At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of May 2022.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

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TD BANK, N.A.,

Plaintiff,

- against -

SDK FURNITURE, INC., and
SALIM KASSAB,

Defendants.

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Index No. 513811/2020
Motion Seq. #01

AMENDED ORDER

The following e-filed papers read herein:

	NYSCEF Doc Nos.
Notice of Motion/Order to Shower Cause/ Petition/Cross Motion and Affidavits (Affirmations)	7-24
Opposing Affidavits (Affirmations)	31
Reply Affidavits (Affirmations)	33

Plaintiff commenced this action to recover damages based upon defendants' breach of a promissory note secured by a guaranty. Plaintiff now moves for an order granting summary judgment pursuant to CPLR §3212 on its first and second cause of action against the defendants jointly and severally. Plaintiff seeks to recover damages in the amount of $106,821.22, plus per diem interest, legal fees, costs, and expenses for a default under the loan documents. Plaintiff also seeks an order granting summary judgment on the third

cause of action against defendant SDK Furniture, Inc. ("SDK"), to enforce plaintiff's rights and remedies as to the collateral.

BACKGROUND

On June 22, 2017, defendants executed and delivered a promissory note ("Note"), a business loan agreement ("Loan Agreement") evidencing the terms of a line of credit ("LOC"), a commercial guaranty ("Guaranty"), and a commercial security agreement ("Security Agreement") granting plaintiff a blanket security interest in, a lien on, pledge and assignment of all of defendant SDK's assets and all other property now existing or hereafter acquired and wherever located (hereinafter "Collateral") in exchange for a LOC of $100,000.00. These documents collectively are hereinafter referred to as the "loan documents." Payments were to be made monthly with interest commencing on July 22, 2017, with subsequent payments continuing the same date thereafter until June 22, 2024.

The Note and Loan Agreement provides that defendant SDK's failure to make payment when due constitutes an event of default. The Guaranty states defendant Salim Kassab's ("Kassab") payment obligation under the Note and Related Documents. According to the Guaranty, defendant Kassab absolutely and unconditionally guarantees the full and punctual payment and satisfaction of all amounts due on the LOC and any other indebtedness owed by defendant SDK to plaintiff.

The Security Agreement provides for plaintiff's rights and remedies in the event of a default, including, but not limited to, accelerating the indebtedness, selling the collateral, and appointing a receiver. It also provides that plaintiff shall have the full power of a secured creditor to sell, lease, transfer, enter defendant SDK's property to take possession

of and remove the Collateral, or otherwise deal with the Collateral or proceeds, and may sell the Collateral at a public auction or private sale. Pursuant to the terms of the Security Agreement, defendant SDK granted the plaintiff a blanket security interest covering among other things, all inventory, equipment, instruments, investment property and money.

Defendant SDK defaulted on the loan when it failed to make the December 22, 2019 payment and each payment thereafter. On June 11, 2020, plaintiff declared a default and demanded defendants make payment on of all amounts owed to the plaintiff, in full. Despite plaintiff's demand, defendants failed to make any payment. Thereafter, on July 31, 2020, plaintiff commenced this action against defendants by filing a summons and complaint. On September 14, 2020, defendants filed their answer and this motion followed.

Plaintiff moves for summary judgment pursuant to CPLR §3212 arguing that no triable issues of fact exist. Plaintiff further argues that the affirmative defenses asserted by defendants lack legal and factual support, are conclusory in nature, and cannot be sustained. In support of the motion, plaintiff submits, *inter alia*, an affidavit of merit of its vice president, Ellen Ferrara, the loan documents, financing statement, payment history, and demand letter.

The Ferrara affidavit states that she is the vice president in plaintiff's SBA Workout Department, has been employed by plaintiff for approximately ten (10) years, and her responsibilities include administering delinquent loans and handling numerous workout and collection matters. Ms. Ferrara is familiar with the systems plaintiff uses to book new loans, record payments, and maintain loan documentation. The affidavit states that she reviewed plaintiff's business records, and upon review, is personally familiar with the facts

and circumstances of this matter. In addition, the Ferrara affidavit mentions the execution of the loan documents and defendants' default as of June 11, 2020.

Defendants' Opposition

In opposition, defendant Kassab contends that he never agreed to personally guaranty the LOC because he did not sign in his "individual" capacity. Defendants also argue that the credit application did not contain all the terms as expected by defendants but were supplemented with other terms in the Loan Agreement that defendants allegedly did not sign nor negotiate. Defendants allege that they did not fully understand the complex terms within the application but relied on plaintiff to administer the loan. Defendants claim plaintiff did not consider defendant SDK's financial instability and had an obligation not to extend credit to defendant SDK.

Defendant Kassab denies receiving any notice from plaintiff demanding payment and argues that defendants did not agree to the acceleration of the loan in the event of a default. Defendants further claim that plaintiff lacks standing, and/or is not the real party in interest and has defrauded the court. Defendants also contend that plaintiff's affiant lacks personal knowledge of the matters regarding the Loan Agreement, and that summary judgment is premature because further discovery could raise a triable issue of fact.

Plaintiff's Reply

In Reply, plaintiff asserts that defendants' argument that defendant Kassab never personally guaranteed the LOC is unfounded. Plaintiff argues that defendant Kassab is still the personal guarantor of the loan because the Guaranty expressly states:

> "Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty or the Indebtedness."

Plaintiff's Reply affirmation explains that all the terms of the loan are embodied in the loan documents, which were fully integrated by merger clause, and signed by defendants. Plaintiff also asserts that defendants failed to proffer any support for their allegation that plaintiff acted improvidently by administering the loan without consideration of defendants' financial instability. Plaintiff further asserts that defendant Kassab's argument that he was not notified about the default and acceleration of the loan is unsupported. Plaintiff served a demand letter dated June 11, 2020, to defendants, specifically advising defendants of the default and acceleration of the loan. Moreover, plaintiff asserts defendants failed to recognize that plaintiff originated the loan and brought this instant action, therefore, it cannot be disputed that plaintiff has standing to enforce any default on the loan documents.

Plaintiff refutes defendants' contention that plaintiff's affiant lacks personal knowledge of the matters regarding the Loan Agreement, as the affidavit is competent and admissible evidence. The Ferrara affidavit provides Ms. Ferrara's background and knowledge as plaintiff's bank employee, her responsibilities, and mentions the loan documents at issue. Plaintiff also refutes defendants' contention that summary judgment is

premature because defendants failed to proffer any support that discovery would establish an existence of a triable issue of fact or raise a potential defense.

DISCUSSION

A motion for summary judgment shall be granted when the pleadings and evidence show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law (*Manicone v City of New York*, 75 AD3d 535, 537 [2nd Dept. 2010]). The burden rests on the moving party to establish their prima facie showing of entitlement to judgment (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2nd Dept. 2004]). Once the moving party has met this burden, it shifts to the non-moving party to establish, by admissible evidence, the existence of a triable issue of fact (*Gesuale v Campanelli & Assocs., P.C.*, 126 AD3d 936, 937 [2nd Dept. 2015]).

Breach of Promissory Note

To establish a prima facie entitlement to judgment as a matter of law to recover on a promissory note, a plaintiff needs to prove the existence of a promissory note, which contains an unequivocal and unconditional obligation to repay, and proof of default by defendants in payment (*Intermax Eco, LLC v Eco Family Food Mart Corp.*,172 AD3d 1040, 1041 [2nd Dept. 2019]). Plaintiff herein made out its prima facie entitlement to judgment on this cause of action by submitting proof of the existence of a Note, which contained the defendants' obligation to repay the loan, and a demand letter stating defendants' nonpayment according to the terms of the loan.

The burden shifts to defendants to demonstrate any triable issue of fact. Defendants argue that defendant Kassab never agreed to personally guaranty the loan. This argument

is without merit. The commercial guaranty attached to the moving papers is signed by defendant Kassab in his individual capacity. It is the only document with no mention of defendant Kassab's title or any indication that he is signing as the president of SDK. It would be an illogical conclusion that the purpose of the guaranty was for defendant SDK to guaranty its own indebtedness in the event of a default, rendering the entire guaranty meaningless (*Key Equip. Fin. v S. Shore Imaging, Inc.*, 69 AD3d 805, 808 [2nd Dept. 2010]). Even if defendant Kassab did not intend to be bound personally, the signed Guaranty indicates otherwise *(id.)*.

Defendants' argument that the terms in the credit application varied from the terms in the Loan Agreement, and was not signed nor negotiated by defendants, is also without merit. Defendants refer to "Exhibit B" of the motion for summary judgment and allege that the defendants never signed this agreement. The Court notes that there is no "Exhibit B" annexed to plaintiff's motion for summary judgment, but rather there is an "Exhibit 2," which is the Business Loan Agreement. This agreement is in fact signed by defendant Kassab. In addition, defendants claim that the loan agreement was attached to the Acceptance Letter, which was signed by senior vice president of plaintiff. Defendants, however, have failed to proffer any supporting evidence demonstrating that the terms of the loan application varied from the Loan Agreement. The terms of the loan are embodied and intended to be read with the related loan documents. Courts are obligated to require full application of the parol evidence rule (*Vivir of L I, Inc. v Ehrenkranz*, 127 AD3d 962, 964 [2nd Dept. 2015]). This rule safeguards against fraudulent claims and provides stability to commercial transactions by prohibiting the introduction of extrinsic evidence to vary or

to add to the terms of a contract, especially where such contract contains a merger clause" (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013] citing *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

It is common practice for a merger clause to apply "the full application of the parol evidence rule to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing" (*Jarecki v Shung Moo Louie*, 95 NY2d 665, 669 [2001]). The merger clause accomplishes the parol evidence rule's purpose by "evincing the parties' intent that the agreement 'is considered a completely integrated writing'" (*id.*). The merger clause contained in the Loan Agreement provides that "This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement . . . " (*see* Exhibit 2, page 4). The terms contained within the loan documents constituted the entire understanding and agreement of the parties, therefore, the parties are bound by the terms set forth in the loan documents.

Defendants claim plaintiff failed to monitor the loan that was extended to defendant SDK because plaintiff knew or should have known that the defendants were not financially sound and could not have afforded the loan. However, the payment history shows that defendants made timely loan payments for over two (2) years before they defaulted, which demonstrated their understanding of the loan and their payment obligations under the loan.

Defendant Kassab's allegation that he did not receive any notice requiring him to pay the full amount of the loan as guarantor, and that the loan documents did not allow for an acceleration of a debt in the event of a default are unavailing. Plaintiff has submitted a copy and proof of mailing of said notice to defendants dated June 11, 2020. Additionally,

pursuant to the terms of the Note under paragraph "Payment," it states the "Borrower will pay this loan in full immediately upon Lender's demand" (*see* Exhibit 1, page 1). In addition, in the Loan Agreement under paragraph "Effect of an Event of Default," it states "If any Event of Default shall occur . . . all indebtedness immediately will become due and payable. all without notice of any kind to Borrower . . . " (*see* Exhibit 2, page 4).

Defendants' argument that plaintiff lacks standing and/or is not the real party in interest and has defrauded the court is also unavailing. Defendants failed to make more than a mere conclusory assertion and such bald, conclusory assertion with no evidentiary support is inadequate to raise any issues of fact and insufficient to defeat a motion for summary judgment (*Stonehill Cap. Mgmt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]). The loan documents establishes that plaintiff is the original owner and holder of the loan.

Defendants' argument that plaintiff's affiant, Ellen Ferrara, does not have personal knowledge of the matters of this case and has not authenticated the loan documents is similarly without merit. The Ferrara Affidavit sufficiently establishes the business records relied upon and satisfies the admissibility requirements (*Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2nd Dept. 2017]).

Defendants' final contention that the motion is premature because discovery is outstanding is also unavailing. Defendants have failed to demonstrate said discovery would lead to any relevant evidence or facts essential to deny the motion. In addition, defendants' mere hope or speculation that discovery would produce any relevant evidence or facts to

defeat the motion is insufficient to deny the motion (*Sterling Nat'l Bank v Alan B. Brill, P.C.*, 186 AD3d 515, 518–519 [2nd Dept. 2020]).

Based upon the foregoing, this Court finds that plaintiff has sufficiently established its prima facie burden of its entitlement to summary judgment. Defendants have failed to raise any triable issue of fact in opposition. Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (Motion Seq. 01) is granted in its entirety; and it is further

ORDERED that plaintiff is entitled to judgment over defendants, jointly and severally, in the amount of $106,821.22, plus per diem interest at the rate of $18.72, from September 18, 2020, through the date of entry of the judgment, legal fees, costs, and expenses; and it is further

ORDERED that plaintiff is authorized to sell, liquidate, dispose of, or retain the aforesaid Collateral in a commercially reasonable manner, with the proceeds from the same being applied first to the costs of such sale or other disposition and then in reduction of the amounts SDK Furniture, Inc.; and it is further

ORDERED that SDK Furniture, Inc. is restrained from any use of the Collateral; and it is further

ORDERED that the sheriff of any county of the State of New York wherein the Collateral is found, is directed to seize the Collateral at issue, and for the purpose, if the Collateral is not delivered to him or her, to break open, enter, and search for the Collateral in the place specified, and to hold the Collateral pursuant to CPLR § 7101, et al; and it is further

ORDERED that the plaintiff shall submit a judgment to the County Clerk of Kings County.

ENTER

J. S. C.

HON. WAVNY TOUSSAINT
J.S.C.