

JPMorgan Chase Bank, N.A. v Geri Transp. Co., Inc.

2007 NY Slip Op 32907(U)

September 12, 2007

Supreme Court, Nassau County

Docket Number: 2043-07/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

**GERI TRANSPORTATION CO., INC.
AND FRED SCHWEGLER,**

Defendants.
-----X

TRIAL TERM PART: 50

INDEX NO.:2043/07

MOTION DATE:8-17-07

SUBMIT DATE:9-7-07

SEQ. NUMBER - 001

The following papers have been read on this motion:

- Notice of Motion, dated 7-11-07.....1**
- Affidavit in Opposition, dated 8-31-07.....2**
- Reply Affirmation, undated3**

The motion by plaintiff for summary judgment pursuant to CPLR §3212, is granted as to the Third and Fourth Causes of Action with respect to Note 2 (as hereinafter defined), the guaranty thereof by defendant Schwegler and attorneys fees, costs and expenses with respect to Note 2 and said guaranty for the amounts set forth in the complaint. A hearing is necessary to determine amounts, if any, due and payable for plaintiff's attorneys fees, expenses and prejudgment interest. The motion for summary judgment is denied with respect to the First and Second Causes of Action which pertain to Note 1 (as such term is hereinafter

defined).

This is an action to recover sums due on loans made by plaintiff to the corporate defendant which were guaranteed by the individual defendant. Plaintiff alleges that the first loan, Note 1, was made on or about June 3, 2003 in the amount of up to \$400,000. Plaintiff has not submitted copies of either the note or the guaranty for this loan but alleges by way of an affidavit from an officer located in Ohio (the loan apparently was made in Brooklyn) that due diligence has been made to locate the note and guaranty without, however, specifying what efforts have been made. Plaintiff simply states that for a loan to be disbursed, plaintiff requires that a full guaranty is executed by the principal(s) of the borrower. Absent from plaintiff's submission are any documents or other evidence created in connection with making the loan or any affidavit from any person involved in the making of the loan. Although the affidavit is dated January 2007, there is no current affidavit as to whether further efforts have been made to locate the note and guaranty for Note 1 and the nature of the basis or source of the officer's knowledge

A second loan was made in March, 2006, in the amount of up to \$650,000, and is evidenced by a Promissory Note, Note 2, a Business Loan Agreement, a Security Agreement and a Commercial Guaranty, the latter, executed by the defendant Schwegler in his individual capacity.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law *see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*,

68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2d Dept. 1991). “The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist, see *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2d Dept. 1989).

The submissions by plaintiff establish entitlement to judgment as to Note 2 thus shifting the burden to the opponent defendants to rebut the movants’ case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, defendants have failed to establish the existence of triable issues of fact, the motion by plaintiff is granted and summary judgment is granted against defendants, on the Third and Fourth causes of action, in the amounts demanded in the complaint plus prejudgment interest at the contract rate. *Quest Commercial LLC v. Rovner*, 35 AD3d 576 (2d Dept. 2006).

The contention of defendants that the motion should be denied because discovery has not been completed is without merit. A motion for summary judgment may be opposed with

the claim that facts essential to justify opposition may exist but that such material facts are within the exclusive knowledge and possession of the moving party. CPLR §3212(f) However, the opposing party must make an evidentiary showing supporting this conclusion and not base the need for further discovery on speculation or conjecture. *Firth v. State*, 287 AD2d 771 (3d Dept. 2001); *Urcan v. Cocarelli*, 234 AD2d 537 (2d Dept. 1996). Although depositions have not been held, defendants have obtained a response to their requests for discovery and inspection and have not challenged its inadequacy. Defendants have not submitted sufficient evidence to support their contention that further discovery will alter the result here.

A hearing to assess interest, attorneys fees, costs and disbursements that may be due pursuant to the Fifth Cause of Action is required. See, as to attorneys fees, *Coniglio v. Regan*, 186 AD2d 708 (2d Dept. 1992) and *Hestnar v. Schetter*, 284 AD2d 499 (2d Dept. 2001).

Subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least 10 days prior thereto, this matter shall appear on the calendar of CCP II on October 18, 2007 at 9:30 a.m.

A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in TAP II to refer the matter to a Justice, Judicial Hearing officer or a Court Attorney/Referee

as he or she deems appropriate.

The plaintiff has failed to make a *prima facie* showing of entitlement to relief with respect to the First and Second Causes of Action which seek recovery of amounts due on Note 1 and the personal guaranty thereof made by defendant Schwegler.

Plaintiff concedes that it does not have the original promissory note and the guaranty and has not submitted copies of the original or any other documents or evidence created in connection with the loan. Plaintiff relies upon an affidavit of an officer and a copy of its loan history. As noted above, the officer's affidavit is lacking in factual content, is vague and is conclusory. Although the affiant represents himself to be "familiar with all the facts and circumstances regarding this matter" the affidavit does not contain any facts regarding the matter. The affidavit states that due diligence has been made to locate the note and guaranty but fails to state what the facts are to support the claim of due diligence.

It is not uniformly required that recovery of a debt requires production of an original writing, and recovery on a note without submission of an original has been permitted upon proof of its execution, exchange of consideration and payment of interest. *See Thomson v. Rubenstein*, 31 AD3d 434 (2d Dept. 2006).

A copy of a note may also be admitted into evidence at trial and thus by extension, upon motion, where there is no dispute as to authenticity and of a satisfactory accounting of the inability to produce the original. *Chamberlain v. Amato*, 259 AD2d 1048 (4th Dept. 1999).

Secondary evidence of the contents of an unproduced original may be considered upon threshold factual findings that the proponent of the substitute (here that would be the

affidavit of the plaintiff's officer) has sufficiently explained the unavailability of the primary evidence, has not procured the loss in bad faith and has made a showing of a diligent search in the location where the document was last known to have been kept, preferably by the testimony of a person who last had custody of the original. *Schozer v. William Penn Life Ins. Co. of New York*, 84 NY2d 639, 643-644 (1994).

Here, plaintiff has failed to satisfy the threshold requirements for the Court to consider its officer's affidavit and loan history as substitutes for the failure to produce copies of the original note and guaranty and thus plaintiff has failed to make a *prima facie* showing of entitlement to relief. On a motion for summary judgment, the burden is on the proponent to make a showing of entitlement to relief. If such a showing is not made, the burden does not shift to the opponent to come forward with any evidence in opposition and the motion must be denied without regard to the sufficiency of the defendants' opposition papers. *Warrington v. Ryder Rruck Rental, Inc.*, 35 AD3d 455 (2d Dept. 2006). The cases relied upon by plaintiff do not alter the result because they suggest consistent with the foregoing that a mechanism exists to establish the efficacy of an unproduced original note. *Ville De Port Inc., v. Apple Bank for Sav.*, 214 AD2d 726 (2d Dept. 1995); *Pintard v. Takington*, 10 Johns. 104 (N.Y. Sup. 1813).

Finally, defendants' request contained in the affirmation of their attorney for leave to submit an amended answer, is denied. Leave to amend must be made by way of motion or cross motion and neither were made here. CPLR §3025(b) and R2215.

Defendants' submission does not contain a copy of the proposed new pleading and it does not contain any facts or analysis tending to demonstrate the merit of the proposed new

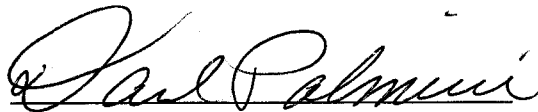
defenses. *Mohan v. Hollander*, 303 AD2d 473 (2d Dept. 2003). Moreover, it has been held that failure to submit a copy of the proposed pleading is alone a sufficient basis to deny a request to amend. *Fernandez v. HICO Corp.*, 24 AD3d 110 (1st Dept. 2005).

Thus the failure to cross move, and to submit the proposed new pleading, combined with the failure to submit any evidence or showing of merit is fatal to the request to amend.

This shall constitute the Decision and Order of this Court

ENTER

DATED: September 12, 2007


HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

SEP 14 2007

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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