

<b>Valley Natl. Bank v Vales Finishing, Inc.</b>
2007 NY Slip Op 31170(U)
May 4, 2007
Supreme Court, New York County
Docket Number: 0102173/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JUDITH J. GISCHE**

PART 10

Index Number : 102173/2007

VALLEY NATIONAL BANK

INDEX NO. \_\_\_\_\_

vs

BALES FINISHING, INC.

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMNT/LIEU COMPLAINT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for an default

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION**

**FILED**

MAY 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE

MAY 04 2007

Dated: \_\_\_\_\_

**HON. JUDITH J. GISCHE** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

Valley National Bank,  
Plaintiff

-against-

Vales Finishing, Inc. and  
Vladislav Belenky,  
Defendants.

-----X

DECISION/ORDER

Index No.: 102173/07  
Seq. No.: 001

Present:  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

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**Papers**  
Pltff's Summons, and N/M [§3213] w/JG affid, exhs .....  
Proof of service .....

Numbered  
**FILED**  
1  
2

MAY 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers the court's decision is as follows:  
  
GISCHE, J.

This is plaintiff's motion for summary judgment in lieu of a complaint. CPLR 3213. Plaintiff has filed proof of service of the summons and motion upon both named defendants. Service was made upon Vales Finishing, Inc. on February 27, 2007 pursuant to BCL § 306 because Vales is a domestic corporation (hereinafter the "corporate defendant"). The summons and motion were served upon Mr. Belenky's co-tenant, a person of suitable age and discretion, who lives with Mr. Belenky. CPLR 308 (2). Service was complete with the mailing of a copy of the summons and motion in February 24, 2007 to Mr. Belenky at his last known residence.

Despite having been served with the summons and motion, neither defendant

[\* 3]

has appeared, or submitted answering papers within the time provided in the notice of motion. CPLR §§ 3213 and 320 (a). Therefore the motion is before the court without opposition.

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). An instrument for the payment of money qualifies for CPLR § 3213 treatment if it contains an unconditional promise by the debtor to repay lender the moneys advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634, (2nd Dept. 1992) The moving party is entitled to summary judgment unless the other party comes forward with evidentiary proof sufficient to raise an issue as to the defenses to the instrument. Id.

To establish the prima facie elements of its case, plaintiff offers the sworn statement of Mr. Gargiulo, a vice president of the plaintiff, and a person with knowledge of the facts. He states that the corporate defendant borrowed the principal sum of \$100,000 upon executing the commercial revolving credit line note dated November 9, 2005. The note is signed by Mr. Belensky, as president of the corporate defendant. Mr. Belensky also signed a guaranty on November 9, 2005, personally guaranteeing the loan. The personal guaranty provides that "[t]his guaranty shall be governed by the law of the State of New Jersey."

Although plaintiff has proved it is entitled to summary judgment in lieu of a complaint against the corporate defendant. It has not proved that the within action is

[\* 4 ]

compliant or consistent with the laws of State of New Jersey. Therefore, plaintiff shall have summary judgment against Vales Finishing, Inc. in the unpaid principal sum of \$99,922.23, together with interest thereon from September 29, 2006 to January 29, 2007, calculated to be the sum of \$3,739.63, together with the costs and disbursements of this action.

However, to the extent that plaintiff seeks legal fees against Vales Finishing, Inc., or a money judgment against the individual defendant/guarantor, the motion is denied without prejudice. Aside from asking for legal fees of \$3,000, the bank has not provided an affirmation of services setting forth hourly rate or number of hours billed, or any other information from which the reasonableness of these fees can be determined.

As for the personal guarantor, for the reasons set forth above, it is unclear if the within action is consistent with the laws of the State of New Jersey, and plaintiff has not addressed this point in its papers.

Although denial of a motion for summary judgment in lieu of a complaint allows for the court to deem the moving papers a complaint, the court will, instead, deny the motion as to the personal guarantor without prejudice and allow plaintiff an additional period of time (90 days) to renew its motion with the missing information and applicable case law addressing this issue.

Accordingly, the motion for summary judgment in lieu of a complaint is partly granted and partly denied, without prejudice.

### **Conclusion**

*It is hereby*

**ORDERED THAT** the Clerk shall enter judgment in favor of plaintiff Valley National Bank, against defendant Vales Finishing, Inc., in the unpaid principal sum of Ninety Nine Thousand Nine Hundred Twenty Two and 23/100 Dollars (\$99,922.23), together with interest thereon from September 29, 2006 to January 29, 2007 in the sum of \$3,739.63, together with the costs and disbursements of this action; and it is further

**ORDERED THAT** plaintiff's motion for legal fees against Vales Finishing, Inc. is denied without prejudice; and it is further

**ORDERED THAT** plaintiff's motion for legal fees against Vales Finishing, Inc. is denied without prejudice; and it is further

**ORDERED THAT** plaintiff's motion for summary judgment against the individual defendant/personal guarantor is denied without prejudice; plaintiff is hereby provided an additional period of time (90 days) to renew its motion with the missing information and applicable case law addressing the issue of whether this action is compliant with the laws of the State of New Jersey; and it is further

**ORDERED THAT** any relief requested but not expressly addressed in this decision and order has nonetheless been considered and is hereby denied; and it is further

**ORDERED THAT** this shall constitute the decision and order of the Court.

Dated: New York, New York  
May 4, 2007

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**

MAY 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE