

Santander Bank, N.A. v KR InterCorp, Inc.
2020 NY Slip Op 33313(U)
October 8, 2020
Supreme Court, New York County
Docket Number: 151589/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

-----X

SANTANDER BANK, N.A.,

Plaintiff,

- v -

KR INTERCORP, INC., JU HUR

Defendant.

-----X

INDEX NO. 151589/2020

MOTION DATE 09/17/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Upon the foregoing documents, plaintiff's motion for summary judgment in its favor and against defendants, jointly and severally, is granted for the reasons stated hereinbelow.

Background

On October 17, 2018, co-defendant KR Intercorp, Inc. (the "Borrower") executed a promissory note (the "Note") in the principal sum of \$900,000.00, in favor of plaintiff, Santander Bank, N.A. (Exhibit A, NYSCEF Doc. 2). Pursuant to the Note, plaintiff agreed to extend a loan (the "Loan") of up to \$900,000.00 to the Borrower. "In connection with the Note," the Borrower executed a Business Loan Agreement (the "BLA," Exhibit B, NYSCEF Doc. 3) and Security Agreement (Exhibit C, NYSCEF Doc. 4) (the BLA and the Security Agreement, collectively, the "Underlying Loan Documents"). The Note required that the Borrower submit monthly payments with an October 17, 2019 Maturity Date (NYSCEF Doc. 2). Additionally, the Note defined a default as an event in which the Borrower failed to submit a monthly payment and/or failed to comply with any other term of the Note. According to the Note, upon such a default, the interest rate on the Note would increase by an eight-percentage point margin (the "Default Rate Margin") (NYSCEF Doc. 2). Also on or about October 17, 2018, co-defendant Ju Yeon Hur (the "Guarantor") executed a Personal Guaranty (Exhibit E, NYSCEF Doc. 6). Pursuant to the terms and conditions of the subject Personal Guaranty, the Guarantor agreed that he "absolutely and unconditionally guarantees full and punctual payment and satisfaction of the indebtedness of Borrower to Lender; and the performance and discharge of all Borrower's obligations under the Note and the Related Documents" (NYSCEF Doc. 6). Also on October 17, 2018, the Borrower executed a Master Commercial Card Agreement (the "Card Agreement") (Exhibit F, NYSCEF Doc. 7).

Also on or about October 17, 2019, plaintiff fulfilled the Borrower's request to enter into a Forbearance Agreement with the Borrower and the Guarantor, which stated the remaining principal balance as \$899,490.66 and provided that plaintiff would not pursue remedies against defendants through January 17, 2020 (Exhibit G, NYSCEF Doc. 8). The Forbearance Agreement also terminated the Card Agreement and stated that the Borrower would not incur further indebtedness pursuant to that agreement (NYSCEF Doc. 1, at 9).

By letter dated January 21, 2020, plaintiff notified defendants that the Borrower had defaulted, as it failed to submit the payments that became due on January 17, 2020 (NYSCEF Doc. 9). Plaintiff asserted that a \$903,764.48 balance (the \$899,490.66 principal, plus interest thereon in the amount of \$4,066.44, plus late fees in the amount of \$207.38, and, also, attorney's fees and charges that continue to accrue under the Forbearance Agreement) remained due to plaintiff (NYSCEF Doc. 9). Plaintiff noted that defendants had through January 28, 2020 (seven days after the date of the subject letter) to pay the aforementioned sums to plaintiff before plaintiff sought remedies against defendants.

On February 10, 2020, plaintiff commenced the instant action against defendants, jointly and severally, asserting the following causes of action: (1) breach of the Loan Documents as against the Borrower; (2) account stated as against the Borrower; (3) unjust enrichment as against the Borrower; (4) breach of the Loan Documents as against the Guarantor; and (5) for an order of replevin as against the Borrower (NYSCEF Doc. 1, at 10-13). Plaintiff seeks a judgment in its favor and against defendants, jointly and severally, for the following relief: (1) on its first, second, and third causes of action, in the amount of \$899,490.66, plus interest thereon in the amount of \$4,066.44, plus late fees thereon in the amount of \$207.38, plus \$75,801.00 under the Card Agreement; (2) on plaintiff's fourth cause of action, in the sum of \$979,565.48; (3) on plaintiff's fifth cause of action, for an order of replevin and possession "with respect to the Collateral;" and (4) attorney's fees and costs that continue to accrue under the Loan Documents (NYSCEF Doc. 1).

On April 6, 2020, defendants jointly answered the complaint with various admissions and affirmative defenses (NYSCEF Doc. 14).

Plaintiff now moves (1) pursuant to CPLR 3212, for summary judgment against defendants for the relief that plaintiff demanded in the instant complaint; and (2) to dismiss defendants' April 6, 2020 answer, which contains nine "unsubstantiated affirmative defenses," on the ground that no triable issues of fact exist (NYSCEF Doc. 15).

In opposition, defendants claim that triable issues of fact exist and that plaintiff failed to make out its prima facie case in determining the payoff amount pursuant to the Card Agreement. The Guarantor asserts that he delivered all payments due under the Note timely and had attempted to settle with plaintiff (NYSCEF Doc. 33). Additionally, the Guarantor claims that on the October 17, 2019 Maturity Date, Mario Tehlikian (whose email signature bears the title, "Associate, Workout, Vice President" for plaintiff) emailed the Guarantor, stating (1) that the Loan had been transferred to the "Upper Business Banking Workout Unit" within plaintiff; and (2) the Guarantor should execute a "Pre-Negotiation Agreement" (NYSCEF Doc. 35). The Guarantor asserts that, prior to the Forbearance Agreement's execution, neither Mr. Tehlikian nor any of

plaintiff's representatives explained why the Loan had been transferred to the "Workout Unit" rather than renewal (NYSCEF Doc. 33, at 2).

Defendants further assert the following, among various arguments, through counsel: (1) the Forbearance Agreement featured ambiguous terms, and plaintiff failed to provide defendants with sufficient time to review the Forbearance Agreement at the time of its execution; (2) defendants did not receive default and/or demand notice(s); (3) plaintiff shared defendants' financial information with third parties without defendants' consent; and (4) the accurate amount of payoff of the Card Agreement constitutes a triable issue of fact (NYSCEF Doc. 34). Defendants also claim that the bank representative has not officially rejected defendant's request to extend the forbearance period (NYSCEF Doc. 34, at 5).

In reply, plaintiff asserts that it has made out its prima facie case for summary judgment against the defendants by submitting proof of the following: (1) the Business Loan Agreement; (2) the Promissory Note; (3) the Security Agreement; (4) the Guaranty; (5) the Master Card Agreement; (6) the Forbearance Agreement; and (7) the default under the Loan Documents (NYSCEF Doc. 39, at 2). Plaintiff emphasizes that defendants signed the Forbearance Agreement that noted the outstanding balance of \$899,490.66 (Exhibit G, NYCEF Doc. 24). Plaintiff also asserts that the Forbearance Agreement provided that said agreement "may be extended by the Lender, in its sole discretion" (NYSCEF Doc. 24, at 2). Plaintiff further asserts that plaintiff operated within the subject agreements' terms by seeking advice from its counsel.

Discussion

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993). Plaintiff has met its burden to make out a prima facie case for summary judgment against defendants by submitting the subject Note, the aforesaid agreements, the January 21, 2020 default letter, and other documentation (NYSCEF Doc. 2 to 9). Additionally, as plaintiff asserts in its memorandum of law, in the subject guaranty, the Guarantor waived all the usual defenses (NYSCEF Doc. 6 and 29).

Once the movant has met its initial burden, it then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). Defendants have failed to meet their burden to raise a triable issue of fact in this matter.

This Court has reviewed defendants' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, for the reasons stated herein, the motion of plaintiff, Santander Bank, N.A., for summary judgment against defendants, KR Intercorp, Inc. and Ju Yeon Hur, jointly and severally, and to

dismiss defendants' April 6, 2020 answer, is hereby granted on plaintiff's first, second, and third causes of action in the amount of \$899,490.66, plus interest thereon in the amount of \$4,066.44, plus late fees thereon in the amount of \$207.38, plus \$75,801.00 under the Card Agreement; on plaintiff's fourth cause of action, in the total sum of \$979,565.48; and on plaintiff's fifth cause of action, for an order of replevin and possession "with respect to the Collateral;" plus costs and disbursements. The Clerk is hereby directed to enter judgment accordingly.

Plaintiff's request for attorney's fees is hereby severed, and plaintiff may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and payment of any necessary fees.


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10/8/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: