

Acquiom Agency Servs. LLC v Silber

2024 NY Slip Op 33950(U)

November 6, 2024

Supreme Court, New York County

Docket Number: Index No. 654386/2024

Judge: Anar Rathod Patel

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

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ACQUIOM AGENCY SERVICES LLC Plaintiff, - v - MOSHE SILBER, Defendant.	<table border="0"> <tr> <td style="width: 150px;">INDEX NO.</td> <td><u>654386/2024</u></td> </tr> <tr> <td>MOTION DATE</td> <td><u>08/26/2024</u></td> </tr> <tr> <td>MOTION SEQ. NO.</td> <td><u>001</u></td> </tr> </table> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>	INDEX NO.	<u>654386/2024</u>	MOTION DATE	<u>08/26/2024</u>	MOTION SEQ. NO.	<u>001</u>
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HON. ANAR RATHOD PATEL:

The following e-filed documents listed by NYSCEF document number (Motion 001): 2–15, 18–23 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Acquiom Agency Services LLC (“Plaintiff or “Acquiom”) moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against Defendant Moshe Silber (“Defendant” or “Borrower”) in the amount of \$19,185,000, as well as interest, attorneys’ fees, and expenses. For the reasons discussed below, Plaintiff’s motion is granted.

Relevant Factual and Procedural History

The Court refers to its August 2, 2024 Decision and Order in the case brought by Plaintiff against Guarantors captioned *Acquiom Agency Services LLC v. Fox Capital, et al.* (Index No. 652265/2024) (“Acquiom I”) wherein the Court granted Acquiom’s motion as to liability against the Guarantors in the amount of \$19,185,000. The Court refers to its prior Decision and Order for a full recitation of facts relevant to this proceeding as well as the reasoning set forth in granting the motion.

Here, Plaintiff seeks an order granting summary judgment in lieu of complaint on the June 2, 2022 Credit Agreement, whereby certain lenders agreed to extend credit and loans to Defendant up to \$20,000,000, of which \$19,185,000 remains due. NYSCEF Doc. No. 3 (J. Anderson Aff.) at ¶ 3; NYSCEF Doc. No. 4 (Credit Agreement). Plaintiff states that, on March 1, 2024, Defendant defaulted under the Credit Agreement in failing to pay at least \$234,798.70 in interest that was then due and payable under the Credit Agreement and related loan documents. NYSCEF Doc. No. 3 at ¶ 18; NYSCEF Doc. No. 10 (Issuer Reminder Statement). On March 6, 2024, Acquiom sent a letter to Defendant and the Guarantors advising them that an event of default under the Credit Agreement had occurred. NYSCEF Doc. No. 3 at ¶ 19; NYSCEF Doc. No. 11 (3/6/24 Notice of Default and Acceleration). On April 2, 2024, Acquiom sent another letter to Defendant and the

Guarantors advising them of the continuing default and that the amounts due remained unpaid. NYSCEF Doc. No. 3 at ¶ 26; NYSCEF Doc. No. 12 (4/2/24 Reservation of Rights Letter).

Plaintiff commenced this action on August 26, 2024, by filing a Summons and Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR § 3213. NYSCEF Doc. Nos. 1–15. Plaintiff seeks summary judgment on the total aggregate principal balance outstanding on loans made under the Credit Agreement in the amount of \$19,185,000, in addition to all monetary sums due under the Credit Agreement, including but not limited to, interest on the outstanding term loans and all fees and other unpaid obligations, as those terms are defined in the Credit Agreement, and as to all of which interest continues to accrue at the default rate, and which interest, as of August 26, 2024, totaled \$2,147,854.38, with \$10,768.55 in additional interest accruing *per diem*; as well as Plaintiff's expenses, attorneys' fees, and disbursements incurred in connection with enforcement of the Credit Agreement and related Loan Documents, and in accordance with Section 9.03(a) of the Credit Agreement. Plaintiff asks that the Court sever the action and hold an inquest to determine the amount of interest and attorneys' fees/expenses due to Plaintiff.

Defendant filed his Opposition on October 21, 2024. NYSCEF Doc. Nos. 21–22. Defendant argues that Plaintiff's motion should be denied because the Credit Agreement does not qualify as an instrument for the payment of money only, but requires non-monetary performance obligations. Defendant's bases for asserting that certain non-monetary performance obligations in the Credit Agreement preclude the application of CPLR § 3213 are identical to those asserted in *Acquiom I*, *compare* NYSCEF Doc. No. 21 (Greene Aff.) at ¶ 9 *with* NYSCEF Doc. No. 26 (Def. Mem. of Law, *Acquiom I*), at 3–4, except that, here, Defendant asks the Court to adhere to the “Majority View” of the First Department's jurisprudence on CPLR § 3213. NYSCEF Doc. No. 22 (Def. Mem. of Law at 5–6).

Legal Discussion

Consistent with the reasoning set forth in the Court's August 2, 2024 Decision and Order in *Acquiom I*, the Court determines that Plaintiff has satisfied its *prima facie* burden on its CPLR § 3213 motion for summary judgment in lieu of complaint by submitting the underlying loan agreement, and its demand letters establishing Borrower's default and failure to perform under the agreement. *See, e.g., DB 232 Seigel Mezz LLC v. Moskovits*, 223 A.D.3d 610, 611 (1st Dept. 2024) (internal citations omitted); *DDS Partners, LLC v. Celenza*, 6 A.D.3d 347, 348 (1st Dept. 2004) (internal citation omitted). “A typical example of an instrument within the meaning of the statute is ‘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’.” *DDS Partners, LLC*, 6 A.D.3d at 348 (internal citation omitted); *see also Bond Street Servicing LLC v. Amended Unadilla Business Corp.*, No. 652074/2021, 2022 WL 3586109, at *1 (N.Y. Sup. Ct. Aug. 18, 2022) (relying upon *DDS Partners LLC* in determining that a commercial credit agreement is an instrument for the payment of money only).

Here, the Credit Agreement constitutes an instrument for the payment of money only where it sets forth an agreement to make loans (“Term Loans”) to Borrower from time to time. NYSCEF Doc. No. 4 at Section 2.01. Defendant does not dispute that the Credit Agreement constitutes an unconditional promise to pay the loans—here, Defendant received three separate Term Loans on the following dates: June 2, 2022; October 18, 2023; November 28, 2023. NYSCEF Doc. No 3 at

¶¶ 8–11. Defendant also does not dispute that he is in default on the loans pursuant to Section 7.01 of the Credit Agreement, and presently owes a principal balance of \$19,185,000 in addition to interest.

Rather, Defendant urges the Court to adhere to the purported “Majority View” of First Department jurisprudence concerning the non-monetary performance obligations. Defendant concedes that the First Department, including in recent cases from 2023, has held that relief pursuant to CPLR § 3213 is appropriate where the underlying agreement is an instrument for the payment of money only and requires no additional performance as a condition precedent to payment. *See e.g., 45-47-49 Eighth Ave. LLC v. Conti*, 220 A.D.3d 473, 473 (1st Dept. 2023); *iPayment, Inc. v. Silverman*, 192 A.D.3d 586, 587 (1st Dept. 2021), *lv dismissed* 37 N.Y.3d 1020 (2021), *citing Park Union Condominium v. 910 Union St., LLC*, 140 A.D.3d 673, 674 (1st Dept. 2016). Here, Defendant concedes that the non-monetary obligations are not a condition precedent to payment and are, in fact, entirely irrelevant from repayment of the loans. *See* NYSCEF Doc. No. 22 at 7. The Court sees no rationale to depart from its previous determination as set forth in *Acquiom I*, and therefore determines that because the non-monetary obligations are admittedly not conditions precedent to repayment, CPLR § 3213 applies. Here, Defendant has raised no genuine issue of material fact in opposition to Plaintiff’s motion and therefore, the Court grants Plaintiff’s motion as to liability.

Plaintiff has also established—and Defendant does not contest—that it is entitled to attorneys’ fees and expenses incurred in connection with the enforcement of its rights under the Credit Agreement pursuant to Section 9.03(a) of the Credit Agreement, which states, in part, that the Borrower shall pay:

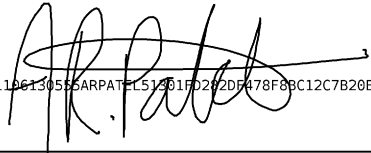
(ii) all out-of-pocket expenses incurred by the Administrative Agent or any Lender (including Other Taxes, the fees, charges and disbursements of separate counsel for each of the Administrative Agent and the Lenders, in connection with the enforcement or protection of its rights (A) in connection with this Agreement and the other Loan Documents, including its rights under this Section, or (B) in connection with the Loans made hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans.

Accordingly, it is hereby

ORDERED that Plaintiff’s Motion for Summary Judgment in Lieu of Complaint is granted as to liability and in the amount of nineteen million, one-hundred and eighty-five thousand dollars and zero cents (\$19,185,000), and it is further

ORDERED that the portion of Plaintiff’s action that seeks interest, expenses, and attorneys’ fees is severed for further proceedings, as directed herein, and it is further

ORDERED that the parties shall appear before the Court for an inquest on December 4, 2024 at 10:00 a.m. in Courtroom 428.


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ANAR RATHOD PATEL, A.J.S.C.

November 6, 2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

APPLICATION: SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE