

**JPMorgan Chase Bank, N.A. v Plas Tech
Electroplate, Inc.**

2007 NY Slip Op 33000(U)

September 18, 2007

Supreme Court, Nassau County

Docket Number: 0502-06/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

Index No. 20502/06

-against-

Motion Dated: 6/29/07

Motion Submitted: 7/12/07

Motion Sequence: 001

**PLAS TECH ELECTROPLATE, INC. AND
GERALYN R. CANNELLA,**

Defendants.

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Motion by the attorneys for the plaintiff for an Order pursuant to CPLR § 3212 granting summary judgment against the defendants is denied.

This is an action to collect monies due pursuant to two (2) Chase Bank Loans. Plaintiff alleges that defendant Plas Tech Electroplate, Inc. applied and was approved for a Chase Bank Promissory Note (hereinafter "Note 1") on or about February 3, 2004 in the amount of \$40,000.00, and a second Chase Bank Promissory Note (hereinafter "Note 2") on or about January 28, 2004 in the amount of \$20,000.00. Plaintiff alleges defendant Cannella executed a personal guarantee for Note 1 on or about January 21, 2004 and a personal guarantee for Note 2 on or about December 22, 2003. Plaintiff alleges defendant Cannella is personally and individually liable to Chase for any outstanding debt arising under the

Notes. Plaintiff alleges defendant Cannella has defaulted on Note 1 by failing to continue to make payment on the debt since March 29, 2006. A balance of \$563.58 remains unpaid. Plaintiff further alleges defendant Cannella has defaulted on Note 2 by failing to continue to make payment on the debt since January 3, 2006. A balance of \$12,309.78 remains unpaid. Defendant Cannella was the President of defendant Plas Tech Electroplate, Inc. (hereinafter "Plas"). The defendant corporation has not answered any of the pleadings served on it in this matter and is in default. The motion is opposed by defendant GERALYN R. CANNELLA.

Plaintiff seeks summary judgment against defendant Cannella for defaulting on Note 1 and Note 2. In order to recover under the terms of a note, the obligee must establish a *prima facie* case by providing proof of a promissory note and a default on that note. (*MDJR Enters. v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 (2d Dept., 2000); *Layden v. Boccio*, 253 A.D.2d 540, 686 N.Y.S.2d 763 [2d Dept., 1998]). In order to recover under the terms of the guarantee, the obligee must establish a *prima facie* case by providing proof of (1) the underlying obligation; (2) the guarantee; and (3) the failure by the guarantor to make payment in accordance with its terms. (*Key Bank of Long Is. v. Burns*, 162 A.D.2d 501, 502, 556 N.Y.S.2d 829 [2d Dept., 1990]). The plaintiff has not made a *prima facie* showing of entitlement to summary judgment against defendant Cannella under the terms of both the notes and the guarantees.

Paragraph 5 of the complaint alleges:

On or about February 3, 2004, defendant Plas made, executed and delivered to plaintiff, for value received, a Business Revolving Credit Account Agreement (the "BRCA") in writing, dated on that day, wherein and whereby it promised to pay to the order of Chase, the principal sum of up to \$40,000.00 with interest thereon, from the date each draw is made, at a rate per annum equal to plaintiff's prime rate (the "Interest Rate").

The copy of the Business Revolving Credit Account Agreement (hereinafter "BRCA") submitted for the within motion and referred to in paragraph 5 of the complaint is not signed by defendant Plas. It is also undated. Further, Exhibit E that plaintiff's attorney in his affirmation in support refers to as "Note 1" is styled a "Credit Summary" and "Business Revolving Credit Account Agreement" (BRCA). Both documents submitted to the Court are undated and not signed by a representative of defendant Plas or defendant Cannella in her corporate or individual capacity.

Paragraph 17 of the complaint alleges:

On or about February 3, 2004, defendant Plas made, executed and delivered to plaintiff, for value received, a Business Installment Loan Note ("BIL") in writing, dated on that day, wherein and whereby it promised to pay to the order of Chase, the principal sum of \$20,000.00 with interest thereon from the date of the BIL at fixed rate of 4.25% per annum in 60 monthly installments.

Again the copy of the BRCA submitted for the within motion referred to in paragraph 17 of the complaint is not signed by defendant Plas. It is also undated. Moreover, Exhibit "H" that plaintiff's attorney refers to as "Note 2" is also styled a "Credit Summary" and "Business Revolving Credit Account Agreement." Again, both documents are undated and not signed by a representative of defendant Plas or defendant Cannella. The documents submitted by plaintiff called "Business Revolving Credit Account Agreement" are neither Note 1 nor Note 2 as alleged by the plaintiff. Further, the initial paragraph states: "By signing the application for a credit line and using the checks provided by the bank, each company named below has agreed to be bound by this Business Revolving Credit Account Agreement (Agreement) between Company and JPMorgan." It is not clear from the agreement which "application for a credit line" is referenced since more than one credit application was allegedly signed by defendant Cannella on different dates to guarantee the underlying obligations.

Paragraphs 19 and 25 of the complaint allege that demand letters were sent to defendant Plas declaring the entire amount under the Business Installment Loan Note (hereinafter "BIL") to be due and payable. Defendant Cannella alleges she never received a copy of a demand letter. Nowhere in the moving papers does plaintiff present evidence that demand letters were sent. In opposition to the motion, defendant alleges she did not make use of the business revolving credit account with the plaintiff.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement as a matter of law, tendering sufficient evidence to eliminate any material issue of fact. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim." (*Fromme v. Lamour*, 292 A.D.2d 417, 738 N.Y.S.2d 863 [2d Dept.,

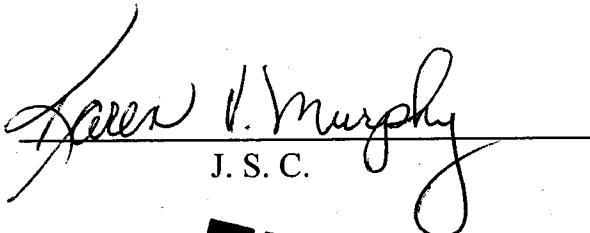
2002]). At the very least, the failure of the plaintiff to submit dated copies of the signed "Notes" (Business Revolving Credit Account Agreement) as well as legible copies of the alleged guarantees referred to in the complaint and affirmation in support preclude the granting of summary judgment.

Defendant's affirmative defense of lack of personal jurisdiction is lacking in merit and unsupported by any probative evidence. The affidavit of service is *prima facie* evidence of proper service. (*Wieck v. Halpern*, 255 A.D.2d 438, 680 N.Y.S.2d 599 [2d Dept., 1998]). Moreover, pursuant to CPLR § 3211(e), an objection that the summons and complaint was not properly served is waived if, having raised such an objection in the verified answer, the objecting party does not move for judgment on that ground within sixty days after serving the verified answer. Defendant's answer was served on or about January 23, 2007. Her sixty (60) days to make a motion have therefore expired and the affirmative defense of lack of personal jurisdiction is dismissed.

All parties and counsel are to appear for a Preliminary Conference in the DCM Part, first floor of the Supreme Court Building, 100 Supreme Court Drive, Mineola, New York on October 16, 2007 at 9:30 A.M.

The foregoing constitutes the Order of this Court.

Dated: September 18, 2007
Mineola, N.Y.


J. S. C.

ENTERED
SEP 21 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE