SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

VALLEY NATIONAL BANK,

Plaintiff,

-against-

MIDI TAXI INC. and LOUIS P. KAROL as EXECUTOR of the ESTATE of MORRIS JASSY,

Defendants.

----------X

DECISION AND ORDER
Index No.: 655245/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

On this motion for summary judgment (motion sequence number 001), plaintiff seeks recovery on a $1 million loan given to defendants. Plaintiff also seeks to foreclose on two taxi medallions and the associated licenses which were pledged as collateral on the loan. For the following reasons, plaintiff's motion is granted.

I. FACTS

As defendants failed to file a Rule 19-a statement, the facts are taken from the plaintiff's Rule 19-a statement of undisputed material facts (NYSCEF Doc. No. 19, SUMF; [*see* 22 NYCRR] § 202.70, Rule 19-a [c]).

On January 29, 2016, non-party Solid Brothers LLC (Solid Brothers), loaned defendant MIDI Taxi, Inc. (Borrower or Midi Taxi) a principal amount of $1 million evidenced by a note (the Note) (*see* NYSCEF Doc. No. 22, Note). The loan was secured by an agreement (the Security Agreement). According to the Note and Loan Agreement, which outlines the terms and conditions of the loan, Borrower was to make monthly payments beginning on February 1, 2016, and on the first day of each month through January 2, 2019, the maturity date (NYSCEF Doc. No. 24, Loan Agreement, ¶ 1.01). At the maturity date, defendants would pay the unpaid principal balance and any accrued interest. The loan was guaranteed by deceased former defendant Morris Jassy (Jassy, or Guarantor), pursuant to an unconditional guaranty of payment (the Guaranty).[1]

[1] Upon Jassy's death in January 2019, the executor of his estate, Louis P. Karol, replaced Jassy as a defendant in this action (NYSCEF Doc. No. 15, Stipulation Substituting a Party Defendant).

The Note "provides that after an event of default or the Maturity Date interest on the unpaid principal balance accrues at the rate of 2% per month until paid in full" (the Default Rate) (SUMF ¶ 4). The Security Agreement granted Solid Brothers a security interest in New York City Taxicab Medallions numbered 4L35 and 4L36 and the licenses associated with these Medallions issued by the NYC Taxi and Limousine Commission and owned by Borrower (together, the Medallions). On May 1, 2017, Solid Brothers assigned its interest in the loan to Valley National Bank (VNB) pursuant to a Sales and Assignment Agreement.

Borrower failed to make an interest payment on April 1, 2018, and has not made a payment since, constituting a default on the Note. VNB's servicer, NAA Funding Inc., sent notices of the default to defendants in letters dated May 15, 2018, June 15, 2018, and July 15, 2018, and an additional notice dated September 20, 2018 (*id.* at ¶¶ 11-12). The loan has since matured without further payment, plus interest.

Plaintiff is seeking the total outstanding debt, $1,292,429.19 as of January 24, 2020, which consists of the unpaid principal amount of $959,368.45, accrued interest of $19,027.47, and accrued default interest of $314,033.27 (*id.* at ¶ 16). Plaintiff also claims interest continues to accrue at a rate of 2% per month until the resolution of this case. In addition, plaintiff seeks seizure of the Medallions and an award of its costs and expenses in bringing this lawsuit, including attorneys' fees, as provided for in the Loan Agreement (*see* Loan Agreement, ¶ 6.02).

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Proving the existence of a written note and the failure of defendant borrower to make the required payments in accordance with its terms constitutes a prima facie case for summary judgment in this case (*see Capital One Equip. v Dues*, 2018 NY Misc LEXIS

3287, *5 [Sup Ct, NY County 2018]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once this initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 35 NY2d 338, 341 [1974]; *see Zuckerman v City of New York*, *supra*; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

III. DISCUSSION

Plaintiff has produced the Loan Documents outlining the terms and conditions of the loan, and the Note provides "failure of the Borrower to pay any scheduled amount of principal or interest required by this Note within ten (10) days of its respective due date" constitutes a default (NYSCEF Doc. No. 22, Note at 3). Defendants do not dispute the principal balance and interest that accrued was not paid in full.

In opposition, defendants argue plaintiff's evidence regarding the loan is inadmissible hearsay, plaintiff is estopped from enforcing the loan, plaintiff has failed to join an indispensable party, further discovery is necessary regarding the making of the loan and the interest charged violates New York's usury laws (*see* NYSCEF Doc. Nos. 34 and 35). Defendants also dispute calculation of the amount of interest that has accrued since the default and claim the collateral

should be the only remedy, or its value deducted from the amount plaintiff claims is owed. At oral argument, defendants abandoned the estoppel and indispensable party defenses. As discussed below, these defenses are meritless.

Defendants concede that the loan documents were signed, and defendants received money (*see* NYSCEF Doc. No. 34, ¶ 2). Defendants' position that Kochenthal's testimony about events prior to plaintiff being assigned the loan are barred as inadmissible hearsay fails. Defendants argue Kochenthal cannot testify as to whether the Loan Documents were made in the regular course of business or as to the source of information contained in the documents, which is necessary under CPLR § 4518 (a) in order to be admissible (NYSCEF Doc. No. 34, affirmation of Haber, ¶ 4). Since plaintiff relies on Mr. Kochenthal's affidavit to establish the Loan Documents as admissible business records, defendants argue the Loan Documents are inadmissible (reply at 3). However, "it is also established law that an assignee . . . may rely upon the business records of the loan originator . . . to establish such transferee's claims for recovery of amounts due from the debtor so long as it establishes that it relied upon those records in the regular course of its business." (*Ditech Fin. v Rohanie*, 2017 NY Misc LEXIS 5673, *7 [Sup Ct, Suffolk County 2017], citing *Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418 [1st Dept 2012]). Kochenthal's affidavit is sufficient to authenticate the documents, as he stated the documents were relied on in plaintiff's regular course of business. Defendants do not cite a case in which loan documents were deemed inadmissible hearsay after an assignment of a loan, and their arguments are unpersuasive. Accordingly, plaintiff has made a prima facie case for summary judgment.

Defendants then assert affirmative defenses they argue preclude liability for the unpaid balance of the loan. Defendants argue plaintiff is estopped from enforcing the note because both parties relied on New York City's valuation of the Medallions and the yellow cab industry continuing to operate on the same basis as it had in the past when defendants received the loan from plaintiff. The introduction of rideshares such as Uber and Lyft caused the value of the Medallions to plummet and led to defendants defaulting on the loan.

Defendants correctly cite the definition of estoppel as "a bar which precludes a party from denying a certain fact or state of facts exists to the detriment of another party who was entitled to rely on such facts and had acted accordingly." (*McManus v Board of Educ.*, 87 NY2d

183, 186-87 [1995]). Although defendants do not specify whether they are asserting the defense of promissory estoppel or equitable estoppel, both arguments fail. "The elements of promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise" (*International Nut Alliance, LLC v Bank. Leumi USA*, 2016 NY Misc LEXIS 3552, *12-13 [Sup Ct, NY County 2016], citing *Sabre Intl. Sec., LTD. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 439 [1st Dept 2012]). Defendants do not allege plaintiff promised the taxi industry would remain stable. Defendants could not have reasonably relied on such a promise because plaintiff would have no way of controlling the market. Further, defendants admit ride share companies came into New York City in 2014 (NYSCEF Doc. No. 34, affirmation of Haber, ¶ 2). The loan was made in 2016, two years later. Any reasonable person in the taxi business would anticipate some impact on the yellow cab industry and could not reasonably rely on a prediction the market would remain steady.

To assert equitable estoppel, defendants must show plaintiff "engaged in conduct which amounted to a false representation or concealment of material facts, that this party knew the truth, and that this party intended the [defendants] to act upon the false representation or concealment" (*International Nut Alliance, LLC v Bank. Leumi USA*, 2016 NY Misc LEXIS 3552, *12-13 [Sup Ct, NY County 2016], citing *BWA Corp. v Alltrans Express USA*, 112 AD2d 850, 853 [1st Dept 1985]). Defendants do not contend plaintiff engaged in conduct that constituted a false representation, as the statement defendants cite was made by the City of New York. Nor do defendants contend plaintiff had secret knowledge about the future of the taxi industry at the time the loan was administered. Also, as above, defendants cannot show reasonable reliance on any such representation. Therefore, the defense of estoppel fails.

Defendants argue the City of New York is an indispensable party to this action because the Taxi & Limousine Commission of the City of New York allowed the rideshare companies into the city, wreaking havoc on the taxi industry (NYSCEF Doc. No. 34, affirmation of Haber, ¶ 8). Plaintiff responds asserting the City of New York is not an indispensable party to this action because the City's rights will not be adversely affected by the outcome. "The scope of indispensable parties [is limited] to those cases and only those cases where the determination of the court will adversely affect the rights of nonparties." (*Castaways Motel v Schuyler*, 24 NY2d

120, 125 [1969]). Defendants have failed to allege the City of New York would be adversely affected by the decision of this case, so the City of New York is not an indispensable party and this defense fails.

Defendants also argue summary judgment is not proper at this time due to the need for further discovery (NYSCEF Doc. No. 34, affirmation of Haber, ¶ 9). Plaintiff counters that defendants' request for further discovery is solely based on speculation and defendants do not identify anything supporting their case that would result from further discovery. Defendant Karol argues "discovery is needed as to the particulars regarding the making of the loan and the mechanics of the payment of the loan" (NYSCEF Doc. No. 35, aff of Defendant Karol, ¶ 4). However, Karol does not identify what would be uncovered through further discovery or how it would affect the outcome of the case, beyond mere speculation. "Defendants cannot avoid summary judgment based on speculation that further discovery may uncover something." (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [1st Dept 2012]). Defendants' request fails as a matter of law.

Defendants also argue that the default interest of 24% (2% per month) is usurious. General Obligations Law §5-521 provides that the civil usury statute may not be asserted as a defense by a corporation and only criminal usury may be asserted as a defense to repayment (*see Ammirato v Duraclean Intern., Inc.*, 687 F. Supp 2d 210). A guarantor of a corporate loan is also precluded from asserting a defense of civil usury (*see Tower Funding Inc. v. David Barry Realty, Inc.*, 302 AD2d 513 [2d Dept 2003]). Further, the criminal usury statutes do not apply here as the default interest rate at issue does not exceed 25%. In any event, "the defense of usury does not apply where . . . the terms of the mortgage . . . impose a rate of interest in excess of the statutory maximum only after default or maturity" *Kraus v Mendelson*, 97 AD3d 641 (2d Dept 2012) (quoting *Miller Planning Corp. v Wells*, 253 AD2d 859).

Defendants also dispute the amount owed, but do not offer an alternative calculation or show where plaintiff erred. Defendants argue the post-default interest rate should be the subject of a separate hearing by the court. However, the note expressly states "interest on the indebtedness evidenced by this note after default or maturity shall be due and payable at the rate of two percent (2%) per month, or the highest rate allowed by law, computed from the date to

which interest was last credited, to the date actual payment of the entire indebtedness" (NYSCEF Doc. No. 22, Note at 2).

Defendants are correct and plaintiff does not dispute that the value of the Medallions should be deducted from the amount plaintiff claims defendants owe. The Security Agreement states:

> "In case of repossession and sale of the goods for default in payment of any part of the net balance due, all sums paid on account of the net balance due and any sum remaining from the proceeds of the sale after deducting the reasonable expenses, including reasonable attorney's fees, of such repossession and sale shall be applied in reduction of such amount, and if the net proceeds of such sale exceed the balance due on such amount, the sum remaining shall be paid to the Debtor."

(NYSCEF Doc. No. 25, Security Agreement at 6-7). A credit shall be given against the judgment for the value of the medallions.

Accordingly, it is hereby

ORDERED that the motion for summary judgment is GRANTED in its entirety and judgment shall be entered against defendants Midi Taxi, Inc., and Louis P. Karol as executor of the Estate of Morris Jassy in the amount of $1,292,429.19 (consisting of unpaid principal of $959,368.45, interest of $19,027.47 and default interest of $314,033.27 through January 24, 2020) plus default interest thereafter at the rate of $639.00 per day until the date of entry of the judgment together with post-judgment interest at the statutory rate of 9% per annum.

This constitutes the decision and order of the court.

DATED: July 29, 2020

E N T E R,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.