Waam Yieldco LLC v Frank
2025 NY Slip Op 33495(U)
September 16, 2025
Supreme Court, New York County
Docket Number: Index No. 653371/2025
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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WAAM YIELDCO LLC, Plaintiff,	**INDEX NO.**	653371/2025
- v -	**MOTION DATE**	06/02/2025
SEAN FRANK, CLOUD EQUITY GROUP SOFI GP LLC Defendant.	**MOTION SEQ. NO.**	001

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 15, 16, 17, 18

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

Upon the foregoing documents, Waam Yieldco LLC (the **Lender**)'s motion (Mtn. Seq. No. 001) for summary judgment in lieu of complaint pursuant to CPLR § 3213 is GRANTED.

Pursuant to the terms of the First Forbearance Agreement (hereinafter defined), the parties expressly agreed that the Note (hereinafter defined) is an instrument for the payment of money only and that the Lender could bring an action pursuant to CPLR § 3213 in the event of non-payment:

> The Maker hereby irrevocably agrees that this Note is an instrument for the payment of money only, and it shall be construed as an instrument for the payment of money only under New York Civil Practice Law and Rules ("CPLR") § 3213. In the event of non-payment or any default under the Note, the Lender may bring an action based on this Note by motion for summary judgment in lieu of a complaint, as permitted under CPLR § 3213.

(NYSCEF Doc. No. 6 § 3[f]). It is also undisputed that there has been a maturity default (NYSCEF Doc. No. 3 § 20; *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *Zuckerman v*

New York, 49 NY2d 557, 562 [1980]). The defendants in this case fail to raise an issue of fact and or defense warranting further proceeding (NYSCEF Doc. No. 7 § 3[a]).

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to (i) a certain Promissory Note (the **Note**; NYSCEF Doc. No. 4), dated September 26, 2024, by and between Cloud Equity Group Special Opportunities Fund II LP and Cloud Equity Group SOFI GP LLC, (ii) a Payment Guaranty (the **Guaranty**; NYSCEF Doc. No. 5), dated September 26, 2024, by Sean Frank (the **Guarantor**), in favor of the Lender, (iii) a Forbearance Agreement and Amendment to the Promissory Note (the **First Forbearance Agreement**; NYSCEF Doc. No. 6), dated January 8, 2025, by and between Cloud Equity Group SOFI GP LLC (the **Borrower**) and the Lender, and (iv) a Second Forbearance Agreement and Second Amendment to the Promissory Note (the **Second Forbearance Agreement**; NYSCEF Doc. No. 7), dated March 28, 2025, by and between the Borrower and the Lender.

Pursuant to the Note, the Lender loaned (the **Loan**) the Borrower $3,300,000, plus interest (NYSCEF Doc. No. 4, at 1). The Note provides for interest to be payable at the rate of 17.5% per annum, accruing from September 26, 2025 through November 26, 2024 (NYSCEF Doc. No. 4 at 1). Following an Event of a Default, the Note provides that interest shall be payable at a rate per annum equal to the lesser of (i) the highest permissible rate under applicable usury law, or (ii) 24% per annum (the **Default Rate**; NYSCEF Doc. No. 4 at 2). The Note additionally provides that Borrower was subject to a late fee of $50 (NYSCEF Doc. No. 4 at 2) and would pay for the Lender's reasonable attorneys' fees and costs in an Event of a Default under the Note

(NYSCEF Doc. No. 4 at 2, 5). The Note also provides that the Loan matures on November 26, 2024 (the **Maturity Date**; NYSCEF Doc. No. 4 at 1).

Pursuant to the terms of the First Forbearance Agreement, the parties agreed to extend the Maturity Date to the earlier of (i) February 15, 2025 or (ii) three business days from the date when Cloud Equity Group Special Opportunities Fund II LP, closes its first round of financing (NYSCEF Doc. No. 6 § 3[a]). The First Forbearance Agreement provides for interest to be payable at the Default Rate if the entire principal balance and all interest accrued is not yet paid on the date immediately following the Maturity Date (NYSCEF Doc. No. 6 § 3[c]). As discussed above, the First Forbearance Agreement also provides that the Note is an instrument for the payment of money only and that the Lender could bring an action pursuant to CPLR § 3213 in the event of non-payment.

Pursuant to the terms of the Second Forbearance Agreement, the parties agreed to extend the Maturity Date a second time until April 30, 2025, but otherwise continued to provide that Default Rate began to accrue on February 16, 2025 (NYSCEF Doc. No. 7 § 5[a]). The Second Forbearance Agreement also provides that if the Lender brings an action based on CPLR § 3213, the Borrower "irrevocably agrees to waive any defense" (NYSCEF Doc. No. 7 § 3[a]).

Pursuant to the Second Forbearance Agreement, the Borrower made a payment of $250,000 to the Lender, to be applied first to the accrued and unpaid Default Rate interest, second to other accrued interest, and lastly to the principal (NYSCEF Doc. No. 3 at 5). It is undisputed that other than this $250,000 payment, the balance of the amounts due under the Note remain unpaid and that there has been maturity default.

The Guaranty is a "guaranty of payment and not of collection" (NYSCEF Doc. No. 5 at 2), and pursuant to the terms of the Guaranty, the Guarantor guaranteed the full and prompt payment of the principal, interest, and all sums under the Note when it becomes due (NYSCEF Doc. No. 5 at 1).

On June 2, 2025, pursuant to CPLR §3213, the Lender filed the instant motion for summary judgment in lieu of complaint to enforce the Guaranty and collect $3,300,000, plus interest at the rate of 17.5% accruing from September 26, 2024 to February 16, 2025, plus interest at the Default Rate of 24% accruing as of February 16, 2025, plus the late fee of $50, less the payment made of $250,000 to be applied to unpaid interest in accordance with the terms of the Second Forbearance Agreement, together with attorneys' fees and the costs and expenses of this action and such other relief as the Court deems just and proper (NYSCEF Doc. No. 3 at 6).

In support of their motion, the Lender adduces the Affirmation of Jarred Winer (NYSCEF Doc. No. 3), which provides in relevant part:

> 18. It was agreed that beginning February 16, 2025, the Note would accrue interest at the Default Rate of twenty-four percent (24%) per annum until paid in full. Exhibit 4, Section 5, and Section 6(a)(iii).
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> 19. As consideration for the Second Forbearance Agreement, Defendants made a payment of Two Hundred Fifty Thousand Dollars ($250,000) to WAAM, to be applied first to accrued and unpaid Default Rate interest, second to other accrued interest, and lastly to principal. Id. at Section 6(b)(iv).

> 20. Defendants have made no further payments and remain in default of the Note, both Forbearance Agreements, and the Guaranty.
>
> 21. Pursuant to the terms of the Second Forbearance Agreement, the Note accrued interest at the contractual rate of seventeen and one-half percent (17.5%) per annum from September 26, 2024 through February 15, 2025. As of February 16, 2025, following the Borrower's continued failure to repay the outstanding principal and accrued interest, the Note began accruing interest at the Default Rate of twenty-four percent (24%) per annum.
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> …
>
> 23. With the exception of the payment of Two Hundred Fifty Thousand Dollars ($250,000) which was a condition for entry into the Second Forbearance Agreement, no payments have been made towards the Note, the Guaranty, the First Forbearance Agreement, and the Second Forbearance Agreement and Defendants are in default, necessitating Court intervention to enter a judgment against Defendants.

(NYSCEF Doc. No. 3 § 18–21, 23).

DISCUSSION

Pursuant to CPLR § 3213, a plaintiff may bring a summary judgment motion in lieu of complaint when the action is based on an instrument for the payment of money only. To meet its *prima facie* burden, the plaintiff must prove (1) the existence of the Note/Guaranty, (2) the underlying debt, and (3) the Borrower/Guarantor's failure to perform (*DDS Partners, LLC v Celenza*, 6 AD3d 347, 348 [1st Dept 2004]; *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). Once a *prima facie* showing is made, the defendant must present admissible evidence that raises a triable issue of fact (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

As discussed above, the Lender adduces evidence of the Note, the Guaranty, a maturity default, and the Borrower's failure to pay $3,300,000, plus interest (NYSCEF Doc. No. 5). Thus, the Lender meets its *prima facie* burden demonstrating its entitlement to summary judgment (*DDS

Partners, 6 AD3d at 348). In their opposition papers, the Borrower merely indicates that the Lender fails to provide the exact amount of money due but does not otherwise dispute the amount borrowed, the lack of repayment, the maturity date, the applicable interest rates, or that the loan documents otherwise provide for the payment of reasonable attorneys' fees. This is insufficient as a matter of law to raise an issue of fact warranting further proceedings (*Equator International Inc. v NH Street Investors, Inc.*, 978 NYS2d 817, 823 [Sup Ct, NY County 2014]; *Community Nat. Bank & Trust Co. of N.Y. v. I.M.F. Trading, Inc.*, 561 NYS2d 578, 580 [1st Dept 1990]). Thus, the motion for summary judgment in lieu of complaint is granted.

Accordingly, it is hereby

ORDERED that the Lender's motion (Mtn. Seq. No. 001) for summary judgment in lieu of complaint pursuant to CPLR § 3213 is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Waam Yieldco LLC and against Sean Frank and Cloud Equity Group SOFI GP LLC in the amount of $3,300,000, plus interest at the rate of 17.5% accruing from September 26, 2024 to February 16, 2025, plus interest at the Default Rate of 24% accruing as of February 16, 2025, plus the late fee of $50, less the payment made of $250,000 to be applied to unpaid interest in accordance with the terms of the Second Forbearance Agreement, for a total of $________________________, plus costs and disbursements as allocated by the Clerk, and the plaintiffs shall have execution thereof; and it is further

ORDERED that the portion of the plaintiff's claim that seeks the recovery of reasonable attorney's fees and costs is severed and the issue of the amount of reasonable attorney's fees and costs that the plaintiff may recover against the defendants is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

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9/16/2025		ANDREW BORROK, J.S.C.
DATE		

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE