

**Medallion Bank v Butwin Tr. Inc.**

2017 NY Slip Op 30877(U)

April 27, 2017

Supreme Court, New York County

Docket Number: 650910/2016

Judge: Saliann Scarpulla

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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 39

-----X  
MEDALLION BANK,

Plaintiff,

**DECISION/ORDER**  
**Index No. 650910/2016**

-against-

BUTWIN TRANSIT INC., MASTER TRANSIT INC.,  
KATUS TAXI INC., ISACC ZUBLI, AKI KATAN

Defendants.

-----X  
HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Medallion Bank (“Medallion”) moves pursuant to CPLR §3213 for summary judgment in lieu of complaint, seeking judgment for the amounts due and owing by defendants Butwin Transit Inc. (“Butwin”), Master Transit Inc. (“Master”), Katus Taxi Inc. (“Katus”), Isacc Zubli (“Zubli”), and Aki Katan (“Katan”) pursuant to certain loan documents, and an inquest to assess Medallion’s costs and expenses of collection, including attorneys fees.

Medallion alleges that, pursuant to three security agreements dated December 24, 2012 (“security agreements”) and three related promissory notes, Butwin, Master and Katus (collectively referred to as “borrowers”) each borrowed \$1.5 dollars from Medallion. The borrowers were required to pay all outstanding principal, accrued interest, and any other related charges by the maturity date December 24, 2015. If they did not submit full payment at that time, Medallion was entitled to accelerate the unpaid principal balance and charge interest. Zubli and Katan (collectively referred to as “guarantors”) executed three guaranty agreements, promising to “irrevocably” and “unconditionally” guaranty to Medallion the full and prompt payment of the entire debt amount upon the occurrence of an event of default or the maturity date. The guaranties

also provided that guarantors would pay "all costs and expenses, including filing fees and attorney's fees" incurred by Medallion in collecting monies due under the loans and enforcing the guaranties.

The borrowers failed to pay by the maturity date and guarantors' obligations to repay the loans were triggered. Guarantors have not paid any part of their obligation. Medallion is now seeking to enforce its rights under the loan documents and the guaranties.

Defendants oppose the motion and also seek to assert "counterclaims against Medallion Bank based upon its breach of contract and covenant of good faith and fair dealing, fraud and fraudulent inducement, and negligent misrepresentation." They maintain that they dealt directly with Medallion Executive Vice President Michael J. Kowalsky ("Kowalsky") regarding the loans. In April 2015, Kowalsky contacted Zubli to meet with him to discuss the loans and their upcoming maturity dates. Kowalsky told Zubli that Medallion would refinance and extend the maturity date, but only if the monthly payments were increased. The defendants agreed. As of that meeting, the monthly payments on the loans increased from \$4,700 to \$7,756.28. According to defendants, based on that meeting, they did not search for an alternative lender and did not consider any restructuring or sale options.

However, according to Medallion, on March 16, 2015, it never made a promise to refinance or extend the maturity date, and instead, sent, to the notice addresses specified in the loan documents, letters to the borrowers and guarantors, notifying them that their monthly payments were being increased because the loan to value ratio had changed. Defendants claim they were never given this information.

According to defendants, in December 2015, Kowalsky met with Zubli again and told him that the loans were in good standing, and that they would be refinanced, but that the new payment would be between \$8,000 and \$8,500. Defendants agreed and were given forms to complete in connection with the refinancing. In January 2016, Zubli met with Kowalsky again to submit the

forms required for the refinance, and was told that he “shouldn’t worry about it” and that they “just need all [the defendants’] information for the file and [the Bank] would be in touch with [the defendants] about the new payment amount.” Two weeks later, Zubli went to Kowalsky’s office to follow up, and Kowalsky told him that Medallion had decided to recall the loans and would not offer any type of refinance. Less than one month later, Medallion filed this motion.

Defendants argue that Kowalsky misrepresented Medallion’s intention to refinance the loans, and defendants reasonably relied on that misrepresentation. Defendants claim that if they had known that Medallion was not going to refinance the loans and extend the maturity date, they would have performed their obligations under the loan documents. In addition, they could have looked for alternative financing options or tried to sell their medallions.

Defendants claim that Medallion acted in bad faith, and purposefully prevented defendants from performing in accordance with the loan agreements. Further, even though there was a waiver of claims provision in the documents, enforcing said provision would be unconscionable because Medallion’s bad faith made it impossible for defendants to comply with their obligations.

Defendants maintain that they need to conduct discovery to challenge the allegations set forth by Medallion, especially because so much of the evidence is particularly within Medallion’s knowledge.

Medallion submits an affidavit from Kowalsky, in which he provided that “in or around April 2015, I participated in an in-person discussion with Mr. Zubli to negotiate a potential early refinancing and/or maturity date extension of the Loans. I was accompanied by a Senior Underwriter of Medallion Financial Corporation, Adrian Rodriguez. Neither Mr. Rodriguez nor I promised that the negotiations would be successful, and expressed that any offer to refinance the Loans would be subject to Credit Committee review and approval. We also made clear that Medallion would consider refinancing the Loans only if the principal balances were reduced.” He

also explained that at a December 2015 meeting with Zubli, prior to the maturity date, he did not promise a refinance or lead him to believe that a refinance was likely to be approved. He communicated that a substantial reduction in principal would be required before Medallion would consider refinancing the loans and extending the maturity date. Kowalsky also explained that he would have had no authority to grant permission to extend the maturity date, or promise a refinancing.

Medallion argues that Zubli's allegations are self-serving, and also inadequate because in the absence of a signed writing modifying the loans, Medallion is entitled to enforce the loan documents in accordance with their terms. The loan documents provide that no oral modifications were permitted. Medallion further maintains that defendants' assertion that they were fraudulently induced is barred because the contractual prohibition against oral modifications negates the essential element of reasonable reliance as a matter of law. Further, claiming that Medallion acted in bad faith during discussions about a potential refinancing cannot relieve defendants of their obligations because a lender's exercise of its contractual rights and remedies cannot constitute bad faith.

Finally, Medallion argues that (1) the loan documents contained express waivers of the right to assert defenses; (2) asserting counterclaims is not appropriate here because there was no answer yet; and (3) no amount of discovery would alter the result mandated by the loan documents.

### Discussion

A plaintiff establishes a *prima facie* case for judgment pursuant to CPLR §3213 by presenting proof of the instrument for payment of money and defendant's failure to make the payments required under the instrument. *Bhatara v. Futterman*, 122 A.D.3d 509, 510 (1<sup>st</sup> Dept. 2014). Courts have similarly recognized that the unconditional guaranty of a loan "is an instrument for the payment of money only within the meaning of CPLR 3213." *Jason Trading Corp. v. Lason*

*Trading Corp.*, 303 A.D.2d 180 (1<sup>st</sup> Dept. 2003). Here, Medallion establishes a *prima face* case for judgment pursuant to CPLR §3213 by presenting proof of the loan documents and defendants' failure to make the payments required. It is clear that the loan documents and guaranties were properly executed by the parties, and money is still due and owing to Medallion.

In opposition, defendants fail to raise an issue of fact. Defendants argue that they were in the process of negotiating a refinancing of the loans with Medallion, and were led to believe that the refinancing would occur. They argue that Medallion acted in bad faith and breached the covenant of good faith and fair dealing. They also argue that Kowalsky misrepresented Medallion's intention to refinance the loans, and defendants reasonably relied on that misrepresentation.

The security agreements and guaranty agreements clearly prohibit oral modifications to the terms of the loans. When parties have expressed an intention not to enter into a modification or amendment of their contract unless such is in writing, they will not be bound until that writing has occurred. *See generally Jordan Panel Sys., Corp. v. Turner Constr. Co.*, 45 A.D.3d 165 (1<sup>st</sup> Dept. 2007); *Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Ward Equities*, 188 A.D.2d 397 (1<sup>st</sup> Dept. 1992); *Brause v. Goldman*, 10 A.D.2d 328 (1<sup>st</sup> Dept. 1960) *affd* 9 N.Y.2d 620 (1961). Medallion's alleged oral promises to refinance cannot serve as a basis to modify the terms of the loan documents, specifically, the maturity date or the amounts owed. Defendants' fraud allegations are without merit because the express language in the loan documents declaring no modification or waiver of their terms without a writing negates the element of justifiable reliance on the alleged oral promise. *See generally Bank of New York v. Spring Glen Assocs.*, 222 A.D.2d 992 (3<sup>rd</sup> Dept. 1995). Further, the covenant of good faith and fair dealing cannot serve to negate express provisions of an agreement. *See Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, \_\_\_ A.D.3d \_\_\_, 48 N.Y.S.3d 110 (1<sup>st</sup> Dept. 2017).

In accordance with the foregoing, it is hereby

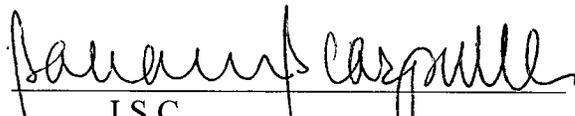
ORDERED that plaintiff Medallion Bank's motion pursuant to CPLR §3213 for summary judgment in lieu of complaint is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff Medallion Bank; and it is further

ORDERED that the parties are directed to schedule an inquest to determine the amounts due for principal and any interest, costs and expenses.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 27, 2017

ENTER:

  
J.S.C.  
HON. SALIANN SCARPULLA