

**Taxi Medallion Loan Trust III v Benson Hacking Corp.**

2019 NY Slip Op 32069(U)

July 3, 2019

Supreme Court, New York County

Docket Number: 655048/2018

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
TAXI MEDALLION LOAN TRUST III,

Plaintiff,

-against-

BENSON HACKING CORP., DEVIN BOUTON, JOSEPH  
BOUTON, DAYNA BOUTON A/K/A DAYNA L.  
STRUMWASSER

Defendants.  
-----X

TAXI MEDALLION LOAN TRUST III,

Plaintiff,

-against-

DEVIN CORP., MICHELE BOUTON, JOSEPH BOUTON

Defendants.  
-----X

HON. JENNIFER G. SCHECTER, J.S.C.

**DECISION AND  
ORDER**

**Index No. 655048/2018  
(Benson Action)**

**Index No. 655049/2018  
(Devin Action)**

Motion sequence 001 in the Benson Action (Index No. 655048/2018) and motion sequence 001 in the Devin Action (Index No. 655049/2018) are consolidated for disposition.

In the Benson Action, plaintiff Taxi Medallion Loan Trust III moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against corporate defendant Benson Hacking Corp. (Benson) and individual defendants Devin Bouton, Joseph Bouton and Dayna Bouton a/k/a Dayna L. Strumwasser (Dayna Strumwasser, collectively Benson Guarantors, with Benson, Benson Defendants). Benson Defendants oppose and cross-move for dismissal. In the Devin Action, plaintiff moves for summary judgment in lieu of complaint against corporate defendant Devin Corp. (Devin, with Benson, Borrowers) and individual defendants Michele Bouton and Joseph Bouton (Devin Guarantors, with Devin, Devin Defendants), who oppose and cross-move for dismissal. As discussed below, plaintiff's motions for summary judgment in lieu of complaint

are granted, and attorneys' fees, unless waived by plaintiffs, will be determined by letter briefing.

The cross-motions are denied.

*I. Procedural History & Factual Background*<sup>1</sup>

On May 28, 2013, taxicab medallion lending company Medallion Funding LLC (Lender) made a \$1,465,000 loan to Benson (the Benson Loan), evidenced by a promissory note signed on behalf of Benson by Devin Bouton and Joseph Bouton as president and secretary of Benson, respectively (Benson Action, Dkt. 4 [Benson Note]).<sup>2</sup> The Benson Guarantors guaranteed the Benson Loan pursuant to an unconditional guaranty dated May 28, 2013 (Benson Action, Dkt. 5 [Benson Guaranty]).<sup>3</sup> On the same date, Lender made another \$1,465,000 loan to Devin (the Devin Loan, with Benson Loan, Loans) evidenced by a note signed by Michele Bouton and Joseph Bouton as president and secretary of Devin, respectively (Devin Action, Dkt. 4 [Devin Note (with Benson Note, Notes)]) and guaranteed pursuant to an unconditional guaranty by the Devin Guarantors (Devin Action, Dkt. 5 [Devin Guaranty (with Benson Guaranty, Guarantees)]).

Joseph Bouton attests that the Benson Loan proceeds helped finance the purchase of two taxi medallions, while the Devin Loan refinanced a prior purchase price loan for two other taxi medallions (collectively, Medallions) (Benson Action, Dkt. 20 ¶ 3; Devin Action, Dkt. 22 ¶ 3). Lender and Borrowers executed security agreements (Security Agreements) securing Borrowers' obligations under the respective Notes with Borrowers' property, including the Medallions (Benson Action, Dkt. 26 [Benson Security Agreement] at 2, 11; Devin Action, Dkt. 28 [Devin Security Agreement] at 2, 11]). New York law governs interpretation of the Notes, Guarantees and Security Agreements (Benson Note at 3; Benson Guaranty at 4; Benson Security Agreement at 9

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<sup>1</sup> Unless otherwise indicated, the following facts are undisputed.

<sup>2</sup> References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

<sup>3</sup> Joseph Bouton executed the Benson Guaranty as attorney in fact for Dayna Strumwasser (Benson Guaranty at 5). Strumwasser does not argue the legal import (if any) of this fact.

¶ 21; Devin Note at 3; Devin Guaranty at 5; Devin Security Agreement at 9 ¶ 21). On May 30, 2013, Lender assigned to plaintiff its rights, title and interest in the Notes, Security Agreements and Guarantees pursuant to two general assignment agreements (Benson Action, Dkt. 5 at 7-8 [Benson Assignment]; Devin Action, Dkt. 5 at 7-8 [Devin Assignment (with Benson Assignment, Assignments)]). Lender executed an allonge to each of the Notes, making them payable to plaintiff (Benson Action, Dkt. 4 at 5 [Benson Allonge]; Devin Action, Dkt. 4 at 5 [Devin Allonge]).

Each of the Notes charged a non-default interest rate of 3.35% per annum and required monthly installment payments of \$7,216.81 and a balloon payment of outstanding principal and accrued interest due May 28, 2016 (Maturity Date) (Benson Note at 2; Devin Note at 2). The Notes entitle Lender to collection costs, including reasonable attorneys' fees, if payments are not made when due, and permit Lender to charge a 5% late charge for payments overdue by more than 10 days (Benson Note at 2; Devin Note at 2). The Notes expressly incorporate the covenants, conditions and agreements of the Security Agreements (Benson Note at 3; Devin Note at 3).

The Security Agreements, in turn, incorporate Borrowers' obligations under the Notes to repay principal and interest on the Loans (Benson Security Agreement at 2 ¶ 1; Devin Security Agreement at 2 ¶ 1), and, like the Notes, set forth a 5% late charge "for the purpose of defraying the expense incident to handling" payments that are overdue by 10 or more days (Benson Security Agreement at 10 ¶ 26; *accord* Devin Security Agreement at 10 ¶ 26). Finally, the Security Agreements prohibit modification or waiver, except by a signed writing. They provide:

No delay on the part of the Lender in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof (Benson Security Agreement at 9 ¶ 14; *accord* Devin Security Agreement at 8 ¶ 14).

This Agreement contains the full understanding of the parties with respect to the subject matter hereof. This Agreement may not be terminated nor may any of its provisions be changed or waived, except by writing signed by the party against whom such termination, change or waiver is sought to be applied. A waiver by the Lender of any default, right or remedy hereunder on any one occasion shall not be construed as a waiver of any other default or a

bar to any right or remedy the Lender would otherwise have on any future occasion (Benson Security Agreement at 9 ¶ 21; *accord* Devin Security Agreement at 9 ¶ 21).

Under the Guarantees, each of Guarantors, as “primary obligor and not merely as a surety irrevocably and unconditionally guarantee[d] to the Lender payment when due, whether by acceleration or otherwise” of Borrower’s liabilities to the Lender, including Borrowers’ obligations under the respective Security Agreements and Notes (Benson Guaranty at 2; *accord* Devin Guaranty at 2). The Guarantees specified that at any time after “any default with respect to payment or performance of the liabilities of the Borrower ... the Lender may, without notice to the Borrower or any aforesaid person, make the liabilities of the Borrower to the Lender, whether or not then due, immediately due from and payable hereunder by the undersigned, and the Lender shall be entitled to enforce the obligations of the undersigned hereunder” (Benson Guaranty at 2-3; *accord* Devin Guaranty at 2-3). The Guarantees waive certain notices and defenses, as follows:

The undersigned ... waives presentment, demand of payment, protest, notice of dishonor or nonpayment of any such liabilities, suit or taking other action by the Lender against, and any other notice to, any party liable thereon (including the undersigned).

The Lender may at any time and from time to time ... without the consent of or ... notice to the undersigned, without incurring responsibility to the undersigned, without impairing or releasing the obligations of the undersigned hereunder, upon or without any terms or conditions and in whole or in part:

(1) change the manner, place or terms of payment, and/or change or extend the time of payment of, renew or alter, any liability of the Borrower, any security therefor, or any liability incurred directly or indirectly in respect thereof, and the guaranty herein made shall apply to the liabilities of the Borrower as so changed, extended, renewed or altered; ...

No invalidity, irregularity or unenforceability of all or any part of the liabilities hereby guaranteed or of any security therefor or any other circumstance that might otherwise constitute a legal or equitable defense of a guarantor shall affect, impair or be a defense to this guaranty, and this guaranty is a primary obligation of the undersigned (Benson Guaranty at 2; *accord* Devin Guaranty at 2).

The Guarantees entitle Lender to recover from Guarantors attorneys' fees, costs and expenses of collection in enforcing the Security Agreements, Notes and Guarantees (Benson Guaranty at 2, 4; *accord* Devin Guaranty at 2, 4). Like the Security Agreements, the Guarantees specify that Lender's rights under the Guarantees may not be modified or waived except by a signed writing (Benson Guaranty at 4; *accord* Devin Guaranty at 4).

Plaintiff initiated the Benson Action and Devin Action on October 10, 2018 by motions for summary judgment in lieu of complaint. The motions in both actions seek identical monetary judgments for amounts allegedly due under the respective Notes at 3.35% (non-default) interest.

In support of its motions, plaintiff relies on the respective Notes, Security Agreements and Guarantees (collectively, the Loan Documents) as well as affidavits from Thomas Munson, Vice President and Secretary of plaintiff attesting to the authenticity of the Loan Documents (Benson Action, Dkt. 3, 24; Devin Action, Dkt. 3, 26). Plaintiff also submits affidavits from Spiro Hellen, its Assistant Vice President (Benson Action, Dkt. 27; Devin Action, Dkt. 29). Based in part on plaintiff's corporate records, Munson attests to the Loans and the Assignments executed two days following the Loans. According to Munson, as of the Maturity Date, \$1,350,758.24 in principal remained outstanding on each of the Loans, interest was paid to December 12, 2016 (with several additional partial interest payments made between then and April 11, 2017, and one more on September 4, 2018), and under each of the Notes, as of September 24, 2018: (1) \$1,350,758.24 in principal remained outstanding; (2) accrued and unpaid interest was \$80,750.16; (3) late charges, accrued on June 7, 2016, were \$67,757.87 and (4) daily interest of \$125.70 continues to accrue on the outstanding principal from and after September 25, 2018 (Benson Action, Dkt. 3 ¶¶ 23, 27-28; *accord* Devin Action, Dkt. 3 ¶¶ 22, 26-27). Plaintiffs also submit letters to Borrowers and Guarantors dated August 2, 2016 and September 19, 2018 declaring that amounts remained due and owing on the Loans (Benson Action, Dkt. 7-8, 25; Devin Action, Dkt. 7-8, 27).

In opposition, defendants submit affidavits from Joseph Bouton (Benson Action, Dkt. 20; Devin Action, Dkt. 22). He and his wife, Michele Bouton, are Devin's sole stockholders; he is also the father of Devin Bouton and Dayna Bouton, Benson's sole stockholders. Defendants explain that the arrival of e-hailing services such as Uber and Lyft upended the New York City taxi regulatory scheme, deflating the Medallions' value. Thereafter, the medallion manager with whom defendants had contracted to operate taxis under the Medallions and remit a monthly fee could no longer afford the monthly payments on the Loans. Joseph Bouton attests that Lender instructed him to make payments that were less than the amounts due on the Loans.

According to defendants, there was no default on the Loans because plaintiff failed to send notices of default, orally modified the Loans and accepted payments after the Maturity Date. Defendants, however, do not contest that plaintiff is Lender's successor-in-interest under the Loan Documents. Nor do defendants deny their own failure to fully repay the Loans. Finally, they generally aver that plaintiff's calculations are not correct, but fail to provide their own calculations.

## II. Discussion

### A. Legal Standard

"When 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; *see Lawrence v Kennedy*, 95 AD3d 955, 957 [2d Dept 2012]). "An instrument is considered to be for the payment of money only if it contains an unconditional promise to pay a sum certain over a stated period of time" (*Lawrence*, 95 AD3d at 957, citing *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). CPLR 3213 may thus be used to collect on a promissory note and unconditional guaranty (*see Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]; *Blumenstein v Waspit Grp., Inc.*, 140 AD3d 620, 620 [1st Dept 2016]).

“To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note’s terms” (*Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]). To enforce a guaranty, plaintiff “must prove ‘the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty’” (*Navarro*, 25 NY3d at 492, quoting *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). Failure to make the requisite prima facie showing requires denial of the motion for summary judgment, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]).

Once plaintiff establishes its prima facie entitlement to summary judgment in lieu of complaint, the burden shifts to defendant to demonstrate “the existence of a triable issue with respect to a bona fide defense” (*Zyskind*, 101 AD3d at 551). Defendant must submit evidentiary proof in admissible form or provide an acceptable excuse for failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to contradict facts is an admission (*Costello Assocs., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed*, 62 NY2d 942 [1984]). The evidence on the motion must be examined in the light most favorable to the opponent of summary judgment (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

Summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). Indeed, summary judgment cannot be avoided by the “shadowy semblance of an issue” (*Jeffcoat v Andrade*, 205 AD2d 374, 375 [1st Dept 1994]).

#### B. Enforcement of the Loan Documents

Plaintiff seeks a monetary judgment in each action against defendants, under the Notes and Guarantees, for \$1,499,266.28—consisting of outstanding principal, late charges and accrued

interest as of September 24, 2018—plus \$125.70 in daily interest from September 25, 2018. Through plaintiff's affidavits, plaintiff met its burden to establish Borrowers' execution of the Notes, Guarantors' execution of the Guarantees and defendants' failure to pay the amounts due on the Notes and Guarantees on or after the Maturity Date (*see 8430985 Canada Inc. v United Realty Advisors LP*, 148 AD3d 428 [1st Dept 2017]; *German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408 [1st Dept 2013]; *Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560 [1st Dept 2012]). Defendants assert that, by accepting monthly payments after the Maturity Date and allegedly failing to issue notices of default or to otherwise act as though the Loans were in default, plaintiff orally modified the Loans and waived its rights thereunder.

Defendants have not demonstrated an issue of fact as to oral modification. The Security Agreements, whose provisions are incorporated by reference into the Notes, state that “[t]his Agreement may not be terminated nor may any of its provisions be changed or waived, *except by writing signed* by the party against whom such termination, change or waiver is sought to be applied” (Benson Security Agreement at 9 ¶ 21 (emphasis added); *accord* Devin Security Agreement at 9 ¶ 21). Likewise, the Guarantees state that “no modification or amendment of this guaranty, shall be deemed to be made by the Lender *unless the same shall be in writing, duly signed* on behalf of the Lender” (Benson Guaranty at 4 (emphasis added); *accord* Devin Guaranty at 4). “[T]he courts of this State will give effect to a party’s clearly stated intention not to be contractually bound until it has executed a formal written agreement” (*Jordan Panel Sys., Corp. v Turner Constr. Co.*, 45 AD3d 165, 169 [1st Dept 2007]). To overcome contractual prohibitions on oral modification, “partial performance alone is not enough; the performance must be unequivocally referable to the oral agreement to modify” (*Rose v Spa Realty Assocs.*, 42 NY2d 338, 345 [1977]). Payments made after the Maturity Date were not “unequivocally referable” to any alleged oral modification. Accordingly, the Loans were not orally modified or extended.

Defendants have also failed to raise a triable issue of fact as to waiver, which “may not be inferred ... to frustrate the reasonable expectations of the parties embodied in a [contract] when they have expressly agreed otherwise” (*Jeppaul Garage Corp. v Presbyterian Hosp. in City of New York*, 61 NY2d 442, 446 [1984]). The Security Agreements and Guarantees state that “[n]o delay on the part of the Lender in exercising any of its options, powers or rights, or partial or single exercise thereof, shall constitute a waiver thereof” (Benson Security Agreement at 9 ¶ 14; *accord* Devin Security Agreement at 8 ¶ 14; Benson Guaranty at 4; Devin Guaranty at 4). Thus, plaintiff’s purported failure to serve a timely “notice of default,” to reject payments, to seize collateral or to more expeditiously file suit, did not effect a waiver. Nor did plaintiff’s mere acceptance of defendants’ sporadic monthly payments after the Maturity Date constitute a waiver (*see Navillus Tile v Turner Constr. Co.*, 2 AD3d 209, 211 [1st Dept 2003] [intent to waive contractual right “must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act” (quotation mark omitted); *Chen v Ins. Co. of the State of Pennsylvania*, 165 AD3d 588, 589 [1st Dept 2018] [waiver not implied unless adversary was misled to its prejudice that waiver existed]).

Guarantors are likewise liable under the unconditional Guarantees, which waived all defenses (*see Steve Young Intl., Ltd. v Barnes*, 267 AD2d 24, 25 [1st Dept 1999]; *Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577, 577 [1st Dept 2010]; *Sterling Natl. Bank v Biaggi*, 47 AD3d 436, 437 [1st Dept 2008]). The Guarantees, moreover, allowed plaintiff to “change or extend the time of payment” without releasing Guarantors (Benson Guaranty at 2; *accord* Devin Guaranty at 2). Thus, even if plaintiff had expressly or de facto extended the time for Borrowers to repay the Notes, Guarantors agreed that any extension would not extinguish their obligations under the Guarantees (*see White Rose Food v Saleh*, 99 NY2d 589, 591-92 [2003]). Guarantors are personally liable under the Guarantees for Borrowers’ liability under the Notes.

As defendants fail to demonstrate a triable issue of material fact, summary judgment is granted to plaintiff against defendants in the Benson Action and the Devin Action for repayment of principal, non-default interest, late charges and reasonable attorneys' fees owed under the respective Notes and Guarantees. Accordingly, it is

ORDERED in the Benson Action that the motion of plaintiff Taxi Medallion Loan Trust III for summary judgment in lieu of complaint against defendants Benson Hacking Corp., Devin Bouton, Joseph Bouton and Dayna Bouton a/k/a Dayna L. Strumwasser is granted, and defendants' cross-motion for dismissal is denied; and it is further

ORDERED in the Devin Action that the motion of plaintiff Taxi Medallion Loan Trust III for summary judgment in lieu of complaint against defendants Devin Corp., Michele Bouton and Joseph Bouton is granted, and defendants' cross-motion for dismissal is denied; and it is further

ORDERED in both actions that within 14 days of the entry of this order on NYSCEF, plaintiff shall e-file a letter to the court not to exceed five pages setting forth its claimed attorneys' fees, explaining why such fees are reasonable and attaching documentary proof thereof, and defendants may e-file a five page letter in opposition within 21 days of plaintiff e-filing its submission; and it is further

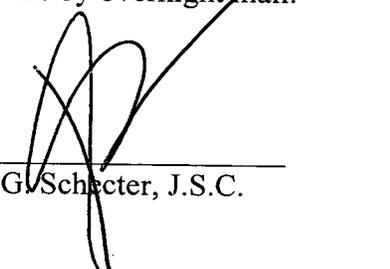
ORDERED in both actions that if plaintiff fails to timely e-file its attorneys' fees letter, plaintiff shall be deemed to have waived its claims for attorneys' fees; and it is further

ORDERED in both actions that plaintiff may expressly waive attorneys' fees and seek entry of judgment in accordance with this decision and order without further proceedings by e-filed letter attaching a proposed order directing the Clerk to enter judgment; and it is further

ORDERED in both actions that within 10 days of entry of this order on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on all defendants by overnight mail.

Dated: July 3, 2019

ENTER:

  
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Jennifer G. Schecter, J.S.C.