

HSBC Bank USA Natl. Assn. v Mitchell

2007 NY Slip Op 32161(U)

July 10, 2007

Supreme Court, New York County

Docket Number: 0114258/2006

Judge: Judith J. Gische

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

#114258/06

PRESENT: J. Gische
Justice

PART 10

HSBC

INDEX NO. 104258/06

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Mitchell, Vivian

The following papers, numbered 1 to _____ were read on this motion to/for Summary J/M

PAPERS NUMBERED 33212

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

FILED

JUL 18 2007,

NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: July 10, 2007

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DEPENDENCE

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

-----X
HSBC Bank USA National Association,

Plaintiff

-against-

Vivian E. Mitchell f/k/a
Vivian E. Memminger f/k/a
Vivian Memminger,

Defendant.

DECISION/ORDER

Index No.: 114258/06
Seq. No.: 001

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

-----X

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

Papers	Numbered
Pitff n/m (3212) w/JAB affid, exhs	1
VEM affid in opp	2
EG affirm in reply	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action by plaintiff to enforce defendant's agreement to repay a line of credit. Plaintiff now moves for summary judgment on the basis that defendant has no defense to the action. Although the note of issue has not yet been filed, issue has been joined. Therefore this motion is timely and the issues presented will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate

any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Discussion

The essential facts of this case are not in dispute. Defendant ("Ms. Mitchell), who is self represented, readily concedes that she borrowed \$100,000 from the plaintiff on April 8, 2004. Plaintiff does not deny entering into the "Agreement for Revolving Credit Term Loan" (credit line agreement) dated April 8, 2004. The credit line agreement requires repayment of the principal sum with interest in 48 consecutive monthly installments. Interest is prime rate plus 2%. The lender has calculated the interest and set forth the basis for its calculation in the complaint (paragraph 10) as well as in its motion for summary judgment. Although plaintiff borrowed this money in connection with a business, she signed the loan in her individual capacity. It is undisputed by defendant that if plaintiff prevails on this motion, the judgment is against her individually.

The sole defense presented by Ms. Mitchell in her answer, and in connection with this motion for summary judgment, is that she does not have the money to repay the loan, and has fallen on hard times. Defendant asks that the plaintiff allow her to repay the defaulted loan over time, without the imposition of interest.

The economic inability of a party to perform the terms of a contractual obligation is not a valid basis for excusing the compliance with a contract. Staszczyn v. Sutton

East Associates, 161 AD2d 269 (1st Dept. 1990). Since plaintiff has established the elements of its breach of contract claim, and defendant has come forward with no factual disputes that would that would require a trial of this action, plaintiff's motion for summary judgment on its first cause of action must be, and hereby is, granted.

Defendant's application for a payout of a moratorium on the payment of interest either on the underlying loan or after judgment is entered is denied. The credit line agreement, by its terms, calls for the imposition of interest on the loan from the date of default as well as other fees, including late charges and attorneys' fees in the event of a default. Since defendant's last payment was on April 18, 2004, the bank is entitled to interest from April 19, 2004, as provided in the credit line agreement, and in the manner set forth in paragraph 10 of the complaint.

The second cause of action allows plaintiff to also recover its reasonable attorneys' fees and other expenses from the plaintiff. Since this cannot be determined from a flat record, the court directs a hearing on attorneys' fees before a special referee who shall report his or her findings to the court with recommendations.

Conclusion

It is hereby

ORDERED that plaintiff HSBC Bank USA National Association's motion for summary judgment is hereby granted; and it is further

ORDERED that the Clerk shall enter judgment on the first cause of action in the complaint in favor of plaintiff HSBC Bank USA National Association against Vivian E. Mitchell f/k/a Vivian E. Memminger f/k/a Vivian Memminger in the unpaid principal sum

of One Hundred Thousand Dollars (\$100,000) with interest from April 19, 2004 through the date of entry at the rate, and in the manner set forth in paragraph 10 of the complaint; and it is further


ORDERED that plaintiff's second cause of action is referred for a hearing before a Special Referee who will conduct a hearing on the reasonable legal fees plaintiff may recover from defendant and report his or her findings to the court with recommendations; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order on the Office of the Special Referee, 60 Centre Street, Room 119 so that the issues framed herein may be calendared and assigned; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
July 10, 2007

So Ordered:



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

FILED
JUL 18 2007
NEW YORK
COUNTY CLERK'S OFFICE