

**Amalgamated Bank v National Museum of Catholic
History & Art**

2007 NY Slip Op 32323(U)

July 19, 2007

Supreme Court, New York County

Docket Number: 0600560/2007

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

Index Number : 600560/2007

AMALGAMATED BANK

vs

NATIONAL MUSEUM

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE 5/14/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

s motion to/for _____

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

NOTING DECISION IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/19/07

HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X

AMALGAMATED BANK

Index No: 600560/07

Plaintiff

-against-

DECISION AND ORDER

THE NATIONAL MUSEUM OF CATHOLIC HISTORY
AND ART and JACK RUDIN

Defendants

-----X

RICHARD B. LOWE, III, J:

Motion Sequence 001 for disposition.

Plaintiff Amalgamated Bank, “Amalgamated”, brings the instant action against Defendants The National Museum of Catholic History and Art and Jack Rudin, respectively referred to as “the Museum” and “Rudin”.

In Motion Sequence 001, Plaintiff Amalgamated moves for a summary judgment in lieu of complaint pursuant to CPLR 3213.

BACKGROUND

On August 16, 2001, Defendant The National Catholic Museum of History and Art (the “Museum”), a not-for-profit corporation existing under the laws of the State of New York, executed and delivered to the Plaintiff Amalgamated Bank (“Amalgamated”), a commercial bank existing under the laws of the State of New York, a Revolving (Grid) Promissory Note (the “Note”). Pursuant to the terms of the Note, the Museum agreed to repay to Amalgamated the

entire amount loaned to the Museum by Amalgamated up to the maximum of \$800,000, or other such lesser amounts as shall be due, with interest and other specified sums.

Previously, Amalgamated had issued a prior loan and note to the Museum for \$500,000. However, on August 13, 2001, Defendant Jack Rudin (“Rudin”), a resident of the State of New York, executed an Absolute Unconditional and Continuing Guarantee (the “Guarantee”) to persuade Amalgamated to advance additional funds to the Museum. Rudin personally guaranteed to pay the Museum’s indebtedness to Amalgamated to a maximum of \$300,000. Subsequently, Amalgamated issued to the Museum a new Note, which replaced the previous note executed by the Museum and loaned an additional \$300,000, extending the maturity date to June 20, 2003. Further, a Schedule indicating the date and amount of Amalgamated’s loans to the Museum is attached to the Note.

Thus, pursuant to the terms of the Note, a total amount of \$800,000 was loaned by Amalgamated to the Museum over a time period of January 23, 2001 to August 23, 2001. \$204,500 of the total amount has already been repaid.

On the maturity date of June 30, 2002, the remaining balance of the Note was due and payable. Pursuant to Section 1(a), the Museum is in default of the Note in that it failed to pay the outstanding amount due on the maturity date.

On October 5, 2006, Amalgamated’s counsel notified Defendant Rudin by letter of the Museum’s default of the payment of the principal pursuant to the Note and demanded that Rudin pay the sum of \$300,000 to Amalgamated pursuant to the Guarantee. Despite this request, Rudin has failed to pay to Amalgamated the \$300,000.

In the instant action, Plaintiff Amalgamated claims that the Museum is in default of the note because it has failed to pay to them the amount due pursuant to the terms of the Note by the

maturity date. The Museum has not filed opposition papers nor has it contested the amount due and owing or offered any other defenses to this action. The Plaintiff also claims that Defendant Rudin failed to pay the amount due pursuant to the terms of the Guarantee. Plaintiff seeks summary judgment in lieu of complaint pursuant to CPLR 3213 against 1) the National Museum of Catholic History and Art for \$797,599.81, which includes the unpaid principal, the accrued interest due through December 31, 2006, plus additional pre and post judgment interest, attorney's fees and costs; and 2) against Jack Rudin in the amount of \$300,000, the total amount due pursuant to the terms of the Guarantee, plus post judgment interest, attorneys' fees and costs.

DISCUSSION

I. Dismissal Pursuant to CPLR 3213 in regards to the Promissory Note

The court will note that Defendant Museum has not filed opposition papers to this motion, nor has it contested the amount due and owing pursuant to the Note. Rudin, on the other hand, opposes this motion in its entirety. The Court finds that a default judgment for summary judgment in lieu of complaint pursuant to CPLR 3213 against the Museum is granted. However, the Court finds that even if the Museum had filed papers in opposition, the motion would still be warranted for the reasons discussed below.

Relief under CPLR 3213 is appropriate where the action is based upon an instrument for the payment of money only. (CPLR 3213). "[A] document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms'" (*Beal Bank v Melville Magnetic Resonance Imaging, P.C.*, 270 A.D.2d 440 [2nd Dep't 2000].) When no proof beyond the instrument is required to substantiate the obligation, the instrument is for the payment of money. (*Shearson Lehman Hutton, Inc. v Myerson & Kuhn*, 602 N.Y.S.2d 396 [1st Dep't 1993].) Thus, to establish a motion for summary judgment in lieu of

complaint, a plaintiff must present “proof of the [instrument] and a failure [by the defendants] to make the payments called for by its terms.” (*Seaman-Andwall Corp. v Wright Mach. Corp.*, 295 N.Y.S.2d 752, 754 [1st Dep’t 1968].)

In opposition to the motion, Defendant Rudin relies upon two cases which state that 1) relief under CPLR 3213 is only appropriate if the “instrument is for the payment of money only inasmuch as it is an unconditional promise to pay a *sum certain* and due on demand or at a definite time” (*Ian Woodner Family Collection, Inc. v Abaris Books, Ltd.* 284 AD2d 163, 164 [1st Dep’t 2001] (*emphasis added*).) and 2) an instrument which requires proof outside of itself does not qualify as an instrument appropriate for summary judgment pursuant to CPLR 3213. (*Tradition North America, Inc. v Sweetney, supra; Channel Excavators, Inc. v Amato Trucking Corp.*, 48 Misc 2d 429, 430 [Sup.Ct. Nassau Co. 1965].)

Rudin also directs this Court to a provision in the Note which requires the Museum to repay “the maximum principle amount of Eight Hundred Thousand and 00/00 United States Dollars or such other lesser amount as shall be noted as unpaid on the Schedule . . .” (Exhibit A—Revolving (Grid) Promissory Note). Since the principal amount could be drawn upon in increments of \$5,000 beginning from the date of execution of the Note until 15 days prior to Maturity Date, (Exhibit A—Revolving (Grid) Promissory Note), Rudin claims that based upon this provision, the parties expressly agreed “that the [new] Note was to guarantee an *additional* loan from any amount from Five Thousand (\$5,000) dollars to Three Hundred Thousand (\$300,000) dollars, and not a sum certain”. (Miltenberg Aff. at ¶14).

Furthermore, the Rudin avers that the Plaintiff cannot prove the amount due pursuant to the Note without relying upon proof outside of the instrument, such as the “The National Museum of Catholic Art and History Schedule”. The Schedule provides the amount of the loans

made to the Museum, the dates of those loans, and all payments of principal given to Amalgamated. Thus, the he claims that the Note is not an appropriate instrument to be granted relief under CPLR 3213 as it requires extrinsic evidence to locate the amount outstanding.

Plaintiff Amalgamated, however, contends that it has established a prima facie entitlement to judgment pursuant to CPLR 3213. “In order to qualify for CPLR 3213 treatment, plaintiff must be able to establish a prima facie case by proof of the agreement and a failure to make the payments called for thereunder.” (*SCP (Bermuda) Inc. v Bermudatel Ltd.* 638 N.Y.S.2d 2 [1st Dep’t 1996].) “Once plaintiff has met its burden, it is incumbent upon defendant to establish, by admissible evidence, that a triable issue of fact exists”. (*Id.*) Plaintiff Amalgamated establishes a prima facie case by providing proof of the Note, which establishes its entitlement to payment, and evidence of the Museum’s failure to make payments: “[The Museum], by its failure to appear in this action . . . has [not] denied that [the Museum] has failed to pay the Note pursuant to its terms” (Bastible Aff., ¶6).

In response to the Defendant Rudin’s contentions that the Note itself did not state the specific amount owed, Plaintiff need only to refer to the Schedule which is attached to the Note. The Schedule, which was completed by Amalgamated, reflects the specific sum due by the Museum upon the date of maturity. A provision in the Note explicitly authorizes the Plaintiff to create this Schedule: “Authorization to Complete Schedule: The Borrower and all endorsers hereby unconditionally authorize the holder of this Note to record on the Schedule: (i) all amounts drawn down, (ii) all dates and payments of principle; and (ii) remaining unpaid principal balance of this Note” (Exhibit A—Revolving (Grid) Promissory Note).

Furthermore, the Note, as a “Revolving (Grid) Promissory Note”, explicitly provides a provision which authorizes the use and attachment of the Grid: “The Bank is authorized to attach

additional Schedules, as needed, to this Note.” (Exhibit A—Revolving (Grid) Promissory Note). In *Beal Bank v Melville Magnetic Resonance Imaging, P.C.*, 270 A.D.2d. 440 [2d Dep’t. 2000], the court refers to a Court of Appeals case, *Weissman v Sinorm Deli*, 88 N.Y.2d 437 [1996], which held that an instrument is one for the payment of money only, if it does not require outside evidence, “other than a simple proof of nonpayment or a similar de minimis deviation from the face of the document”. Reference to the Schedule does not qualify as more than a “de minimis deviation from the face of the document” as it is explicitly authorized by provisions in the Note to be included as a part of the Note itself and does not require going outside of the document. (*id.*) Furthermore, the Appellate Division of the First Department has held that where reference to an indenture was necessary “to establish the amount of liability, [it] would not in any event affect the availability of CPLR 3213 because it would not alter the purely monetary nature of the obligation set forth in the note.” (*Boland v Indah Kiat Finance (IV) Mauritius Ltd.*, [1st Dep’t 2002].)

Based upon the requirements under CPLR 3213, the Court agrees with the Plaintiff and finds that a prima facie case has been established by providing evidence of a right to payment pursuant to the Note, and evidence of a failure to pay by the Defendant Museum. The defendant fails to raise any issue of fact as to defenses to the Note, thus summary judgment in lieu of complaint pursuant to CPLR 3213 is granted.

II. Dismissal Pursuant to CPLR 3213 in regards to the Guarantee

“In order to qualify for CPLR 3213 treatment, plaintiff must be able to establish a prima facie case by proof of the agreement and a failure to make the payments” (*SCP (Bermuda) Inc. v Bermudatel Ltd.*, 638 N.Y.S.2d 2 [1st Dep’t1996].) A Guarantee is an instrument for the payment of money only, qualifying for judgment under CPLR 3213, if no proof outside the face

of the Guarantee, other than of non-payment, is needed to prove a prima facie case. (*Valencia Sportswear, Inc. v D.S.G. Enterprises, Inc.*, 237 A.D.2d 171 [1st Dep't 1997], *relying upon Chemical Bank v Nemeroff*, 650 N.Y.S.2d 110 [1st Dep't 1996].) In essence, a Plaintiff must bring forth evidence of "the notes and guarantees, and defendants' default under their terms, thereby qualifying the documents for accelerated judgment under CPLR 3213". (*SCP (Bermuda) Inc. v Bermudatel Ltd.*, 638 N.Y.S.2d 2, 4 [1st Dep't 1996].)

In the instant case, Rudin claims that CPLR 3213 should be precluded since there are numerous issues of fact regarding his obligation pursuant to the Guarantee. Defendant asserts that the terms of the Guarantee "contains no reference to any specific transactions that the Guarantee was allegedly intended to cover." (Miltenberg Aff., ¶20). More precisely, he avers that the Guarantee does not make any references to the \$500,000 that Amalgamated previously loaned to the Museum. Additionally, Rudin refers to a letter written by his counsel to the Plaintiff a week before the additional \$300,000 was loaned to the Museum, seeking confirmation that the Guarantee "is merely for the limited purpose of guaranteeing the increased credit line of the Museum to \$800,000.00 and will not cover any additional or substitute indebtedness from the Museum to the Bank." (Miltenberg Aff. at Exhibit 1) The Defendant claims to have understood the increase of the Museum's Credit line by \$300,000, which occurred subsequent to Rudin's execution of the Guarantee, as a confirmation by the Plaintiff that the parties intended that the Guarantee was for the purpose guaranteeing the increase of the Museum's credit line, and would apply only to amounts *above* the original \$500,000 loan.

Rudin additionally asserts that even if the facts contended by the Plaintiff are true, since the total outstanding amount due pursuant to the Note is \$595,000, he is liable for payment of only \$95,000, plus interest, pursuant to the Guarantee. Rudin claims that the calculation of the

amount owed by Defendant is a triable issue of fact which precludes summary judgment in lieu of complaint.

In support of their motion, Plaintiff Amalgamated asserts that it has established a prima facie case concerning the Guarantee and that Defendant has not raised any triable issues of fact. Since there is no dispute that the Museum defaulted on the loan, evidence of the underlying Note, the Guarantee are sufficient to show that the Plaintiff has satisfied the burden of summary judgment in lieu of complaint. Under the provision "Obligor's Liabilities" in the Guarantee signed by Rudin it states, "The term 'Obligor's Liabilities' means and includes any and all obligations, debts, and liabilities, of any kind whatsoever of Obligor, however arising, whether . . . now outstanding or hereafter existing, arising, incurred or suffered, . . . due or hereafter becoming due, to, or held or hereafter becoming held by, the Bank" (Mallner Aff. at Exhibit C ¶ 4). The Guarantee itself expressly provides that it would include current obligations.

Further, the Plaintiff disputes Rudin's reliance upon his counsel's letter of confirmation to the Bank by emphasizing the provision in the Guarantee which requires that the Defendant is "not relying on, any oral or other representation, covenant, commitment or agreement with or to Guarantor, except pursuant to any written document executed by the Bank." (Mallner Aff. at Exhibit C ¶ 27). Although the Guarantee does not specify the exact sum it is guaranteeing, "A guarantee may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain. The need to refer to the underlying promissory notes to establish the amount of liability does not affect the availability of CPLR 3213." (*Manufacturers Hanover Trust Co. v Green*, 464 N.Y.S.2d 474 [1st Dep't 1983].)

Additionally, Rudin claims that triable issues of fact still exist regarding the amount of his liability under the Guarantee. Rudin claims that since the outstanding amount due is

\$595,000, he should at most liable for the amount of \$95,000, plus interest, pursuant to the Guarantee. Rudin avers that the amount due is a triable issue of fact which should preclude summary judgment.

In response, Amalgamated asserts that the Guarantee does not provide any basis of calculation for Rudin's liability based on the outstanding amount due. Rudin has guaranteed the total outstanding amount pursuant to the Note, including principal, interest and charges, subject to the \$300,000 limit of his guaranty. Since the unpaid balance of principal and interest was \$821,415 as of April 30, 2007 (post notice of motion), Rudin is liable for the full monetary limit of his guarantee. Therefore, the Court finds that a prima facie case has been established and judgment is granted for Plaintiff Amalgamated against Defendant Rudin, pursuant to CPLR 3213.

CONCLUSION

For the foregoing reasons, the motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted in its entirety. SETTLE ORDER.

Dated: July 19, 2007

ENTER:



HON. RICHARD B. LOWE, III
RICHARD B. LOWE, III, J.S.C.