SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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FRATELLI INVESTMENTS LTD., ICE EM CREDIT ABSOLUTE RETURN MASTER FUND DESIGNATED ACTIVITY CO., ICE ORYX ALPHA MASTER FUND DESIGNATED ACTIVITY CO., JP MORGAN CHASE RETIREMENT PLAN, ICE GLOBAL CREDIT FUNDS-ICE EM CREDIT TOTAL RETURN FUND, VR GLOBAL PARTNERS, L.P.

Plaintiff,

- v -

CIMENTO TUPI, S.A.,

Defendant.

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INDEX NO. 654421/2019

MOTION DATE 9/24/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 86

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that this action is converted to a plenary action; and it is further

ORDERED that the papers submitted in this action will be deemed the complaint in said plenary action; and it is further

ORDERED that defendant shall serve its answer within 20 days of service upon it of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.

MEMORADNUM DECISION

Plaintiffs Fratelli Investments Ltd., ICE EM Credit Absolute Return Master Fund Designated Activity Co., ICE ORYX Alpha Master Fund Designated Activity Co., JPMorgan Chase Retirement Plan, ICE Global Credit Funds-ICE EM Credit Total Return Fund, and VR Global Partners, L.P. (collectively, Plaintiffs) move, pursuant to CPLR 3213, for summary judgment in lieu of a complaint.

BACKGROUND FACTS

Plaintiffs seek to recover an aggregate principal sum of $113,067,000 due on certain "Senior Unsecured Notes" (the Notes) issued by defendant Cimento Tupi, S.A. (Defendant). Defendant issued a total of $185 million stated principal amount of Notes, pursuant to an "Indenture" dated May 26, 2011, as amended and supplemented by an "Indenture Supplement" dated April 26, 2012 (together, the Indenture). *See* NYSCEF Doc No. 29, ¶¶ 3, 4, 17. Plaintiffs allege that they hold beneficial ownership interests in said Notes, but they acknowledge, as they must, that their names do not appear upon said Notes.

As an initial matter, defendant argues that this court lacks jurisdiction over it, because defendant was denied the requisite time to serve its answering papers. That argument is based upon defendant's assumption that service of process upon it was effected pursuant to CPLR 308 (3) (*See* NYSCEF Doc No. 53 at 8), and that, accordingly, it was entitled to 30 days within which to respond. CPLR 320 (a) requires a defendant to appear within 30 days of service by plaintiff pursuant to CPLR 303. 308 (2), (3), (4), or (5), or 313, 314, or 315. CPLR 308, however, is applicable only to service upon "natural persons.: "Personal service upon a natural person shall be made by any of the following methods." Defendant, a corporation organized under the laws of the Federative Republic of Brazil, was served pursuant to CPLR 311, by

service upon its "agent authorized by appointment . . . to receive service." CPLR 311 (a) (1). Indeed, Defendant acknowledges that service was effected upon the agent that it had appointed, pursuant to the Indenture, to receive service. NYSCEF Doc No. 53 at 6. Accordingly, defendant was entitled to 20, rather than 30, days to respond. *See* CPLR 320 (a). It does not contend that it was afforded less time.

DISCUSSION

Turning to the merits,

> "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.'"

Cooperative Centrale Reiffeissen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro, 25 NY3d 485, 491-492 (2015), quoting *Weissman v Sinorm Deli,* 88 NY2d 437, 443 (1996). It is established that, in order to prevail on a CPLR 3213 motion, a plaintiff must rely upon documentary evidence, showing "an instrument for the payment of 'money only'" (*Jones v Madison Plaza Commercial Owners LLC* (173 AD3d 599, 600 [1st Dept 2019]), and that

> "'[a] document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make more than a de minimis deviation from the face of the document.'"

Fiore Fin. Corp. v Gaea N. Am., LLC, 179 AD3d 621, 621 (1st Dept 2020), quoting *PDLP Biopharma, Inc. v Wohlstadter,* 147 AD3d 494, 495 (1st Dept 2017).

Here, as is generally the case with global securities, the Notes were issued as securities registered in the name of Cede & Co. as the record holder, and as nominee of The Depository Trust Company (DTC). Plaintiffs argue persuasively, citing, among others, *First Interstate Credit Alliance v Sokol* (179 AD2d 583, 584 [1st Dept 1992]) that the presence of multiple

covenants in the Notes, extraneous to the payment obligations contained in them, do not render the Notes other than instruments for the payment of money only, because those terms do not require any additional performance as a condition precedent to repayment. Plaintiffs also argue that, other than the fact of nonpayment, nothing outside of the face of the Notes is needed to show that Defendant is liable, and that it is because of the ownership structure created by defendant that plaintiffs' names do not appear on the Notes. Plaintiffs cite *Matapos Tech Ltd. v Compania Andina de Comercio Ltda* (68 AD3d 672, 672 [1st Dept 2009]), which affirmed an order granting summary judgment pursuant to CPLR 3213, although plaintiff's name did not appear on notes that had been assigned to it by a corporation that later merged with another corporation.

Here, however, far more than "a *de minimis* deviation from the face of the instrument[s]" is required to show plaintiffs' respective entitlements to recover under the Notes. Indeed, in order to make an a priori showing of their respective rights, after defendant pointed out their failure to have done so, plaintiffs submitted eight supplemental affidavits and 16 supplemental exhibits, eight of which contain additional affidavits and supporting materials. This production is a far cry from a *de minimis* deviation from the face of the Notes. Accordingly, while plaintiffs may well be entitled to summary judgment, they are not entitled to summary judgment pursuant to CPLR 3213.

It does not follow that this action must be dismissed. Rather, this court will follow the example set in *JFURTI, LLC v First Capital Real Estate Advisors, L.P.* (165 AD3d 419 [1st Dept 2018]), which, like the instant case, was brought by a plaintiff improperly seeking summary judgment pursuant to CPLR 3213, and converts this action to a plenary action.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that this action is converted to a plenary action; and it is further

ORDERED that the papers submitted in this action will be deemed the complaint in said plenary action; and it is further

ORDERED that defendant shall serve its answer within 20 days of service upon it of a copy of this order with notice of entry; and it is further

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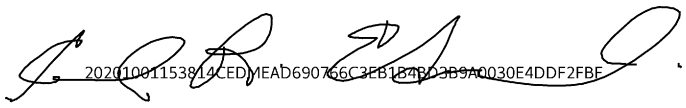
ORDERED that counsel for Plaintiffs shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.



10/1/2020
DATE

CAROL R. EDMEAD, J.S.C.

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