

Signature Bank v Startup Mgt. Solution, Inc.

2007 NY Slip Op 33614(U)

November 1, 2007

Supreme Court, Nassau County

Docket Number: 0357-07/

Judge: Leonard B. Austin

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INDEX
No. 07-010357

**SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY**

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

**Motion R/D: 8-10-07
Submission Date: 10-29-07
Motion Sequence No.: 001/MOTD**

SIGNATURE BANK,

Plaintiff,

- against -

**COUNSEL FOR PLAINTIFF
Farrell Fritz, P.C.
1320 RexCorp Plaza
Uniondale, NY 11556**

**STARTUP MANAGEMENT SOLUTION,
INC., and JACOB ZILBERMAN,**

Defendants.

**COUNSEL FOR DEFENDANT
NO APPEARANCE**

x

ORDER

The following papers were read on Plaintiff's motion for summary judgment in lieu of complaint:

Notice of Motion dated June 12, 2007;
Affidavit of Scott McGrath sworn to on May 8, 2007; and
Memorandum of Law dated June 7, 2007.

Plaintiff, Signature Bank ("Signature"), moves for summary judgment in lieu of complaint against Defendants, Startup Management Solution, Inc. ("Startup") and Jacob Zilberman ("Zilberman").

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BACKGROUND

On February 9, 2006, Signature and Startup entered into a Business Revolving Credit Account Loan Agreement (“Agreement”). Under the terms of the Agreement, Startup agreed to repay the outstanding principal balance of the amount borrowed along with interest in monthly installments. The Agreement provides that the interest rate will be a fluctuating rate per annum equal to The Wall Street Journal Prime Rate plus 1.00%. Upon default in payment, Signature had the right to accelerate the balance due. Additionally, the terms of the Agreement require Startup to pay reasonable attorneys’ fees incurred by Signature in connection with the enforcement of the Agreement.

Zilberman, an individual residing in Brooklyn, NY, executed a guaranty (“Guaranty”) on February 9, 2006. By executing the guaranty, Zilberman unconditionally guaranteed the payment of the indebtedness owed by Startup under the Agreement as well as any other costs and expenses, including reasonable attorneys’ fees incurred by Signature.

Startup breached the Agreement by failing to pay Signature the principal and interest payments due under the Agreement on December 1, 2006, and on each succeeding month thereafter. In addition, Zilberman defaulted under the Guaranty by failing to pay Signature the amounts owed by Startup under the Agreement on December 1, 2006, and on each succeeding month thereafter.

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Upon the defaults by both Startup and Zilberman, by letters dated December 7, 2006, Signature notified the Defendants of their respective defaults and of Signature's acceleration of the entire outstanding indebtedness owed, and demanded the immediate payment in full of all amounts due.

Defendants have failed to pay Signature any portion of the outstanding indebtedness which totaled \$178,808.29 as of April 30, 2007. This included a principal balance of \$172,172.02 and accrued interest in the amount of \$6,636.27, based on an annual interest rate of 9.25%.

Signature now moves for summary judgment in lieu of complaint pursuant to CPLR 3213.

DISCUSSION

CPLR 3213 is a hybrid procedure which incorporates elements of an action and elements of motion practice. Flushing Nat'l Bank v. Brightside Mfg. Inc., 298 N.Y.S.2d 197 (Sup.Ct. Queens Co. 1969). As with plenary actions, jurisdiction is obtained over a defendant through service pursuant to CPLR Article 3. Goldstein v. Saltzman, 821 N.Y.S.2d 746 (Sup.Ct. Nassau Co. 2006). CPLR 3213 requires that a notice of motion and supporting papers accompany the summons instead of a complaint. Siegel, *New York Practice 4th § 288*.

Pursuant to CPLR 3213, the minimum amount of time a plaintiff must give a defendant to oppose a motion for summary judgment in lieu complaint is established by

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CPLR 320 (a). The method of service will determine the amount of time the defendant must be given to oppose the motion just as it does when determining the amount of time a defendant is given to appear in a plenary action. See, 1 New York Civil Practice: CPLR ¶ 3213.03; and McKinney's Practice Commentaries C3213:5.

In establishing the time in which the defendant may respond to a motion for summary judgment in lieu of complaint, CPLR 3213 begins to resemble motion practice under CPLR Article 22. As with motion practice, under CPLR 2214, the movant must select a specific return date on which the motion is to be heard taking into account a demand for answering papers in advance of the motion's return date. Likewise, a party moving pursuant to CPLR 3213 can demand answering papers be served in advance of the return date. However, the plaintiff is restrained to demanding answering papers no earlier than ten days prior to the return date. A movant under CPLR 3213, seeking answering papers in advance must add that number of days to the return date. For example, if the defendant is a natural person and is personally served within New York on October 1, the hearing of the motion cannot be set for a date earlier than October 21. If the Plaintiff requests to receive the answering papers ten days in advance of the hearing date, the date of the hearing of the motion cannot be earlier than October 31.

In the case at bar, Signature has satisfied the CPLR 3213 procedural requirements with regard to Startup; but not to Zilberman. Startup was served through the New York Secretary of State on June 26, 2007. See, BCL § 306. Signature set an

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original return date of August 10, 2007 and demanded answering papers ten days in advance of the return date. CPLR 320(a) allows defendants served pursuant to BCL § 306 thirty days to appear. Startup was thus entitled to forty days to oppose the motion for summary judgment in lieu of complaint. By granting Startup forty-five days between service and the original return date, Signature satisfied the requirements of CPLR 3213.

However, there is no evidence that Zilberman has ever been served with the summons and notice of the motion for summary judgment in lieu of complaint. Thus, Zilberman has not been brought within the jurisdiction of this Court. Thus, this Court will sever the claims against Ziberman and deny summary judgment.

Substantively, CPLR 3213 requires the action be based upon an instrument for the payment of money. It has been held in numerous court decisions that the instrument in question does not qualify under CPLR 3213 if any proof outside of the instrument itself is necessary. See, e.g., Channel Excavators, Inc. v. Amato Trucking Corp., 264 N.Y.S.2d 987 (Sup.Ct. Nassau Co. 1965). Courts have also recognized promissory notes as instruments for the payment of money only. Bank Leumi Trust Co. v. Rattet & Liebman, 182 A.D.2d 541 (1st Dept. 1992).

Plaintiff shall establish a *prima facie* case by showing proof of (1) a promissory note executed by defendant which states unequivocal and unconditional obligations to repay and (2) the Defendant's default. Constructamax, Inc. v. CBA Assoc., Inc., 294

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A.D.2d 460 (2nd Dept. 2002); and Colonial Commercial Corp. v. Breskel Assoc., 238 A.D.2d 539 (2nd Dept. 1997). See also, Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968), *aff'd.*, 29 N.Y.2d 617 (1971) (holding a *prima facie* case is made out by proof of the written instrument and a failure to make the payments called for by its terms).

In a case similar to the one at bar, a simple loan agreement for the payment of money qualified for a CPLR 3213 motion because no proof outside of the face of the document itself, other than that of nonpayment, was needed to prove a *prima facie* case. Valencia Sportswear, Inc. v. D.S.G. Enterprises, Inc., 237 A.D.2d 171 (1st Dept. 1997). Likewise, where liability is predicated upon the simple terms of a written agreement for the payment of money along with proof of nonpayment, a motion for summary judgment in lieu of complaint under CPLR 3213 will be granted. North Fork Bank & Trust Co. v. Cardiff Rose Enterprises, Inc., 104 A.D.2d 932 (2nd Dept. 1984). Moreover, loan agreements that contain an “unambiguous and unconditional promise to pay a specified sum on a specified date” are instruments for the payment of money only within the meaning of CPLR 3213. DH Cattle Holdings Co. v. Kuntz, 165 A.D.2d 568, (3rd Dept. 1991).

Once the plaintiff has carried its burden of establishing a *prima facie* case, the defendant must establish a genuine issue of fact exists. SCP (Bermuda) Inc. v. Bermudatel Ltd., 224 A.D.2d 214 (1st Dept. 1996). Startup has failed to oppose the

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Plaintiff's motion and is thus in default. Therefore, summary judgment in lieu of complaint against Startup is warranted.

Signature also seeks to recover attorneys' fees it has incurred as a result of prosecuting this action. The terms of the Agreement provide that Startup is responsible for reasonable attorneys' fees which Signature may incur to enforce the Agreement. Such provisions are valid and will be enforced. Arent, Fox, Kinter, Plotkin & Kahn, PLLC v. Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002). However, attorneys' fees cannot be considered as a sum certain. Lonstein v. Seeman, 112 A.D.2d 566 (3rd Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See, Simoni v. Time-Line, Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridge Development Corp., 270 A.D.2d 377 (2nd Dept. 2000). The issue of attorneys fees is thus referred to a Special Referee to hear and determine the amount of legal fees to which Signature is entitled.

Accordingly, it is,

ORDERED, that Plaintiff's motion for summary judgment in lieu of complaint against Defendant, Startup Management Solution, Inc. is **granted**; and it is further,

ORDERED, that the matter of reasonable attorneys fees is referred to the Special Referee, Thomas V. Dana, on December 13, 2007 at 10:00 a.m. to hear and determine all issues relating to the award of reasonable attorneys fees; and it is further,

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ORDERED, that Plaintiff's counsel shall serve upon the attorneys for the Defendant Startup and file with the Clerk of the Court, a copy of this Order with Notice of Entry and a Notice of Inquest, and shall pay the appropriate filing fees on or before November 28, 2007; and it is further,

ORDERED, that upon the determination of attorneys fees by the Special Referee, the Nassau County Clerk is directed to enter judgment in favor of Plaintiff, Signature Bank and against Defendant, Startup Management Solution, Inc. in the amount of \$172,172.02 and accrued interest at the rate of 9.25% from the date of default, December 1, 2006, until the date the judgment is entered together with reasonable attorneys fees determined by the Special Referee and costs and disbursements as taxed by the Clerk; and it is further,

ORDERED, that Plaintiff's motion for summary judgment in lieu of complaint against Defendant, Jacob Zilberman, is **denied**.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
November 1, 2007



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
NOV 07 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE