SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 36

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TAXI MEDALLION LOAN TRUST III,

Plaintiff,

Index No. 656081/2017
Motion Seq. No. 001

DECISION and ORDER

- against -

D. & G. TAXI INC., RONIT NAVARO A/K/A RONIT NAVARO LAPID and JOSEPH BOUTON,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 61, 62, 64
were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 61, 62, 64
were read on this motion to/for JUDGMENT - SUMMARY.

Doris Ling-Cohan, J.S.C.:

This action involves a loan dispute between plaintiff Taxi Medallion Loan Trust III, the lender, defendant D. & G. Taxi Inc. (D&G), the borrower, and defendant-guarantors of the loan, Ronit Navaro a/k/a Ronit Navaro Lapid (Guarantor 1) and Joseph Bouton (Guarantor 2).

Plaintiff seeks (i) a summary judgment against D&G and Guarantor 1 (Answering Defendants), pursuant to CPLR 3212; (ii) a default judgment against Guarantor 2, pursuant to CPLR 3215; (iii) a money judgment against all defendants; and (iv) an order of replevin with respect to certain

collateral, pursuant to UCC § 9-609 (a) (1) and (b) (1). The Answering Defendants oppose plaintiff's motion, and Guarantor 1 has filed a cross motion seeking dismissal of this action as against her. For the reasons stated below, plaintiff's motion is granted to the extent set forth herein, and the cross motion is denied.

BACKGROUND

The following statements are derived primarily from plaintiff's complaint (NYSCEF #1; Complaint). In connection with a loan, D&G executed a promissory note, dated May 28, 2013, in the amount of $1,142,000 (Note) in favor of Medallion Funding LLC. The Note was thereafter assigned to plaintiff (*id.*, ¶ 5). Pursuant to the Note, which accrued interest at 3.35% per annum, D&G was required to make monthly payments of principal and interest, with a balloon payment due on the maturity date of May 28, 2016 (*id.*, ¶¶ 6-7). D&G also signed a security agreement granting plaintiff a lien and security interest in collateral, including, without limitations, New York City Taxi Medallions bearing numbers 9J10 and 9J89, as well as two taxicabs (*id.*, ¶ 8). Plaintiff filed a UCC-1 financing statement for its lien and security interest in collateral (*id.*, ¶ 9). As additional consideration for the loan, Guarantor 1 and Guarantor 2 each signed a guaranty in favor of plaintiff, guaranteeing the full and prompt payment to plaintiff of all amounts due under the Note and the security agreement (*id.*, ¶ 10).

On June 7, 2016, plaintiff and all defendants entered into a note modification agreement (Modification Agreement), which extended the maturity date of the Note from May 28, 2016 to August 28, 2016 (*id.*, ¶ 11). D&G defaulted on the loan by failing to pay the full amount of the Note on the maturity date, and by letter dated September 8, 2017, plaintiff notified defendants of

the default and demanded full payment of the Note (*id.*, ¶¶ 12-13). Defendants failed to pay the outstanding principal and accrued interest under the Note (*id.*, ¶ 14).

The complaint asserts seven causes of action: breach of contract (first), account stated (second), unjust enrichment (third), replevin (fourth), breach of guaranty (fifth), temporary restraining order and permanent injunction (sixth), and attorneys' fees and expenses incurred by plaintiff in enforcing and collecting upon the Note (seventh). In response to the complaint, Answering Defendants filed an answer asserting a general denial of the complaint's allegations, as well as thirteen (13) affirmative defenses (NYSCEF # 14).

In the within motion, plaintiff filed supporting affirmations/affidavits (NYSCEF # 20-21) and a memorandum of law (NYSCEF # 33; Moving Brief), together with various exhibits. In response, Answering Defendants filed affirmations/affidavits in opposition, and Guarantor 1 filed a cross motion to dismiss this action as against her, along with exhibits and a memorandum of law (NYSCEF # 37-42). Plaintiff filed a reply memorandum of law in further support of this motion and in opposition to the cross motion (NYSCEF #44; Reply Brief). Guarantor 2 has neither answered the complaint, nor appeared in this action, and plaintiff seeks a default judgment against Guarantor 2, pursuant to CPLR 3215.

Notably, in its moving papers, plaintiff states that if this Court grants summary judgment with respect to the first (breach of contract), fourth (replevin) and fifth (breach of guaranty) causes of action, it will withdraw or waive the remaining causes of action of the complaint (NYSCEF # 33, Moving Brief at 1, n 1; NYSCEF # 20, Counsel Affirmation, ¶ 22).

APPLICABLE LEGAL STANDARDS

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals has noted the following:

> "As we have stated frequently, 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (internal citations omitted)"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant must tender evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment (*Gammons v City of New York*, 24 NY3d 562, 569 [2014]).

The courts scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted, because entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy,* 35 NY2d 361, 364 [1974]). In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Also, the Court of Appeals has held that bare allegations or conclusory assertions are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]).

ANALYSIS

I. Claims for Breach of Contract/Breach of Guaranty and Cross Motion to Dismiss

Plaintiff's moving brief is more akin to support a motion to strike affirmative defenses than for summary judgment. Indeed, the moving brief argues that all affirmative defenses asserted in Answering Defendants' answer should be stricken or dismissed. Nonetheless, for purposes of this motion, the most relevant portion of the brief addresses Answering Defendants' contention, by way of the eleventh affirmative defense, that there was no default under the Note and the security agreement because the loan documents had allegedly been orally modified. Seeking dismissal of such affirmative defense, plaintiff argues that, because the Modification Agreement expressly provides that it "may not be modified or terminated except by a writing signed by the parties," the oral modification defense has no merit, as "Answering Defendants have not alleged that any writing exists which further modifies this Loan" (NYSCEF #33 at 10). Plaintiff also argues that the oral modification defense is invalidated by New York General Obligations Law, which provides, in effect, that an agreement or promise to modify a contract or an obligation shall not be invalid for lack of consideration, provided that the agreement or promise "shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge . . . ." (*id.* at 11, citing GOL § 5-1103). Plaintiff further argues that, because the statute expressly requires a signed writing where parties seek to modify an obligation without consideration, the absence of a signed writing in the instant case bars the alleged oral modification defense (*id.*).

In opposition, Answering Defendants contend that, because plaintiff continued to accept reduced monthly payments on the Note for over one year after its maturity date and plaintiff never demanded full payment of the Note, even though the balloon payment had become due, such conduct evinced an oral agreement to modify the loan, despite the prohibition against oral

amendment in the Modification Agreement (NYSCEF #42; Opposition Brief, at 1-3). Answering Defendants rely primarily on the case of *Rose v Spa Partnership* (42 NY2d 338 [1977]) for the proposition of law that, "a partial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the statutory requirement of a writing," and that in addition to the partial performance doctrine, "[o]nce a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification" (Opposition Brief, at 3, quoting *Rose*, 42 NY2d at 344). Thus, answering defendants contend that plaintiff's acceptance of the reduced payments on the Note after the maturity date was "unequivocally referable" to the oral modification, and evinced adherence to the oral agreement to modify the loan (*id.*). Answering Defendants also contend that the Note is not in default because "no prior notice of default was ever delivered by Plaintiff to Defendants" (*id.* at 1).

In its reply brief, plaintiff argues that the holding in *Rose* is inapplicable to this case because (i) the facts in *Rose* indicated that there were writings between the parties which, in part, memorialized the alleged oral modification, and Answering Defendants do not even allege or state the actual terms of the purported oral modification; (ii) Answering Defendants' conduct was not "unequivocally referable" to the alleged oral modification "because there are no proposed, modified terms to refer to," as there is "no allegation that the Maturity Date was [further] extended or that the parties even discussed the amount or duration of any future payments;" and (iii) Answering Defendants were "already obligated to pay the amount due under the Note, and, thus, any payments made by them after the Maturity Date [neither]

constitutes a material alteration of their position", nor demonstrates "any significant and substantial reliance on the alleged agreement to modify" (NYSCEF #44; Reply Brief, at 3-5, citing, *inter alia*, *New York State Urban Dev. Corp. v Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 771 [2d Dept 1983] ["bare assertion that certain representatives of the mortgagee made such a promise is not enough to create an issue of fact"]). Thus, plaintiff argues that Answering Defendants' claim of an alleged oral modification is not supported by the facts and the law, and does not create an issue of fact sufficient to defeat the instant motion (Reply Brief, at 6).

Plaintiff's arguments are persuasive, particularly when viewed in the context of the express language of the Modification Agreement, which, provides, in relevant part, that "[n]otwithstanding anything to the contrary contained herein, all payments that are or may become due and payable under the Note . . . shall be due and payable in accordance with the terms of the Note, without giving effect to the modification to the Note herein . . ." and "[a]ll of the terms and conditions of the Security Agreement and, as modified by this Agreement, all of the terms and conditions of the Note, are hereby ratified and confirmed and shall continue in full force and effect" (Modification Agreement, ¶¶ 2[b] and [3]). The foregoing, indicates that the parties agreed, in writing, that the rights of plaintiff (as lender), and the obligations of D&G (as borrower), under the Note and the security agreement would not be changed or varied by the Modification Agreement. Thus, plaintiff's acceptance of the reduced monthly payments, after the maturity date, is not be viewed as its forbearance from strictly enforcing the terms of the loan.

Answering Defendants' argument that evidence of monthly statements and reduced payment checks (NYSCEF # 40) indicates that the loan was modified by an alleged oral agreement to refinance the loan, and that, the loan was not not in default as long as payments were being made is without merit (Navaro Affidavit, ¶¶ 11, 13). Notably, in *Waterways Ltd. v Barclays Bank PLC* (202 AD2d 64, 72-75 [1st Dept 1994]), the appellate court, found without merit, the mortgagor's argument that the mortgage loan had been modified by a new agreement, and granted summary judgment in favor of the mortgagee, because the underlying loan agreement stated that the mortgagee's delay or forbearance would not constitute a waiver of its rights, and that the mortgagor's proffered evidence merely showed, at best, "an agreement to agree to forbear or modify the loan agreement once certain conditions had been met." In this case, the security agreement likewise provided that "[n]o delay on the part of the Lender in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof" (NYSCEF #3, ¶ 14). Moreover, as pointed out by plaintiff (and the undisputed facts reflect), Answering Defendants have neither alleged, nor stated the terms of the purported oral agreement. Hence, the purported agreement could not constitute a further modification of the Modification Agreement and, at best, might be deemed an agreement to agree, while plaintiff exercised its discretion to forbear for a limited time on enforcing the terms of the loan and reserving its contractual rights.

Answering Defendants' argument that no prior notice of default was given by plaintiff is equally without merit. By letter dated September 8, 2017, plaintiff's counsel notified defendants that "the loan is in default due to your failure to make the balloon payment due on August 28, 2016" and that "[i]f Lender does not receive the full amount due under the Loan documents

within five days of the date of this letter, it will commence an action against you" (NYSCEF # 27). It is undisputed that Answering Defendants failed to make the balloon payment due on August 28, 2016, which constituted a default under the Note and the security agreement. Therefore, summary judgment is granted with respect to the complaint's breach of contract (first) cause of action against D&G, on the issue of liability.

In the cross motion, Guarantor 1 (Navaro) contends that, because at the time the Modification Agreement was signed on June 7, 2016, no new guaranty was signed by her with respect to the modified Note obligation, she "did not agree to continue or extend [her] personal guarantee" dated May 28, 2013 (NYSCEF # 38, ¶ 14). Thus, Guarantor 1 contends that "a guarantor's obligation cannot be altered without its consent; if the original note is modified without its consent, the guarantor is relieved of its obligation" (NYSCEF #42, Opposition Brief, at 5, citing *White Rose Food v Saleh*, 99 NY2d 589 [2003]).

The facts herein do not support defendant Navaro's contention. Notably, in the Modification Agreement, Guarantor 1 not only signed it in her capacity as "President and Secretary" of D&G, but also in her capacity as "Stockholder and Guarantor." By signing in her capacity as Guarantor, it evidenced her consent to the terms of the modified Note, and, thus, the Note modification did not relieve her of the obligations under her personal guaranty dated May 28, 2013. More importantly, her personal guaranty stated, in relevant part, that: "The Lender may at any time and from time to time . . .without the consent of or . . . notice to the undersigned [guarantor] . . . without impairing or releasing the obligations of the undersigned hereunder . . . change or extend the time of payment of, renew or alter, any liability of the Borrower . . . ." (NYSCEF # 31; personal guaranty at 1). Because the guaranty permitted plaintiff to modify the

terms of the Note without Guarantor 1's consent, her contention to the contrary is defeated by the very terms of the document she signed. Indeed, in *White Rose Food*, the case relied upon by Guarantor 1, the Court of Appeals held that the guarantor was not relieved of his obligations based upon a similar provision in the loan documents. Accordingly, the relief requested in Guarantor 1's cross motion is denied.

Further, because it is undisputed that Guarantor 1 failed to fulfill her obligations of the guaranty, as the Note was in default and she failed to pay plaintiff the amount due, summary judgment is granted with respect to the complaint's breach of guaranty (fifth) cause of action against her, on the issue of liability.

II. The Replevin Cause of Action

As noted, the instant motion seeks an order of replevin (fourth cause of action). "The action of replevin is essentially possessory in nature" and is "a provisional remedy which may be used as an incident to an action to recover a chattel" (*Americredit Fin. Servs., Inc. v Decoteau*, 103 AD3d 761, 762 [2d Dept 2013] [internal citations omitted and quotation marks in original]). To state a replevin cause of action, "a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff" (*Khoury v Khoury*, 78 AD3d 903, 904 [2d Dept 2016]). Further, it has been held that, on a motion for an order of seizure pursuant to Article 71 of the CPLR, "a plaintiff must demonstrate a likelihood of success on its cause of action for replevin and the absence of a valid defense to its claim" (*Great Am. Ins. Co. v Auto Mkt. of Jamaica, N.Y.*, 133 AD3d 631, 632 [2d Dept 2015][internal citations omitted]).

In this case, plaintiff, by its counsel, states that plaintiff only "seeks an order of replevin pursuant to NY Uniform Commercial Code," and not an order of seizure pursuant to Article 71," and, thus, is not required to post a bond (NYSCEF #20; Counsel Affirmation, at 2, n 3). Yet, in plaintiff's proposed order and judgment (NYSCEF #18), a form of which is attached to the motion, plaintiff proposes that this court direct a sheriff to "replevy the Medallions and deliver same into the possession of Plaintiff" and that the sheriff be "authorized to break open, enter and search for the Medallions any place where they may [sic] found." Notably, the requested judicial relief may be granted in an order of seizure pursuant to CPLR 7102, only after a movant's fulfilment of the enumerated statutory requirements. Here, plaintiff has failed, among other things, to submit an affidavit setting forth all of the statutory elements required by CPLR 7102 (c) in support of the relief sought.

Indeed, plaintiff's moving brief contains little discussion on the law of replevin, except for a short citation to *Khoury,* along with a brief reference to section 9-609 of the Uniform Commercial Code (UCC), and asserts that "after a default the secured party may take possession of the collateral" (NYSCEF #33; Moving Brief, at 4). Apart from failing to sufficiently set forth the applicable laws and facts (such as a defendant's unlawful withholding of property) to support this cause of action, plaintiff has not identified any provision or condition in the security agreement that grants plaintiff, as the lender, a superior right or title to the collateral vis-a-via the borrower. Moreover, although plaintiff states that it has filed a UCC-1 financing statement for the secured transaction (NYSCEF #30), it does not assert (to the extent applicable), whether it continues to hold a perfected security interest in the collateral under the UCC. Furthermore, plaintiff's papers do not indicate how the collateral will be disposed of, when and after it is

seized by a sheriff or marshal, including whether plaintiff intends to foreclose on the collateral and apply the proceeds to reduce the debt, or to retain the collateral in satisfaction of the debt, in compliance with the UCC or other applicable laws. Because the moving papers are insufficient to support entry of an order of replevin or seizure, the relief requested cannot be granted.

Correlatively, a money judgment requested by plaintiff cannot be entered with respect to the breach of contract (first) and breach of guaranty (fifth) causes of action at this time, because the amount of the outstanding debt must take into account the value of the collateral, which may be determined after a resolution of the replevin cause of action.

III. Default Judgment Against Guarantor 2

Pursuant to CPLR 3215, plaintiff seeks a default judgment against Joseph Bouton (i.e. Guarantor 2), who has not answered the complaint, nor appeared in this action.

To obtain a default judgment against a defendant, pursuant to CPLR 3215, the moving party must file proof of service of the summons and complaint, along with proof of the facts constituting the claim and default (*Zibro v Milan House Inc.*, 2018 WL 3536398 [NY County Sup Ct 2018]). Moreover, pursuant to CPLR 3215 (g) (3), when a default judgment is sought against a natural person based upon the "nonpayment of a contractual obligation, an affidavit must be submitted, that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment by mailing a copy of the summons by first class mail to the defendant . . . ."

Here, the record shows that Guarantor 2 was served with the summons and complaint on October 31, 2017 (NYSCEF #23), and that a "Notice Pursuant to CPLR 3215" was mailed to him on November 20, 2017 (NYSCEF #24). In addition, an "Affirmation of Non-Military

Status" with respect to Guarantor 2 was filed with this court on or about January 16, 2018 (NYSCEF #26). Based upon the foregoing, plaintiff has complied with CPLR 3215 for entry of a default judgment against Guarantor 2.

CONCLUSION

Based upon all of the above, it is

ORDERED that plaintiff's motion for summary judgment (sequence number 001) is granted, to the extent of granting judgment, on the issue of liability, with respect to the breach of contract (first) cause of action against defendant D&G Taxi Inc. and the breach of guaranty (fifth) cause of action against defendant Ronit Navaro a/k/a Ronit Navaro Lapid (Navaro), and is otherwise denied; and it is further

ORDERED that plaintiff's motion for entry of a default judgment (sequence number 001) against defendant Joseph Bouton is granted; and it is further

ORDERED that the cross motion of Navaro seeking dismissal of this action as against her is denied; and it is further

ORDERED that the issue of damages is respectfully

referred to a Special Referee, to hear and determine, in accordance with CPLR 4317 (b); and it is further

ORDERED that *within 30 days of entry of this order*, plaintiff shall serve a copy of this order with notice of entry upon all parties and upon the Special Referee Clerk (Room 119M) to arrange a calendar date for the reference to a Special Referee; and it is further

ORDERED that *within 30 days of entry of this order*, plaintiff shall serve a copy of this order, with notice of entry upon all parties, and upon the Clerk of the General Clerk's Office (60

Centre Street, Room 119) in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page at the website www.nycourts.gov/supctmanh).

DATED: January 8, 2020

Doris Ling-Cohan, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[X]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[X]	REFERENCE

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