

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

-----	X	
ELISA WIETSCHNER, as Trustee of the WFIG TRUST,	:	
	:	Index No.
Plaintiff,	:	
	:	
v.	:	
	:	
9 VANDAM JV LLC,	:	
	:	
Defendant.	:	
-----	X	

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

MEISTER SEELIG & FEIN PLLC
125 Park Avenue, 7th Floor
New York, New York 10017
Tel: (212) 655-3500

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
FACTS	2
A. Defendant Signs the Promissory Notes.....	2
B. The Terms of the Promissory Note are Virtually Identical.....	3
C. Defendant Defaults on the Promissory Notes	4
ARGUMENT.....	5
I. SUMMARY JUDGMENT IN FAVOR OF THE TRUST IS WARRANTED AS DEFENDANT IS OBLIGATED TO PAY THE TRUST THE AMOUNT DUE AND OWING UNDER THE PROMISSORY NOTES	5
A. The Trust has Established a Prima Facie Case for Breach of the Promissory Notes	6
B. Defendant is Required to Pay the Costs and Expenses Incurred by the Trust in Enforcing Its Rights under the Promissory Notes.....	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Arbor-Myrtle Beach PE LLC v. Frydman</i> , 202 A.D.3d 464 (1st Dep’t 2022)	6, 7
<i>Chase Manhattan Bank, N.A. v. Marcovitz</i> , 56 A.D.2d 763 (1st Dep’t 1977)	8
<i>DDS Partners, LLC v. Celenza</i> , 6 A.D.3d 347 (1st Dep’t 2004)	6, 8
<i>Int’l Fin. Grp., Inc. v. Hambrecht</i> , 203 A.D.3d 606 (1st Dep’t 2022)	6
<i>Manufacturers Hanover Trust Company v. Green</i> , 95 A.D.2d 737 (1st Dep’t 1983)	8
<i>Poah One Acq. Holdings V Ltd. v. Armenta</i> , 96 A.D.3d 560 (1st Dep’t 2012)	5
<i>Seaman-Andwall Corp. v. Wright Machine Corp.</i> , 31 A.D.2d 136 (1st Dep’t 1968) <i>aff’d</i> , 29 N.Y.2d 617 (1971)	6, 7
<i>Shearson Lehman Hutton, Inc. v. Myerson & Kuhn</i> , 197 A.D.2d 410 (1st Dep’t 1993)	7
<i>Solanki v. Pandya</i> , 269 A.D.2d 189 (1st Dep’t 2000)	5
<i>Tars Uluslararası Dis Ticaret Turizm v. Sanayi Ltd.</i> , 26 A.D.3d 298 (1st Dep’t 2006)	8
<i>Torres & Leonard, P.C. v. Select Professional Realities, Ltd.</i> , 118 A.D.2d 467 (1st Dep’t 1986)	7, 8
<i>Weissman v. Sinorm Deli, Inc.</i> , 88 N.Y.2d 437 (1996)	5
<u>Statutes</u>	
N.Y. LLC Law § 1104(a)(c)	4
N.Y. Penal Law § 190.40	4

Rules

[CPLR 3213](#).....Passim

Plaintiff Elisa Wietschner (“Plaintiff”), as Trustee of the WFIG Trust (the “Trust”), respectfully submits this memorandum of law in support of her motion for summary judgment in lieu of complaint on amounts due to the Trust under three promissory notes pursuant to [CPLR 3213](#) and against defendant 9 Vandam JV LLC (“Defendant”).

PRELIMINARY STATEMENT

This is an action to recover sums due to the Trust pursuant to three written promissory notes executed by Defendant to evidence the aggregate principal indebtedness of Defendant to the Trust in the amount of \$1,049,089.55. The Trust advanced these funds to Defendant as emergency “bridge funding” in connection with a real estate project. All the notes contain virtually identical substantive terms, differing, in relevant part, only with respect to each note’s amount. As set forth below and in the accompanying Affidavit of Elisa Wietschner sworn to November 7, 2023 (“[Wietschner Aff.](#)”), there is no dispute that Defendant signed the three promissory notes in favor of the Trust. On September 28, 2023, Defendant’s manager admitted in writing that there was “no money to proceed” with the real estate project at issue. As a result, the manager was unable to satisfy its financial obligations as they became due and Defendant was unable to make payments under the promissory notes, which constituted an event of default under each of the promissory notes. At no time has Defendant ever made any payments under any of the promissory notes. There are no defenses to this action. The Trust is entitled to relief under [CPLR 3213](#).

As a matter of law, the Trust is entitled to a judgment against Defendant in the outstanding aggregate principal amount in default of \$1,049,089.55 (consisting of \$349,089.55 for the first note, \$400,000 for the second note, and \$300,000 for the third note), together with contractual interest of 11.15% per annum from each note’s effective date to October 3, 2023 (*i.e.*, the date on which the Trust notified Defendant of its default), as well as contractual default interest at the rate

of 25% per annum from October 4, 2023 until the date judgment is entered against Defendant. In addition, pursuant to the terms of the promissory notes, the Trust is entitled to a judgment awarding the costs and expenses incurred by the Trust in connection with the enforcement and collection of the payment obligations under the promissory notes, including attorneys' fees incurred by the Trust.

FACTS

A. Defendant Signs the Promissory Notes

On or about November 29, 2021, a lender named Maxim Credit Group, LLC ("Maxim") made a series of loans totaling \$7 million (the "Maxim Loan") to Defendant's affiliate, 9 Vandam Borrower 2 LLC (the "Vandam Affiliate"), in connection with the Vandam Affiliate's acquisition and agreement to develop certain real property located at 9 Vandam Street, New York, New York 10013 (the "Project"). [Wietschner Aff.](#), ¶ 2. Beginning in April 2023, the Trust and Defendant negotiated and entered into three promissory notes to evidence loans the Trust made to Defendant. [Wietschner Aff.](#), ¶ 3. These loans provided emergency "bridge funding" in connection with the financing of the Project. [Id.](#)

Specifically, on April 21, 2023, Defendant executed a promissory note for the principal sum of \$349,089.55 (the "First Note"); on June 2, 2023, Defendant executed a second promissory note for the principal sum of \$400,000.00 (the "Second Note"); and on June 7, 2023, Defendant executed a third promissory note for the principal sum of \$300,000.00 (the "Third Note"). [Wietschner Aff.](#), [Ex. A](#), [Ex. B](#), [Ex. C](#). The First Note, Second Note, and Third Note are hereinafter referred to collectively as the "Promissory Notes."

At all relevant times, Defendant and the Vandam Affiliate were, and continue to be, managed and controlled by the Arch Companies ("Arch"), a real estate development company

based in Manhattan, New York. [Wietschner Aff.](#), ¶ 8. Jeffrey Simpson, a principal of Arch, signed each of the Promissory Notes as Defendant's authorized signatory. [Wietschner Aff.](#), [Ex. A](#) at p. 6, [Ex. B](#) at p. 6, [Ex. C](#) at p. 6.

B. The Terms of the Promissory Note are Virtually Identical

The maturity date of the Promissory Notes is defined to be the date on which the Maxim Loan is fully satisfied. [Wietschner Aff.](#), [Ex. A](#) at ¶ 1, [Ex. B](#) at ¶ 1, [Ex. C](#) at ¶ 1.¹ However, the Promissory Notes also provide that an event of default under the Promissory Notes occurs if Defendant "generally fails to pay, or admits in writing its inability to pay, its debts as they become due, subject to applicable grace periods, if any." [Wietschner Aff.](#), [Ex. A](#) at ¶ 3.1(c), [Ex. B](#) at ¶ 3.1(c), [Ex. C](#) at ¶ 3.1(c). The Promissory Notes further provide that, upon becoming aware of an event of default, the Trust may accelerate the Promissory Notes by written notice to Defendant, with the outstanding principal balance then becoming immediately due and payable in cash. [Wietschner Aff.](#), [Ex. A](#) at ¶ 3.2, [Ex. B](#) at ¶ 3.2, [Ex. C](#) at ¶ 3.2.

The Promissory Notes provide for the accrual of interest on the outstanding principal from the effective date of each Promissory Note at a rate of eleven and one-fifteenth percent (11.15%) per annum. [Wietschner Aff.](#), [Ex. A](#) at ¶ 2, [Ex. B](#) at ¶ 2, [Ex. C](#) at ¶ 2. At any time following the occurrence of an event of default, and upon written notice given by the Trust, the Promissory Notes provide that interest accrues on the outstanding principal balance at a default interest rate of

¹ Unlike the Second Note and Third Note, the First Note states that it matures upon "the earlier of" April 20, 2024 or the date on which the Maxim Loan is fully satisfied. [Wietschner Aff.](#), [Ex. A](#) at ¶ 1. As explained herein, the Vandam Affiliate has defaulted on the Maxim Loan, and Defendant has admitted in writing that it cannot satisfy its debts to the Trust.

twenty-five percent (25%) per annum or the maximum rate permitted under applicable law, whichever rate is lesser. [Wietschner Aff., Ex. A](#) at ¶ 3.2, [Ex. B](#) at ¶ 3.2, [Ex. C](#) at ¶ 3.2.²

In the Promissory Notes, Defendant waived any presentment, demand, protest or other notice of any kind. [Wietschner Aff., Ex. A](#) at ¶ 3.2, [Ex. B](#) at ¶ 3.2, [Ex. C](#) at ¶ 3.2. In the event the Trust institutes legal proceedings in order to collect any amounts owed under the Promissory Notes, Defendant also agreed to pay the costs incurred by the Trust for such collection, enforcement or action, including without limitation the Trust's attorneys' fees and disbursements. [Wietschner Aff., Ex. A](#) at ¶ 8, [Ex. B](#) at ¶ 8, [Ex. C](#) at ¶ 8.

C. Defendant Defaults on the Promissory Notes

By letter dated September 28, 2023, Maxim formally notified the Vandam Affiliate that the Vandam Affiliate was in default under the Maxim Loan due to the Vandam Affiliate's failure to make a timely interest payment for the month of September 2023. [Wietschner Aff., Ex. D](#). In the evening of September 28, 2023, Jeffrey Simpson, the principal of Arch, admitted in writing, via email, that Arch (which encompasses Defendant and the Vandam Affiliate, which are managed and controlled by Arch) "overextended ourselves on this project," that the "staff has been furloughed," that Arch (and by extension the entities under its management and control) are unable to pay their debts in connection with the Project or fund their financial obligations when due because as they

² [N.Y. LLC Law § 1104\(a\)](#) states that "[n]o domestic or foreign limited liability company shall hereafter interpose the defense of usury in any action." Nevertheless, under [N.Y. LLC Law § 1104\(c\)](#), an LLC, like Defendant, is permitted to assert a defense of criminal usury under [N.Y. Penal Law § 190.40](#), which provides that interest is criminally usurious if it exceeds a rate of 25% per annum. Here, the default interest rate established by the Promissory Notes is exactly 25% per annum and thus does not exceed 25% per annum. See [Wietschner Aff., Ex. A](#) at ¶ 3.2, [Ex. B](#) at ¶ 3.2, [Ex. C](#) at ¶ 3.2. As such, the default interest rate of 25% set forth in the Promissory Notes does not run afoul of [N.Y. Penal Law § 190.40](#).

“cannot find more capital at this time without participation,” and that “there is no money to proceed at this time.” [Wietschner Aff.](#), [Ex. E](#).

By letters dated October 3, 2023, the Trust notified Defendant of its default under each of the Promissory Notes based on Jeffrey Simpson’s written admission that Arch and the entities under its management and control, including Defendant, are unable to pay their debts when due, among other things. [Wietschner Aff.](#), [Ex. F](#), [Ex. G](#), [Ex. H](#). In each of these letters, pursuant to the terms of the Promissory Notes, the Trust demanded payment of the sum then due and owing under each Promissory Note, including principal and applicable interest. [Wietschner Aff.](#), [Ex. F](#), [Ex. G](#), [Ex. H](#). However, to date, Defendant has not made any payment whatsoever on any of the Promissory Notes. [Wietschner Aff.](#), ¶ 15.

ARGUMENT

I. SUMMARY JUDGMENT IN FAVOR OF THE TRUST IS WARRANTED AS DEFENDANT IS OBLIGATED TO PAY THE TRUST THE AMOUNT DUE AND OWING UNDER THE PROMISSORY NOTES

[CPLR 3213](#) provides that: “[w]hen an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.”³ Documents that qualify as “instruments for the payment of money only” are those upon which a *prima facie* case can be made out by the instrument itself, plus proof that the payments required under the terms of the instrument were not made. *Weissman v. Sinorm Deli, Inc.*, [88 N.Y.2d 437](#) (1996). A motion under [CPLR 3213](#) is an appropriate means to collect on a promissory note. *Solanki v. Pandya*, [269 A.D.2d 189](#) (1st Dep’t 2000); *Poah One Acq. Holdings V Ltd. v. Armenta*, [96 A.D.3d 560](#) (1st Dep’t 2012).

³ The Promissory Notes are governed by New York law. [Wietschner Aff.](#), [Ex. A](#) at ¶ 10, [Ex. B](#) at ¶ 10, [Ex. C](#) at ¶ 10.

A. The Trust has Established a Prima Facie Case for Breach of the Promissory Notes

A plaintiff in an action seeking summary judgment in lieu of a complaint pursuant to [CPLR 3213](#) on a promissory note establishes *prima facie* its entitlement to judgment as a matter of law by (i) producing and establishing the existence of the promissory note executed by the defendant, and (ii) demonstrating that the defendant has defaulted thereon. *Int'l Fin. Grp., Inc. v. Hambrecht*, [203 A.D.3d 606](#) (1st Dep't 2022); *Arbor-Myrtle Beach PE LLC v. Frydman*, [202 A.D.3d 464](#), 464 (1st Dep't 2022); *DDS Partners, LLC v. Celenza*, [6 A.D.3d 347](#), 348 (1st Dep't 2004); *Seaman-Andwall Corp. v. Wright Machine Corp.*, [31 A.D.2d 136](#), 137 (1st Dep't 1968), *aff'd*, [29 N.Y.2d 617](#) (1971).

Defendant executed the Promissory Notes. Under the First Note, Defendant was obligated to pay \$349,089.55 in principal with applicable interest; under the Second Note, Defendant was obligated to pay \$400,000.00 in principal, with applicable interest; and under the Third Note, Defendant was obligated to pay \$300,000.00 in principal, with applicable interest. See [Wietschner Aff.](#), [Ex. A](#), [Ex. B](#), [Ex. C](#).

There can be no dispute that Defendant has defaulted under the Promissory Notes. On September 28, 2023, Jeffrey Simpson — the principal of Arch who signed the Promissory Notes as Defendant's authorized signatory — admitted in writing that Arch and the entities under its management and control, which includes Defendant, are unable to pay their debts. [Wietschner Aff.](#), [Ex. E](#). On October 3, 2023, the Trust notified Defendant of its default under each of the Promissory Notes. [Wietschner Aff.](#), [Ex. F](#), [Ex. G](#), [Ex. H](#). However, to date, Defendant has not made any payment whatsoever on any of the Promissory Notes. [Wietschner Aff.](#), ¶ 15.

Thus, the Trust has established a *prima facie* case for breach of the Notes. Where, as here, a *prima facie* case is established, it is “incumbent on defendants to come forward with evidentiary

proof sufficient to raise an issue as to the defenses.” *Seaman-Andwall Corp.*, [31 A.D.2d at 137-38](#).

That the Promissory Notes were part of a larger transaction (*i.e.*, the Project) does not bar accelerated treatment or the availability of [CPLR 3213](#). *See Arbor-Myrtle-Beach*, [202 A.D.3d at 464](#). “The application of the statute is not affected by the circumstance that the instrument in question was part of a larger transaction, such as the sale of business, as long as the instrument requires the defendant to make certain payments and nothing else.” *Torres & Leonard, P.C. v. Select Professional Realities, Ltd.*, [118 A.D.2d 467](#), 468 (1st Dep’t 1986). Further, the Promissory Notes are “instruments for the payment of money only,” even where they refer to the Maxim Loan in connection with the terms of payment. *See Shearson Lehman Hutton, Inc. v. Myerson & Kuhn*, [197 A.D.2d 410](#), 410 (1st Dep’t 1993) (holding that motion court improvidently denied [CPLR 3213](#) motion where promissory note referred to a separate agreement for the definition of “default”).

B. Defendant is Required to Pay the Costs and Expenses Incurred by the Trust in Enforcing Its Rights under the Promissory Notes

As set forth above, Defendant has failed to make any payments whatsoever when due in breach of the Promissory Notes. As a result, the Trust has been compelled to bring this action to enforce its rights under the Promissory Notes. The Trust has incurred, and will continue to incur, costs and expenses to recover and collect the outstanding amounts due under the Promissory Notes. Under the express terms of the Promissory Notes, Defendant is required to pay to the Trust “the costs incurred by [the Trust] for such collection, enforcement or action including, without limitation, attorneys’ fees and disbursements.” [Wietschner Aff., Ex. A](#) at ¶ 8, [Ex. B](#) at ¶ 8, [Ex. C](#) at ¶ 8.

Courts routinely award attorneys' fees and costs to plaintiffs seeking summary judgment in lieu of complaint pursuant to [CPLR 3213](#). See *DDS Partners, LLC*, [6 A.D.3d at 349](#) ("In addition to summary judgment, plaintiff is also entitled to reasonable attorneys' fees and costs expended in connection with the enforcement of its rights to collect on the note"); *Tars Uslararasi Dis Ticaret Turizm v. Sanayi Ltd.*, [26 A.D.3d 298](#), 299 (1st Dep't 2006). Since the Promissory Notes entitle the Trust to recover its attorneys' fees and costs from Defendant, the Trust has established a *prima face* entitlement to the recovery of its reasonable attorneys' fees and costs in prosecuting this action.

The question as to the reasonableness of items such as attorneys' fees does not preclude an award of summary judgment under [CPLR 3213](#). See *Chase Manhattan Bank, N.A. v. Marcovitz*, [56 A.D.2d 763](#), 763 (1st Dep't 1977). The usual practice in New York is to grant judgment on the issue of the defendant's liability for attorneys' fees and costs while ordering a hearing on the issue of the reasonable value of the attorneys' services. See, e.g., *Torres & Leonard, P.C.*, [118 A.D.2d at 467](#); *Manufacturers Hanover Trust Company v. Green*, [95 A.D.2d 737](#) (1st Dep't 1983).

Accordingly, the Trust hereby requests that summary judgment be granted forthwith for the full amount of principal and interest due and owing pursuant to the Promissory Notes and that, if necessary, a hearing be set in order to determine the costs and disbursements, including attorneys' fees and expenses, due to the Trust.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the accompanying affidavit, the Trust is entitled to summary judgment against Defendant:

- (a) in the aggregate principal amount in default of \$1,049,089.55, consisting of \$349,089.55 in principal for the First Note, \$400,000 in principal for the Second Note, and \$300,000 in principal for the Third Note;
- (b) contractual interest at a rate of 11.15% per annum from the effective date of each Promissory Note through October 3, 2023, *i.e.*, the date on which the Trust provided notice to Defendant of its default under the Promissory Notes;
- (c) contractual default interest at the rate of 25% per annum from October 4, 2023 until the date judgment is entered against Defendant; and
- (d) the Trust's costs and expenses, including reasonable attorneys' fees and legal expenses, incurred in connection with the collection of the Promissory Notes.

Dated: New York, New York
November 8, 2023

MEISTER SEELIG & FEIN PLLC

By: /s/ Jeffrey Schreiber
Jeffrey Schreiber, Esq.
Amit Shertzer, Esq.
125 Park Avenue, 7th Floor
New York, NY 10017
Tel: (212) 655-3500

Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that the number of words in the foregoing document, according to the word count on the word processing program utilized, inclusive of point headings and footnotes, and exclusive of the caption, tables of contents and tables of authorities (if any), signature block and this certificate of compliance is **2,734**.

Dated: New York, New York
November 8, 2023

/s/ Jeffrey Schreiber
JEFFREY SCHREIBER