Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **PHILLIP HOM** IA PART 14
Justice

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Dmitriy Gulkarov,

Plaintiff,

-against-

Paradiso Caelis Airways and Nicholas L. Joseph,

Defendants.

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Index No.: 723005/20
Motion Date: 7/14/22
Motion Seq. No.: 4

The following e-filed documents, listed by NYSCEF document number, were read on this motion by Plaintiff for summary judgment

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits.....	51-58
Affirmation in Opposition-Exhibits……...	59-65
Replying…….	66-69

Upon the foregoing cited papers, it is ordered that this motion by Plaintiff for summary judgment in lieu of complaint, pursuant to CPLR 3212 and 3213, is determined as follows:

Procedural History

Plaintiff Dmitriy Gulkarov ("Plaintiff") commenced this action against Defendants, Paradiso Caelis Airways ("Defendant Airways") and Nicholas L. Joseph ("Defendant Joseph") (collectively "Defendants"), via summary judgment in lieu of complaint, to recover amounts owed under a promissory note (the "Original Note") and an amended promissory note (the "Amended Note"). The Original Note was not signed by Defendant Airways; however, on the same document, there was a personal guaranty executed on June 9, 2019, in which Defendant Joseph, in his individual capacity, personally guaranteed the Original Note (the "Guaranty"). The Amended Note was executed on November 13, 2020, between Plaintiff, Defendant Airways by its President, Defendant Joseph, and Defendant Joseph as the personal guarantor of the Original Note. Plaintiff seeks the remainder of the principal balance, plus interest and the costs of collection, including attorneys' fees.

Plaintiff's original summary judgment in lieu of complaint (Seq. No. 1), which Defendants opposed, was denied in an order, dated March 8, 2021, and entered April 1, 2021 (Elliot, J.) (EF Doc 17). The court held that Plaintiff failed to meet his prima burden, as the record did not reflect an unconditional promise to repay the borrowed sum at a definite time, and outside proof was needed other than simple proof of nonpayment. Specifically, the court found that there was a question of fact as to the maturity date of the Original Note, as the Investor Agreement, the terms of which were referenced and incorporated into the Original Note, calls for an extension of the maturity date. The Investor Agreement was not provided to the court. The court also found that

CPLR 3213 relief was unavailable, because Plaintiff failed to, (i) explain the two-year payment schedule annexed to the Original Note (the "Annexed Payment Schedule"), and (ii) address Defendants' submissions suggesting payments were made and accepted beyond the alleged maturity date and before the execution of the Amended Note. The court deemed the moving and the answering papers as the complaint and the answer, respectively.

Thereafter, Plaintiff moved, by order to show cause (Seq. No. 2), to reargue, or alternatively, to renew his original summary judgment motion. The court (Elliot, J.) denied Plaintiff's motion to reargue in an order, dated August 10, 2021, and entered August 12, 2021 (EF Doc 33). Plaintiff moved (Seq. No. 3) for an order striking Defendants' Answer under CPLR 3126, or alternatively, for a conditional preclusion order under CPLR 3124, which was withdrawn and resolved pursuant to a so ordered stipulation (EF Doc 49).

Discussion

Now, Plaintiff moves (Seq. No. 4) for summary judgment under CPLR 3213 and 3212. Defendants oppose.

Summary Judgment in Lieu of Complaint under CPLR 3213

CPLR 3213 provides, in relevant part, that "[w]hen an action is based upon an instrument for the payment of money only […], 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 is unavailable where "outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show that the defendant executed the promissory note, which contains an unequivocal and unconditional promise to repay the plaintiff *upon demand or at a definite time*, and the failure by the defendant to pay in accordance with the note's terms (*see* UCC 3-104 [1] [a] – [d] and [2] [d]; *Weissman*, 88 NY2d at 444; *Loewenberg v Basnight*, 172 AD3d 1356, 1357 [2d Dept 2019]; *Mehta v Mehta*, 168 AD3d 716, 716 [2d Dept 2019]; *Ahern v Miloslau*, 128 AD3d 992, 992 [2d Dept 2015]; *Von Fricken v Schaefer*, 118 AD3d 869, 870 [2d Dept 2014]; *Lugli v Johnston*, 78 AD3d 1133, 1135 [2d Dept 2010]).

"If in the […] note anything appears requiring reference to another document to determine whether in fact the unconditional promise to pay a fixed sum at a future date is modified or subject to some contingency, then the promise is no longer unconditional" (*Enoch v Brandon*, 249 NY 263, 267 [1928]).

As previously stated, the court (Elliot, J.) denied Plaintiff's original motion under CPLR 3213 because outside proof was required and deemed his moving papers as the Complaint (Seq. No. 1). Now, Plaintiff argues that CPLR 3213 is appropriate (Seq. No. 4) because no outside proof is required, and he has eliminated the triable issues of fact the court (Elliot, J.) found in the original motion (Seq. No. 1). This Court finds such arguments unavailing.

While Plaintiff argues here (Seq. No. 4), in essence, that he has eliminated the triable issues of fact raised in his original motion (Seq. No. 1), Plaintiff relies upon outside evidence to do so.

For example, Plaintiff argues (Seq. No. 4) that the issues regarding, (i) the Annexed Payment Schedule and (ii) the Investor Agreement, which he notes is an issue that the court (Elliot, J.) raised sua sponte (Seq. No. 1), are moot. In Plaintiff's original CPLR 3213 motion, like here, Plaintiff had the initial burden of submitting sufficient evidence showing entitlement to judgment as a matter of law. There, Plaintiff's own submissions (Seq. No. 1), e.g., the Original Note and the Annexed Payment Schedule, raised triable issues of fact as to the Original Note's maturity/due date and its terms of repayment. Significantly, the Original Note explicitly referenced and incorporated the terms of the Investor Agreement. Hence, the previously assigned trial judge (Elliot, J.) was not required to ignore such terms merely because Defendants did not raise the issue in their opposition (Seq. No. 1) (*id.*; *Crutch v 421 Kent Development, LLC*, 192 AD3d 982, 984 [2d Dept 2021]). Now, Plaintiff relies (Seq. No. 4) upon outside evidence to show that, (i) the Annexed Payment Schedule was not, among other things, incorporated into the Original Note,[1] and (ii) the Investor Agreement was never executed[2] and therefore, its terms were not incorporated in the Original Note. While the Court agrees that the issues regarding the Annexed Payment Schedule and the Investor Agreement are moot, it finds that CPLR 3213 is unavailable because outside evidence is necessary to establish such.

Plaintiff also argues (EF Doc 52) that the maturity/due date of the Original Note, i.e., September 1, 2019, was never extended in writing or otherwise. Notably, the Original Note provides that the maturity/due date is September 1, 2019, "in the event that [Defendant Airways] has not been successful in closing title on the purchase of the other airline [("AirBroc Airline")]. In such an event, the funds are due and payable on September 1, 2019. However, in the event of a successful closing, the due date will be extended for one year from the closing date, as specified in the Investor Agreement." Thus, while the Investor Agreement was never executed, the plain language of the Original Note requires outside proof[3] to determine whether there was a successful closing on the purchase of the AirBroc Airline.

Therefore, CPLR 3213 is unavailable, and the Court will apply the CPLR 3212 standard in deciding this motion (*see id.*; *Weissman*, 88 NY2d at 444-45; *Suozzi v Scharf*, 115 AD3d 933, 934 [2d Dept 2014]; *see also Kerin v Kaufman*, 296 AD3d 336, 337-38 [1st Dept 2002]).

Summary Judgment under CPLR 3212

In a summary judgment motion, pursuant to CPLR 3212, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima

[1] Defendants admit that the Annexed Payment Schedule was not related to or incorporated into the Original Note, and that it did not relate to the preparation or drafting of the Original Note, in their Response to Notice to Admit (EF Doc 55) and during Defendant Joseph's examination before trial (EF Doc 56).
[2] Defendants admit that the Investor Agreement was never executed in their Response to Notice to Admit (EF Doc 55) and during Defendant Joseph's examination before trial (EF Doc 56).
[3] Defendants admit that they never purchased AirBroc Airline in their Response to Notice to Admit (EF Doc 55) and during Defendant Joseph's examination before trial (EF Doc 56).

facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Here, Plaintiff is seeking summary judgment on the Original Note, the Amended Note, and the Guaranty. Plaintiff argues, in essence, that Defendants defaulted on the Amended Note, and thus, the full amount owed under the Original Note and the Guaranty is now immediately due. Plaintiff further argues, in anticipation of Defendants' opposition, that the Amended Note is not a contract of adhesion.[4]

In support, Plaintiff submits, among other things, his affidavit (EF Doc 53), the transcript of the examination before trial ("EBT") of Plaintiff (EF Doc 55), the transcript of Defendant Joseph's EBT (EF Doc 56 & 57), the Original Note and Guaranty (EF Doc 54), the Amended Note (EF Doc 54), e-mail communications between Plaintiff's counsel, Defendant Joseph, and nonparty Veronika Singh, Defendant Joseph's business partner (EF Doc 54), the unexecuted Investor Agreement (EF Doc 55), Plaintiff's Notice to Admit dated April 2, 2021, coupled with Defendants' Response to such (EF Doc 55), and the handwritten, untitled, undated, and unsigned purported agreement that restructured the repayment terms of the Original Note ("Restructure Agreement") (EF Doc 55).

The following facts are undisputed: (1) Plaintiff loaned Defendant Airways $150,000, pursuant to the Original Note, for the purpose of purchasing AirBroc Airline; (2) that said funds were taken from the home equity of Plaintiff's personal residence in which he is currently paying interest on such; (3) Defendant Joseph signed[5] the Guaranty that personally guaranteed the Original Note; (4) the Investor Agreement referenced in the Original Note was never executed between the parties, and the parties never intended to be bound by such; (5) Defendant Airways never purchased AirBroc Airline; (6) the Annexed Payment Schedule was not related to the Original Note; (7) the Annexed Payment Schedule was not incorporated into the terms of the Original Note; (8) the Annexed Payment Schedule had nothing to do with the preparation and drafting of the Original Note; and (9) Defendants have not repaid the $150,000 loan in full.

Breach of Contract—the Original Note & the Amended Note

The essential elements to recover damages for a breach of contract claim are: (1) the existence of a contract; (2) the plaintiff's performance pursuant to the contract; (3) the defendant's breach of its contractual obligations; and (4) damages resulting from the breach (*see 223 SAM, LLC v 223 15th Street*, 210 AD3d 733, 734-35 [2d Dept 2022]; *Dean Builders Grp., P.C. v M.B. Din Constr., Inc.*, 186 AD3d 1612, 1614 [2d Dept 2020]; *Junger v John V. Dinan Assocs., Inc.*, 164 AD3d 1428, 1430 [2d Dept 2018]).

[4] In opposition to Plaintiff's original summary judgment motion, Defendants argued that the Amended Note was a contract of adhesion; however, such issue was not decided.
[5] Defendant Joseph verified his notarized signature.

As stated above, Plaintiff's performance pursuant to the Original Note, i.e., loaning Defendants $150,000, is undisputed.

The Existence of a Contract

"If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home, Inc. v Henry and Warren Corp.*, 74 NY2d 475, 482 [1989]; *see Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 106 [2018]). This rule serves two related purposes: (1) "unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy," and (2) it "assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement" (*Cobble Hill Nursing Home, Inc.*, 74 NY2d at 482).

It is well-settled law that, "a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute—such as the statute of fraud (General Obligations Law § 5-701)—that imposes such a requirement" (*Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 368 [2005]). "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*id.* at 369). "[W]here a question of intention is determinable by written agreement, the question is one of law" (*Gallagher v Long Island Plastic Surgical Group, P.C.*, 113 AD3d 652, 653 [2d Dept 2014], quoting *Mallad Const. Corp. v County Fed. Sav. & Loan Ass'n*, 32 NY2d 285, 291 [1973] [internal quotation marks omitted]).

"The doctrine of incorporation by reference that the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt" (*Chiacchia v National Westminster Bank*, 124 AD3d 626, 628 [2d Dept 1986]). "It is the reference to the paper by proper description and identification, in a manner and by words indicating an intent to make it a part of the instrument, that affects the incorporation for all purposes. Parol evidence may be resorted to to prove the identity of the paper" (*In re Board of Com'rs of Washington Park*, 52 NY 131, 134 [1873]).

Under General Obligations Law § 15-301 (1), "[a] written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

Here, as previously stated, while the Original Note was not signed by Defendant Airways, it was personally guaranteed by Defendant Joseph. Notably, Defendants do not argue that the Original Note is unenforceable because it is not signed by them, or that its material terms are not reasonably certain. Nor do they contest the enforceability of the Original Note prior to the Restructure Agreement. Instead, Defendant Joseph testified that he believed that the Original Note was null and void, because the AirBroc Airline deal fell through; however, the Original Note accounts for such scenario. Defendants do not dispute that Plaintiff loaned them $150,000 and that they were supposed to repay said amount plus interest. Defendant Joseph testified that, on April 1, 2020, they started to repay Plaintiff and made a payment in the amount of $82,615 towards the principal loan; however, he attested that the remaining principal amount was in the possession

of a third-party. Defendant Joseph testified that they had to go after said third-party for the remainder, and that, in the interim, and in good faith, Defendants would pay Plaintiff $307[6] per month to help alleviate Plaintiff's financial burden. Defendant Joseph further testified that, in effect, in or around March 2020, such oral modification was memorialized by the Restructure Agreement, which invalidated the Original Note. Notably, the Restructure Agreement does not refer to the Original Note or the oral modification, and it does not contain, among other things, the identities of the contracting parties.

Plaintiff argues, in effect, that the purported Restructure Agreement did not constitute an amendment or otherwise change the terms of the Original Note, such terms being incorporated into the Amended Note by reference. Plaintiff attests that Defendants failed to repay the Original Note by its maturity date, i.e., September 1, 2019. Plaintiff further attests that, after Defendants' default under the Original Note, he tried to work with them during the COVID-19 global pandemic, and he accepted Defendants' payments in the total amount of $85,105,[7] prior to executing the Amended Note. The parties executed the Amended Note on November 13, 2020.[8] The Amended Note provides, in relevant part, the following:

> […] [Defendant Airways] executed [the Original] Note in favor of [Plaintiff] […] promising to pay [Plaintiff] on the 1st day of September, 2019 the sum of $150,000.00 with interest; and […] the parties have agreed to amend the terms of the [Original] Note in certain respects as hereafter set forth below […]:
>
> 1. [Plaintiff] has agreed to reduce the amount due and owing under the [Original] Note in the sum of $74,750.00 which includes payment of legal fees in the sum of $1,750.00. This amount must be paid as follows: $11,750.00 within seven (7) days of the execution of this Amended […] Note, time being of the essence to this date, and the remaining balance of $63,000.00 on or before February 1, 2021, time being of the essence to this date.
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> 2. If the $11,750.00 is not timely paid with seven (7) days of the execution of this Amended […] Note, time being of the essence to this date, then the full amount of money due and owing under the [Original] Note shall be immediately be due and owing to [Plaintiff] after giving credit to [Defendant Airways] for any payments made.
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> 3. If the $63,000.00 is not timely paid by February 1, 2021, time being of the essence to this date, then the full amount of money due and owing under the [Original] Note shall be immediately be due and owing to [Plaintiff] after giving credit to [Defendant Airways] for any payments made.
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> […] 5. Except as herein modified, all other terms, covenants and conditions of the [Original] Note shall remain in full force and effect and hereby ratified and confirmed. The [Original] Note, as herein amended constitutes the entire agreement between the parties and may not be further amended or modified except in a writing duly signed by the parties hereto.
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> 6. In the event of a conflict between the terms of the [Original] Note and this Amendment, the language of this Amended […] Note shall control.

The Court finds that the Amended Note, which was duly executed by all parties, and specifically references the Original Note, incorporates all terms of the Original Note, except modified therein; however, the Amended Note also incorporates all modified terms of the Original Note, in the event of a default. Defendant Joseph verified both his notarized signature as President of Defendant Airways and his notarized signature "as Personal Guarantor who guaranteed

[6] Note: The parties agree that such payments were towards the interest on the funds; however, the parties disagree on the effect of such payments.

[7] Based upon the submissions, Defendants paid $82,615 toward the principal on April 1, 2020, and a total amount of $2,490 towards the interest between March 9, 2020, and October 9, 2020.

[8] Plaintiff signed the Amended Note on November 13, 2020. On November 9, 2020, Defendant Joseph signed the Amended Note on two separate lines, i.e., as Defendant Airways' President and as personal guarantor.

compliance with all the terms of the [Original] Note" on the signature page of the Amended Note. Thus, the Court finds that the Amended Note, on its face, demonstrates that the parties intended to be bound by the Original Note (*see Flores*, 4 NY3d at 369; *Mallad Const. Corp.*, 32 NY2d at 291; *Gallagher*, 113 AD3d at 653).

Moreover, the objective evidence of the parties' course of conduct, including, among other things, Plaintiff's delivery of the $150,000 loan, Defendants' acceptance of said loan, and Defendants' payments towards the principal loan and interest made prior to the Restructure Agreement and the Amended Note, supports the conclusion that the parties intended to be bound by the unsigned Original Note (*see Gallagher*, 113 AD3d at 653).

Additional testimony and documentary evidence adduced during discovery, also support such conclusion, and show that the Original Note was not amended, modified, or otherwise changed pursuant to any alleged oral modification and/or the Restructure Agreement (*id.*). For example, the Original Note contains a provision to the effect that it cannot be changed orally: "No provisions herein shall be excluded, modified or limited except by a written instrument expressly referring hereto and setting forth the provision so excluded, modified or limited." Therefore, under General Obligations Law § 15-301 (1), the Original Note cannot be changed by an agreement unless such agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent. Notably, unlike the Amended Note, the Restructure Agreement is unsigned and does not expressly reference the Original Note or the provision it purportedly excluded, modified, or limited.

Hence, the Restructure Agreement did not modify, amend, or otherwise affect the Original Note, as it does not comply with such provision and/or General Obligations Law § 15-301 (1). Moreover, regardless of said provision and statute, the Restructure Agreement, on its face, is unenforceable as the Court is unable to determine, among other things, what the agreement is (*see Kolchins*, 31 NY3d at 106; *Cobble Hill Nursing Home, Inc.*, 74 NY2d at 482).

Accordingly, Plaintiff establishes the existence of a contract by demonstrating, among other things, that the parties intended to be bound by the unsigned but personally guaranteed Original Note, which was amended and incorporated into the Amended Note.

Contract of Adhesion

"A contract of adhesion contains terms that are unfair and nonnegotiable and arises from a disparity of bargaining power or oppressive tactics" (*Molino v Sagamore*, 105 AD3d 922, 923 [2d Dept 2013], quoting *Love'M Sheltering, Inc. v County of Suffolk*, 33 AD3d 923, 924 [2d Dept 2006] [internal quotation marks omitted]).

In anticipation of Defendants' opposition, Plaintiff argues that the Amended Note is not a contract of adhesion. In support, he submits, among other things, Defendant Joseph's affidavit and e-mails[9] submitted in opposition to Plaintiff original summary judgment motion, and

[9] Plaintiff's counsel argues that, under CPLR 4547, the Court cannot consider his e-mails with Defendant Joseph and Singh sent prior to the execution of the Amended Note, because such e-mails were exchanged in an attempt to settle the matter. Nevertheless, Plaintiff argues that the e-mails show that Defendant Joseph was not under duress when he

Defendant Joseph's EBT testimony. Defendant Joseph attested that he attempted to negotiate with Plaintiff's counsel regarding repayment; however, his proposals were rejected. Defendant Joseph testified that Plaintiff's counsel e-mailed them his nonnegotiable terms that he accepted; however, he claimed that the Amended Note contained additional and deceitful terms.[10] Defendant Joseph claimed that when he called and inquired about the additional terms, Plaintiff's counsel was allegedly "aggressive and nasty" and told him that if he did not sign the Amended Note "there would be immediate consequences." Defendant Joseph testified that there are no e-mails, letters, or anything to support his claim that he was under duress when he signed the Amended Note.

The Court finds that that Defendants' claim that the Amended Note is a contract of adhesion amounts to nothing more than unsubstantiated and conclusory statements which are insufficient to defeat a summary judgment motion (*see generally Bosio v Selig*, 165 AD2d 822 [2d Dept 1990]). The Amended Note's terms, while nonnegotiable, were fair and favorable to Defendants. Notably, according to the Amended Note, Plaintiff was willing to accept a *reduced* amount due and owed by Defendants under the Original Note. The Court notes that Defendant Joseph signed the Amended Note in Florida, and outside the presence of Plaintiff and Plaintiff's attorney. As previously discussed, Defendants intended to be bound by the Original Note, and they do not dispute that they did not repay the $150,000 loan in full. Additionally, the Amended Note was clear and unambiguous, and did not contain deceptive language.

Furthermore, Defendant Joseph's EBT testimony and the e-mails also support the conclusion that Defendant Joseph executed the Amended Note free of duress, and it was not a contract of adhesion. The Court also notes that neither the insistence upon the execution of the Original Note following Defendants' default, nor the threat of litigation, constitute duress (*see generally Cavalli v Cavalli*, 226 AD2d 666 [2d Dept 1996]; *Shire Realty Corp. v Schorr*, 55 AD2d 356 [2d Dept 1977]).

Defendants' Breach of the Amended Note

Plaintiff avers that Defendants breached the Amended Note by failing to make payments in accordance with such. While Defendants dispute whether the Amended Note is enforceable, they do not dispute that they failed to make payments in accordance with such. Therefore, the Court finds that Plaintiff establishes Defendants' breach of their obligations under the Amended Note.

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executed the Amended Note. Those e-mails show, among other things, that: Defendants offered a settlement agreement which was rejected by Plaintiff. Plaintiff, through his attorney, made a nonnegotiable counteroffer ("Plaintiff's counteroffer") to accept a *lower* amount than the amount owed. Plaintiff's attorney said that if Defendants were unwilling to accept such counteroffer, then Plaintiff would proceed with a lawsuit. Defendants made a counteroffer which was rejected. Plaintiff's counsel informed Defendants that they would no longer continue settlement discussions and would commence a lawsuit. Defendants subsequently agreed to Plaintiff's counteroffer which was memorialized in the Amended Note.

[10] Defendants argue that the Amended Note contained an additional "escalation clause that triggered in seven days," while the e-mails "expressly state that the escalation clause applies if the balance was untimely." Notably, the e-mails explicitly state that such amount "must be paid as follows: $10,000 within a week of the execution of the Amended [Note] […]." The Court notes that the escalation clause in the e-mails and the Amended Note are consistent, as there are seven days in a week. Defendants also argue that the same clause was deceiving because it called for the payment of $11,750 instead of $10,000. The Court notes that such language does not constitute deceptive language. Furthermore, the submissions show that the additional $1,750 represented attorneys' fees.

Damages resulting from Defendants' breach

As previously quoted, the Amended Note provides that if Defendants fail to make payments in accordance with the Amended Note, "then the full amount of money due and owing under the [Original] Note shall be immediately […] due and owing to [Plaintiff] after giving credit to [Defendants] for any payments made." Hence, Plaintiff avers that, due to Defendants' breach, they owe him the remaining balance after credits, plus interest and expenses incurred, including attorneys' fees, pursuant to the Original Note. Plaintiff also attests that the interest continues to accrue, as well as the costs.

Based upon Plaintiff's evidentiary submissions, including, among other things, the Original Note, the Amended Note, the calculations chart annexed to Plaintiff's affidavit ("Calculations Chart") (EF Doc 57), and sworn admissions by Defendants, Plaintiff establishes the following:

Unpaid Principal Balance & Interest

Plaintiff loaned Defendants $150,000 pursuant to the Original Note, effective June 9, 2019. The Original Note provides, "[t]he due date reflected in this [Original] Note, September 1, 2019, has been stated as the due date in the event that [Defendant Airways] has not been successful in closing title on the purchase of the [AirBroc Airline]. In such event, the funds are due and payable on September 1, 2019." It is undisputed that Defendant Airways did not purchase AirBroc Airline. Thus, the maturity date of the Original Note is September 1, 2019.

The Original Note provides, in relevant part, that "interest will accrue on the unpaid principal at the rate of thirteen (13%) percent for the initial two months of this loan […] and will raise to sixteen (16%) percent if the loan is not repaid on September 1, 2019 […]." Furthermore, if the $150,000 "is not paid in full [by September 1, 2019], then the amount of the principal sum shall bear interest from the due date [i.e., September 1, 2019], to the actual date of payment at the rate of sixteen (16%) percent per annum." By its plain terms, the Original Note accumulated $4,496 in interest, starting June 9, 2019, and ending August 31, 2019.[11] Furthermore, the Original Note accrued $14,000 in interest, starting September 1, 2019, and ending March 31, 2020.[12] Defendants paid $2,490 towards the interest. Thus, Plaintiff establishes his entitlement of $16,006[13] in interest from June 9, 2020, through March 31, 2020.

On April 1, 2020, Defendants paid Plaintiff $82,615 towards the principal balance. After crediting said payment, the unpaid principal amount is $67,385.[14] Furthermore, Plaintiff is entitled to interest on the remaining unpaid principal amount, i.e., $67,385, at the rate of 16% per annum

[11] Calculation: 13/100 = 0.13; 0.13/12 = 0.01083333; 0.01083333 x $150,000 = $1,625/month; $1,625/30 = $54.16666; 83 days x $54.17 = $4,496.11.
[12] Calculation: 16/100 = 0.16; 0.16/12 = 0.013333; 0.013333 x $150,000 = $2,000/month; $2,000 x 7 months = $14,000.
[13] Calculation: $4,496 + $14,000 = $18,496; $18,496 - $2,490 = $16,006.
[14] $150,000 - $82,615 = $67,385. The Court notes that Plaintiff avers that the remaining balance is $64,895, which apparently includes the $2,490 in payments towards interest; however, based upon the submissions, it is undisputed that Defendants only paid $82,615 towards the principal balance. Hence, the remaining principal balance is $67,385.

from April 1, 2020 (*see generally NML Capital v Republic of Argentina*, 17 NY3d 250 [2011]; *Ross v Ross Metals Corp.*, 111 AD3d 695 [2d Dept 2013]; *Yellow Book of New York, L.P. v Cataldo*, 81 AD3d 638 [2d Dept 2011]; CPLR 5001).

Costs and Disbursements, including, Attorneys' Fees

It is well-established law that attorneys' fees are not recoverable absent a specific contractual provision, statutory authority, or court rule (*see 214 Wall Street Associates, LLC v Medical Arts-Huntington Realty*, 99 AD3d 988, 990 [2d Dept 2012]; *In re Ernestine R.*, 61 AD3d 874, 876 [2d Dept 2009]; *Levine v Infidelity, Inc.*, 2 AD3d 691, 692 [2d Dept 2003]). The Court has the inherent authority to determine reasonable attorneys' fees and is not bound by the fixed percentage set forth in the Original Note (*see First Nat. Bank of East Islip v Brower*, 42 NY2d 471, 474 [1977]; *Orix Credit Alliance, Inc. v Grace Industries, Inc.*, 261 AD2d 521, 521-22 [2d Dept 1999]).

Here, the Original Note also provides that, Defendants agree "to pay all expense incurred, including reasonable attorney's fees of at least Thirty Three [33%] Percent of the then unpaid principal and any interest thereon if this [Original] Note is placed in the hands of an attorney for collection, or if collected by suit, or through any probate or other legal proceedings." Therefore, Plaintiff establishes his entitlement to costs and disbursements, including, attorneys' fees, pursuant to the Original Note (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 584 [2018]; *214 Wall Street Associates, LLC*, 99 AD3d at 990; *In re Ernestine R.*, 61 AD3d at 876; *Levine*, 2 AD3d at 692). Additionally, Plaintiff's attorney requests that the Court conduct "a fee hearing to determine the amount of court costs, expenses and attorneys' fees to be awarded to Plaintiff upon the adjudication of this pending Motion" (EF Doc 52). Therefore, Plaintiff establishes entitlement to a hearing regarding such (*see First Nat. Bank of East Islip*, 42 NY2d at 474; *Orix Credit Alliance, Inc.*, 261 AD2d at 521-22).

Furthermore, Plaintiff argues that even if the Court found that the Amended Note was unenforceable, he would still be entitled to the same damages under the Original Note and Guaranty.

Breach of Contract—the Personal Guaranty

To establish prima facie entitlement to judgment as a matter of law with respect to a guaranty, a plaintiff must show the existence of a guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (*see Encore Nursing Center Partners Limited Partnership—85 v Schwartzberg*, 172 AD3d 1166, 1168 [2d Dept 2019]; *Hyman v Golio*, 134 AD3d 992, 992 [2d Dept 2015]).

Pursuant to the statute of frauds, in order to be enforceable, certain types of agreements must be in writing and subscribed by the party to be charged therewith or by his or her lawful agent (*see* General Obligations Law § 5-701; *Massias v Goldberg*, 163 AD3d 648, 649 [2d Dept 2018]). Such agreements include a guaranty (*see* General Obligations Law § 5-701 [a] [2]).

"A guaranty is a promise to fulfill the obligations of another party, and is subject 'to the ordinary principles of contract construction'" (*Cooperative Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015], quoting *Compagnie Financiere de CIC et de L'Union Europeene v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 188 F3d 31, 34 [2d Cir 1999]).

Under the principles of contract construction, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Cooperative Centrale Raiffeisen-Boerenleenbank, B.A.*, 25 NY3d at 493, quoting *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] [internal quotation marks omitted]). A guaranty must be interpreted in the strictest manner (*see White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *2402 East 69th Street, LLC v Corbel Installations, Inc.*, 183 AD3d 859, 861-62 [2d Dept 2020]). "A guarantor's obligation cannot be altered without its consent; if the original note [or contract] is modified without its consent, a guarantor is relieved of its obligation" (*White Rose Food*, 99 NY2d at 591).

The Guaranty provides the following:

> I [Defendant Joseph] hereby personally guarantee compliance with all the terms of the [Original Note]. I further personally guarantee payment of the [Original Note]. The undersigned [Defendant Joseph] Guarantor guarantees to [Plaintiff], [Plaintiff's] successors and assigns the full performance and observance of all the agreement to be performed and observed by [Defendant Airways] in this [Original] Note, without requiring any notice to [Defendant Joseph] Guarantor of nonpayments or, nonperformance, or proof, or notice of demand to hold the undersigned responsible under this guaranty, all of which the undersigned hereby expressly waives. The Guarantor [Defendant Joseph] further agrees that the guaranty shall remain and continue in full force and effect as to any renewal, change or extension of the [Original] Note. As *further inducement* to [Plaintiff] to make this [Original] Note, that [Defendant Joseph] in any action or proceeding brought by [Plaintiff] against Guarantor on any matters concerning this [Original] Note or of this guaranty that Guarantor shall and does waive trial by jury [emphasis added].

Here, the personal Guaranty is written at the end of the Original Note, and signed by Defendant Joseph, in his individual capacity; however, the Original Note is not signed by Defendants. While the Guaranty and the Original Note are on the same paper, they are two separate and distinct undertakings/contracts (*see Pitsy, LLC v Rindenow*, 165 AD3d 1300, 1301 [2d Dept 2018]; *Hyman*, 134 AD3d at 992; *Acadia Woods Partners, LLC v Signal Lake Fund LP*, 102 AD3d 522, 523 [2d Dept 2013]). The personal Guaranty also constitutes objective evidence showing that the parties intended to be bound by the unsigned Original Note (*see Flores*, 4 NY3d at 368-69; *Gallagher*, 113 AD3d at 653).

The personal Guaranty is unambiguous, and it contains references to the Original Note (*see Key Equipment Finance v South Shore Imaging, Inc.*, 69 AD3d 805, 808 [2d Dept 2010]). The terms of the Guaranty are clear and unequivocal, and by its plain terms, Defendant Joseph unconditionally personally guaranteed compliance with the terms of the Original Note. Furthermore, by the Guaranty's plain terms, Defendant Joseph, as personal guarantor, is precluded from seeking a jury trial regarding any issues concerning the Guaranty and/or the Original Note. The Court finds that Plaintiff establishes that the Guaranty is a valid, absolute, and unconditional personal guaranty. The Court further finds, for the same reasons discussed above, that Plaintiff establishes the underlying debt and that Defendant Joseph, as the personal guarantor, failed to perform under the Guaranty.

Additionally, Defendant Joseph, as the personal guarantor of the Original Note, was not relieved of his obligations due to any amendments, because the written Guaranty allows for changes in the terms of the Guaranty, and because he signed the Amended Note as Defendant Airways' President and personal guarantor of the Original Note (*see White Rose Food*, 99 NY2d at 591; *2402 East 69th Street, LLC*, 183 AD3d at 861-62).

Accordingly, the Court finds that Plaintiff demonstrates his prima facie entitlement to judgment as a matter of law to the unpaid principal balance of $67,385, plus interest in the amount of $16,006 from June 9, 2020, through March 31, 2020, as well as interest at the rate of sixteen percent (16%) per annum on the unpaid balance starting April 1, 2020, coupled with costs and disbursements, including attorneys' fees incurred prior to the commencement of this action and arising from this action (*see Giuffrida*, 100 NY2d at 81; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 560; *223 SAM, LLC*, 210 AD3d at 734-35; *Dean Builders Grp., P.C.*, 186 AD3d at 1614; *Junger*, 164 AD3d at 1430). It is incumbent upon Defendants to show that material issues of fact exist (*id.*).

Defendants' Opposition to Plaintiff's Summary Judgment Motion

In opposition, Defendants submit, among other things, an attorney affirmation (EF Doc 59), Defendant Joseph's affidavit (EF Doc 60), and e-mail communications between Plaintiff's counsel, Defendant Joseph, and Veronika Singh, Defendant Joseph's business partner (EF Doc 63). Defendants argue that there is a question of fact as to whether the Amended Note is enforceable given the Restructure Agreement. Defendants further argue that even if the Amended Note is deemed to be valid, it is a contract of adhesion and thus unenforceable. The Court rejects such arguments for the same reasons discussed above. Additionally, Defendants fail to raise a triable issue of fact regarding, among other things, the Original Note and Guaranty, Defendants' breach thereunder, and damages arising from such breach. The Court finds Defendants' remaining contentions without merit.

Therefore, Plaintiff's summary judgment motion is granted to the extent that he is entitled to recover, (1) the unpaid principal balance under the Original Note, the Guaranty, and the Amended Note, in the amount of $67,385; (2) interest from June 9, 2020, through March 31, 2020, in the amount of $16,006; (3) interest on the remaining unpaid principal amount, i.e., $67,385, at the rate of 16% per annum[15] from April 1, 2020; (4) Court costs, which shall be taxed by the Queens County Clerk; and (5) expenses/disbursements, including, attorneys' fees. This matter shall be set down for a virtual inquest, via Microsoft Teams, for an assessment of expenses/disbursements, including, Plaintiff's attorneys' fees (*see First Nat. Bank of East Islip*, 42 NY2d at 474; *Orix Credit Alliance, Inc.*, 261 AD2d at 521-22).

In accordance with the foregoing, it is hereby **ORDERED** that, upon the payment of applicable fees, if any, and service of a copy of this Order with Notice of Entry, the Queens County Clerk is directed to enter a judgment, in favor of Plaintiff Dmitriy Gulkarov, and against Defendants Paradiso Caelis Airways and Nicholas L. Joseph, **in the total amount of $83,391**

[15] Calculation: 16/100 = 0.16; 0.16/12 = 0.013333; 0.013333 x $67,385 = $898.47 per month.

($67,385 unpaid balance + $16,006 in interest from June 9, 2020, through March 31, 2020), **plus interest on $67,385 (unpaid balance), at the rate of sixteen percent (16%) per annum from April 1, 2020**, coupled with **Court costs as taxed by the Queens County Clerk**; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected; and it is further

ORDERED that this matter is set down for a virtual inquest, via Microsoft Teams, for an assessment of Plaintiff's expenses/disbursements, including, attorneys' fees incurred prior to the commencement of this action and arising from this action against Defendants Paradiso Caelis Airways and Nicholas L. Joseph, on **Monday May 15, 2023, at 10:00 A.M.**; and it is further

ORDERED that Plaintiff's attorney shall e-mail this Part at QSCPart14@NYCourts.gov, copying Defendants' attorney, on or before April 24, 2023, to receive the Microsoft Teams link for the inquest; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry upon Defendants, and the Queens County Clerk, within fifteen (15) days of the date of entry. Proof of service shall be provided at the time of the inquest; and it is further

ORDERED that Plaintiff shall file a Note of Issue and Statement of Readiness for Trial within twenty (20) days of entry of this Order; and it is further

ORDERED that a Notice containing the date of the inquest shall also be served upon Defendants, no later than thirty (30) days prior to the inquest. Proof of such shall be provided at the time of the inquest.

This constitutes the Decision and Order of this Court.

Dated: March 15, 2023

PHILLIP HOM, J.S.C.