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

J-BAR REINFORCEMENT INC., Plaintiff,	:	
-against-	:	Index No. 650404/2016 (Scarpulla, J.S.C.)
CREST HILL CAPITAL LLC and MANTIS FUNDING LLC, Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS

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Plaintiff J-Bar Reinforcement Inc. ("J-Bar" or the "Lender"), by and through its undersigned counsel, The Law Offices of David J. Shapiro, P.C., respectfully submits this memorandum of law in further support of its motion seeking an order pursuant to CPLR § 3213 granting summary judgment in lieu of complaint (the "Motion"), and in opposition to the cross-motion for an order pursuant to CPLR Rule 3211 dismissing the action by Defendants Crest Hill Capital LLC ("Crest Hill") and Mantis Funding LLC ("Mantis Funding") (collectively, the "Borrowers") (the "Cross-Motion").

PRELIMINARY STATEMENT

On July 17, 2014, J-Bar, which is wholly owned by a small business owner in the construction industry, signed a simple and straightforward Note with companies that describe themselves as being at "the center of the non-bank business financing industry."[1] J-Bar agreed to loan Crest Hill and Mantis Funding $1 million (a very significant sum for it) in exchange for, among others, two essential promises: one, that it would be paid 15% interest per annum; and two, that, if it so chose, it could elect to accelerate the Note, deem it non-extended and receive on a fixed "Maturity Date" six months later the principal and interest. Nothing could be more straightforward.

As recounted in the affidavits submitted by the Borrowers, the relationship between the parties soured. At one point, Crest Hill and Mantis Funding refused to pay interest in the amount and on the dates requested by J-Bar. This was a sign that the Borrowers would not be playing straight with J-Bar and that – for whatever reason – they had decided to delay payments whenever possible. On July 16, 2015, the Lender, as was his bargained-for right under the Note, had elected

[1] http://cresthillcapital.com/company.html. (All defined terms herein have the same meaning as those used by the Lender and Borrowers in their papers.)

to accelerate the Note and deem it non-extended. This required the Borrowers to make a "Repayment" of the principal and any interest still owed by January 16, 2016. Business plans and commitments were made based on receipt of the money as contractually mandated and the delay in repayment has prejudiced J-Bar's business plans. [Doc. 16, ¶ 4]

Now, not only have the Borrowers refused to meet their contractual commitments by making the Repayment on January 16, they are continuing their campaign of delay by asserting, preposterously, that the Subordination Agreement between J-Bar and the Borrowers' senior creditor, Dominion, blocks J-Bar's right to seek judicial redress for their undisputed non-Repayment of monies owed as mandated by the Note. The Borrowers, in other words, are now attempting to use the court in their drive to, as one of their principals put it, make sure that J-Bar's principal would "never see a dime" of his money. [Doc. 16, ¶ 5] They are attempting to do this by ripping words from the Subordination Agreement out of context and overlooking controlling New York authority. Under the Borrowers' reading of the Note and the Subordination Agreement, these documents forbid the Lender from declaring an event of default upon non-Repayment and suing the Borrowers at any time, and under any conditions, and for any amount, until such time (no matter how far in the future, if ever), the Borrowers no longer owe any money to Dominion. This argument, however, overlooks controlling New York law which specifically provides that if the lender/borrower agreement allows the lender to accelerate the note (or provides for a specific event of default), then there is no bar to the action. Subordination agreements like the one here only affect a lender's ability to *collect* a payment; they do not limit its ability to *obtain a judgment* on the amount due. Moreover, even if the Subordination Agreement could be read to block an action for breach pending full payment to Dominion (which it does not), the Borrowers do not have standing to enforce its terms: the agreement specifically provides that only Dominion has that right and, under New York law, therefore, only Dominion would have standing.

The Borrowers' other arguments for denying the motion and *dismissing the action* – even though they concede that the Note required a Repayment on a date certain and such did not occur – borders on the frivolous. They assert, for example, that the Non-Extension Notice *that they concede they received* was defective because it came from the Lender's lawyer, and not the Lender, even though it is undisputed that the Borrowers were aware that Lender's counsel had authority to act on its behalf and had been working with him for over a year. Here the Borrowers rely exclusively on New York landlord/tenant and similar cases where faulty termination notices would have resulted in eviction or forfeiture. In the commercial context, of course, this form over substance argument is not the law.

The Borrowers then make the desperate ploy, often invoked by people who owe money, that the Lender is "equitably estopped" from bringing the action because its principal allegedly made an oral promise to, in the future, extend the Maturity Date. This assertion is found in two self-serving affidavits (one of which incorporates the other) containing unsubstantiated assertions. This New York law does not allow. Moreover, as a matter of law, an oral promise to do an act in the future (as opposed to a misrepresentation of a present or past material fact) cannot be the basis for an equitable estoppel claim. Finally, the Borrowers complain that the Lender did include in its moving papers that, after issuing the Non-Extension Notice, the Borrowers made interest payments under the Note. This is irrelevant because the Borrowers concede that (i) they did not make the Repayment of $1 million on the Maturity Date, as mandated by the Note, (ii) they have not made any interest payments since December 16, 2015; and (iii) the Note provides a mechanism for determining interest (15% per annum as computed on the basis of a 365-day year, for the actual number of days elapsed). There is, therefore, no triable issue on the amounts owed by the Borrowers: $1 million plus 15% interest from December 31, 2015 until such time as the $1 million is paid in full.

The opposition to the Motion and the Cross-Motion are delay tactics. Time is of the essence for J-Bar because every day that it is not repaid the principal and interest is another day it cannot make commitments to others. There is no dispute that the Note allows the Lender to accelerate the Note and declare it non-extended; that the Lender did just that; and that the Borrowers elected not to pay on the Maturity Date. The Motion should therefore be granted and the Cross-Motion denied.

ARGUMENT

I. The Subordination Agreement Does Not Bar The Lender From Bringing This Action Or Asserting An Event Of Default Under The Note Upon Non-Repayment On The Maturity Date.

The Borrowers assert that the Subordination Agreement signed by Dominion and the Lender precludes the Lender from bringing an action against the Borrowers for breach of the Note, and asserting an event of default under the Note upon non-Repayment, even though (i) the Note specifically and unambiguously allows the Lender to accelerate the Note upon six months' notice and specifies that "Repayment" will be due on the "Maturity Date"; (ii) the Subordination Agreement subordinates "payment" under the Note in favor of Dominion until such time as Dominion has been paid in full (absent agreement by the Borrowers to do otherwise); and (iii) the Note provides that the Borrowers can make interest *and principal* payments as long as no event of default has occurred under the pre-existing Borrowers/Dominion loans (and none has). [Doc. 22 at 13-16] The Borrowers, therefore, are wrong.

The Subordination Agreement and the Note should be read together. Under New York law, "[w]here several instruments constitute part of the same transaction, they must be interpreted together." *BWA Corp. v Alltrans Exp. U.S.A., Inc.*, 493 N.Y.S.2d 1, 3 (1st Dept. 1985) (citing *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197 (1941)). *See also Morse,* *Zelnick, Rose & Lander, LLP v Ronnybrook Farm Dairy, Inc.*, 939 N.Y.S.2d 365, 366 (1st Dep't 2012) (promissory note and subordination agreement "must be read together"). When read together, these financial instruments stand for the following common sense and business-logical proposition: During the term of this Note, the Lender may not ask for, demand or sue for principal or interest until such time as Dominion (the Senior Creditor) has been paid in full; however, if the Lender gives the Borrowers six months' notice, the Note is accelerated and full repayment is due even if the Borrowers still owe money to Dominion on pre-existing loans and, if the Borrowers refuse, there is, obviously, an event of default. Any other reading leads to the ludicrous result that – notwithstanding the Borrowers' agreement that the Lender could accelerate the Note and declare it non-extended – he has no recourse if the Borrowers elect *not* to make the "Repayment" on the "Maturity Date" and if the Borrowers elect to amend, restate, extend or supplement their agreements with Dominion such that they hold the Lender's money, as they put in in their affidavits, "in perpetuity." Marano Aff'd, ¶ 6 [Doc. 20]; Lovette Aff'd, ¶ 4 [Doc. 21].

Pursuant to the Note, the Borrowers promised to pay the Lender the principal sum of $1,000,000.00 and to pay interest on that Outstanding Balance of the Note. Note, at 1. Paragraph 2 of the Note is entitled "Payment *and Repayment*" (emphasis added). Under this provision, the "Initial Maturity Date" was January 16, 2016. *Id.*, ¶ 2.1. The Note then goes on to provide that it will be automatically extended for six months, and the Borrowers will not have to make the "Repayment" on January 16, "unless the Lender shall provide a notice . . . six months prior to the Initial Maturity Date [and] the . . . applicable Maturity Date . . . shall not be extended." *Id*. (emphasis added). If there is a "Non-Extension Notice" then the Borrowers must make the "Repayment" on January 16. The Note, in other words, provides a mechanism whereby the Lender can accelerate the Note and demand Repayment on a date certain. Failure to make a Repayment on the Maturity Date is obviously an event of default under the Note and the Lender has a right to demand (and if need be, sue for) the Repayment it bargained for.[2]

Pursuant to the Subordination Agreement, the Lender agrees to “subordinate payment” of the Note (the "Subordinated Indebtedness") to monies owed to Dominion by the Borrowers (the “Obligations”) pursuant to loan agreements between Dominion and the Borrowers (the "Existing Loan Agreements"). Subordination Agreement, ¶ 1. The Lender also agrees to subordinate any liens or security interests it may have on the Borrowers’ assets in favor of liens and security interests enjoyed by Dominion. *Id.*, ¶ 2. The Subordination Agreement, in other words, prioritizes liens and payments during the term of the Note (*e.g.*, “so long as this Agreement shall be in effect, Creditor will not take any action to foreclose or otherwise enforce any of Creditor's Liens”). The agreement then goes on to explain that if there is a “readjustment” of the Borrowers’ debts via “any . . . *action or proceeding* involving . . . the Subordinated Indebtedness,” Dominion is to be paid first. *Id.*, ¶ 3 (emphasis added). This is another example of the Subordination Agreement prioritizing the Lender’s right of payment vis-à-vis Dominion.

In Paragraph 5 of the Subordination Agreement, the Lender acknowledges that the Subordinated Indebtedness is “subordinated in right of payment to the Obligations” and that it cannot be paid monies owed under the Note, and it cannot ask for, demand or sue for those monies, while Dominion is still owed money by the Borrowers. The agreement, however, provides for a specific carve out against paying the Lender while Dominion is still owed money: As long as it will not cause an event of default under the pre-existing Dominion/Borrowers loan

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[2] The Borrowers’ principals have testified that the Outstanding Balance of $1 million is “tied up in other transactions and cannot be easily withdrawn to repay Plaintiff.” Marano Aff’d, ¶ 6; Lovette Aff’d, ¶ 4. Not surprisingly, they do not cite any authority for the proposition that the degree of difficulty in repaying a debt is a valid defense to non-payment. They also assert that the purpose of the Note was to generate interest payments. Marano Aff’d, ¶ 9; Lovette Aff’d, ¶ 6. These are inaccurate statements: the Note demands payment of principal *and* interest.

agreements, the Borrowers can make principal and interest payments. *Id.*, ¶ 5. And the Note (which should be read together with the Subordination Agreement), also provides a specific mechanism whereby the Lender is immediately paid: As long as the Lender gives six months' notice, the Note can be accelerated and the Borrowers must make "Repayment" on the Maturity Date. Note, ¶ 2.1.[3]

Under New York law, a Subordination Agreement is not a bar to seeking redress for breach of a promissory note, based on the fact that monies are still owed to a senior creditor, when the instruments provide a mechanism for accelerating the note. This principle of the law (and common business sense) is illustrated in *Minority Equity Capital Co. v. Jackson*, 798 F. Supp. 200 (S.D.N.Y. 1992).

In *Minority Equity*, defendant Jackson borrowed $800,000 from plaintiff Minority Equity pursuant to a promissory note, but because Jackson had a pre-existing debt to Chemical, Jackson, Minority Equity and Chemical entered into a subordination agreement. (Unlike in this case, in *Minority Equity*, the borrower was a party to the subordination agreement.) Pursuant to the subordination agreement, as in this case, "the debt represented by the Note would be subordinate to the debt owed by Jackson to Chemical." *Id.* at 201. The subordination agreement, as in this case, provided that Minority Equity could not ask for, demand or sue for monies owed to it by Jackson until Chemical had been paid in full:

> Except as provided in paragraph (b) hereof, [Minority Equity] will not ask, demand for, sue for, take or receive, directly or indirectly, from [Jackson] . . . in cash or other property, by set-off or otherwise, by exercise of any remedies or rights under the Junior Obligation Documents or by executions, garnishments, levies, attachments or by any other action relating to the [Note], or in any other manner, receive payment of, or security for, all or any part of the [Note] unless and

[3] The Borrowers draw the Court's attention to the "Agreement Not To Pay Subordinated Indebtedness" signed by the Borrowers wherein they "agree[] not to pay any of the Subordinated Indebtedness." Marano Aff'd, Ex. 2, 10. It is not signed by Dominion or the Lender. Even if this document was a contractual promise from the Borrowers to Dominion (which it is not), it does not dictate the relationship between the Borrowers and the Lender.

until the Senior Obligations have been paid in full.

Id. The subordination agreement, as in this case, made the exception for voluntary payments by the borrower (as long as it did not cause an event of default in the Jackson/Chemical agreements) and, as with the Note in this case, it provided for acceleration of payment under the note if certain undisputed preconditions were met:

> [Minority Equity] may receive, and [Jackson] may pay (but not prepay) principal and interest on the [Note] in the amount and at the times set forth therein . . . if, and only if at the time of making any such Scheduled payment and immediately after giving effect thereto, no default . . . shall have occurred and be continuing; provided however, that if [Minority Equity] does not receive three consecutive Scheduled Interest Payments or three consecutive Principal payments . . . notwithstanding that the Bank has not declared the Senior Obligations to be immediately due and payable, [Minority Equity] may, upon giving ten days prior written notice to the Bank, accelerate the [Note].

Id. at 201-02.

Just as the Borrowers assert here, Jackson sought a judgment arguing that Minority Equity's action was in violation of the subordination agreement because even though Minority Equity had a right to accelerate the debt, the subordination agreement did not "provide [Minority Equity] with a right to sue." *Id*. at 202. The court rejected Jackson's position, explaining that, "[t]he purpose of a subordination agreement is [to] set out the relative positions of lenders in respect to their right to receive payments from the borrower" and, because it was undisputed that Minority Equity had the right to accelerate the note and had issued its intent to do so, it followed that the subordination agreement did not block Minority Equity's action. *Id*.

Just as the Borrowers do here, Jackson had asserted that Minority Equity could not sue for breach of the note because there was no explicit provision in the subordination agreement allowing for such, but the court correctly rejected that assertion based on provisions in the "integrated" agreement. *Id*. The court wrote that, while it was true that the subordination agreement did not state that Minority Equity could "ask," "demand" or "sue" once the conditions precedent for accelerating the loan were met, the fact that Minority Equity had bargained for the right to accelerate the debt meant that it "ha[d] every right to [do so] and sue for a judgment thereon." *Id*.

The same is true here. The Subordination Agreement subordinates the Lender's right of payment to Dominion and states that the Lender may not ask, demand or sue for amounts owed under the Note while Dominion remains unpaid but, at the same time, the Note (which is Exhibit A to the Subordination Agreement), states that the Lender may accelerate the Note and declare it non-extended upon the happening of a condition precedent (the six months' Non-Extension Notice). Under the logic and text of the agreements (and the instruction of *Minority Equity*), the Lender is free to accelerate the Note, demand Repayment on the Maturity Date and "sue for a judgment thereon," even if Dominion remains unpaid on the Existing Loan Agreements. This is the only commercially reasonable way to interpret the documents because, by not doing so, the Borrowers can exercise their right to amend, restate, extend or supplement the Existing Loan Agreements (Subordination Agreement, ¶ 1), and the Lender will never be repaid.[4] And that would turn a promissory note into an investment which the common law does not allow. *See*, *e.g.*, *Kornfeld v. NRX Technologies, Inc.*, 461 N.Y.S.2d 342, 343 (1st Dep't 1983) (subordination clause in promissory note did not alter the unconditional nature of the note or the right of the creditor to initiate the proceeding upon default because debtors "may not validly contend that the notes were never to be paid and that the transaction was essentially an investment"), *aff'm*, 62 N.Y.2d 686 (1984).

[4] This reading of the instruments may explain why, on July 14 2015, on a conference call with Mr. Ed Lovett and Mr. Michael Marano, the Crest Hill Managing Partners, Mr. Bouderau (President of J-Bar) was threatened by Mr. Marano who said to him, "I will end you" and who said that Mr. Bouderau would "never see a dime" of his money. [Doc. 16, ¶ 5]

The Borrowers' reading of the instruments would also result in granting the Lender the right to accelerate and demand Repayment on the Maturity Date without any means of exercising that right and this, too, the common law does not allow. *Kavanaugh v. Cohoes Power & Light Corp.*, 187 N.Y.S. 216, 219 (Sup. Ct. 1921) ("In the interpretation of a contract the court will endeavor to give it the construction most equitable to both parties instead of a construction which will give one of them an unfair and unreasonable advantage over the other."). Similarly, "[a] reading of the contract should not render any portion meaningless." *Beal Sav. Bank v. Sommer*, 834 N.Y.S.2d 44, 47-48 (2007). "A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." *In re Lipper Holdings, LLC*, 766 N.Y.S.2d 561, 562 (1st Dep't 2003), *appeal denied*, 2004 N.Y. App. Div. LEXIS 1625 (1st Dep't 2004).

The logic and holding of *Minority Equity* is in accord with other controlling New York authority. For example, in *Dorf v. Knitmedia Inc.*, 847 N.Y.S.2d 901 (Sup. Ct., NY Cty. 2007) (Cahn, Herman, *J.*), a subordinated unsecured promissory note was executed and delivered with a fixed annual rate and a Maturity Date. The note contained a subordination clause which unambiguously provided that "[t]he indebtedness evidenced by the Note is subordinate and junior in right of payment to the prior payment in full of all Senior Indebtedness . . . of Maker." *Id.* at 901. The "Senior Indebtedness" included "all indebtedness of the Company" and it continued to be Senior Indebtedness "and entitled to the benefits of the subordination provisions irrespective of any amendment . . . of any instrument relating to the Senior Indebtedness." *Id.* As the court observed, pursuant to the subordination agreement, "all other indebtedness of the company will have priority over the Note." *Id.* And, just as in this case, the debtor moved to dismiss based on documentary evidence asserting that "as a subordinate note holder, Plaintiff is barred from bringing a claim to collect the Note until all senior debt is paid." *Id.* The motion to dismiss, however, was denied because "it does not necessarily follow that [the junior creditor] is barred from bringing a claim on the Note merely because his priority in collection does not yet permit him to collect." *Id*. "[A] judgment which merely declared that [plaintiff] has the right to the full accelerated amount of the Note as well as court costs and reasonable attorney's fees as provided for in the note, does not preclude [the priority lender] from collecting its debt ahead of [plaintiff]." *Id*. (quoting *Minority Equity*). "Subordination affects only the *priority* of debt, not the *existence* of the underlying liability." *Imtrac Indus. v. Glassexport Co*., 1996 U.S. Dist. LEXIS 1022, at *16 (S.D.N.Y. 1996) (emphasis in original). In *Imtrac*, the junior creditor's motion for partial summary was granted, notwithstanding the presence of the contract's subordination clause, because "[t]he subordination clause in the [contract] impacts only [lender's] right to collect, not its entitlement to judgment." *Id.* As the court in *Imtrac* explained, when the sole condition precedent to payment has occurred, a subordination agreement does not block the junior creditor's right to a judgment based on nonpayment because "[a] debtor's obligation to pay junior creditors exists independent of the debtor's senior liabilities, and junior creditors are thus entitled to sue for judgment[.]" *Id*.

Courts outside of New York have also recognized that a subordination clause should not be "construed so as to render the [note] unenforceable." *Norton v. Leadville*, 570 F.2d 911 (10th Cir. 1978). Similarly, in *North Star Universal v. Graphics Unlimited*, 563 N.W.2d 73 (Minn. Ct. App. 1997), the court rejected the borrower's argument that under the subordination agreement its default on a senior debt prohibited it from making its payment to the junior lender, and that its obligation to pay the junior creditor was therefore excused. As the court in *North Star* explained, if a junior creditor cannot obtain a judgment upon nonpayment, then it would effectively be subordinate not only to senior creditors but also to all other creditors, and the junior creditor would have no recourse.

Here, the Subordination Agreement does not bar an action to collect on a breach of the Note where the Lender has provided a non-extension notice; rather, it orders the priority of J-Bar's rights as against Dominion. The authorities relied upon by Borrowers are not to the contrary. For example, in *Morse, Zelnick, Rose & Lander, LLP v Ronnybrook Farm Dairy, Inc.*, 939 N.Y.S.2d 365 (1st Dep't 2012), the subordination agreement provided that "the repayment of the note held by [plaintiff] shall be subordinate and subject to [1] the repayment of the notes . . . or [2] the payment of any Liquidation Preference on the Series A Preferred Shares." *Id*. at 366. There was, in other words, in the subordination agreement, two well-defined conditions precedent before the creditor could be paid *without any exceptions*. *Id*. ("The [subordination] agreement further provides that "[a]fter [1] the notes have been repaid in full or [2] after [nonparty] Sofisco and [nonparty] Osofsky have received the entire Liquidation Preference with respect to the Series A Preferred Shares that they hold, [defendant] shall repay the note held by [plaintiff]."). The note at issue in *Morse* did not allow for an acceleration of the note, and there were no exceptions in the subordination agreement for payment while amounts remained outstanding to the non-parties. Instead (unlike in this case), the subordination agreement contained conditions precedent which had not been met. *Id*. Here, there is no dispute that the Borrowers were obligated to make Repayment on the Maturity Date, but did not. Similarly, in *Gard Entertainment, Inc. v. Country in N.Y., LLC*, 948 N.Y.S.2d 42 (1st Dep't 2012), the decision reflects that the note was "subordinated to senior indebtedness," but there is no indication that the creditor had the right to accelerate the note as in *Minority Equity* and *Dorf*. The same is true for *Comforce Telecom, Inc. v. Spears Holding Co., Inc.*, 840 N.Y.S.2d 145 (2d Dep't 2007). [Doc. 22 at 16][5]

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[5] The Borrowers incorrectly assert that the Subordination Agreement is "extrinsic" to the Note and compare it to the Settlement Agreement at issue in this Court's decision in *Octagon Asset Mgt., LLC v Morgan*, 2015 N.Y. Misc. LEXIS 165 (Sup. Ct., N.Y. Cty. 2015). [Doc. 22 at 17] The difference, of course, is that in *Octagon*, it was "undisputed that

The Subordination Agreement, therefore, is not a bar to this action, and it does not provide that failure to make the Repayment on the Maturity Date *after the Lender has issued its Non-Extension Notice* is not an event of default.

II. <u>The Borrowers Do Not Have Standing To Enforce The Subordination Agreement</u>.

Even if the Subordination Agreement did provide for a total blockade of an action for non-Repayment, notwithstanding the express provision in the Note for acceleration (which it does not), Borrowers do not have standing to enforce the terms of the Subordination Agreement.

The Borrowers are not signatories to the Subordination Agreement. [Doc 20, Ex. 2] Further, the agreement specifically and unambiguously states that only one party may "enforce" the agreement, and that party is Dominion:

> [Lender] warrants to [Borrowers] that . . . this Agreement is valid and binding upon [Lender] and <u>is and will be enforceable by [Dominion]</u> in accordance with its terms (except as limited by bankruptcy and other laws affecting the rights of creditors generally).

Subordination Agreement, ¶ 6 (emphasis added). Indeed, the agreement repeats throughout that only Dominion has enforcement authority. *Id.*, ¶ 2 ("Dominion shall have the exclusive right to manage, perform *and enforce* the underlying terms of the Dominion Loan Agreement") (emphasis added); *id.* ("Subject to the Subordination Agreement between Dominion and [two other Dominion-related entities], [one of the Dominion entities] shall have the exclusive right to manage, perform *and enforce* the underlying terms of [a Dominion] Loan Agreement.") (emphasis added).

Under New York law, when a subordination agreement specifically states that only one party may enforce its terms, non-parties to the agreement (even alleged third-party beneficiaries), lack standing to do so. This common law principle was illustrated in *Taberna Preferred Funding*

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the Note was a *byproduct* of the Settlement Agreement and was executed on the same day as the Settlement Agreement, subject to conditions set forth in the Settlement Agreement." Here, the Subordination Agreement is Ex. A to the Note and the instruments, when read together, do not block this action. There is nothing beyond the instruments that the Court need address in order to determine if the Borrowers are liable for their non-Repayment.

II, Ltd. v Advance Realty Group LLC, 2014 N.Y. Misc. LEXIS 4339 (N.Y. Sup. Ct. 2014) (Sup. Ct. NY Cty. 2014) (Kornreich, Shirley, *J.*). In *Taberna*, the Subordination Agreement at issue noted that "this subordination is for the benefit of the Trustee *and* the Holders," but it further stated that it "shall be enforceable *by the Trustee* on behalf of the Holders, or any of them." *Id*. at *18 (emphasis added). The court correctly held that, under the terms of the subordination agreement, only the Trustee (and not the alleged third-party beneficiary) had standing to enforce the terms of the agreement. "[The subordination agreement] is an instrument entered into for the benefit of the . . . [H]olders, *but enforcement is left to the Trust*." *Id.* (emphasis added). The court noted that when a subordination agreement specifically empowers only one party to enforce the agreement, then even where the agreement contains a provision protecting its enforceability, that does not alter the fact that only the party so empowered has standing to enforce its terms. *Id*. at 19 ("A provision protecting the enforceability of the agreement is not the same as one *empowering* the Holders to bind or act on behalf of the Trust.") (emphasis in original). When only one party is granted the power to enforce the terms of the subordination agreement, only that party (and not the alleged third-party beneficiary) has standing to enforce its terms. *Id*. (because the subordination agreement states that only the Trust has the authority to enforce its terms, the purported third-party beneficiary lacks standing to do so).

Taberna is in accord with generally accepted common law principles regarding the non-standing of third-parties when the contract empowers only one party to enforce its terms. "To state a claim for breach of contract . . . a claimant must show either that it is a party to the relevant agreement or that the contracting parties intended the claimant to be a third-party beneficiary *with enforcement rights*." *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 408 (S.D.N.Y. 2011) (interpreting New York law) (emphasis added). The language in the contract "must be such as to evince an intent to permit enforcement by the third party." *Binghamton*

Masonic Temple v. City of Binghamton, 623 N.Y.S.2d 357, 360 (3rd Dep't), *appeal denied*, 85 N.Y.2d 811 (1995). "In order for a contract to confer *enforceable* third-party beneficiary rights, it must appear 'that no one other than the third party can recover if the promisor breaches the contract' or the contract language should otherwise *clearly evidence 'an intent to permit enforcement by the third party.*'" *Artwear, Inc. v. Hughes*, 615 N.Y.S.2d 689, 692 (1st Dep't 1994) (emphasis added). Here, not only is there no language in the Subordination Agreement "clearly evincing an intent to permit enforcement" by Borrowers, it is quite the opposite: the agreement clearly evinces an intent to permit enforcement only by Dominion. Subordination Agreement, ¶ 6.

The authorities relied upon by the Borrowers are not to the contrary. For example, in *Alden State Bank v. Sunrise Bldrs., Inc.*, 853 N.Y.S.2d 230 (4th Dep't 2008), the subordination clause in a building contract stated that "all terms and provisions of this Contract are and shall be subject and subordinate to the lien of any building loan mortgage heretofore or hereafter made." *Id.* at 231. The non-party to the contract had standing to enforce its terms but there was no provision – as in this case – which specifically directed that only one party had the authority to enforce the agreement. The court noted that "the terms of the subordination clause are not vague or ambiguous." *Id.* at 232. So to in the Subordination Agreement between Dominion and the Lender: it is clear who may enforce its terms. Similarly, in *Mendel v. Henry Phipps Plaza W., Inc.*, 811 N.Y.S.2d 294 (2006) (which is not a subordination agreement case), the contract did not contain a clause stating which party – signatory or third-party – may enforce its terms. And although the Borrowers rely on *All Am. Moving & Stor., Inc. v Andrews*, 949 N.Y.S.2d 17 (1st Dep't 2012), that was an action to recover damages arising out of a warehouse fire and it involved a sprinkler inspection services contract. The contract is not quoted in the opinion, but there is no evidence that it included a provision similar to the one in the Dominion/Lender Subordination Agreement which provides Dominion with the exclusive right to enforce the agreement's terms. The same is true in

Aymes v. Gateway Demolition Inc., 817 N.Y.S.2d 233 (1st Dep't 2006); it is a non-subordination agreement case and the contract did not include a provision empowering only the signatory to enforce its terms.

Therefore, even if the Subordination Agreement blocked this action notwithstanding the acceleration provision in the Note (which it does not), the Borrowers do not have standing to enforce its terms; only Dominion does, and they are a not a party.

III. The Non-Extension Notice Is Effective And It Put Borrowers On Notice Of The Acceleration Of The Note.

As demonstrated above, a fair and common sense (and commercially reasonable) reading of the Note and Subordination Agreement stands for the proposition that the Lender may not commence an action for non-payment while Dominion is owed money by the Borrowers during the term of the Note unless, of course – per the Note – the Lender issues a Non-Extension Notice, at which point the Borrowers must make their "Repayment" on the Maturity Date. Recognizing, as they must, that this provision is a fatal flaw to their position that they are allowed to keep the Lender's money "in perpetuity," the Borrowers assert that the Non-Extension Notice is "legally defective." [Doc. 22 at 17-21]. The Borrowers are wrong.

Significantly, while the Borrowers' affidavits recount alleged "defects" in the Non-Extension Notice, they admit that they received a copy from Lender's counsel, Mr. Ron Meyers, six months prior to the "Initial Maturity Date" of January 16, 2016. Lovette Aff'd, ¶ 5. Both individuals recount, in detail, the negotiations that ensured *after* receipt of the Non-Extension Agreement. *Id.* ("In the instant dispute, Plaintiff first gave a defective notice of non-extension, then engaged in negotiations to amend the terms of the Note."); Marano Aff'd, ¶ 7 (same). There is, therefore, no dispute that the Borrowers knew on July 16, 2015 (six months before the Initial Maturity Date), that:

- they were receiving a communication regarding the "Promissory Note dated July 17, 2014" memorializing a loan of $1 million to the Borrowers at the address for receiving notifications under the Note ("80 Pine Street, 32nd Floor, New York, New York");

- the letter was serving as "the Non-Extension Notice pursuant to Section 2.1 of the Note";

- They should be advised that "full repayment of all principal, together with all accrued interest, under the Note" was due on January 16, 2016;

- They should "Please contact [Lender's counsel] for any further discussion of this matter, *particularly if for any reason you feel that this notice is not effective*"; and,

- Their "*receipt and acceptance of this notice will be assumed if [counsel does] not hear from you otherwise in the next ten days*."

Marano Aff'd, Ex. 7 (emphasis added).

The Non-Extension Notice was also provided to Borrowers' previous counsel Wei-Li Tjong, Esq. of Tjong & Hsia, LLP. *Id.* The Borrowers' affidavits do not attach or discuss any communication from their attorney to Mr. Meyers asserting any reason as to why the notice was not "effective." And, pursuant to the Non-Extension Notice, failure to so inform Lender's counsel within 10 days of receipt demonstrated acceptance of the notice (as did Borrowers' actions in attempting to negotiate a new Note). Moreover, while the Borrowers disingenuously assert that the Non-Extension Notice fails to state that Mr. Meyers was the Lender's agent with authority to issue the notice of behalf of his client, it is undisputed that on December 3, 2015, current counsel for the Borrowers communicated with Mr. Meyers via email with proposed new terms for the Note. Supplemental Affidavit of Ray Bouderau, March 23, 2016 ("Bouderau Supp. Aff'd"), Ex. A. The Borrowers write that, "No evidence . . . was . . . ever received by Defendants . . . of any proof that was contemporaneously provided of Mr. Meyers's authority to act on behalf of Plaintiff." Doc. 22 at 20. The fact that Borrowers' counsel had sent Mr. Meyers a draft of a new Note 4½ months after receipt of the Non-Extension Notice establishes that they were aware at the time of the notice that

Mr. Meyers (who was the attorney on the original deal in July 2015) was Lender's counsel.[6]

Given these undisputed facts, under New York common law, the Borrowers were on notice of the Non-Extension Notice and hence cannot argue that it was not effective as against them. *New York Cent. Employees, etc. v. Commercial Credit Co.*, 178 N.Y.S.2d 977 (City Ct. 1958) (it is "well settled" that where a notice under a contract is given in accordance with its terms, the contract's provisions relating thereto are triggered because "[the] view generally taken is that any notice otherwise sufficient in form, which clearly conveys to the [contracting party] notice [of triggering events in the contract] . . . is effective"). *See also Alsam Holding Co. v. Consolidated Taxpayers' Mut. Ins. Co.*, 4 N.Y.S.2d 498, 510 (Mun. Ct. 1938) (failure of the contracting party at the proper time to assert that the notification was defective, and "proceeding without complaint or reservation" is "equitably estopped from impeaching [the notification]"). Given that this case involves intricate financial instruments negotiated by sophisticated parties, and that the Note provides that the Borrowers must receive notice of Lender's intent to accelerate the Note and declare it non-extended, the assertion (based mainly on landlord/tenant cases, as discussed below) that they could ignore the notice upon receipt (which they did not), or that as a matter of law it was null, void and ineffective, would be "in contravention of well-settled canons of contract interpretation [and] an exercise in elevating form over substance." *RM Realty Holdings Corp. v. Moore*, 884 N.Y.S.2d 344, 347 (1st Dep't 2009) (citing *W.W.W. Assocs. v. Giancontieri*, 565 N.Y.S.2d 440 (1990)).

The authorities relied upon by the Borrowers are not to the contrary. For example, in

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[6] The Borrowers also complain that the Non-Extension Notice was not addressed to both Crest Hill and Mantis Funding. [Doc. 22 at 10] This complaint borders on the absurd since both Messrs. Marano and Lovette are Managing Partners at Crest Hill and both are Managing Members at Mantis Funding. https://www.corporationwiki.com/p/2k3ow6/michael-marano Moreover, the Borrowers drafted the documents in this deal and even they are not punctilious in their nomenclature. *See, e.g.* Ex. A to Borrowers' copy of the Subordination Agreement which refers to the "Promissory Note; dated as of June 17, 2014, in the original principal amount of $1,000,000 made by Crest Hill Capital LLC in favor of Creditor." Marano Aff'd, Ex. 2.

Sutton v E & B Giftware LLC, 2013 N.Y. Misc. LEXIS 5771 (Sup. Ct. 2013), it was undisputed that the plaintiff failed utterly to provide the defendant with 60 days' written notice of his intent to terminate the contract and hence the condition precedent for bringing suit had not been met. *Id.* at *10 ("Sutton, in his pleadings and submissions in opposition to the motion, concedes that he did not provide 60 days notice."). Here, by contrast, there is no dispute that the Borrowers received the Non-Extension Notice. Lovette Aff'd, ¶ 5. Similarly, in *Oppenheimer & Co. v. Oppenheim*, 86 N.Y.2d 685 (1995), the contract provided that there would be no sublease until the obligee delivered to the obligor the prime landlord's written consent to perform certain tenant work. The obligee, however, only provided timely oral notice, and not the written notice that was required by the terms of the lease agreement. The case was dismissed because "[i]t is settled … that when a contract requires that written notice be given within a specified time, the notice is ineffective unless the writing is actually received within the time prescribed." *Id*. Here, Paragraph 2.1 of the Notice required written notice and there is no dispute but that it was received. Lovette Aff'd, ¶ 5; Marano Aff'd, ¶ 7.

MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640 (2009) is also inapplicable. In that case, the contract obligated the defendant to proceed with a stock purchase agreement but only if the lender approved the transaction by a fixed date through its execution of a consent form. The execution of the consent form was an express condition precedent and because it was uncontested that the lender did *not* execute the consent form, plaintiff could not seek damages stemming from the fact that the defendant did not proceed with the purchase. *Id.* at 646 ("Upon the failure of [the lender] to accept the terms of the consent form by that date, [defendant] was authorized to destroy or return the stock purchase agreement and annexed documents, all of which then became 'null and void'"). *MHR Capital* is inapplicable for the obvious reason that, in this case, the express condition precedent to accelerating the Note and demanding Repayment on the Maturity Date *was* met: Borrowers received notice of Lender's election not to extend the Note.[7] *Rensselaer County Indus. Dev. Agency v. Fuccillo Automotive Group, Inc.*, 841 N.Y.S.2d 180 (3d Dep't 2007), fares no better. In that case, the court held that, pursuant to General Obligations Law § 15-301(4), a requirement in a contract that the termination notice had to be in writing could not be waived unless that requirement itself was waived in writing, which had not happened and, based on the unambiguous language of the assignment, the assignee's oral notice was ineffective. Here, the Borrowers *did* receive written notification of Lender's election to not extend the Note.

The Borrowers go to great lengths in their brief to point out alleged "defects" in the Notice of Non-Extension (e.g., it came from Lender's counsel, and not from the Lender itself) and rely on landlord/tenant and similar cases that stand for the proposition that only tenants can terminate leases, and not their attorneys, absent authority to speak on behalf of the tenant. [Doc. 22 at 18-20]. The differences between a landlord/tenant situation and that of a lender/borrower are stark. As the court in *Siegel v. Ky. Fried Chicken*, 488 N.Y.S.2d 744 (2d Dep't 1985) [Doc. 22 at 18], pointed out, the reason for the rule was because the lease provided that certain of the rights and immunities arising thereunder could only be exercised and enjoyed by either the "Landlord or Landlord's agents," but where it elsewhere designated a specific named third party as the landlord's attorney,

> it was only reasonable that a *forfeiture provision* calling for cancellation of the lease upon only three days' written notice emanating specifically from the "Landlord" should be strictly construed against its drawer to require unequivocal notice by either the landlord himself or his authorized agent, accompanied by proof of the latter's authority to bind the landlord in the giving of such notice.

[7] The Borrowers' reliance on Gen. Oblig. L. § 15-301 is misplaced for the same reason. [Doc. 22 at 18] That statutory provision is a memorialization of the common law: if termination or discharge must be in writing, there can be no waiver of that requirement except if memorialized in a separate writing. Here, the Borrowers received a written Non-Extension Notice.

Id. at 746 (emphasis added). Here, by contrast, the Non-Extension Notice does not impact anything as dramatic as a forfeiture proceeding; it is designed to put the Borrowers on notice of the Lender's election to not extend the Note, which it did. Indeed, even the majority in *Siegel* acknowledge the obvious; namely, that in non-landlord/tenant cases that do not involve forfeiture, when it is obvious that an attorney is acting on behalf of a client, there is no requirement to inquire as to whether or not the attorney has authority to bind his client. *Id.*

For similar reasons, the Borrowers' reliance on *Arcadia Mgt. v. Schillan*, 883 N.Y.S.2d 881 (Dist. Ct., Nassau Cty. 2009), is equally misplaced. [Doc. 22 at 19] In that case, the 30-day notice to have the respondent *involuntarily discharged* from petitioner's *senior citizen residential assisted living facility* for failure to pay amounts due was strictly construed given the grievous consequences of the respondent's actions. *Arcadia* is very much akin to a landlord/tenant situation in that the termination notice would result in eviction. That is obviously not the case here. So too with *Williamsen v. Bugay*, 2009 N.Y. Misc. LEXIS 2439 (Sup. Ct., Kings Cty. 2009) [Doc. 22 at 19]. That case – a summary holdover proceeding – also involved a notice of termination sent to a tenant by a landlord and the notice was sent pursuant to a statute designed to protect tenants. None of the issues at play in *Williamsen* and Borrower's other notice cases are at play here.

In this regard, the Borrowers' complaint about the adequacy of the Non-Extension Note borders on the silly. They allege that the Notice is defective because in it Mr. Meyers wrote that he "represents Ray Bouderau, the lender under the above-referenced Note, and I write on his behalf," when, technically, the Lender was Mr. Bouderau's company, J-Bar. It is undisputed that the Borrowers were aware that Mr. Bouderau was the owner of Lender J-Bar; that one of the Borrowers' principals had been dealing with him for over twenty years; and that he was the individual with whom any negotiations had to take place. Marano Aff'd, ¶¶ 7, 20 ("On or about July 15, 2015, *Mr. Bouderau* called Defendants and asked for immediate interest payments") (emphasis added); Lovette Aff'd, ¶ 6 (in July 2014, Lender's principal *Ray Bourderau* worked with the Borrowers regarding the loan of $1 million) (emphasis added).

Surprisingly, the Borrowers also rely on *Equator Intl., Inc. v NH St. Invs., Inc.*, 978 N.Y.S.2d 817 (Sup. Ct., NY Cty 2014), for the proposition that the holding in *Siegel* is applicable in this lender/borrower situation. [Doc. 22 at 19] In that case, however, the court *granted* the lender's motion for summary judgment in lieu of complaint and held that plaintiff's written notice of default and demand for payment *did* provide adequate notice under the terms of the instrument *even though* the borrower asserted that the notice was a "hearsay document"; that the lender's attorneys lacked personal knowledge regarding the default; and that the lender's lawyer "had no authority to declare Defendant in default." *Id.* at 826. As in *Equator Intl.*, here the Note provided for a Non-Extension Notice "by the Lender" and there is no dispute that the Borrowers received the Non-Extension Notice by the Lender's agent.

The Borrowers negotiated and accepted Paragraph 2.1 of the Note which allowed the Lender to provide them with notice that the Note would not be extended. There is no dispute that the Borrowers, pursuant to the plain meaning of that paragraph, received "notice" of Lender's election to not extend the Note. Because the Non-Extension Notice was "sufficient in form" and put the Borrowers on notice of the non-cancelation (thus triggering the post-notice negotiations), any alleged defectives in the notice itself are of no moment. It is undisputed that the Borrowers were on notice of the non-extension, did not object to it (as they were instructed to do if there were any problems with it) and proceeded accordingly. The Non-Extension Notice, therefore, was effective and the Borrowers are bound by it.[8]

[8] The Borrowers assert that because the Non-Extension Notice was allegedly legally defective the Lender has no cause of action for non-payment as a matter of law and hence this action should be dismissed. [Doc. 22 at 21] As demonstrated above, however, the Non-Extension Notice complied with New York law and the Borrowers did not, as they were instructed to do, report any deficiency with the notice. There is, therefore, no basis to dismiss the action and Borrowers' Rule 3211 cases are inapplicable.

IV. As A Matter Of New York Law, The Borrowers' Self-Serving, Bald And Unsubstantiated Allegation That The Lender's Principal Promised In The Future To Extend The Note Does Not Create A Triable Issue Of Fact Regarding The Borrowers' Assertion Of Equitable Estoppel.

The Borrowers also argue that the Motion should be denied because they allegedly detrimentally relied on the Lender's alleged promise to, in the future, extend the maturity date of the Note. [Doc 22 at 22-23] In support of this assertion, they rely on two self-serving affidavits, one of which incorporates the other by reference. Lovette Aff'd, ¶¶ 5, 16-18 (asserting that an oral "promise" was made to extend the Note at some point in the future); Marano Aff'd, ¶¶ 8, 26 (citing to Paragraphs 16 to 18 of the Lovette Aff'd).

The law is clear, however, that unsupported and self-serving allegations which are devoid of any evidence of a promise and a justifiable reliance thereon, and which fail to "conclusively" establish this affirmative defense, are insufficient to defeat a Section 3213 action. *Branch Banking & Trust Co. v South Fork Resources LLC*, 2011 N.Y. Misc. LEXIS 4975 at *8 (Sup. Ct. 2011) ("The defendants have failed to conclusively establish equitable estoppel as a complete defense to the instant action [because] [t]he defendants allege only that plaintiff 'lulled' defendants by conveying the impression that plaintiff would work with defendants to sell the property"). Under New York law, when "[t]he only evidence offered . . . of any such representation is . . . unsubstantiated and self-serving statements" that is "insufficient to defeat the motion for summary judgment." *First Northern Mortgagee Corp. v. Yatrakis*, 546 N.Y.S.2d 9, 10 (2d Dep't 1989).

Similarly, when borrowers do not "present any facts that reveal a compelling injustice worked upon them by [lender's] conduct" and when the borrowers fail to present "facts which demonstrate particular representations or conduct which manifested [lender's] abandonment of its claims under the promissory note," or "any unambiguous manifestation that it would not seek recovery on [the] notes," a motion to dismiss a summary judgment in lieu of complaint action based on detrimental reliance must fail. *Branch Banking*, 2011 N.Y. Misc. LEXIS 4975 at *8-9. *See also Elmsford-Interstate Bldg. Material Corp. v. Elm Ridge Mgmt.*, 243 A.D.2d 675, 675 (2d Dep't 1997) (order denying summary judgment in lieu of complaint reversed where borrower submitted "a conclusory affidavit . . . without any evidentiary support" because "the bald, conclusory assertions submitted in opposition to the motion were insufficient to demonstrate the existence of genuine issues of material fact"); *Alicanto, S. A. v. Woolverton*, 531 N.Y.S.2d 296, 297 (2d Dep't) ("bald conclusory allegations contained in the defendants' affidavits are insufficient to defeat the motion for summary judgment [in lieu of complaint]"), *appeal denied*, 73 N.Y.2d 702 (1988); *First Northern*, 546 N.Y.S.2d at 10 (motion for summary judgment on action to foreclose mortgage is granted notwithstanding defendants' assertion of estoppel because "[t]he only evidence offered by the appellant of any [actionable] representation is the appellant's husband's affidavit which contained unsubstantiated and self-serving statements").

Moreover, the common law also instructs that when a borrower only submits affidavits alleging that the lender's president "took various actions and made certain representations to [borrower] regarding its obligations on the note which they claim caused [borrower] to prejudicially alter its position in reliance thereon," that does not, as a matter of law, establish justifiable reliance and it is not sufficient grounds for denying a motion for summary judgment in lieu of complaint. *Tosapratt, LLC v Sunset Props., Inc.*, 926 N.Y.S.2d 760, 761 (3d Dep't 2011). *See also IPFS Corp. v K & A Trucking, Inc.*, 2015 N.Y. Misc. LEXIS 133 at *11 (Sup. Ct., NY Cty. 2015) (motion for summary judgment on breach of a premium finance loan granted and lender is not equitably estopped from seeking to recover on its loan because "[borrower] did not change its position in any way, much less in a significant and justifiable way, based on the alleged conversation with [lender's] agent, merely because it may have come to the happy belief that it would never have to pay the debt").

As in the above-cited authorities, here the Borrowers simply allege that the Lender's principal promised to perform a certain act in the future (*i.e.*, extending the loan) and, as a matter of New York law, that is insufficient to sustain a claim for equitable estoppel. That is because, under well-settled New York law, "statements relating to the future conduct of the [party], rather than a representation concerning a past or present fact, cannot form the basis for equitable estoppel." *Solow Management Corp. v. Hochman*, 594 N.Y.S.2d 751, 752 (1st Dep't 1993). Therefore, in cases such as this, an allegation of equitable estoppel cannot defeat a motion for summary judgment seeking to enforce a note. *See, e.g., Longview Equity Fund, LP v. McAndrew*, 2007 U.S. Dist. LEXIS 4581 (S.D.N.Y. 2007) (motion for summary judgment to enforce notes is granted notwithstanding borrowers' allegation of equitable estoppel because the alleged promises – i.e., that lenders would in the future loan the borrowers an additional sum, and that they had no interest in taking over the borrowers – concerned an alleged intent to act (or not act) in the future).

Because the Borrowers have only submitted self-serving affidavits asserting an alleged promise to perform an act in the future and which do not contain any substantiated evidence that they changed their position in a "justifiable way," there is no triable issue of fact on their claim of equitable estoppel. The authorities relied upon by the Borrowers do not compel a different result. For example, in *Cadlerock, LLC v Renner*, 2012 N.Y. Misc. LEXIS 3938 (Sup. Ct., NY Cty. 2012) [Doc. 22 at 22], the defendant/borrower successfully defeated a motion for summary judgment on a complaint alleging non-payment of a note because the plaintiff/lender received *nine years* of payments at a mistaken lower rate rather than the rate stipulated in the note, and he never said a word. Under *those* facts, the trial court concluded that there was a triable issue of fact as to "whether [borrower] *justifiably* relied on the nine years of inaction by [lender] . . . to *reasonably* conclude that his monthly payments were sufficient to satisfy his payment obligations under the note [and was therefore] misled into paying a reduced amount for years." *Id*. at *6. Similarly, in

Matter of Shondel J. v. Mark D., 7 N.Y.3d 320 (2006), the Court held that equitable estoppel had been established when (i) a man held himself out to be the father of a child, (ii) a parent-child relationship had developed between the two, (iii) the child would thus be justified in relying on the man's representations that he is her father, and (iv) she would be harmed by the man's denial of paternity. That is obviously not this case.

Similarly, the other authorities cited by the Borrowers that simply restate the elements of the claim of equitable estoppel are inapposite, as they do not deal with the situation in this case; *i.e.*, the bald assertion that the defendant relied to his detriment on an alleged promise to perform a future act. *See, e.g., Fisk Bldg. Assoc. LLC v. Shimazaki II, Inc.*, 76 A.D.3d 468 (1st Dep't 2010) (in a landlord/tenant summary proceeding, the landlord did *not* establish detrimental reliance, a necessary element of equitable estoppel, based on the fact that he accepted rent after the issuance of a warrant of eviction); *Giannetto v. Knee*, 919 N.Y.S.2d 176 (2d Dep't 2011) (court finds a triable issue of fact on equitable estoppel defense in malpractice action because the patient alleged that the doctor concealed his malpractice by knowingly misrepresenting the patient's condition and by bonding her tooth); *Rosefsky by Koffman v. State*, 205 A.D.2d 120 (3d Dep't 1994) (respondent was *not* estopped from challenging the validity of a contract where it accepted benefits).[9]

In sum, under New York law, the Borrowers' self-serving and bald assertion of a promise by Lender's principal to perform a future act does not, as a matter of law, assert facts sufficient to raise an equitable estoppel claim and hence cannot be proper grounds for defeating the Motion. In order to defeat a motion for summary judgment in lieu of complaint, a defendant must "lay bare his evidentiary proof supporting any . . . defenses." *Alfred E. Mann Living Trust v. ETIRC Aviation*

[9] The Borrowers rely on *dicta* in *Rosefsky* that discusses the potential role an implied promise may play in an action involving an "implied-in-law" contract where one party, without any expression of assent from the other, obtains or retains possession of money or other property that actually belongs to the latter by oppression, extortion, deceit or similar means. *Id.* at 123. Thus, even if the court's language was not *dicta* (which it is), it would be irrelevant given that this case does not involve an "implied-in-law" contract.

S.A.R.L., 910 N.Y.S.2d 418, 423 (1st Dep't 2010). Here, what the Borrowers have laid bare simply isn't enough as a matter of law. The affidavits, in other words, do not create a triable issue of fact on any justifiable reliance by the Borrowers.

V. The Motion Properly Sets Forth The Amount Due And Owing: $1 Million Plus 15% Interest From The Maturity Date Until The $1 Million Is Repaid.

The Borrowers assert that the Motion should be denied because it does not set forth the amount due and owing because Lender did not report that $225,000 had been paid in interest after the Non-Extension Notice was issued. [Doc. 22 at 23-26] This argument is a red herring.

In New York, under Section 3213, the moving party is obligated to establish (i) the principal amount owed; and (ii) a method by which principle is to be computed. That is all that is required, and the Lender has done that. For example, in *Schwartz v. Turner Holdings, Inc.*, 527 N.Y.S.2d 229 (1st Dep't), *appeal dismissed*, 72 N.Y.2d 949 (1988), the plaintiff contended that the defendant defaulted on its payment of interest on a note, and he moved for summary judgment in lieu of complaint. However, because the note on which he was suing did not state a rate of interest he did not set forth, in his motion papers, the exact amount of interest owed. The trial court denied the motion because, in its view, the interest owed could only be ascertained with reference to external evidence, and thus in violation of Section 3213. The First Department, however, reversed, holding that it did not matter that the plaintiff had not specified in his motion papers the exact amount of interest owed because "the interest [was] readily ascertainable." *Id.* at 230.

Similarly, in *Apple Bank for Sav. v. Mehta*, 609 N.Y.S.2d 221, 222 (1st Dep't 1994), the trial court entered an order granting the lender's motion for summary judgment in lieu of complaint "with interest as prayed for allowable by law to be computed by the Clerk." On appeal, the First Department held that the order was sufficient because, relying on *Schwartz*, it did not matter that the rate of interest was not specifically set forth in the note because it was easily ascertainable.

These cases stand for the proposition that, as long as the amount of interest is "readily ascertainable," failure to so state the amount is not a valid grounds upon which to deny a motion for summary judgment in lieu of complaint.

Moreover, in this case, of course, the amount of interest owed to the Lender *is* set forth in the Note. Note, ¶ 1 ("Interest") (interest shall be charged on the outstanding principal amount at a rate of fifteen percent (15%) per annum, as computed on the basis of a 365-day year, for the actual number of days elapsed). And the law is clear that when the instrument at issue *does* set forth the formula for determining the interest, the lender also does not have to set forth the exact dollar and cents owed because the amount owed is easily discernable. For example, in *Equator Intl., Inc. v NH St. Invs., Inc.*, 978 N.Y.S.2d 817 (Sup. Ct., NY Cty 2014) (relied upon by the Borrowers), the lender sought the entry of a judgment against the borrower in the amount of the unpaid principal "as well as interest accrued thereon under the terms of the [instrument]." *Id.* at 820. The court held that there were no triable issues of fact as to the amount owed by defendant because the note set forth the principal amount owed by the defendant, as well as the method by which interest accrues on that principal amount. *Id.* at 822-23. "Where, as here, the method for calculating interest is set forth in the [note] and Plaintiff's moving papers," relief under CPLR 3213 is proper. *Id*. at 823.

The Borrowers complain that the Lender's affidavit did not set forth the interest paid after the issuance of the Non-Extension Notice. [Doc. 22 at 23-26] That fact is not fatal to a Section 3213 action because the affidavit and moving papers truthfully state that the principal has not been paid (a fact the Borrowers concede), that interest is due on owing on that principal (also a fact the Borrowers concede), and that the Note provides the method of determining that interest (yet another fact the Borrowers concede). Under these facts, the Motion should be granted (*Equator Intl*., 978 N.Y.S.2d at 823), and the authorities relied upon by the Borrowers are inapplicable. For example, in *Zyskind v FaceCake Mktg. Tech., Inc.*, 956 N.Y.S.2d 45 (1st Dep't 2012), the court simply held that a waiver provision does not, as a matter of law, foreclose borrower's reliance on the claim that it was fraudulently induced into entering the underlying agreement pursuant to which the relevant notes were issued. *Nanuet Nat'l Bank v. Eckerson Terrace, Inc.*, 402 N.Y.S.2d 42 (2d Dep't 1978) is inapplicable because it was an action to foreclose a mortgage on real property involving N.Y. Lien Law § 22. In that case, the court denied the motion for summary judgment because "a lender, who knowingly files a false and inaccurate *borrower's affidavit, to retain his priority over mechanics lienors* would defeat the salutary purpose of the statute." *Id.* at 43 (emphasis added). The affidavits in this case do not allege any such deception, as indeed they could not because the affidavits told the truth – the Borrowers owe the Lender the Outstanding Balance, plus interest.

Similarly, in *Phillips v. Cioffi*, 611 N.Y.S.2d 181 (1st Dep't 1994), *appeal denied*, 85 N.Y.2d 810 (1995), the First Department *reversed* a denial of a motion for summary judgment in lieu of complaint because evidence of partial payment does not create a genuine issue of fact. As the court correctly noted, "the invocation of defenses based on facts extrinsic to an instrument for the payment of money only does not preclude CPLR 3213 consideration." *Id*. at 182. Partial payments are not a defense to a well-founded 3213 action. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 298 N.Y.S.2d 601 (1st Dep't 1969) (order denying Section 3213 motion reversed on action to collect on a note even though it is not disputed that partial payments were made), *aff'm*, 309 N.Y.S.2d 341 (1970). As long as the judgment on the motion for summary judgment in lieu of complaint reflects amounts already paid, the motion should be granted. *Cadle Co. v Patton*, 2016 N.Y. Misc. LEXIS 674 (Sup. Ct., N.Y. Cty. 2016) (granting motion for summary judgment in lieu of complaint and directing the Clerk to enter judgment in favor of the plaintiff of a sum certain, plus interest as calculated by the Clerk, less amounts received from defendant).

The Lender, of course, does not contest that the Borrowers made, prior to the Maturity Date, interest payments totaling $225,000. Bouderau Supp. Aff'd, ¶¶ 4, 5.[10] But it is also undisputed that the Borrowers have not made any payments since December 16, 2015. *Id.*, ¶ 6; Lovette Aff'd, ¶¶ 13-14; Marano Aff'd, ¶¶ 13-14. Therefore, pursuant to the plain terms of the Note, the Lender is owed the "Outstanding Balance" of $1 million under the Note, with interest to be charged on the $1 million at 15% per annum on the basis of a 365-day year, for the actual number of days elapsed, beginning on December 31, 2015 until the payment in full of the Outstanding Balance. Bouderau Supp. Aff'd, ¶ 7. This is undisputed. And, per the authorities above, where, as here, the method for calculating interest is set forth in the note and the moving papers, the Motion should be granted. There are, therefore, no triable issues of fact on what Lender is owed and how it is to be determined.

CONCLUSION

The Borrowers agreed to a Repayment of the Outstanding Balance of $1 million, plus interest at 15% per annum, until that Outstanding Balance was paid in full. It is undisputed that these sums have not been paid. Under New York law, the Note and Subordination Agreement provide the mechanism for and the right to Repayment if the Note is not extended, even if the Borrowers still owe Dominion money. And, even if that was not the case (which it is), only Dominion has standing to enforce its terms. There is also no dispute that the Borrowers received the Lender's Non-Extension Notice and were aware of the Lender's attorney's authority to issue

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[10] The Lender is not asking for a "double recovery" and, therefore, the Borrowers' authorities which state that such recoveries are not allowed in New York (Doc. 22 at 25) are inapposite.

it. The Borrowers' assertions of equitable estoppel fail as a matter of law and the Motion clearly sets forth the principal owed and the method for determining interest. The Motion, therefore, should be granted and the Cross-Motion should be denied.

Dated: New York, NY
March 23, 2016

Respectfully submitted,

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