SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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VALLEY NATIONAL BANK,

Plaintiff,

- v -

SHAMUELY CAB CORP., SAMI ITSHAIK, 412 EXPRESS MANAGEMENT CORP.

Defendant.

INDEX NO.	655246/2020
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) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33
were read on this motion for SUMMARY JUDGMENT & DEFAULT JUDGMENT.

Defendant Shamuely Cab Corporation ("Borrower") received financing from Plaintiff and executed a promissory note (the "Note"). Borrower proffered certain taxi medallions as collateral for the Note. Borrower made the required payments under the Note until March 17, 2020, then stopped. Plaintiff now moves (i) for summary judgment against the Borrower and the Defendant Individual Guarantor, Sami Itshaik, for the outstanding debt on the Note, delivery of the collateral, and for reimbursement of attorneys' fees and costs; and (ii) for default judgment against the Defendant Corporate Guarantor, 412 Express Management Corp., for the outstanding debt on the Note and reimbursement of attorneys' fees and costs. Defendants oppose these motions, arguing (without citation to authority) that repayment became "impossible" as of March 2020 due to the effects of the COVID-19 pandemic (augmented by competition from rideshare apps).

For the reasons set forth below, Plaintiff's motion is granted. While the adverse impact of the pandemic on the taxi industry undoubtedly has been substantial, there simply is no viable defense to repayment of the Note.

BACKGROUND

A. Terms of the Note

Plaintiff lent Borrower $1,125,500.00 in July 2017. Borrower agreed to pay interest at an annual rate of 3.23% until the principal was repaid in full by July 2022. In the event of a default, Borrower was required to pay an additional 5% interest starting at the time of the default (the "Default Rate").

Borrower proffered certain taxi medallions in its possession as collateral for the Note pursuant to a Security Agreement. The Security Agreement explicitly provided Plaintiff with the remedy, *inter alia*, to take possession of the collateral and sell the medallions at a public or private sale upon an Event of Default. Plaintiff perfected its security interest in the two medallions by filing a UCC-1 Filing Statement with the Secretary of State for the State of New York.

The Note was guaranteed by Defendants Sami Itshaik ("Individual Guarantor") and 412 Express Management Corp. ("Corporate Guarantor").

B. Defendants' Breach and Procedural History

Borrower made the required payments under the Note until March 17, 2020, and then stopped. Plaintiff served Defendants with a notice of default on August 21, 2020. Defendants failed to cure the default.

Plaintiff commenced this lawsuit on October 13, 2020, naming Borrower and Individual Guarantor as defendants. Borrower and Individual Guarantor answered the Complaint and

asserted various affirmative defenses (without supporting factual allegations). Plaintiff thereafter filed an Amended Complaint naming Corporate Guarantor as an additional defendant. Corporate Guarantor did not respond to the Amended Complaint.

Plaintiff now moves for summary judgment on its claims against Borrower and Individual Guarantor for the debt outstanding on the Note, applicable interest accrued at the Default Rate, and reimbursement for reasonable attorneys' fees. It also seeks an order directing Borrower to assemble and deliver the collateral taxi medallions per the Security Agreement. Separately, Plaintiff seeks a default judgment against the Corporate Guarantor under CPLR 3215 for the debt outstanding on the Note, applicable interest accrued at the Default Rate, and for reimbursement for reasonable attorneys' fees due to the Corporate Guarantor's failure to answer or otherwise respond to the Amended Complaint.

Answering Defendants asserted twelve affirmative defenses in their Answer: (i) failure to state cause of action; (ii) collateral estoppel; (iii) statute of frauds; (iv) doctrine of laches; (v) doctrine of waiver; (vi) statute of limitations; (vii) claims barred by subject agreement; (viii) lack of standing; (ix) damages were the result of circumstances, persons, or conditions outside of Defendants' control; (x) N.Y. Gen. Obligations L. § 5-701 (*i.e.*, the Statute of Frauds); (xi) failure to join necessary parties; and (xii) breach of implied covenant of good faith and fair dealing).

In response to this motion, Defendants argue that repayment of the Note became impossible due to the effects of the pandemic on the taxi industry. They assert that because repayment of certain other forms of consumer and commercial debt has been suspended by regulatory order, "logic follows" that Defendants' repayment obligations should be suspended as well (NYSCEF Doc. No. 30 at 2) because the loan was premised on there being a "fully

functioning industry," which they assert was no longer the case after March 17, 2020. They contend the debt should be "revisited once life has resumed as normal" (*id.*). Individual Guarantor further notes in an affidavit the impact of rideshare applications such as Uber and Lyft (NYSCEF Doc. 31 at ¶ 7), though that is not argued in the brief and in any event pre-dated the nonpayment of the debt.

DISCUSSION

A. Summary Judgment Standard

"[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; CPLR 3212 [b] [summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"]). To obtain summary judgment, the movant "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make this prima facie showing triggers denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). In determining entitlement to summary judgment, the Court will view the facts alleged in a light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). However, the party opposing the motion for summary judgment "must produce evidentiary proof, in admissible form, sufficient to require a trial . . . mere conclusions, expressions of hope, unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also State Bank of Albany v Fioravonti*, 51 NY2d 638, 647 [1980]).

B. Plaintiff Is Entitled to Summary Judgment on Its Claims for Breach of the Note, Delivery of the Collateral Taxi Medallions, and Attorneys' Fees Against Answering Defendants

To establish a prima facie case for breach of a promissory note, a plaintiff must submit proof of the existence of an underlying note and the promisor's default pursuant to the note's terms (*Superior Fid. Assur., Ltd. v Schwartz*, 69 AD3d 924, 925 [2d Dept 2010]; *Mariani v Dyer*, 193 AD2d 456, 457 [1st Dept 1993] [an affidavit showing due execution and default in payment on a promissory note is sufficient to establish a prima facie case]).

Similarly, to establish a prima facie case against a guarantor, a plaintiff must prove the existence of the guaranty, default on the underlying debt by the primary obligor, and the guarantor's failure to perform under the guaranty (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]; *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *Overseas Priv. Inv. Corp. v. Kim*, 69 AD3d 1185, 1187 [3d Dept 2010] ["A party is entitled to summary judgment on a guaranty of a note if it proves that there has been a default on the payment of a promissory note, and the party against whom judgment is sought has executed a valid guaranty . . . ."]). If the plaintiff establishes a prima facie case, the guarantor must submit evidence in admissible form establishing the "existence of a triable issue with respect to a bona fide defense" (25 NY3d at 492, *quoting Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710 [2d Dept 2008]; 69 AD3d at 1187).

Here, Plaintiff readily establishes its prima facie case for summary judgment both against Borrower and Individual Guarantor. Plaintiff has submitted the Note and Security Agreement (along with its corollary UCC-1 Financing Statement) executed by Defendants, a guaranty agreement executed by Individual Guarantor, and provided an accounting of the outstanding

principal debt and accrued interest (NYSCEF Docs. 15 – 19). Moreover, the Individual Guarantor concedes Defendants' failure to pay (*see* NYSCEF Doc. 31, ¶ 4 ["I believe that the failure to make payment should not be construed as a default"]).

Answering Defendants fail to raise a triable issue of fact in defense to Plaintiff's claims. First, they fail to submit any evidence in support of their conclusory affirmative defenses. Indeed, the only asserted defense that arguably is implicated by their response to Plaintiff's summary judgment motion is that the damages at issue were the result of circumstances or conditions outside of Defendants' control. In their filings opposing the motion, Answering Defendants argue that "[t]he loans are predicated on . . . a fully-functioning taxi cab industry;" that the entrance of rideshare applications into the taxi market along with the COVID-19 pandemic disrupted the full functioning of this industry; that because certain New York State and Federal stays have been imposed for payment of commercial mortgages, evictions for residential rent arrears, and payment of student loans, "logic follows" that payment obligations under the Note should also be suspended. Answering Defendants also argue that they have had no chance to conduct discovery with respect to the calculation of the amounts due to Plaintiff under the Note (*see* NYSCEF Docs. 29 – 32).

These arguments in opposition to summary judgment are unavailing. First, the fact that the federal and state governments have provided relief from certain consumer and commercial debt obligations is irrelevant. Whether extension of that relief to the taxi industry would be "logical" is not for this Court to determine. Second, to the extent Defendants intend to assert (unpleaded) defenses of impossibility or frustration of purpose, such defenses have been rejected in the taxi context (*Medallion Bank v Makridis*, 2021 N.Y. Slip Op. 30033[U] [Sup Ct N.Y. County 2021]) and in the analogous setting of commercial lease obligations (*Gap, Inc. v 170*

Broadway Retail Owner, 195 AD3d 575, 577 [1st Dept 2021]; *A/R Retail LLC v Hugo Boss Retail*, 72 Misc 3d 627, *641 – 50 [Sup Ct NY County 2021]). The purpose of the loan was to provide financing, which it did. And the fact that the borrower encountered unexpected financial difficulties does not trigger a defense of impossibility.

Moreover, Defendants failed to provide any information that would reasonably call into question Plaintiff's calculation of what was owed to it pursuant to the Note. Defendants' disagreement is an unsubstantiated assertion, which is insufficient to raise a triable issue of fact in opposition to a motion for summary judgment.

C. Default Judgment

Plaintiff motion for a default judgment under CPLR 3215 against Corporate Guarantor for failure to timely appear, answer, or otherwise move with respect to Plaintiff's supplemental summons and complaint (NYSCEF Docs. 5 & 6) is granted. Plaintiff has submitted unrebutted evidence demonstrating compliance with the requirements of CPLR 3215 (*see* NYSCEF Docs. 7 & 8). Therefore, Plaintiff's motion for default judgment is granted as to liability. The relief sought is identical to that sought against Answering Defendants—*i.e.*, $1,124,997.79 of outstanding principal, plus interest accrued on the outstanding principal at the contractual per annum interest rate of 3.23% until August 21, 2020 equaling an amount of $18,336.04, plus interest accrued pursuant to the additional contractual default rate at 5% from August 22, 2020 to the present. As such, Plaintiff's motion for default judgment is granted as to damages.

Defaulting Corporate Guarantor may seek a vacatur of the instant default judgment if it can satisfy the requirements of CPLR 5015, CPLR 317, or any other relevant law.

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is **GRANTED** against Answering Defendants Shamuely Cab Corp. and Sami Itshaik in the amount of $1,124,997.79 of outstanding principal, plus interest accrued on the outstanding principal at the contractual per annum interest rate of 3.23% until August 21, 2020 equaling an amount of $18,336.04, plus interest accrued pursuant to the additional contractual default rate at 5% from August 22, 2020 to the present, together with costs and disbursements as calculated by the County Clerk; it is further

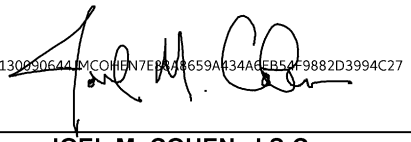
ORDERED that Plaintiff's motion for a default judgment is **GRANTED** against Defendant 412 Express Management Corp. in the amount alleged in the Complaint, which is an amount of $1,124,997.79 of outstanding principal, plus interest accrued on the outstanding principal at the contractual per annum interest rate of 3.23% until August 21, 2020 equaling an amount of $18,336.04, plus interest accrued pursuant to the additional contractual default rate at 5% from August 22, 2020 to the present, subject to a credit based on the sale of the collateral, together with costs and disbursements as calculated by the County Clerk; it is further

ORDERED that Defendants shall assemble and deliver to Plaintiff the collateral, including medallions issued by the New York City Taxi and Limousine Commission bearing numbers 9J23 and 9J24; it is further

ORDERED that that Plaintiff shall submit to the Court a bill of costs with respect to collection expenses within 10 days from the date of entry of this Decision and Order, and Defendants shall have 10 days thereafter to submit an objection to the bill of costs; and it is further

ORDERED that the Clerk shall enter a judgment in accordance with this Decision and Order, to be submitted to the Clerk by Plaintiff after the Court determines the amount of collection expenses.

This constitutes the Decision and Order and Judgment of the Court.



11/30/2021
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	