

**Cessna Fin. Corp. v BK Leasing, LLC**

2009 NY Slip Op 32448(U)

October 15, 2009

Supreme Court, Nassau County

Docket Number: 012451-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**CESSNA FINANCE CORPORATION,**  
**a Kansas corporation,**  
  
**Plaintiff,**

**TRIAL/IAS PART: 25**  
  
**NASSAU COUNTY**

**-against-**

**Index No: 012451-09**

**BK LEASING, LLC and,**  
**MARIO A. FARETRA,**

**Motion Seq. No: 1**  
**Submission Date: 8/10/09**

**Defendants.**

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**The following papers having been read on this motion:**

**Notice of Motion, Affidavit in Support and Exhibits.....x**

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Cessna Finance Corporation ("Cessna") on July 16, 2009 and submitted on August 10, 2009. Defendants have not submitted any response to Plaintiff's motion. The Court grants Plaintiff's motion. For the reasons set forth below, the Court 1) grants Plaintiff summary judgment against Defendants; and 2) directs that an inquest be held on the issues of damages, interest, counsel fees and costs.

**BACKGROUND**

**A. Relief Sought**

Plaintiff requests an Order, pursuant to CPLR § 3213, directing the entry of summary judgment in favor of Plaintiff and against Defendants in the sum of \$261,833.45, representing

principal, interest, late charges and counsel fees due on two promissory notes, together with interest accrued from June 3, 2009 to the date of entry of judgment.

B. The Parties' History

In support of its motion, Plaintiff provides an affidavit of Eddie D. Winkler ("Winkler"), an Assistant Secretary of Cessna dated June 23, 2009. Winkler affirms as follows:

Cessna ("Lender") is a company that provides financing for the acquisition of aircraft and related equipment. Lender's principal place of business is located in Wichita, Kansas.

Defendant BK Leasing, LLC ("Borrower") is a New York limited liability company located in Island Park, New York. Defendant Mario A. Faretra ("Guarantor") is an individual who resides at the same location in Island Park at which the Borrower is located. Cessna has sued to recover sums due pursuant to two promissory notes ("Notes"), dated December 30, 2004 and January 12, 2005, that the Borrower made and the Guarantor guaranteed, in favor of the Lender.

I. The December 30, 2004 Loan

Winkler affirms that, prior to the execution of the December 30, 2004 Note, Borrower was indebted to Lender in the principal sum of \$101,200. In light of that debt, Borrower executed to Lender a promissory note on December 30, 2004 ("December 2004 Note"), to secure that sum. The December 2004 Note provided for interest of 7% (seven percent) per annum on the unpaid balance. It also provided for the payment of all accrued unpaid interest in regular monthly installments, commencing February 1, 2005, and on that date of each month thereafter until fully paid, except that the final payment of remaining principal and unpaid accrued interest, if not paid sooner, would be due and payable on January 1, 2017. Winkler provides a copy of the December 2004 Note.

To secure payment of the December 2004 Note, Guarantor executed and delivered to Lender a guaranty dated December 30, 2004 ("December 2004 Guaranty"), pursuant to which Guarantor unconditionally guaranteed to Lender the payment of the December 2004 Note. Pursuant to the December 2004 Guaranty, Guarantor guaranteed the payment of principal and interest, as well as costs and reasonable attorneys' fees that Lender might incur in collecting sums owed. Specifically, as to collection costs, the December 2004 Guaranty provides, at ¶ D, that the Guarantor agrees that "If you [Lender] incur any expenses to collect any amounts that I owe you under the terms of this Guaranty or to otherwise enforce or defend your rights

hereunder, I will reimburse you for those expenses, including, without limitation, your attorneys' fees, court costs and any other expenses, whether or not you bring suit against me."

To provide additional security for payment of the December 2004 Note, Borrower executed a Security Agreement dated December 30, 2004 that granted Lender a security interest in particular aircraft. Winkler provides a copy of that Security Agreement, which describes the secured property as a Piper, Model PA-34-200, FAA Reg. No. N56722, Serial No. 34-7450026.

Winkler affirms that, as of June 2, 2009, the principal sum of \$77,472.76 was due under the December 2004 Note, plus \$5,428.02 in interest and \$468.45 in late fees.

## II. The January 12, 2005 Loan

Prior to the execution of the January 12, 2005 Note ("January 2005 Note"), Borrower was indebted to Lender in the principal sum of \$198,807.80. In light of that debt, Borrower executed the January 2005 Note to secure that sum. The January 2005 Note provided for interest at the fixed rate of 6.25% (six and one quarter percent) per annum on the unpaid balance. The Note provided for the payment of all accrued unpaid interest in regular monthly installments, commencing February 12, 2005, and on that day of each month thereafter until fully paid, except that the final payment of remaining principal and unpaid accrued interest, if not paid sooner, would be due and payable on January 12, 2020. Winkler also provides a copy of the January 2005 Note.

Winkler affirms that payment of the January 2005 Note was secured by a guaranty that Guarantor executed on April 2, 2004 ("April 2004 Guaranty"). To explain the sequence of events, as April 2004 is obviously prior to January 2005, Winkler further affirms that the April 2004 Guaranty originally guaranteed an April 2, 2004 promissory note between Lender and Borrower. The April 2, 2004 promissory note was replaced by an October 8, 2004 promissory note, which was then replaced by the January 2005 Note that forms the basis of this action.

To secure payment of the April 2, 2004 promissory note, which was eventually replaced by the January 2005 Note, Borrower executed a Security Agreement dated April 2, 2004. That Security Agreement was subsequently amended on October 8, 2004 and again on January 12, 2005. The Security Agreement, and relevant amendments, describe the secured property as a Piper, Model PA-34-220T, F.A.A. Reg. No. N82176, Serial No. 34-8233153.

Winkler affirms that, as of June 2, 2009, the principal sum of \$164,004.01 was due under

the January 2005 Note, plus \$8,771.08 in interest and \$689.13 in late fees.

Paragraph 4 of the December 2004 and January 2005 Notes, titled "Payment Schedule," reflects the Borrower's promise to pay a particular amount, by a designated date, as the first payment under the Note, along with the following language: "with a payment in the same amount on the same day of each month thereafter." Pursuant to the Notes, failure to make a monthly payment in the month that it is due constitutes a default under the Notes.

Paragraph 5 of the Notes provides that, if a payment on the Note is more than ten (10) days late, Lender will charge a late fee of 5% (five percent) of the unpaid amount of the regularly scheduled payment. Winkler affirms that a total of \$468.45 is due on the December 2004 Note for late charges, and a total of \$689.13 is due on the January 2005 Note for late charges.

Paragraph 8 of the Notes provides that, upon default, the Lender may require immediate payment of all amounts due under the Note. Winkler affirms that the Borrower failed to make payments of all accrued unpaid interest from October 12, 2008. Lender affirms that it demanded payment on numerous occasions, but Borrower failed to make payment. Lender provides copies of correspondence dated December 12, 2008 and January 1, 2009, addressed to Borrower and Guarantor, in which Lender advised Borrower and Guarantor that 1) Lender had notified Borrower and Guarantor on several prior occasions that the accounts were in default; 2) the accounts continued to be in default; and 3) Lender was electing to accelerate the entire loan balance and to demand payment in full of the entire balance due on the accounts. The correspondence reflects the principal, interest and late charges that were owed on the Notes.

The Notes and Security Agreements provide that, in the event that the Notes are referred to an attorney for collection, the Borrower is responsible for reasonable attorneys' fees. Winkler affirms that "[t]he sum of \$5,000 is reasonable and due under the Notes for attorneys' fees."

Winkler affirms that, as of June 2, 2009, Defendants owed a total of \$256,833.45 on the Notes. Specifically, as to the December 2004 Note, Defendants owed a total of \$83,369.23, representing \$77,472.76 in principal, \$5,428.02 in interest and \$468.45 in late fees. As to the January 2005 Note, Defendants owed a total of \$173,464.22, representing \$164,004.01 in principal, \$8,771.08 in interest and \$689.13 in late fees. With the \$5,000 counsel fees that, Winkler affirms, constitute reasonable attorneys' fees under the Notes, Winkler affirms that

Defendants owe a total of \$261,833.45. In addition, Winkler affirms that Defendants owe interest accrued from June 3, 2009 to the date of entry of judgment.

C. The Parties' Positions

Lender submits that it is entitled to summary judgment against the Defendants, jointly and severally, for the sum of \$261,833.45, representing principal, interest, late charges and counsel fees due on the Notes, together with interest accrued from June 3, 2009 to the date of judgment in light of its showing that 1) Lender made numerous demands for payment of the amounts due under the Notes but Borrower failed to make those payments; 2) upon Borrower's failure to pay, Lender made demands of Guarantor for payment of the debt, but Guarantor also did not make the required payments; and 3) Guarantor is jointly and severally liable, with Borrower, for the principal, interest, late charges, costs and attorneys' fees as outlined by Lender.

No opposition or other response was submitted to Lender's motion.

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

#### B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept.2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatoridi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

The Court concludes that Plaintiff has met its burden of demonstrating the existence of the Notes and Borrower's failure to make payment pursuant to that instrument. Moreover, Borrower has interposed no defense to Plaintiff's action. Accordingly, the Court grants Plaintiff summary judgment against Borrower for non-payment of the principal and interest Defendant owes pursuant to the Note, as well as appropriate counsel fees and other costs. The Court directs that an inquest shall be held to determine damages and interest that Defendant owes to Plaintiff.

#### C. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys.*,

*Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

Plaintiff-Lender has demonstrated all of the elements to recover as a matter of law on the guarantees here. Lender's affirmations, and the accompanying documentation, demonstrate that judgment as a matter of law is appropriate. Accordingly, the Court concludes that Plaintiff is entitled to summary judgment against the Guarantor who personally guaranteed the Notes.

#### D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

Plaintiff requests counsel fees in the sum of \$5,000, but does not provide the Court with

sufficient information to conclude that an award in that sum is appropriate. Accordingly, the Court directs that the inquest shall include the determination of an appropriate counsel fee award.

In light of the foregoing, it is hereby:

**ORDERED**, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is granted; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank N. Schellace to hear and determine all issues relating to the determination of damages, counsel fees and other costs, if appropriate, on November 18, 2009 at 10:00 a.m.; and it is further

**ORDERED**, that Plaintiff's attorneys file a Notice of Inquest or a Note of Issue and pay the appropriate filing fees on or before November 6, 2009; and it is further

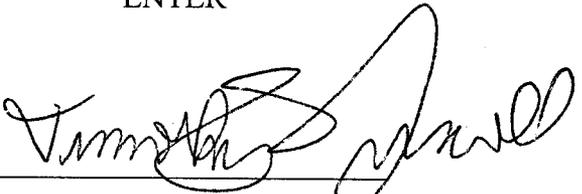
**ORDERED**, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendants in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
October 15, 2009

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
OCT 19 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE