it did not execute the proposed loan modification documents due, among other things, to LoVerde's failure to execute the documents and Defendants' failure to comply with conditions precedent in paragraph 7 of the documents. As such, Plaintiff reiterates its argument that it has shown prima facie entitlement to judgment as a matter of law and argues that Defendants have failed to raise a genuine issue of material fact.

At the January 8, 2018 oral argument on the instant motion, the parties reiterated the arguments made in their papers. As a preliminary matter, the Court questioned the timeliness of the instant motion, which was to be filed within 60 days of the filing of the note of issue. There was some concern from the Court that the motion had been filed just beyond the 60-day time limit.

Notably, at the oral argument, counsel for Defendants stated that LoVerde signed the proposed 2010 loan modification documents and "forwarded over \$325,000.00 to cement the deal. Then [TD Bank] took the money and refused to sign it." (Tr at 29, lines 22-24.) Counsel for Defendants was then asked where the signed copy was and stated "I have a copy. I didn't keep it on here but of course [LoVerde] signed it." (Tr at 30, lines 8-9.) Counsel for Defendants

would again state that LoVerde executed the agreement. (Tr at 33, lines 4–9.) Counsel for Plaintiff stated in reply that LoVerde never signed the documents. (Tr at 44, lines 4–20.) Counsel for Defendants then appears to admit that LoVerde never signed the documents, stating that this was “[b]ecause [TD Bank] took away the home loan,” which TD Bank then disputed. (Tr at 44, line 21–26.) The Court, having heard the oral argument, stated that, in light of that discovery had been completed, although in the prior summary judgment motion the motion court found an issue of fact, the Court was “not sure at the moment what the issue of fact is.”

DISCUSSION

As a threshold matter, the Court must determine whether the instant motion was timely. A so-ordered stipulation by and between the parties, dated February 6, 2017, indicated “dispositive motion(s) to be filed within 60 days of the filing of the NOI.” The note of issue in this case was filed on March 29, 2017. Sixty days from the filing of the note of issue was Sunday, May 28, 2017. The following Monday, May 29, 2017, was Memorial Day. On the following Tuesday, May 30, 2017, Plaintiff filed the instant motion. As such, pursuant to General Construction Law § 25-a, the motion was timely. (*See also* NYSCEF Doc No. 135.)

As a second threshold matter, the Court must determine whether to consider the instant motion, the second motion for summary judgment in the instant action, on the merits, or whether the Court should deny the instant motion based upon the common law rule which disfavors successive summary judgment motions.

“As a general rule, parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment.” (*Chong Min Mun v Soung Eun Hong*, 109 AD3d 732, 732 [1st Dept 2013].) “[M]ultiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or sufficient cause.” (*Public Serv. Mut. Ins. Co. v Windsor Place Corp.*, 238 AD2d 142, 143 [1st Dept 1997].) “[T]he policy against multiple summary judgment motions has no application where [] the first motion, made before discovery, is denied on the ground of the existence of a factual issue which, through later uncovering of the facts, is resolved or eliminated.” (*Freeze Right Refrig. and A.C. Servs., Inc. v City of New York*, 101 AD2d 175, 181 [1st Dept 1984]; *see also Sansol Indus., Inc. v 345 E. 56th St. Owners, Inc.*, 276 AD2d 370, 371 [1st Dept 2000] [holding that a plaintiff’s reliance upon the policy against successive summary judgment motions was misplaced where previously extant factual issues had been obviated through intervening discovery].) “Sufficient cause to except to the rule exists inasmuch as the record . . . demonstrates that the matter can be further disposed of without burdening the resources of the court and movants with a plenary trial. If a dispositive point can be reached, it should be.” (*Varsity Tr., Inc. v Board of Educ. of City of New York*, 300 AD2d 38, 39 [1st Dept 2002].)

In the instant action, the Court finds that nearly five years had passed from the date of the decision and order on the first summary judgment, July 11, 2012, to the filing of the note of issue, on March 29, 2017. Plaintiff’s new motion permits the Court to perform an accounting of all the proof in the case. Further, the Appellate Division has adopted a pragmatic view of

successive summary judgment motions, reasoning that where such a motion submission resolves a prior issue of fact and may further dispose of the matter without a trial, a motion court should find sufficient cause to hear the new motion. Based upon the Court's decision on the motion as discussed more fully below, the Court finds that there exists sufficient cause to consider the instant successive summary judgment motion on the merits. As such, the Court will now consider Plaintiff's motion pursuant to CPLR 3212 for summary judgment in favor of TD Bank and against JLS and LoVerde.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Based upon the papers and the oral argument on the instant motion, the Court finds that Plaintiff has shown prima facie that JLS and LoVerde, jointly and severally, owe \$1,305,056.36 to TD Bank on the LOC as of May 27, 2017. Plaintiff has further shown prima facie that JLS and LoVerde, jointly and severally, owe \$188,206.56 to TD Bank on the Term Loan. Plaintiff has shown prima facie that the LOC Maturity Date was July 8, 2008, and the Term Loan Maturity Date was July 11, 2009. Plaintiff has further shown prima facie that Defendants have defaulted in their obligations to pay off the Loans in full on their respective maturity dates. Plaintiff has further shown prima facie that the Loan Documents were never modified, in 2010 or otherwise, in any way, including to consolidate, and/or to extend the repayment dates, of the Loans. The Court finds that the July 2009 emails were not a signed writing that could serve to modify the Loan Documents, which were fully integrated agreements, by their own modification terms. The Court finds further that the LOC Guaranty was a continuing, unlimited guaranty that was never revoked and that covers both the LOC and the Term Loan.

The Court finds further that Defendants have failed to raise a genuine issue of material fact in response. Insofar as the motion court on the first summary judgment motion had found that "the sworn affidavit of John Lo[V]erde is sufficient to demonstrate th[e] existence of a genuine issue of material fact as to whether plaintiff miscalculated the payment schedules," the affidavits of Mr. Kothari and Ms. Uleano and the exhibits annexed thereto have eliminated this

as a genuine issue of material fact. In the first instance, reference to a payment schedule applies only to the Term Loan. Further, although counsel for Defendants argued that Defendants were burdened by suddenly owing \$500,000.00 on the term loan as of the Term Loan Maturity Date, July 11, 2009, as a result of a miscalculated payment schedule, TD Bank regularly accepted payments, including late payments, regardless of the payment schedule, and assessed late fees accordingly.

To wit, according to the Term Loan History, the Term Loan principal amount of \$2,000,000 was advanced to JLS on July 12, 2007. Beginning on August 1, 2007, in accordance with the Term Loan payment schedule in paragraph 2.1 (c) of the Term Loan Agreement, JLS began making the interest-only payments that were due for the first six months of the loan. Thereafter, payment of the outstanding remaining interest was made to TD Bank on or about the first of the month—on August 31, 2007, October 1, 2007, November 1, 2007, November 30, 2007, December 31, 2007, February 1, 2008, and February 29, 2008. Quarterly payments of \$250,000.00 on the outstanding principal balance, which were due beginning on February 1, 2008, did not begin until March 31, 2008, when the first quarterly payment of \$250,000.00 was made, reducing the outstanding principal balance to \$1,750,000.00. Thereafter, on May 16, 2008, and June 16, 2008, TD Bank assessed late fees on the Term Loan of \$367.71 and \$369.60, respectively.

On or about July 2, 2008, the second quarterly payment of \$250,000.00 was made, and the interest was paid off in full, leaving an outstanding principal balance of \$1,500,000.00. The next quarterly payment of \$250,000.00 was made on September 30, 2008, leaving an outstanding principal balance of \$1,250,000.00. The next payment on principal was not made until April 3, 2009, in the amount of \$250,000.00, and another was made on April 7, 2009, in the amount of \$250,000, leaving an outstanding principal balance of \$750,000.00. No late fees appear to have been assessed in the interim. On July 1, 2009, the last payment on principal before the Term Loan Maturity Date was made in the amount of \$250,000.00, leaving an outstanding principal balance of \$500,000.00. On July 27, 2009, a late fee of \$37,607.76 was assessed, but it was waived as of September 25, 2009. The earlier accrued late fees of \$737.31 were waived on September 26, 2009. No further late fees were assessed.

Based upon the Term Loan Agreement, the first quarterly payment was due on February 1, 2008, and subsequent payments were due every three months thereafter. Accordingly, the remaining quarterly payments would have been due prior to the Term Loan Maturity Date on May 1, 2008, August 1, 2008, November 1, 2008, February 1, 2009, and May 1, 2009. This is a total of six quarterly payments due before the final balloon payment due on the Term Loan Maturity Date, July 11, 2009.

Based upon the Term Loan History, JLS and/or LoVerde made a total of six quarterly payments before the Term Loan Maturity Date. In accordance with the Term Loan Agreement, the balloon payment of the outstanding principal balance and remaining interest was due. There does not appear to have been any lasting penalty for late payment of any amount due on the Term Loan. Further, the Term Loan Agreement did not purport to structure payments such that a final quarterly amount of \$250,000.00 would be all that was due and owing as of the Term Loan

Maturity Date, because the Term Loan was effectively structured to include a six-month grace period on principal payments; only interest payments were required for the first six months. It follows that, if no principal was due for the first six months of the Term Loan period, then, at the end of the term loan, assuming timely quarterly payments were made, six months' worth of principal would be due and owing to TD Bank from Defendants.

This is exactly what occurred. That LoVerde emailed TD Bank on March 31, 2008, stating that the first principal payment was due that day, indicates that it was in fact LoVerde, not TD Bank, that miscalculated as to when payments of principal were due to Plaintiff under the Term Loan. That TD Bank accepted principal payments as they came, and received, by the Term Loan Maturity Date, \$1,500,000.00 in principal payments, which was exactly as much payment of principal as was expected under the Term Loan Agreement by the Term Loan Maturity Date, and forgave any and all late fees charged on the Term Loan, establishes unambiguously that TD Bank did not err in calculating any payment schedule.

According to the LOC and Term Loan Histories, on or about the LOC Maturity Date, the LOC had an outstanding principal balance of \$1,000,000.00 and a remaining interest balance of \$3,682.67; and on the Term Loan Maturity Date, the Term Loan had an outstanding principal balance of \$500,000.00 and a remaining interest balance of \$1,976.78. The LOC History reflects that the last payment made after the LOC Maturity Date was on November 3, 2010, in the amount of \$30,000.00, which was applied to the outstanding principal balance. As of May 30, 2017, the interest rate on the LOC was 6.49500%. The Term Loan History reflects that the only payment made after the Term Loan Maturity Date on the Term Loan was on January 5, 2011, in the amount of \$375,000.00. As of May 25, 2017, the interest rate on the Term Loan was 6.25%. As such, the Court will award interest at the last prior reported rate on the LOC and the Term Loan per the LOC and Term Loan Histories until the date of this decision and order.

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CONCLUSION

Accordingly, it is

ORDERED that branch of the motion by Plaintiff TD Bank, N.A., successor by merger to Commerce Bank, N.A. ("TD Bank") pursuant to CPLR 3212 for summary judgment in favor of TD Bank and against Defendants JLS Industries Inc. ("JLS") and John LoVerde ("LoVerde") on the complaint is granted; and it is further

ORDERED that the branch of the motion pursuant to CPLR 3211 (b) to strike Defendants' answer and affirmative defenses is resolved as academic; and it is further

ORDERED that movant is directed, within 20 days of entry of this order, to serve a copy of this order with notice of entry upon Defendants and upon the Clerk, who is directed to enter judgment in favor of TD Bank and against JLS and LoVerde, jointly and severally, in the amount of \$188,206.56, at the rate of 6.25% per annum, from May 25, 2017, until the date of the decision and order on this motion, and thereafter at the statutory rate, and in the amount of \$1,305,056.36, at the rate of 6.495% per annum, from May 30, 2017, until the date of the decision and order on this motion, and thereafter at the statutory rate, as a single judgment, the sum to be calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon the presentation of an appropriate bill of costs.

The foregoing constitutes the decision and order of the Court.

Dated: June 27, 2018
New York, New York


HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE