

ORIGINAL

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

----- X
 ALFRED E. MANN LIVING TRUST, :
 :
 Plaintiff, :
 :
 -against- :
 :
 ETIRC AVIATION S.a.r.l. and :
 ROLAND ("ROEL") PIEPER, :
 :
 Defendants. :
 ----- X

INDEX NO. 09000849 /09
Date Purchased: March __, 2009

SUMMONS

Plaintiff designates the County of New York as the place of trial

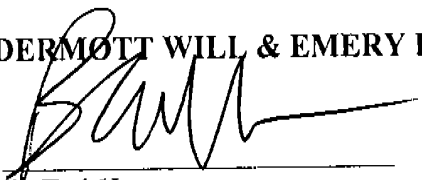
The bases of Venue is N.Y. C.P.L.R. §§ 501

FILED
MAR 19 2009
NEW YORK
COUNTY CLERK'S OFFICE

YOU ARE HEREBY SUMMONED to submit answering papers on the Motion for Summary Judgment in Lieu of Complaint (the "Motion") made herein within the time provided in the accompanying Notice of Motion, dated March 19, 2009 (the "Notice"). In case of your failure to submit answering papers on the Motion, judgment will be taken against you by default for the relief demanded in the accompanying Notice and Motion.

Dated: New York, New York
March 19, 2009

MCDERMOTT WILL & EMERY LLP

By: 
B. Ted Howes
340 Madison Avenue
New York, New York 10017
Telephone: (212) 547-5400
Facsimile: (212) 547-5444

*Attorneys for Plaintiff
Alfred E. Mann Living Trust*

To: ETIRC Aviation S.a.r.l.
Attention: Mr. Roel Pieper
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Luxembourg 1258
Luxembourg
E-mail: roelpieper@msn.com
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Mr. Roel Pieper
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NL-2111 HP Aerdenhout
Netherlands
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berry@etirc.com

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09000849

**NOTICE OF MOTION
FOR SUMMARY JUDGMENT
IN LIEU OF COMPLAINT**

(Oral Argument Requested)

FILED
MAR 19 2009
NEW YORK
COUNTY CLERK'S OFFICE

PLEASE TAKE NOTICE, that upon the accompanying Affidavit of Alfred E. Mann
sworn to on March 11, 2009, the Attorney Affirmation of B. Ted Howes, Esq., dated March 18,
2009, and all other papers and proceedings filed and had herein, plaintiff Alfred E. Mann Living
Trust, through its undersigned attorneys, McDermott Will & Emery LLP, will move this Court
on April 21, 2009, at 9:30 a.m., or as soon thereafter as counsel may be heard, in the Motion
Support Courtroom (Room 130) of the Courthouse of the Supreme Court of the State of New
York, County of New York, located at 60 Centre Street, New York, New York, for an Order
pursuant to N.Y. C.P.L.R. § 3213 granting judgment in favor of plaintiff, and against defendants
ETIRC Aviation S.a.r.l. and Roland ("Roel") Pieper, in an amount totaling no less than
\$10,206,027.39, plus interest accruing at a per diem rate of \$2,796.17 from February 28, 2009
through the date of final payment, plus all costs and expenses, including reasonable attorneys'
fees, plus such other and further relief as this Court deems just and proper (the "Motion").

This action and the subject Motion arise from, and have been brought to recover for, defendants' nonpayment of two instruments for the payment of money only, which are now due and payable.

Venue in the County of New York is based upon the contractual of agreement of the parties pursuant to N.Y. C.P.L.R. §§ 501.

Pursuant to N.Y. C.P.L.R. § 3213, answering papers, if any, are required to be served upon the undersigned at least ten days before the return date of this Motion.

Dated: New York, New York
March 19, 2009

MCDERMOTT WILL & EMERY LLP

By: 

B. Ted Howes

340 Madison Avenue
New York, New York 10017
Telephone: (212) 547-5400
Facsimile: (212) 547-5444

*Attorneys for Plaintiff
Alfred E. Mann Living Trust*

To: ETIRC Aviation S.a.r.l.
Attention: Mr. Roel Pieper
16 Rue Jean-Brasseur
Luxembourg 1258
Luxembourg
E-mail: roelpieper@msn.com
berry@etirc.com

Mr. Roel Pieper
5, Vogelenzangseweg
NL-211 HP Aerdenhout
Netherlands
E-mail: roelpieper@msn.com
berry@etirc.com

SUPREME COURT OF THE STATE OF NEW YORK
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**AFFIDAVIT OF
ALFRED E. MANN
IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
IN LIEU OF COMPLAINT**

STATE OF CALIFORNIA)
 : ss.:
COUNTY OF LOS ANGELES)

ALFRED E. MANN, being duly sworn, hereby deposes and says:

1. I am the appointed Trustee of plaintiff Alfred E. Mann Living Trust (hereafter, "Plaintiff" or "the Trust"). The statements set forth below are based on my own personal knowledge, except where I have stated that they are based upon "information and belief," in which case I believe, in good faith, the same to be true.

2. I submit this affidavit in support of Plaintiff's motion for summary judgment in lieu of complaint pursuant to N.Y. C.P.L.R. § 3213. As detailed below, defendant ETIRC Aviation S.a.r.l. ("ETIRC") has defaulted under an unconditional promissory note issued to Plaintiff in the principal amount of \$10,000,000. As further detailed below, defendant Roel Pieper ("Mr. Pieper") has defaulted under a guaranty pursuant to which Mr. Pieper unconditionally guaranteed to pay any amounts not paid under ETIRC's promissory note.

3. By this action, Plaintiff seeks payment of the principal and interest due under the aforementioned promissory note and guaranty, along with all costs and expenses incurred by Plaintiff (including its reasonable attorneys' fees) in enforcing defendants' payment obligations thereunder.

The Parties

4. Plaintiff is a private trust organized under the laws of California with its principal place of business located at 2801 Coast Line Court, Las Vegas, Nevada 89117. I am the appointed Trustee of Plaintiff.

5. Upon information and belief, Defendant ETIRC is a corporation organized and existing under the laws of the country of Luxembourg, with its registered head office located at 16 Rue Jean-Brasseur, Luxembourg 1258, Luxembourg. Upon further information and belief, ETIRC is engaged in the business of, *inter alia*, providing on-demand, point-to-point air taxi jet travel services.

6. Upon information and belief, defendant Roel Pieper is an individual citizen of the Netherlands who resides at 5, Vogelenzangseweg, NL-2111 HP Aerdenhout, Netherlands. Upon further information and belief, Mr. Pieper is the founder, Chairman and Managing Director of ETIRC.

The Promissory Note

7. On or about November 26, 2008, Plaintiff and ETIRC entered into a certain funding agreement. *See* Exhibit A hereto. This funding agreement was subsequently amended by a writing executed by both parties on or about January 6, 2009. *See* Exhibit B hereto. This funding agreement, as amended by the January 6, 2009 amendment, is referred to herein as the "Funding Agreement."

8. Under the terms of the Funding Agreement, Plaintiff and ETIRC agreed, *inter alia*, to each provide \$10 million in funding -- or an aggregate amount of \$20 million in funding -- to a company known as Eclipse Aviation Corporation ("EAC"). The parties further agreed that if Plaintiff provided ETIRC's \$10 million share of the funding to EAC, ETIRC would be obligated to pay Plaintiff back pursuant to the terms of a \$10 million promissory note. *See Exhibit A hereto at 2 (third paragraph)*. This promissory note was annexed to the Funding Agreement as Exhibit B-1. *Id.* at Exhibit B-1.

9. Subsequent to the execution of the Funding Agreement, Plaintiff did in fact provide the entire \$20 million financing -- including ETIRC's \$10 million share -- to EAC. Accordingly, pursuant to its agreement under the Funding Agreement, ETIRC executed a promissory note, in the principal amount of \$10 million, in Plaintiff's favor. A copy of this promissory note (as amended by the parties in connection with the aforesaid January 6, 2009 amendment to the Funding Agreement) is annexed hereto as Exhibit C and is referred to herein as the "Promissory Note." Mr. Pieper signed the Promissory Note on behalf of ETIRC in his capacity as Managing Director of ETIRC. *See Exhibit C hereto at 3.*

10. In the Promissory Note, ETIRC unconditionally agreed to repay the \$10 million loan to Plaintiff with interest. In this regard, the Promissory Note provides in relevant part as follows:

FOR VALUE RECEIVED, ETIRC AVIATION Sa.r.l., a corporation organized under the laws of Luxembourg ("Borrower"), hereby unconditionally promises to pay to the order THE ALFRED E. MANN LIVING TRUST ("Lender") the principal amount of \$10,000,000 (U.S.) The principal amount . . . shall bear interest from the date hereof until such entire principal amount outstanding shall be paid in full (whether upon maturity, acceleration or otherwise) at a rate equal to eight percent per annum.

Id. at §§ 1-2.

11. The Promissory Note further provided that the principal amount, plus interest, had to be repaid to Plaintiff by no later than February 28, 2009. *Id.* at § 4. In the event that the loan was not repaid by this February 28, 2009 deadline, the Promissory Note provided that the amount of principal and accrued interest then due would continue to bear interest at a “default” rate of 10% per annum until fully paid. *Id.* at § 3.

12. The Promissory Note further provided that an “Event of Default” would occur under the note if ETIRC failed to repay the amounts due by the February 28, 2009 due date, “and such failure shall continue for three business days after the due date.” *Id.* at § 5(a). In the case of such an Event of Default, the Promissory Note provides Plaintiff with the following remedy:

Upon or at any time after the occurrence of an Event of Default . . . this Promissory Note shall, at the option of Lender [*i.e.*, Plaintiff], become due and payable forthwith, without demand upon or notice to Borrower [*i.e.*, ETIRC], and upon the occurrence of any such Event of Default Lender shall have all the rights and remedies provided under applicable law. . . . This Promissory Note is payable without set-off or recoupment.

Id. at § 6.

13. ETIRC agreed that any legal action to enforce the Promissory Note could be brought in the courts of the State of New York. This agreement is set forth in paragraph 13 of the Funding Agreement, which provides in relevant part as follows:

The parties hereto hereby consent and agree that the state and federal courts located in New York shall have exclusive jurisdiction to hear and determine any claim or dispute between [Plaintiff] and ETIRC pertaining to this Agreement or to any matter arising out of or related to this Agreement. Each party hereto expressly submits and consents in advance to such jurisdiction in any such court and hereby waives any objection that it may have based upon lack of personal jurisdiction, improper venue or forum non conveniens.

See Exhibit A hereto at § 13.

14. Accordingly, because the Promissory Note was entered into pursuant to the Funding Agreement -- and, indeed, was specifically referenced in and attached to the Funding Agreement -- ETIRC consented to the jurisdiction and venue of the Courts of New York for any disputes relating to the Promissory Note. ETIRC further agreed that the Promissory Note would be governed by the laws of the State of New York. See Exhibit C hereto at § 9.

The Guaranty

15. In addition to requiring that ETIRC execute the Promissory Note, the Funding Agreement also required that Mr. Pieper execute a separate guaranty -- in his individual capacity -- covering ETIRC's obligations under the Promissory Note. See Exhibit A hereto at 2 (third paragraph). On or about November 26, 2008, Mr. Pieper did in fact execute this guaranty. See Exhibit D hereto.

16. The parties subsequently made minor amendments to Mr. Pieper's guaranty in connection with the aforementioned January 6, 2009 amendment to the Funding Agreement and the Promissory Note. See Exhibit B hereto. Mr. Pieper's guaranty, as amended by this January 6, 2009 amendment, is referred to herein as the "Guaranty".

17. In the Guaranty, Mr. Pieper unconditionally agreed to guarantee ETIRC's payment obligations under the Promissory Note. In this regard, the Guaranty provides in relevant part as follows:

Guarantor [*i.e.*, Mr. Pieper] hereby unconditionally, irrevocably and absolutely guarantees to lender [*i.e.*, Plaintiff] . . . the prompt payment (whether at stated maturity, by acceleration, or otherwise) and performance of the Guaranty Obligations [*i.e.*, payment of the amounts due under the Promissory Note], whether now or hereafter existing, and whether for principal, interest, fees, expenses, or otherwise, howsoever created, arising, or evidenced, whether direct or indirect, absolute or contingent, or now or hereafter existing or due or to become due

See Exhibit D hereto at § 2.1(a).

18. The parties further agreed that Mr. Pieper's payment obligation under the Guaranty was "absolute" and, as such, would "not be exonerated, discharged or released" by any event, including, but not limited to, (i) any failure or delay by Plaintiff to enforce any of its rights, whether against ETIRC or Mr. Pieper, (ii) the insolvency of ETIRC or Mr. Pieper, (iii) "any claim, defense, counterclaim, or setoff that [ETIRC] or [Mr. Pieper] may have or assert, including any defense of incapacity, disability or lack of authority to execute any documents relating to the Guaranty Obligations, other than . . . the defense of prior performance", and (iv) "any other action or circumstances that might otherwise constitute a defense available to, or a legal or equitable discharge of," Mr. Pieper. *Id.* at § 2.2. *See also id.* at § 3.6.

19. Consistent with the "absolute" and "unconditional" nature of Mr. Pieper's guaranty, the Guaranty further provided that "[u]pon the occurrence . . . of an Event of Default" under the Promissory Note, Plaintiff "may declare all of the Guaranty Obligations, immediately and without demand, notice or legal process of any kind, to be, and such Guaranty Obligations, shall immediately become, due and payable . . ." *Id.* at § 6. In other words, Mr. Pieper agreed that his obligation to pay the outstanding amounts under the Promissory Note would immediately and automatically become due upon ETIRC's failure to meet the February 28, 2009 payment deadline under the Promissory Note (which, as discussed above, is an "Event of Default" under the Promissory Note).

20. Furthermore, just like ETIRC agreed with respect to the Promissory Note, Mr. Pieper agreed that the Guaranty would be governed by the laws of the State of New York and that any legal action to enforce the Guaranty could be brought in the courts of the State of New York (subject to Plaintiff's right to bring legal actions elsewhere in the world as may be

necessary to enforce or collect upon Mr. Pieper's guaranty obligations). In this regard, the Guaranty provides in relevant part as follows:

GUARANTOR HEREBY CONSENTS AND AGREES THAT THE STATE OR FEDERAL COURTS LOCATED IN NEW YORK SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIMS OR DISPUTES BETWEEN GUARANTOR AND LENDER PERTAINING TO THIS GUARANTY OR TO ANY MATTER ARISING OUT OF OR RELATED TO THIS GUARANTY; PROVIDED, THAT NOTHING IN THIS AGREEMENT SHALL BE DEEMED OR OPERATE TO PRECLUDE LENDER FROM BRINGING SUIT OR TAKING OTHER LEGAL ACTION IN ANY OTHER JURISDICTION TO COLLECT THE GUARANTY OBLIGATIONS OR TO ENFORCE A JUDGMENT OR OTHER COURT ORDER IN FAVOR OF LENDER. GUARANTOR EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR SUIT COMMENCED IN ANY SUCH COURT, AND GUARANTOR HEREBY WAIVES ANY OBJECTION THAT IT MAY HAVE BASED UPON LACK OF PERSONAL JURISDICTION, IMPROPER VENUE OR FORUM NON CONVENIENS.

Id. at § 11(a).

21. In addition to waiving any objections to the jurisdiction or venue of the New York courts, Mr. Pieper also expressly waived any right to personal service of any summons or complaint commencing a New York court action, as well as any right to a jury trial. *Id.* at § 11(b).

22. Finally, Mr. Pieper agreed that Plaintiff would be entitled to recover its reasonable attorneys' fees and costs in any legal action to enforce the payment of the Guaranty Obligations. This agreement is unambiguously set forth in Section 7 of the Guaranty, which provides in pertinent part as follows:

Guarantor agrees to indemnify and hold Lender harmless from and against any taxes, liabilities, claims, and damages, *including reasonable costs, attorneys' fees, and disbursements*, and other expenses incurred or arising by reason of the taking or the failure to take action by Lender, in good faith, in respect of any

transaction effected under this Guaranty, including any action to enforce payment of the Guaranty Obligations

Id. at § 7 (*italics added*). Thus, by the express terms of the Guaranty, Plaintiff is entitled to recover, in addition to other expenses, all attorneys' fees and related costs in connection with the present lawsuit.

**Defendants Default Under
the Promissory Note and Guaranty**

23. As of the present date, ETIRC has failed to pay the amounts due under the Promissory Note. Since more than three business days have transpired since the February 28, 2009 payment due date, ETIRC is therefore in default under the express terms of the Promissory Note. *See* Exhibit C at §§ 4-5.

24. Mr. Pieper has likewise failed to pay off the Promissory Note. Since, as set forth above, Mr. Pieper's payment under the Guaranty became immediately due and payable upon ETIRC's default under the Promissory Note, Mr. Pieper is likewise in default of the Guaranty.

25. At or about the time that ETIRC defaulted under the Promissory Note, I contacted Mr. Pieper, the Chairman and managing Director of ETIRC, and demanded that ETIRC pay the Promissory Note in full. In the alternative, I demanded that Mr. Pieper individually pay off the Promissory Note pursuant to his obligations under the Guaranty. *See, e.g.*, Exhibit E hereto (March 4, 2009 e-mail exchange with Mr. Pieper).

26. In response to my inquiries, Mr. Pieper has not denied that ETIRC is in default of the Promissory Note or that he is in default of the Guaranty. Instead, Mr. Pieper has informed me that he allegedly does not have adequate funds to fully meet his payment obligations. However, an alleged lack of funds to make payment does not constitute a defense under the absolute and unconditional terms of the Promissory Note or the Guaranty.

27. On or about March 8, 2008, my legal counsel sent an e-mail to Mr. Pieper pursuant to the notice provisions under both the Funding Agreement/Promissory Note and the Guaranty. *See* Exhibit F hereto. In this e-mail, my counsel reiterated to Mr. Pieper, among other things, that he was in willful default of the Guaranty and demanded “full and prompt payment” of the amounts due under the Guaranty and the Promissory Note. *Id.* To date, Mr. Pieper has not responded to this e-mail.

**Money Due As a Result
of Defendants’ Default**

28. As set forth above, and per the terms of the Promissory Note, the \$10,000,000 principal amount due under the Promissory Note (and, by extension, under the Guaranty) earned interest at an annual rate of 8% per annum until the February 28, 2009 due date. *See* Exhibit C hereto at § 2. Accordingly, the amount of principal and interest due as of the February 28, 2009 due date therefore totaled \$10,206,027.39.

29. As also per the terms of the Promissory Note, any principal and interest not paid as of the February 28, 2009 due date would thereafter bear interest at a “default rate” equal to 10% per annum until paid in full. *Id.* at § 3. Accordingly, the amount due as of February 28, 2009 (\$10,206,027.39) is continuing to bear additional “default interest” at a *per diem* rate of \$2,796.17 until paid in full.

30. In addition to the above direct damages, ETIRC’s and Mr. Pieper’s failure to pay the Promissory Note and Guaranty on time is threatening to cause me tens of millions of dollars in additional consequential damages. I expressly reserve the right to seek such additional consequential damages against Mr. Pieper and ETIRC in the future, whether in this action or a subsequent suit.

Conclusion

31. For the foregoing reasons, I respectfully request that this Court grant summary judgment in favor of Plaintiffs, and against Defendants, on a joint and several basis, in the amounts set forth above, plus all reasonable attorneys' fees and costs incurred by Plaintiff in prosecuting this action.


ALFRED E. MANN

Sworn to before me this 11th
day of March 2009

Silvia C. Weeks

Notary Public

Silvia C. Weeks

