At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of December, 2021.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

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POPUPMASTERS CORP.,

Plaintiff,

- against -

Index No. 501550/21

JULIEN LEGEARD, THE PRESTIGE GROUP OF CRAFTSMANSHIP CORP., d/b/a THE PRESTIGE GROUP, and THE PRESTIGE GROUP OF CRAFTSMEN LLC d/b/a THE PRESTIGE GROUP,

Defendants.

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The following e-filed papers read herein:	NYSCEF:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	2 – 12
Affirmation (Affidavit) in Opposition and Exhibits Annexed	13 – 20
Affirmation (Affidavit) in Reply	23 – 26

Upon the foregoing papers, plaintiff POPUPMASTERS CORP. (hereinafter "PopUp" or "plaintiff") moves for an order pursuant to CPLR 3213, directing the entry of judgment in favor of plaintiff and against the defendants, JULIEN LEGEARD ("Legeard"), THE PRESTIGE GROUP OF CRAFTSMANSHIP CORP. d/b/a THE PRESTIGE GROUP ("TPG CORP"), and THE PRESTIGE GROUP OF CRAFTSMEN LLC d/b/a THE PRESTIGE GROUP ("TPG LLC" and with TPG CORP, "TPG" and collectively with Legeard, "defendants"), jointly and severally, in an amount not less than $99,538.60, plus pre-judgment interest. Defendants oppose.

Background

According to the affidavit of Morris Michael Kattan ("Kattan"), PopUp's owner, on or about March 2, 2020, Legeard, in his individual capacity and on behalf of TPG, signed and notarized a document (hereinafter referred to as the "Note") acknowledging a debt to PopUp in the sum of $108,000.00 for services previously rendered by PopUp for the benefit of the defendants. Pursuant to the Note, the defendants were to make payments as follows: $18,000 on or before March 15, 2020; $15,000 on or before March 28, 2020; $30,000 on or before April 18, 2020; $30,000 on or before April 30, 2020; and $15,000 on or before May 15, 2020.

Kattan avers that the defendants only made one payment in the amount of $8,461.40, leaving an outstanding balance on the Note in the amount of $99,538.60, and despite constant demands to pay the balance, defendants have defaulted.

Plaintiff argues that it is entitled to judgment pursuant to CPLR 3213 based on its submission of the Note; and Kattan's affidavit attesting to the failure of the defendants to make the payments called for by the Note's terms. Because the Note, which the defendants signed and notarized, sets forth a specific amount due at a fixed time (on or before May 15, 2020) and their only obligation thereunder is to make payments, plaintiff posits that the Note constitutes an instrument for the payment of money only and qualifies for relief under CPLR 3213.

In opposition to plaintiff's motion, the defendants contend that the subject Note does not qualify for the expedited procedure under CPLR 3213 because (1) there is no language explicitly guaranteeing or promising to pay a debt; (2) no clear deadline for payment is

provided given that the top of the statement specifies that payment is "[d]ue on receipt" – that is, on March 2, 2020, but the handwritten notations on the bottom specifies a payment plan extending through May 2020; (3) the amount claimed to be owed, $99,538.60, is not determinable from the face of the statement; and (4) the identity of the party to be charged is not apparent since the Note is billed to "The Prestige Group/Julien Legeard" but whether this refers to TPG CORP or TPG LLC or both is a significant distinction, given that only TPG LLC is an active entity. Defendants further assert that it is impossible to ascertain whether Legeard is included on the Note as the contact person for TPG or whether he is, as plaintiff alleges, personally indebted for the amount.

In addition, the defendants argue that issues of fact preclude a finding of summary judgment. Specifically, that as evidenced by Legeard's contemporaneous email dated June 5, 2020 sent to plaintiff upon his receipt of the Note, the handwritten payment terms on the Note were not present when Legeard signed the statement. Further, that TPG LLC's obligation to pay PopUp was subject to a condition precedent—receipt of relevant funds from a TPG LLC client which did not occur.

In this regard, the defendants proffer Legeard's affidavit explaining the background of the parties' relationship. Legeard states that he met Kattan in early 2019. Legeard, as owner of TPG CORP and TPG LLC, two interrelated entities based in Brooklyn offering architectural, interior design, and project management services to residential and commercial clients, believed a professional arrangement with Kattan and his startup, PopUp, would be mutually beneficial (NYSCEF Doc No. 14, ¶ ¶ 2-6). TPG possessed years of experience, a solid reputation, and deep industry contacts, while Kattan and PopUp

had the staffing and resources that would enable TPG to service the kind of clients that Legeard sought (*id.* at ¶ ¶ 4, 5).

Legeard states that sometime in the middle of 2019, he and Kattan entered into an oral agreement whereby Legeard agreed to serve as PopUp's CEO on an independent contractor basis (*id.* at ¶ 6). Around the same time, TPG LLC negotiated a major contract with Bond Collective ("Bond"), a Manhattan-based provider of coworking spaces around the United States, under which TPG LLC would serve as a project manager to oversee the construction of new coworking spaces in Texas, Washington, D.C., and Chicago (*id.* at ¶ 7). Thereafter, Legeard states that he and Kattan agreed that monies paid by Bond to TPG LLC would be directed to PopUp, which would use the funds to pay itself and hire vendors for the cabinetry, stonework, and upholstery services required by Bond (*id.* at ¶ 8). Under this arrangement, Legeard would oversee the provision of the interior design services, while Kattan would manage the cashflows (*id.*).

However, according to Legeard, the parties' relationship started to deteriorate and, in February 2020, Legeard agreed with Kattan that TPG LLC would take over all of PopUp's relationships with the vendors retained for the Bond project (*id.* at ¶ 10). Legeard also promised PopUp that TPG LLC would provide the 30 percent profit margin that PopUp expected to make on the Bond project (*id.*). Legeard, however, maintains that (1) he did not commit to doing so personally and (2) it was understood, as with the funds received from Bond to-date, that PopUp would receive no payment if Bond for some reason failed to pay under its contract with TPG LLC (*id.* at ¶ 11).

On March 2, 2020, as he was moving out of PopUp's office, Legeard avers that he was "accosted" by Kattan and Philippe Dallacorte ("Dallacorte"), PopUp's co-founder, who presented him with a purported invoice, the Note, indicating a balance due of $108,000, which represented the amount that PopUp expected to receive from Bond (*id.* at ¶ 12). Legeard states that he signed the Note, having little reason to believe that Bond would default in payment and confirming that PopUp was entitled to receive an additional $108,000 out of future funds to be paid by Bond to TPG LLC (*id.* at ¶ 13). However, that as Covid-19 essentially halting the use of commercial office space, the Bond project terminated soon thereafter, and no further funds were paid by Bond (*id.* at ¶ 14). While TPG LLC eventually went on to direct some $8,500 to PopUp to cover the invoices of some vendors on the Bond project, no money was received from Bond for payment of PopUp's desired profit margin (*id.*).

Thereafter, on June 5, 2020, Legeard states that he received an email from Kattan with the invoice signed three months prior, but that the invoice was notarized and contained additional language reflecting what appeared to be a payment schedule (*id.* at ¶ 15). Legeard avers that he immediately responded by email in protest, stating that he was "seeing that the signed invoice was notarized and that some language [was] added to it that [was] not on the paperwork when [he] signed" (*id.* at ¶ 17). But that no explanation followed and this lawsuit was commenced instead (*id.*).

In reply, plaintiff argues that the purported "invoice" is not barred from the reaches of CPLR 3213 where the defendants' notarized signature and payment schedule are present. As for the four alleged deficiencies cited by the defendants regarding the Note,

plaintiff contends: (1) it is not a legal requirement that a defendant explicitly guarantee or promise to pay a debt for a written instrument to fall within the scope of CPLR 3213; (2) there is no confusion on the face of the Note as to when the payments were due because "due on receipt" is superseded by the handwritten payment plan written after the "due on receipt" was printed; (3) the defendants' claim that the amount due is not determinable because plaintiff seeks a lower amount than the amount reflected on the face of the Note is absurd since that would mean no creditor could bring a CPLR 3213 action where a debtor makes a partial payment; and (4) that Legeard's name is on the Note, in addition to "The Prestige Group," because Legeard accepted the debt personally, in contrast to prior invoices, which are attached as exhibits, where plaintiff only billed to "The Prestige Group." To the extent that the court finds a question of fact remains as to whether "The Prestige Group" includes both TPG LLC and TPG CORP or just one of the entities, plaintiff requests that the court enter judgment against TPG LLC only, as the defendants have repeatedly enumerated that TPG LLC would be the liable party.

Further, plaintiff proffers the affidavit of Joan Scanlon ("Scanlon"), the Note's notary, who attests that the handwritten payment plan on the Note was written by her in Legeard's presence and upon his direction (NYSCEF Doc No. 25, Scanlon Affidavit, ¶ 5), that she witnessed Legeard sign the Note (*id.* at ¶ 6), and that she handwrote the acknowledgment and notarized same in Legeard's presence (*id.* at ¶ 7). Plaintiff also disputes the defendants' assertion that plaintiff did not respond to Legeard's email where he suddenly claimed to have no recollection of the notarization and to be unfamiliar with the additional handwritten language. In support, plaintiff proffers its email responding to

defendants' email stating "[t]his is not true," and asking Legeard which language he was talking about with regard to what was added to the Note (see NYSCEF Doc No. 26).

Finally, plaintiff argues that the defendants' claimed condition precedent that their obligation to pay hinged on payment from Bond is nowhere to be found on the Note, and the only support for such a condition existing is the defendants' own self-serving assertion.

Discussion

CPLR 3213 provides that "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (CPLR 3213). A threshold issue on a motion for summary judgment in lieu of complaint is whether the instrument sued upon is "for the payment of money only" (CPLR 3213). "If an instrument contains an unconditional promise to pay a sum certain over a stated period of time, it is considered an instrument for the payment of money only" (*Bloom v Lugli*, 81 AD3d 579, 580 [2d Dept 2011] [citations omitted]). "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money — an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996] [citation omitted]). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*id.*). Where there are questions of performance by a party within the context of a written agreement, that is not an instrument for the payment of money only (*see Haupt v Metal City Findings Corp.*, 47 AD2d 837, 838 [2d Dept 1975]).

As stated by the court in *Interman Industrial Products, Ltd. v R. S. M. Electron Power, Inc.*, 45 AD2d 34 [2d Dept 1974]:

> "Where the account stated is grounded on an express assent -- such as a promissory note or a check or an unqualified written agreement to pay -- the conditions of CPLR 3213 are met, and the accelerated judgment procedure can be followed. An account stated may, however, come into being from an implied assent, such as the retention by the debtor of the creditor's statement without objection for a reasonable time. The circumstances dictate what length of time is deemed reasonable for the retention of the statement without protest; and the relation of the parties is a significant factor in determining whether the inference of assent may be fairly drawn. In this kind of an account stated, based on an implied assent, the statutory procedure cannot be followed, for there is no "instrument for the payment of money only" to which the obligation to pay can be clearly referred" (*id.* at 36 [internal citations omitted]).

Here, the character of the instrument relied upon by plaintiff does not meet the express statutory requirement that it be "for the payment of money only" (*see A. Stanley Proner, P. C. v Julien & Schlesinger, P. C.*, 134 AD2d 182, 185 [1st Dept 1987][finding that a letter agreement between two attorneys to share a fee does not qualify as an instrument "for the payment of money only" since proof of performance by plaintiff of a condition outside the agreement is necessary before defendant's obligation to pay becomes enforceable]). The Note, titled "invoice" references an "Activity" of "Fabrication" and a "Description" of "Bond Collective/Coworkers LLC," which raises the question of plaintiff's performance of the activity referenced. In addition, while Legeard concedes that the signature present on the Note is his, the handwritten "payment schedule," which is

disputed by Legeard, contains multiple cross-outs and, though mostly legible, suffers from a lack of clarity on its face.

Moreover, Legeard raises the prospect of the multiple handwriting additions being added after-the-fact, which further pushes this case outside the ambit of CPLR 3213. As evidenced by plaintiff's proffer of Scanlon's affidavit in reply, the handwriting additions on the Note raise issues that require proof beyond a single document to substantiate the underlying obligation, and as such, the fact that Legeard signed the invoice is insufficient to convert this invoice-referencing statement of account into an "instrument for the payment of money only." Thus, while plaintiff possesses a plenary cause of action for an account stated, plaintiff may not proceed by way of this expedited procedural vehicle of summary judgment in lieu of complaint under CPLR 3213.

Based upon the foregoing, plaintiff's motion for summary judgment in lieu of complaint is denied. The court now converts the matter to a plenary action and hereby directs the plaintiff to serve and e-file a regular complaint in this matter no later than 45 days from the date hereof, which service shall include a copy of this decision and order. Defendants shall have 20 days from the date of service of the complaint to serve any answers.

The foregoing constitutes the decision and order of the court.

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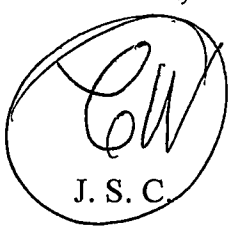

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HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT