

**Halgene Watch Ltd. v Alex Capital Fund, LLC**

2024 NY Slip Op 34417(U)

December 10, 2024

Supreme Court, New York County

Docket Number: Index No. 654217/2024

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY M. BANNON PART 61M**

*Justice*

-----X

HALGENE WATCH LTD. and LISA EDELSTEIN

Plaintiffs,

- v -

ALEX CAPITAL FUND, LLC, and STEPHEN J. ROSENBERG,

Defendants.

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**INDEX NO.** 654217/2024

**MOTION DATE** 12/03/2024

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

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

In this action to recover \$808,002.66 plus contractual attorney’s fees and costs upon a promissory note and guaranty agreement, the plaintiffs, Halgene Watch Ltd. and Lisa Edelstein, move pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendant Alex Capital Fund and its managing member and guarantor, defendant Stephen J. Rosenberg. The defendants oppose the motion. The motion is granted.

A plaintiff may seek relief under CPLR 3213 “[w]hen [the] action is based upon an instrument for the payment of money only.” See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1<sup>st</sup> Dept. 2013); Allied Irish Banks, P.L.C. v Young Men’s Christian Assn. of Greenwich, 105 AD3d 516 (1<sup>st</sup> Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1<sup>st</sup> Dept. 2013). The purpose of the statute “is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself.” G.O.V. Jewelry, Inc. v United Parcel Service, 181 AD2d at 517 (1<sup>st</sup> Dept. 1992). Thus, in order to establish a *prima facie* entitlement to summary judgment in lieu of a complaint, a plaintiff must produce an instrument containing an “unequivocal and unconditional obligation to repay” (Zyskind v FaceCake Mktg. Tech., Inc., 101 AD3d 550, 551 [1<sup>st</sup> Dept. 2012]), one which by its terms is for the payment of money only over a stated period of time (see Bloom v Lugli, 81 AD3d 579,580 [2<sup>nd</sup> Dept. 2011]), and establish that the defendant failed to pay in accordance

with those terms. See Zyskind v FaceCake Mktg. Tech., Inc., *supra*; Rhee v Meyers, 162 AD2d 397 (1<sup>st</sup> Dept. 1990). Under these guidelines, a promissory note may qualify as such an instrument, so long as the plaintiff submits proof of the existence of the note and of the defendant's failure to make payment. See Bonds Financial, Inc. v Kestrel Tech., LLC, 48 AD3d 230 (1<sup>st</sup> Dept. 2008); Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136 (1<sup>st</sup> Dept. 1968). Furthermore, it is well settled that "where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1<sup>st</sup> Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1<sup>st</sup> Dept. 1991).

A proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See CLR 3212; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). The plaintiffs have met their burden on the motion and the defendants have not met their burden.

The plaintiffs met their burden by submitting, *inter alia*, the subject promissory note, signed by defendant Rosenberg on behalf of defendant Alex Capital Fund LLC, and the guaranty agreement, signed by defendant Rosenberg in his individual capacity. The plaintiffs also submit the affidavits of Victor Mayer, a member of Halgene Watch Ltd., and Lisa Edelstein, as well as a supplemental affidavit of Victor Mayer supported by an account statement showing the account activity and outstanding balances, including interest, through November 2024.

By their proof, the plaintiffs have established its "*prima facie* entitlement to judgment as a matter of law by demonstrating the existence of a promissory note, executed by the defendants, containing an unequivocal and unconditional obligation to repay, and the failure by the defendants to pay in accordance with the note's terms." Kim v Il Yeon Kwon, 144 AD3d 754, 755 (2<sup>nd</sup> Dept. 2016) (citing Ahern v Miloslaw, 128 AD3d 992 [2<sup>nd</sup> Dept. 2015]; see Zyskind v FaceCake Mktg. Tech., Inc., *supra*). The plaintiff also submits a clear and unambiguous guaranty signed by defendant Stephen Rosenberg with language that conclusively binds the

guarantor to its terms (see Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 [1<sup>st</sup> Dept. 2012]) such that enforcement of the guaranty is warranted.

In opposition, the defendants do not dispute that some monies are owed but argue that the number is closer to \$100,000, but they submitted inadmissible screenshots of purported wire transfers to the defendants, some of which reference only “Vicky” or “Lisa” as a recipient and/or indicate that the payment was to a supermarket or a catering service. The supplemental papers permitted by the court did not advance the defendants’ position.

Therefore, pursuant to the terms of the note and guaranty, the plaintiff is entitled to of \$808,002.66, plus statutory interest from August 31, 2024. Although a greater sum is sought in the supplemental papers, in the original motion papers the plaintiff seek the amount due through August 31, 2024.

The plaintiff has also established entitlement to contractual attorney’s fees and costs as both the promissory note and guaranty contain a provision expressly providing for such relief. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010). However, the plaintiffs submit no supporting proof of the amount of fees and costs incurred. Therefore, the plaintiffs may submit supplement papers in the form of an attorney affirmation, billing invoices or other proof to establish the amount of fees incurred, within 30 days. The parties are encouraged to explore settlement in the meantime.

Accordingly, upon the foregoing papers, it is


ORDERED that the plaintiff’s motion for summary judgment in lieu of a complaint pursuant to CPLR 3213 is granted, and it is further

ORDERED that the Clerk shall enter judgment in favor of the plaintiff, Halgene Watch Ltd, and Lisa Edelstein, and against the defendants, Alex Capital Fund LLC and Stephen J. Rosenberg a/k/a Stephen Rosenberg, jointly and severally, in the sum of \$808,002.66, plus statutory interest from August 31, 2024, and it is further

ORDERED that the plaintiffs’ application for contractual attorney’s fees is granted as to liability and, if so advised, they may submit supplemental papers in support of the application

within 30 days of the date of this order, with e-mail notification to the Part 61 Clerk, of any such filing.

This constitutes the Decision and Order of the court.

<u>12/10/2024</u> DATE	 <hr/> NANCY M. BANNON, J.S.C. <b>HON. NANCY M. BANNON</b>	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE