SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Industrial Bank of Korea, as trustee of PIA Private Real Estate Investment Trust No. 6-2, as lender Plaintiff, v. DAVID NOVICKI, as Co-Executor of the Estate of Louis L. Ceruzzi, Jr. and Trustee of the Louis L. Ceruzzi, Jr. Marital Trust, CHARLES MANTELL, as Co-Executor of the Estate of Louis L. Ceruzzi Jr. and Trustee of the Louis L. Ceruzzi, Jr. Marital Trust, and BVS ACQUISITION CO. LLC, Defendants.	Index No.: _____/2021 Motion Seq. No. 001 **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes and Rules

Other

Plaintiff Industrial Bank of Korea, as trustee for PIA Private Real Estate Investment Trust No. 6-2, respectfully submits the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213 against (i) David Novicki and Charles Mantell (together, the "Co-Executor"), in their capacity as Co-Executors of the Estate of Louis L. Ceruzzi, Jr. (the "Estate"), and as Trustees of The Louis L. Ceruzzi, Jr. Marital Trust, as successor of the Estate of Louis L. Ceruzzi, Jr. (the "Trust"), and (ii) BVS Acquisition Co. LLC ("BVS," and together with the Co-Executor, the "Guarantors" or "Defendants"). The underlying facts relevant to this motion are taken from the accompanying Affirmation of Seung Won Kwak, dated January 21, 2021 (the "Aff."), and the exhibits attached thereto.

I. PRELIMINARY STATEMENT

This action arises from the Defendants' failure to honor their clear, unconditional, and irrevocable obligations under a payment guaranty issued as security for a $110 million mezzanine loan (the "Loan") in connection with a residential condominium building named *The Centrale* at 138-146 East 50th Street in New York City (the "Project"). Pursuant to the payment guaranty, Defendants guarantied payment of up to $40 million of Borrower's payment obligations under the Loan. The Borrower currently owes Plaintiff more than $86 million. Plaintiff is entitled to summary judgment on its claim, because, pursuant to settled New York law, the payment guaranty is an "instrument for the payment of money only" for purposes of CPLR 3213. Upon review of the documentary evidence, there is no triable question of material fact regarding Defendants' obligations under the payment guaranty or the fact of their non-compliance, and thus, judgment for the Plaintiff is warranted.

To set forth the parties' rights and obligations with respect to the $110 million loan, Industrial Bank of Korea, as trustee for lender PIA Private Real Estate Investment Trust No. 6-2 (together, "Lender" or "Plaintiff"), entered into a Mezzanine Loan Agreement (the "Loan

Agreement") with 50 Lex Development Mezz LLC (the "Borrower"), evidenced by a Mezzanine Loan Note in the amount of $110 million (the "Note"). Both the Note and Loan Agreement were executed on February 19, 2020.

As security for the Loan, Defendant Co-Executor and BVS – each of whom had or represented a current (or, in the case of the Marital Trust, intended) beneficial interest in the Borrower – simultaneously executed, among various other guaranties, an irrevocable and unconditional Mezzanine Payment Guaranty in favor of the Lender (the "Payment Guaranty"). Pursuant to the Payment Guaranty, Defendants guarantied Borrower's obligation to pay up to $40 million of the debt under the terms of the Loan Agreement.

On November 19, 2020, when Borrower's initial interest payment came due, Borrower failed to timely pay approximately $2.35 million in interest. By letter dated November 20, 2020, Plaintiff notified Borrower and the Guarantors that, based on the missed interest payment, it had the right to immediately call an Event of Default pursuant to Section 5.1(h) of the Loan Agreement (the "Initial Notice"). Less than one week later, on November 26, Lender sent a second notice to the Guarantors advising them explicitly of the Borrower's failure to pay amounts owed under the Loan Documents and demanding payment pursuant to the Guaranty (the "Guarantor Notice").

Then, on January 5, 2021, Plaintiff Lender sent Borrowers and the Guarantors a Notice of Default and Acceleration, notifying the parties that it was accelerating the principal balance of $81,730,962.03 under the Loan Agreement as a result of the Events of Default. The Acceleration Notice also detailed that additional interest of $4,642,772.49 (incurred at the default rate) had been added to the amount due under the Loan Documents, for a total outstanding balance of $86,609,165.08 owing as of December 31, 2020, exclusive of any additional expenses incurred by Plaintiff in pursuing its remedies under the Loan Documents. The Notice of Default and

Acceleration provided Borrower and Defendants with five business days, upon receipt of the notice, to pay the full outstanding balance of the debt to Plaintiff. To date, no payment has been received and the full balance remains outstanding.

There are no disputed issues of material fact with respect to the amount Defendants now owe Plaintiff. In executing the Payment Guaranty, Defendants unconditionally agreed that they would be liable for "the due and punctual payment in full of the outstanding Principal Balance … as and when due under the terms of the Loan Documents" up to a maximum of $40 million, plus out of pocket costs incurred in enforcing the Guarantor's obligations. More than $86 million is now owed to Lenders by Borrowers; Defendants are directly liable to Plaintiff as primary obligors under the Payment Guaranty for $40 million of that total.

Accordingly, as a matter of New York law, pursuant to the explicit terms of the Payment Guaranty, summary judgment should be granted against Defendants in the amount of $40 million. Plaintiff is also entitled to a judgment awarding it all reasonable fees and expenses incurred in securing its rights under the Payment Guaranty, including attorneys' fees, subject to further proof of the expenses incurred through judgment.

II. STATEMENT OF UNDISPUTED FACTS

A. The Loan Documents

1. The Mezzanine Loan Agreement and Note

On February 19, 2020, 50 Lex Development Mezz LLC, as borrower, and Industrial Bank of Korea, as the trustee of lender PIA Private Real Estate Investment Trust No. 6-2, entered into the Mezzanine Loan Agreement. Aff. ¶ 16; Ex. A. As set forth in the Loan Agreement, Plaintiff agreed to provide Borrower with a loan in the maximum amount of $110 million (Ex. A at 1), as evidenced by the Mezzanine Loan Note in the amount of $110 million, also dated as of February 19, 2020 (the "Note"). Aff. ¶ 17; Ex. B.

Pursuant to the Note, Borrower agreed to pay interest on the principal balance of the Loan in arrears on each payment date during the term of the Loan. *See* Ex. B, at Recital (b), Schedule I; Aff. ¶ 18 (reflecting an initial interest payment date of November 19, 2020 for the August 19 – November 18, 2020 initial term). Borrower further agreed that:

> [t]he failure to make any payment required under this Note, subject to any applicable notice and/or grace periods provided for herein or the occurrence of any Event of Default (as such term is defined in the Loan Agreement) shall constitute an Event of Default under this Note.

Id. The Loan Agreement provides that Borrower's failure to pay interest on the Payment Date constitutes an "Event of Default" under Section 5.1 of the Loan Agreement. Ex. A § 5.1(h); Aff. ¶ 19.

Borrower thus breached its obligation under both the Loan Agreement and the Note when it failed to make the initial interest payment on November 19, 2020. Aff. ¶¶ 25-26; Ex. A § 5.1(h); Ex. B, § (d). Pursuant to the Loan Agreement, upon an Event of Default, Plaintiff was permitted to accelerate "the aggregate principal amount of the Note (together with all the accrued interest thereon and all other amounts due and payable with respect thereof)" such that the accelerated amount would become "immediately due and payable to [Plaintiff] without notice." Ex. A § 5.3; Aff. ¶¶ 19, 26.

2. <u>The Mezzanine Payment Guaranty</u>

On February 19, 2020 the Guarantors executed a Payment Guaranty in favor of Plaintiff in order "to induce Lender to extend the Loan to Borrower." Ex. C; Aff. ¶ 20.[1] The Payment

[1] As explained in the Payment Guaranty, "each [of the] Guarantor[s] other than the Trust is an owner, either directly or indirectly, of a beneficial interest in Borrower and in the instance of the Trust, is intended to be an owner, either directly or indirectly of a beneficial interest in Borrower upon the distribution of the assets of the Estate . . ." Ex. C (Recitals, at pg. 2). The parties thus agreed that the execution of the Payment Guaranty was "of substantial benefit" to each of the Guarantors. *Id.*; *see also* Aff. ¶ 21.

Guaranty provides, in relevant part:

> **Payment Guaranty and Agreement.** (a) Guarantor hereby, jointly and severally, unconditionally and irrevocably guarantees to Lender and to its successors, endorsees and/or assigns the full and prompt payment when due, by acceleration or otherwise, the due and punctual payment in full of the outstanding Principal Balance (as defined in the Note) as and when due under the terms of the Loan Documents, provided, however, that, in no event shall the sum of (1) the Guarantors' liabilities with respect hereto (but not as to out of pocket costs of enforcement incurred by Lender in enforcing Guarantors' obligations hereunder) plus (2) Guarantors' liabilities with respect to the matters set forth in Section 1 of that certain Payment Guaranty, dated of even date herewith, made by Guarantor in favor of Mortgage Lender (but not as to out of pocket costs of enforcement incurred by Mortgage Lender in enforcing Guarantors' obligations thereunder), exceed in the aggregate FORTY MILLION AND 00/100 DOLLARS ($40,000,000.00) …

Ex. C § 1 (emphasis in original); Aff. ¶ 22. Thus, among other obligations, with the execution of the Payment Guaranty, Defendants guaranteed repayment of the Loan up to $40 million. *Id.* In executing the Guaranty, Defendants also agreed to more than twenty specific waivers of their legal rights, including "[a]ny right to require Lender to proceed against Borrower or any other Person or to proceed against or exhaust any security held by Lender at any time or to pursue any other remedy in Lender's power or under any other agreement before proceeding against such Guarantor hereunder." Aff. ¶ 23; Ex. C § 3(a).

B. Defendants' Guaranty Obligations Were Triggered By The Borrower's Failure to Perform

On November 19, 2020, Borrower failed to make a timely initial interest payment of $2,354,305.55. Aff. ¶ 25; *see also* Ex. D. On November 20, 2020, Plaintiff sent Borrower and the Guarantors notice that Borrower had "failed to timely pay on or before November 19 2020 the Payment required to be made pursuant to clause B of the … Mezzanine Note," and informed Borrower that, according to the terms of the Mezzanine Note, Lender had the right to call an Event of Default pursuant to Section 5.1(h) (the "Initial Notice"). Aff. ¶ 26; Ex. E. In particular, the

Initial Notice made clear to Borrowers that "there is no grace period for failure to make" payments as due. *Id.*

On November 26, Lender sent a second Notice to the Guarantors advising Guarantors of the Borrower's failure to pay amounts owed under the Loan Documents, and demanding "immediate payment in full of the amounts due and owing from Borrower and for which Guarantors are obligated under the Guaranties . . . up to Forty Million Dollars ($40,000,000.00)". Aff. ¶ 27; Ex. F. The Guarantors failed to make any payment in response to this demand. Aff. ¶ 28.

Then, on January 5, 2021, Plaintiff sent Borrower and the Guarantor Defendants a Notice of Default and Acceleration, notifying the Borrower and the Guarantors that it was accelerating a principal balance of $81,730,962.03 under the Loan Agreement as a result of the Events of Default (the "Acceleration Notice"). Aff. ¶ 29; Ex. G. The Acceleration Notice also reflected that accrued interest of $4,642,772.49, incurred at the default rate, was also owed as of December 31, 2020, plus a late charge of $235,430.56. Aff. ¶ 30; Ex. G at 5 (Outstanding Amounts). Thus, Borrower owed a total balance of $86,609,165.08 in connection with the Loan (the "Acceleration Shortfall"), exclusive of any additional expenses that the Lenders might incur in pursuing a timely remedy under the Loan Documents. *Id.* The Acceleration Notice provided Borrower and Defendants with 5 business days, upon receipt of the Notice, to pay the full outstanding balance of the debt. Aff. ¶ 31. No payment has been received. Aff. ¶ 32. The full balance of $86,609,165.08, plus additional interest accrued since December 31, 2020, remains outstanding. *Id.*

C. Plaintiff's Rights Upon Default and Events of Default

The Payment Guaranty does not require notice. Aff. ¶ 24; *see generally*, Ex. C. Pursuant to Section 3(e) of the Guaranty, Defendants waived the right to bring any defense to a claim pursuant to the Guaranty arising out of "notice of nonpayment, protest, notice of protest and all other notices of any kind, or the lack of any thereof . . .". Ex. C at § 3(e). Nevertheless,

pursuant to the Acceleration Notice, on January 5, 2021, Plaintiff provided Borrowers and the Gurantor Defendants with five business to pay the full outstanding balance of the debt to lender. Aff. ¶ 31; Ex. G. Defendants have failed to make the payment required under the Guaranty in response to that Notice. Aff. ¶ 32.

III. JURISDICTION AND VENUE

This Court has jurisdiction over Defendant Co-Executors, with a business address at 400 Park Avenue, 5th Floor, New York, New York, 10022. *See* CPLR 301. The co-executors of Defendant Co-Executors, David Novicki and Charles Mantell, are both citizens of Connecticut. This Court also has jurisdiction over Defendant BVS because it is a Delaware limited liability company authorized to do business in New York with an address at 400 Park Avenue, 5th Floor, New York, New York 10022. *See* CPLR 301.[2]

Venue is proper in this Court because the parties contractually consented to the exclusive jurisdiction of New York courts for all matters arising under the Loan Agreement, Note and Payment Guaranty, the terms of which are to be construed in accordance with New York law. *See* Aff. ¶¶ 14-15; Ex. C § 7(j); Ex. A § 11.4 ("Governing Law; Jurisdiction"); Ex. B § (aa).

Specifically, the Payment Guaranty states that:

> (j) Governing Law …. This Guaranty shall be governed by and construed in accordance with the substantive laws of the State of New York without giving effect to its principles of choice of law or conflicts of law, except to the extent that the applicability of any such laws may now or hereafter be preempted by Federal law, in which case such Federal law shall so govern and be controlling. …

[2] Defendant Co-Executors Novicki and Mantell did not dispute this Court's jurisdiction in a similar matter currently pending before Justice Andrea Masley of the Commercial Division, which also relates to the Co-Executor's obligations arising out of certain guaranties executed in connection with an Upper East Side real estate development project. *See 86th Street Lender LLP v. David Novicki et al.*, Index No. 655250/2020, Dkt. No. 29 (Opp. to Motion for Summary Judgment in Lieu of Complaint).

Ex. C at § 7(j). In addition, Section (aa) at page 9 of the Note states that, as to "any claim, action, or dispute arising under, or to interpret or apply, this note or any other security document, or to resolve any dispute arising under the foregoing or the relationship between" the Borrower and the Lender, each party:

> … IRREVOCABLY SUBMITS TO THE NONEXCLUSIVE JURSIDICTION OF THE COURTS OF THE STATE OF NEW YORK AND THE UNITED STATES DISTRICT COURT LOCATED IN THE BOROUGH OF MANHATTAN IN NEW YORK CITY, NEW YORK, AND APPELLATE COURTS FROM ANY OF SUCH COURTS. [BORROWER] AND [LENDER] EACH IRREVOCABLY WAIVES ANY OBJECTION THAT EITHER MAY HAVE AT ANY TIME TO VENUE OF ANY SUCH SUIT, ACTION, OR PROCEEDING BROUGHT IN ANY SUCH COURT, INCLUDING ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING SO BROUGHT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.

Ex. B § (aa) (formatting in original).

IV. ARGUMENT

A. Summary Judgment In Lieu of Complaint Is Appropriate

Pursuant to CPLR 3213, "[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 complaint." "CPLR 3213 was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless." *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485, 491-92 (2015) (internal quotations omitted); *see also DDS Partners, LLC v. Celenza*, 6 A.D.3d 347, 348 (1st Dep't 2004) ("A plaintiff is entitled to an accelerated procedure to commence and pursue an action to recover on an instrument for the payment of money only.") "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money, … [thus the CPLR 3213] remedy has proved an effective one, particularly

for financial institutions recovering on promissory notes and unconditional guaranties." *Weissman v Sinorm Deli*, 88 N.Y.2d 437, 443 (1996) (citations omitted).

For decades, New York courts have frequently granted CPLR 3213 relief following nonpayment under an instrument for the payment of money only. *Id.* at 443-444 (Court of Appeals describing history and frequent reliance on CPLR 3213 by litigants since the law's enactment) (citing 1st Prelim Report of Advisory Comm. on Practice and Procedure, 1957 NY Legis. Doc No. 6 [b], at 91). Pursuant to CPLR 3213, a plaintiff makes out a prima facie case for summary judgment in lieu of complaint where it provides proof of an instrument for the payment of money only and the defendant's failure to make payment according to its terms. *See Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136, 137 (1st Dep't 1968). Thereafter, "the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense." *Cooperatieve Centrale*, 25 N.Y.3d at 492 (quoting *Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 A.D.3d 708, 710 (2d Dep't 2008)).

Here, Plaintiff has established a prima facie case for summary judgment in lieu of complaint. Defendants cannot establish the existence of any material issue of fact that would warrant a trial of this action before the Court, because there is none. Summary judgment in favor of Plaintiff is warranted.

1. The Payment Guaranty is an Instrument for the Payment of Money Only

The Payment Guaranty reflects the Guarantor's unconditional promise to pay up to $40 million owed by Borrowers upon the Borrower's failure to fulfill its obligations under the Mezzanine Loan. *See* Ex. C, § 1; *supra* at 4-5. As such, it is plainly an instrument for the payment of money only, and fits squarely within the ambit of CPLR 3213 relief.

It is well established in New York that an "unconditional guaranty is an instrument for the payment of 'money only' within the meaning of CPLR 3213." *Cooperatieve Centrale*, 25 N.Y.3d at 492 (citing *Eur. Am. Bank & Tr. Co. v. Schirippa*, 108 A.D.2d 684, 684 (1st Dep't 1985)); *see also Jason Trading Corp. v. Lason Trading Corp.*, 303 A.D.2d 180, 180-181 (1st Dep't 2003) (finding an unconditional guranty of a promissory note an instrument for the payment of money only within the meaning of CPLR 3213).[3]

As the New York Court of Appeals has noted, "[g]uaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, *i.e.*, guaranties that are 'absolute and unconditional,' have been consistently upheld by New York courts" as suitable for 3213 treatment. *Cooperatieve Centrale*, 25 N.Y.3d at 493 (collecting cases).[4]

Here, the Payment Guaranty is plainly an unconditional guaranty. By its explicit terms, the Guarantor[s] "jointly and severally, unconditionally and irrevocably guarantee[d] to Lender … the full and prompt payment when due, by acceleration or otherwise, the due and punctual payment in full of the outstanding Principal Balance" up to a maximum of $40 million (plus fees). Aff. ¶ 22; Ex. C § 1. The Payment Guaranty is "unconditional" and does not obligate Plaintiff to pursue any

[3] *Compare, for example, Weissman*, 88 N.Y.2d at 445 (court finding that indemnification agreement providing for an indemnification of all liabilities arising out of any breach of any covenant in a contract for the sale of stock, and of the indemnitee's unstated, unknown, future contingent obligations, did not qualify as an instrument "for the payment of money only", where the court found that significant outside proof would be required to ascertain the alleged liabilities and obligations.)

[4] As the Court of Appeals discussed in *Cooperatieve*, the court has acknowledged the application of absolute guaranties *even to claims of fraudulent inducement in the execution of the guaranty*. *Citibank v. Plapinger*, 66 N.Y.2d 90, 95 (1985) (Court of Appeals holding that, given the substance of the guaranty, to permit defendants to assert that the bank induced them to sign "would in effect condone defendants' own fraud in 'deliberately misrepresenting [their] true intention' when putting their signatures to their 'absolute and unconditional' guarantee") (quotations omitted).

other remedies prior to commencing an action against Defendants. *See* Ex. C.[5] The Guaranty also identifies more than twenty "Waivers by Guarantor," pursuant to which the Guarantors purposefully and explicitly "waive[d] and agree[d] not to assert" (*id.* at § 3) a long list of anticipated possible defenses, including, for example, the right of Lender to proceed against Borrower (*id.* at §3(a)), statute of limitations defenses (*id.* at §3(b), claims of Guarantor incapacity (*id.* at §3(c)), or broadly – "[a]ny principle or provision of law, statutory or otherwise, which is or might be in conflict with the terms and provisions of this Guaranty," (*id.* at § 3(h)), among many others. The Guarantors also made a number of explicit waivers of "all rights and defenses that such Guarantor may have because Borrower's debt is secured by real property. *Id.* § 4(a) ("Additional Waivers"); §5 ("Suretyship Waiver").

The Payment Guaranty is thus plainly an instrument for the payment of money only within the meaning of CPLR 3213.[6]

[5] That the precise amount owed under the Guaranty may fluctuate depending on how much is due at the time the Guaranty is invoked is irrelevant: it is a promise to pay Plaintiff for the portion of principal amount of the Mezzanine debt up to $40 million, whether by maturity or acceleration, in the event that Borrower fails to timely repay the principal.

[6] As the First Department held in *Mfrs. Hanover Tr. Co. v. Green*, a guaranty "may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain." 95 A.D.2d 737, 737 (1st Dep't 1983). In this case, the Payment Guaranty identifies a maximum possible guaranty of $40 million, limited by how much remains owing to Lender from Borrower under the Loan Documents, *plus expenses incurred in enforcing the Guaranty.* As the *Hanover* court found, the possible "need to refer to [other Loan Documents] to establish the amount of liability does not effect the availablity of CPLR 3213" relief. *Id.* Similarly, the application of CPLR 3213 "is not affected by the circumstance that the instrument in question was part of a larger transaction … as long as the instrument requires the defendant to make certain payments and nothing else." *Bank of America, N.A. v Solow*, 2008 WL 1821877, *4 (Sup Ct, N.Y. Cnty, 2008).

2. Plaintiff Has Made a Prima Facie Case for Summary Judgment in Lieu of Complaint

To meet its prima facie burden on a motion for summary judgment in lieu of complaint, a plaintiff seeking to enforce the terms of a guaranty must prove "the existence of the guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *Cooperatieve Centrale*, 25 N.Y.3d at 492 (citing *Davimos v Halle*, 35 A.D.3d 270, 272 (1st Dep't 2006), *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 (1st Dep't 1998)). Here, Plaintiff has met its prima facie burden because the payment obligations under the Loan Agreement and the Payment Guaranty are clear and unambiguous on their face, and are not subject to any reasonable dispute. It is also undisputed that the entire outstanding amount of the Loan was accelerated on January 5, 2021 (Aff. ¶ 29; Ex. G; *supra* at 6), and that neither Borrower nor the Defendants have made any payments in connection with the Acceleration Shortfall despite Plaintiff's written demand for such payments. Aff. ¶ 32; Ex. G. Accordingly, based on the foregoing undisputed facts, Plaintiff has made a prima facie showing that it is entitled to summary judgment in lieu of complaint. *See Poah One Acquisition Holdings V. Ltd. v. Armenta*, 96 A.D.3d 560, 560 (1st Dep't 2012) ("Plaintiff demonstrated its entitlement to summary judgment as against [guarantor] by submitting the guaranty executed by him and an affidavit of nonpayment.").[7]

Having established a prima facie showing that Plaintiff is entitled to summary judgment, the burden shifts to Defendants to establish that a triable issue of fact exists such that summary

[7] *See also German Am. Cap. Corp. v. Oxley Dev. Co.*, 102 A.D.3d 408, 408 (1st Dep't 2013) (affirming grant of summary judgment in lieu of complaint where, as here, plaintiff submitted a loan agreement, guaranty, and a sworn statement from plaintiff's principal attesting to defendant's failure to make payment of the amount due under the loan); *Seaman-Andwall Corp.*, 31 A.D.2d at 137-39 (granting summary judgment in lieu of complaint where note called for payment and affidavit alleged a default in payment obligations).

judgment is not appropriate. *See Simoni v. Time-Line, Ltd.*, 272 A.D.2d 537, 538 (2d Dep't 2000). Defendants here cannot do so.

First, Defendants cannot dispute that they are liable to Plaintiff for the amount due under the clear and binding terms of the Payment Guaranty. Ex. C; Ex. F. *Nor* can Defendants dispute that, pursuant to the Loan Documents, Borrowers now owe Plaintiff more than $86 million – well in excess of the $40 million maximum guarantied amount pursuant to the Payment Guaranty. *Id.*

Plaintiff's claims against Defendants are also not subject to any defenses, as Defendants expressly waived all conceivable defenses in executing the Payment Guaranty. *See* Ex. C, §§ 3, 4, 5. New York courts have consistently upheld "[g]uaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, *i.e.*, guaranties that are 'absolute and unconditional.'" *Cooperatieve Centrale*, 25 N.Y.3d at 493. Where, as here, the guaranty waives all defenses other than complete payment or performance, guarantors are precluded from asserting any defenses to payment in response to a summary judgment motion. *See United Orient Bank v. Bao Lee*, 223 A.D.2d 500, 500 (1st Dep't 1996) (defendants precluded from asserting release-related defenses where guaranties waived all defenses except full payment); *Hyman v. Golio*, 134 A.D.3d 992, 993 (2d Dep't 2015) ("By the plain language of the guaranty, the defendant was precluded from raising any defenses or counterclaims relating to the underlying debt.").

Under analogous circumstances, courts applying New York law have found such provisions to be dispositive and have granted the same relief sought by Plaintiff here. *See, e.g.*, *Cooperatieve Centrale*, 25 N.Y.3d at 494 (holding that guaranty's "[b]road, sweeping and unequivocal language" established guarantor's liability and foreclosed "any challenge to the enforceability and validity of the [underlying] documents"); *Hyman*, 134 A.D.3d at 993 (same).

Plaintiff's summary judgment motion therefore should be granted pursuant to CPLR 3213 because: (1) this action is based upon Defendants' absolute, unconditional, and irrevocable Payment Guaranty, which constitutes an instrument for the payment of money only under New York law; (2) the Acceleration Shortfall has not been paid; and (3) Defendants have failed to perform their guaranty obligation. *See Isr. Disc. Bank of N.Y. v. 500 Fifth Ave. Assoc.*, 167 A.D.2d 203, 203 (1st Dep't 1990) (holding that plaintiff was entitled to summary judgment in lieu of complaint based on plaintiff's showing of defendant's personal guaranties and failure to pay).

B. Plaintiff Is Entitled To Attorneys' Fees Under the Payment Guaranty

Pursuant to the Payment Guaranty, Defendants explicitly agreed that Plaintiff would be entitled to seek attorneys' fees in connection with enforcing its rights under the Guaranty.

First, Section 1 of the Payment Guaranty states that the $40 million cap on the Guaranty does not include the "out of pocket costs of enforcement incurred by [Plaintiff] in enforcing Guarantors' obligations" under the Guaranty – inferring that such costs should be covered by the Guarantors. Ex. C § 1.

Then, Section 7(n) of the Payment Guaranty, titled "Attorneys' Fees," provides that:

> In the event it is necessary for Lender to retain the service of an attorney or any other consultants in order to enforce this Guaranty, or any portion thereof, Guarantor agrees to pay to Lender any and all costs and expenses, including, without limitation, attorneys' fees, incurred by Lender as a result thereof and such costs, fees and expenses shall be included in Guaranteed Obligations.

Ex. C § 7(n).

It is well-established under New York law that Plaintiff is entitled to recover its costs and expenses, including attorneys' fees, pursuant to CPLR 3213 where the underlying documents, like here, provide for such recovery. *See, e.g.*, *DDS Partners LLC,* 6 A.D.3d at 348-49 (affirming order pursuant to CPLR 3213 awarding plaintiff attorneys' fees and costs under terms of instrument for payment of money, subject to hearing on amount of fees); *Simoni*, 272 A.D.2d at 538-39 (same);

Cmty Nat'l Bank & Tr. Co. of N.Y. v. I.M.F. Trading, Inc., 167 A.D.2d 193, 194-95 (1st Dep't 1990) (same); *Citibank, N.A. v. Ahmad*, 2020 WL 6161624 (N.Y. Sup., 2020) (same). Given that Plaintiff was required to engage legal counsel in order to enforce the Payment Guaranty, this Court should award Plaintiff its legal fees and expenses, subject to a hearing as to the amount, as the parties agreed.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an order and judgment pursuant to CPLR 3213 in favor of Plaintiff and against Defendants, jointly and severally, in the amount of $40 million. Plaintiff further requests fees and expenses, including attorneys' fees incurred in connection with the enforcement of its rights under the Payment Guaranty, and any such other and further relief as the Court deems just and proper.

DLA PIPER LLP (US)

Dated: New York, New York
January 27, 2021

By: */s/ Melissa J. Godwin*

Anthony P. Coles
Melissa J. Godwin
anthony.coles@us.dlapiper.com
melissa.godwin@us.dlapiper.com
1251 Avenue of the Americas
New York, NY 10020-1104
Tel: 212.335.4500

Attorneys for Plaintiff Industrial Bank of Korea, as trustee of PIA Private Real Estate Investment Trust No. 6-2, as lender

CERTIFICATION

I hereby certify pursuant to Commercial Division Rule 17, 22 NYCRR § 202.70(g)(17) as follows:

1. I filed via NYSCEF the foregoing Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment in Lieu of Complaint.

2. The foregoing document was prepared on a computer using Microsoft Word. The total number of words in the document, exclusive of caption, signature block, and this certification is 4,965.

3. The foregoing document is in compliance with the word count limit set forth in Commercial Division Rule 17, effective October 1, 2018.

Dated: New York, NY
January 27, 2021

/s/ Melissa J. Godwin
Melissa J. Godwin