Millman LLC v Greenman
2020 NY Slip Op 32246(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 650161/2019
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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MILLMAN LLC

Plaintiff,

- v -

MARGOT GREENMAN,

Defendant.

INDEX NO. 650161/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35
were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

In this case, Plaintiff Millman LLC ("Plaintiff") seeks summary judgment in lieu of complaint under CPLR 3213, based on a "Secured Promissory Note," dated November 1, 2011 (the "Note"), entered with Defendant Margot Greenman ("Defendant"). Defendant opposes the motion and cross-moves to dismiss the action on several grounds, including for lack of personal jurisdiction. For the reasons set forth below, Plaintiff's motion is Granted, Defendant's cross-motion is Denied, and this action is disposed.

BACKGROUND

The Court presumes the parties' familiarity with the background facts of the case. In a nutshell, while it is undisputed that Defendant obtained a $1.65 million loan from Plaintiff in 2011, which she has not repaid, the parties disagree about whether the Note itself represents the operative loan instrument. Under the Note, Defendant promised to pay the principal sum of $1,650,000 to Plaintiff, together with interest equal to the Libor rate plus 0.50% per annum, due and payable on December 31, 2018 (the "Note") (NYSCEF 4; NYSCEF 3 ¶¶ 2-3, 6 [Miller

Aff.]). The Note was secured by Defendant's property in São Paulo, Brazil, where she is now a permanent resident (*id.*; NYSCEF 16 ¶¶ 2-4 [Greenman Aff.]). Plaintiff's manager, Larry Miller, avers that Defendant made periodic interest payments for years as required under the Note – 55 such installments, in fact – but has not paid any portion of the principal sum (NYSCEF 3 ¶ 5; NYSCEF 5 [schedule of interest payments received]). According to Plaintiff, there is now $1,665,692.35 due under the terms of the Note, plus interest from December 31, 2018, at 9% per annum (*id.* ¶ 6).

Defendant does not dispute the existence of the Note. She asserts that the Note is really the "Third Note," signed in 2015 but backdated to 2011 (by agreement of the parties) to reflect the original transaction (NYSCEF 16 ¶¶ 17-19). Defendant maintains that in 2011 she signed a different document with different terms, which she dubs the "Original Note" (*id.* ¶ 9). According to the Defendant, the Original Note, unlike the Note, is not subject to interest and is not secured by collateral (NYSCEF 17). Defendant does not, however, dispute that she made interest payments, which (by her own assertions) could only have been paid in connection with the superseding 2015 Note, which required such payments.[1]

The bottom line is that Defendant does not dispute the existence of the $1.65 million loan, or the assertion that she has not repaid the loan in full.

[1] Mr. Miller says he has never seen, "or even heard about," this "Original Note" before (NYSCEF 23 ¶ 2 [Miller Reply Aff.]). Given the record that Defendant made payments under the superseding 2015 Note, until she didn't, any dispute on this point is irrelevant.

DISCUSSION

A. Defendant is Subject to Personal Jurisdiction in New York

Defendant is subject to personal jurisdiction in New York under CPLR 302(a)(1), which empowers the Court to "exercise personal jurisdiction over any non-domiciliary" who "transacts any business within the state." This "is a 'single act statute'; accordingly, physical presence is not required and one New York transaction is sufficient for personal jurisdiction" (*C. Mahendra (N.Y.), LLC v Natl. Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015]). "The statute applies where the defendant's New York activities were purposeful and substantially related to the claim", with "'[p]urposeful' activities'" defined as "'those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*id.*, citing *D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 404 [1st Dept 2011]); *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]).

Here, Defendant's purposeful activity in New York in connection with the Note is significant and undisputed. She obtained the $1.65 million loan in New York (*see* NYSCEF 16 ¶ 9; NYSCEF 3 ¶ 4); specifically directed that Plaintiff move the funds to her Citibank account in New York, rather than in Brazil (NYSCEF 3 ¶ 7; NYSCEF 24 [email from Defendant explaining that she prefers a "US based transaction (easier)" over "a cross-boarder [sic] transaction (more complicated)"]); used her Citibank account in New York to make 55 interest payments to Plaintiff's Citibank account in New York (NYSCEF 23 ¶¶ 8-9; NYSCEF 4 [spreadsheet showing interest payments received]); and communicated with Plaintiff, Mr. Miller, and her own Citibank private banker in New York concerning payments due under the Note (NYSCEF 3 ¶¶ 6-8). In addition, Defendant provided a New York address for herself in the Note (NYSCEF 4 ["Margot

Greenman, with an address c/o Jane Greenman, 315 West 36th Street, New York, New York, 10018"]).[2]

These undisputed contacts with New York – essentially, choosing to repay a New York loan to a New York company with money from a New York bank – are sufficient to confer personal jurisdiction over Defendant (*see Fisher v McClain*, 216 AD2d 210, 210 [1st Dept 1995] [holding "there was clearly purposeful activity in New York" where, inter alia, a "check was drawn on a New York bank"]; *Georgia-Pac. Corp. v Multimark's Intern. Ltd.*, 265 AD2d 109, 111 [1st Dept 2000] [denying motion to dismiss for lack of personal jurisdiction where the defendant corporation's "deliberate use of a New York bank" to conduct relevant business evinced an in-state presence]; *Kleinfeld v Rand*, 143 AD3d 524 [1st Dept 2016] ["negotiating the terms of a note constitutes the transaction of business" under CPLR 302(a)(1)]; *see also Sterling Nat. Bank & Tr. Co. of New York v Fid. Mortg. Inv'rs*, 510 F2d 870, 873 [2d Cir 1975] [exercising personal jurisdiction over a Massachusetts corporation in connection with promissory note made payable in New York and involving transfers into New York bank account]).

Granted, "the mere allegation that [she] signed a note in New York, or signed a note payable in New York, does not . . . give rise to personal jurisdiction" (NYSCEF 22 at 8 [Mem. of Law in Supp. of Cross-Motion to Dismiss and in Opp. to S.J.]; *see Wirth v Prenyl*, 29 AD2d 373, 374-75 [1st Dept 1968] ["The fact that such note was delivered, completed and made payable in New York, and that breach of payment occurred here, are entirely insufficient in themselves to confer jurisdiction upon the courts of this State under CPLR 302 (subd. [a], par. 1)."]; *Shalik v Coleman*, 111 AD3d 816, 818 [2d Dept 2013] [finding "contacts [were] insufficient to support

[2] The Original Note, too, lists this address under her name (NYSCEF 17 at 1).

jurisdiction under CPLR 302(a)(1)" where "promissory note provide[d] that it should be governed and construed in accordance with the laws of New York . . . there were communications made between the appellant and the plaintiff via telephone and email, and . . . the appellant mailed payments due on the note to the plaintiff's office in New York"]; *Am. Recreation Group, Inc. v Woznicki*, 87 AD2d 600 [2d Dept 1982] [granting motion to dismiss for lack of personal jurisdiction where "defendant's sole contact with the State of New York is that he executed a promissory note which was payable in New York"]).

But in this case, unlike in *Wirth*, payment on the Note was transmitted through New York at the insistence of Defendant, the payor, who explicitly sought the benefits of a domestic transaction (NYSCEF 24 ["Once it is all based in the US, then I can use the proceeds to buy assets anywhere"]; *see D & R Glob. Selections, S.L.*, 90 AD3d at 404 [defining "[p]urposeful activities" as "those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State."]). That arrangement contrasts with the facts in *Wirth*, where the benefits of using a New York forum flowed the other way: "[t]he choice of New York as the place of payment was to accommodate the *payee*," and "[c]ommercial benefit did not accrue to the defendants by fixing the place of payment in New York" (29 AD2d at 375 [emphasis added]; *see ESI, Inc. v Coastal Corp.*, 61 F Supp 2d 35, 60 [SDNY 1999] [distinguishing *Wirth* and similar cases as "involv[ing] the wiring of payments to New York by the defendant as a 'passive accommodation' to the plaintiff, rather than a contractual obligation"]). Defendant's repeated and consistent use of a New York banking channel to make 55 interest payments to Plaintiff's New York account further underscores her connection to this forum.

In short, the Court finds that Defendant's contacts with New York provide sufficient basis for the exercise of personal jurisdiction. Therefore, the branch of Defendant's cross-motion to dismiss for lack of personal jurisdiction is **DENIED**.

B. Plaintiff is Entitled to Summary Judgment in Lieu of Complaint

Under CPLR 3213, "when an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." An "instrument for the payment of money only" is one that "requires the defendant to make a certain payment or payments and nothing else" (*Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept. 1968], *affd* 29 NY2d 617 [1971]; *Ian Woodner Family Collection, Inc. v Abaris Books, Ltd.*, 284 AD2d 163, 164 [1st Dept. 2001] [holding that an "instrument for the payment of money only" is one in which there is "an unconditional promise to pay a sum certain at a given time or over a stated period"]).

"A note qualifies as such an instrument for this purpose, provided the plaintiff can establish a prima facie case via 'proof of the note and a failure to make the payments called for by its terms'" (*Bonds Fin., Inc. v Kestrel Tech., LLC*, 48 AD3d 230, 231 [1st Dept 2008], citing *Seaman–Andwall Corp.*, 31 AD2d at 137; *see Atul Bhatara v Futterman*, 122 AD3d 509, 510 [1st Dept 2014] ["Plaintiff made a prima facie showing of his entitlement to summary judgment in lieu of complaint by producing the note executed by defendant for a $200,000 loan and proof of defendant's failure to pay in accordance with the note's terms."]; *Ness v Fellus*, 92 AD3d 551, 551-52 [1st Dept 2012] ["Plaintiff established his entitlement to summary judgment by producing the 'Loan Note' . . . and demonstrating that defendant failed to pay in accordance with the note's terms."]).

Plaintiff makes a prima facie showing of entitlement to summary judgment in lieu of complaint by producing the signed Note and proof of Defendant's failure to pay in accordance with the Note's terms (NYSCEF 3-5). Among the evidence of non-payment is Defendant's email announcing her intention, in the immediate term, not to pay:

> I am writing to inform you that the amount due in accordance with the promissory note owed by me to Millman has been put aside in an interest bearing account to be paid as soon as possible. Unfortunately, I have been advised by counsel that due to the ongoing litigation between the two equal partners in Millman and the possibility of multiple claims on this money, I should wait for a court of law to determine how this amount should be paid.

(NYSCEF 27).[3] This email also acknowledges the existence of Defendant's outstanding obligations under the Note – "the amount due . . . owed by me to Millman" – and indicates that the amount will "be paid as soon as possible" (*id.*).

In opposition, Defendant fails to raise a triable issue of fact concerning the validity of the Note or her obligations thereunder. Initially, Defendant contends that the Note is invalid because it "is not the valid, Original Note between the parties" (NYSCEF 22 at 10), citing case law requiring parties to "produc[e] the original promissory notes" (*see, e.g.*, *Ventricelli v DeGennaro*, 221 AD2d 231, 232 [1st Dept 1995]; *Marrazzo v Piccolo*, 163 AD2d 369, 369 [2d Dept 1990] ["The defendant has failed to produce both original notes although the plaintiff concedes that the promissory note for $20,000 represents a valid debt."]; *Am. Inv. Bank, N.A. v Dobbin*, 209 AD2d 780, 781 [3d Dept 1994] ["[P]laintiff has not satisfactorily shown that it has possession of the note upon which it seeks to recover."]).

[3] As the email alludes to, there is a separate lawsuit, pending before this Court, between Mr. Miller and Defendant's mother over the control of Millman (*see Greenman v Miller*, Index No. 650304/2017) (hereinafter, "*Greenman*").

This circular argument – the Note is invalid because it is not a valid note – rests on a misapplication of the case law. As the term is used in those cases, producing an "original" promissory note demonstrates the existence of that note and the claimant's true ownership or interest in it (*see Ventricelli*, 221 AD2d at 232 ["Plaintiff . . . failed to sustain her burden of proving ownership of the notes at trial by either producing the original promissory notes or satisfactorily setting forth the circumstances of their loss."]; *Marrazzo*, 163 AD2d at 369 ["Notwithstanding her failure to produce the original promissory notes, the defendant could still recover pursuant to UCC 3-804, which deals with lost, destroyed or stolen instruments and requires the requesting party to prove ownership of the notes[.]"]). Those concerns are absent here, since there is no dispute about the existence of the Note, its terms, or its authenticity. And merely labeling the earlier (alleged) version of the Note as "Original," without more, does not undermine the validity of the Note itself.

Next, Defendant urges that the Note is "a freestanding document that is invalid for lack of consideration" (NYSCEF 22 at 12). Neither part of that statement withstands scrutiny. *First*, accepting Defendant's allegation that the Note was in fact the third iteration of the parties' debt contract, it was not a "freestanding document" untethered from the earlier versions. As Defendant herself avers, the Note (or Third Note) was "a revised version of the Second Note," which in turn was a restatement of the "$1.65M loan that [she] had already received in 2011" (NYSCEF 16 ¶¶ 15, 17). *Second*, as to consideration, "[t]he courts avoid an interpretation that renders a contract illusory and therefore unenforceable for lack of mutual obligation and prefer to enforce a bargain where the parties have demonstrated an intent to be contractually bound" (*Curtis Properties Corp. v Greif Companies*, 212 AD2d 259, 265-66 [1st Dept 1995], citing *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88 [1917]). Here, the Note states that it was "FOR

VALUE RECEIVED," and Defendant admits that she "agreed to provide" her signature on the Note in 2015 to reflect the loan she received in 2011 (NYSCEF 4; NYSCEF 19; NYSCEF 16 ¶ 14).[4] Therefore, the Court will not invalidate the Note for lack of consideration, and the branch of Defendant's cross-motion seeking to dismiss the action on that basis is **DENIED**.

C. **There is No Basis to Stay this Action Pending the Resolution of *Greenman***

Leaving aside the personal connections, Defendant fails to adequately explain how the resolution of *Greenman* "is likely to aid resolution in this case" (NYSCEF 22 at 18). Delaying this case is especially inappropriate because CPLR 3213 "was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro,* 25 NY3d 485, 491-92 [2015] [internal quotation marks and citation omitted]; 7 Weinstein, Korn & Miller, New York Civil Practice: CPLR 3213.00 ("CPLR 3213 provides the plaintiff . . . with a procedural device that can avoid some of the delay associated with the normal give any take associated with the pleading and disclosure portion of an action."]). Therefore, the branch of Defendant's cross-motion seeking to stay this action is **DENIED**.

The Court has considered Defendant's remaining arguments and finds them to be unavailing.

* * * *

Accordingly, it is

[4] Defendant states that she did not receive "any money or any other consideration *when [she] signed the Third Note*" (NYSCEF 16 ¶ 18 [emphasis added]), but does not dispute that she received $1.65 million in loan funding previously.

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint is Granted; it is further

ORDERED that Defendant's cross-motion to dismiss is Denied; it is further

ORDERED that that the Clerk of the Court is directed to enter judgment in favor of Plaintiff Millman LLC and against Defendant Margot Greenman in the amount of $1,665,692.35, plus interest at the rate of 9% per annum from December 31, 2018, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; it is further

ORDERED that Plaintiff shall serve this Order with Notice of Entry on Defendant within 5 days of the date of this Order, unless additional time is needed in light of the public health situation.

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7/10/2020
DATE

JOEL M. COHEN, J.S.C.

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