At an IAS Term, Part 45 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of April, 2008.

P R E S E N T:

HON. ANN T. PFAU,

Justice.

----------X

BROWN BARK I, L.P., AS SUCCESSOR IN INTEREST TO BANK OF AMERICA, N.A., SUCCESSOR IN INTEREST TO FLEET BANK,

Plaintiff,

- against -

Index No. 18259/07

WESTSIDE HOME IMPROVEMENTS INC., et ano.,

Defendants.

----------X

The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 5
Opposing Affidavits (Affirmations)	6- 7
Reply Affidavits (Affirmations)	8- 9
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action by plaintiff Brown Bark I, L.P., as successor in interest to Bank of America, N.A., successor in interest to Fleet Bank (Brown Bark) against defendants Westside Home Improvements Inc. (Westside) and Harold Lapa (Lapa) (collectively, defendants) to recover payment of the balance of principal and interest owed by Westside pursuant to a line of credit note and credit agreement, and alleging claims of a breach of Westside's obligations under that agreement, an entitlement to attorneys' fees, a

breach of a permanent guaranty by Lapa, and an account stated, Brown Bark moves for an order, pursuant to CPLR 3211, dismissing all of defendants' affirmative defenses and, pursuant to CPLR 3212, granting it summary judgment in its favor.

Factual Background

On May 22, 2007, Brown Bark filed this action against Westside and Lapa. Brown Bark's complaint alleges that on August 13, 2001, Westside applied to Fleet Bank for a business line of credit in the principal amount of $100,000, pursuant to the terms of a Line of Credit Note and a Fleet Bank Line of Credit Agreement (collectively, the Agreement). It further alleges that under the terms of the Agreement, Fleet Bank loaned Westside the principal sum of $100,000, and Westside accepted the terms of the Agreement by using the line of credit offered by Fleet Bank. It sets forth that in consideration of the Agreement, Westside agreed to repay to Fleet Bank all amounts borrowed from Fleet Bank by Westside, together with any and all accrued finance charges thereon, as well as any and all other fees and charges thereon.

Brown Bark's complaint also alleges that Fleet Bank then merged with and into Bank of America, N.A. (Bank of America), and that Bank of America acquired all of Fleet Bank's right, title, and interest in and to the Agreement, including Fleet Bank's right to receive all payments due and to become due from Westside pursuant to the Agreement. It further alleges that on October 24, 2006, Bank of America, for good and valuable consideration, sold, assigned, and transferred to Brown Bark all of its right, title, and

interest in and to the Agreement, including its right to receive all payments due and to become due from Westside pursuant to the Agreement.

According to Brown Bark's complaint, Westside defaulted on and breached its obligations under the Agreement by failing to make the payments when due pursuant to the Agreement, by failing to repay the required finance charges, principal, and other charges when due pursuant to the Agreement, and by failing to make any further payments thereunder. Brown Bark, therefore, elected to declare all of Westside's obligations under the Agreement due and payable. The balance of principal and interest remaining due on October 24, 2006, at the time that Bank of America sold, assigned, and transferred its interest in the Agreement to Brown Bark was $101,922.78. Brown Bark asserts that Westside has failed and refused to pay it this balance due under the Agreement in the sum of $101,922.78, plus interest thereon from October 24, 2006. Brown Bark's first cause of action seeks recovery of this sum.

Brown Bark's second cause of action alleges that pursuant to the Agreement, Westside agreed to pay it all reasonable attorneys' fees and expenses incurred by it in collecting the amounts due and owing under the Agreement. It seeks recovery of these attorneys' fees and expenses.

Brown Bark's third cause of action alleges that on August 13, 2001, Lapa executed a written personal guaranty (the Guaranty), pursuant to which Lapa personally and unconditionally agreed to pay all of Westside's obligations under the Agreement. It

asserts that Bank of America, thereafter, acquired all of Fleet Bank's right, title, and interest in the Guaranty, and that, on October 24, 2006, Bank of America sold, assigned, and transferred to Brown Bark all of Bank of America's right, title, and interest in the Guaranty. It seeks, based upon the Guaranty, recovery from Lapa of the sum of $101,922.78, plus interest thereon from October 24, 2006, and all reasonable attorneys' fees and expenses incurred by Brown Bark in collecting the amounts due and owing under the Agreement and the Guaranty.

Brown Bark's fourth cause of action alleges an account stated between defendants and Brown Bark based upon a letter dated November 8, 2006, in which Brown Bark demanded the principal sum of $95,237 plus accrued unpaid interest in the sum of $6,918.88. It seeks a total payment of $102,155.88, plus interest thereon from November 8, 2006, predicated on a theory of an account stated.

Defendants interposed an answer dated June 28, 2007, which contained general denials, but no affirmative defenses. Thereafter, Brown Bark brought this motion for summary judgment.

In support of its instant motion, Brown Bark has submitted the sworn affidavit, dated October 9, 2007, of James M. Hrebenar (Hrebenar), the executive vice-president and chief operating officer of NC Bark I, LLC, the general partner of Brown Bark. Hrebenar attests that in August 2001, Westside applied to Fleet Bank for a business line of credit in the principal amount of $100,000 pursuant to the Agreement, and annexes a

copy of the Agreement as well as a document containing further terms and conditions of the Agreement.

Hrebenar, in his affidavit, explains that Fleet Bank merged with and into Bank of America, and Bank of America acquired all of Fleet Bank's right, title, and interest in and to the Agreement, including Fleet Bank's right to receive all payments due and to become due from Westside pursuant to the Agreement. Hrebenar's Affidavit annexes documents demonstrating the merger. These documents include a letter dated June 8, 2005, from the Comptroller of the Currency Administrator of National Banks, which states that it is the official certification for the merger of Fleet National Bank into and under the charter and title of Bank of America. Also included as documentary evidence of the merger is an Order Approving the Merger of Bank Holding Companies, effective March 8, 2004, which sets forth Bank of America's request for the Bank's approval to merge with FleetBoston Financial Corporation and to acquire its subsidiary banks, Fleet National Bank, and Fleet Maine. Finally, attached as further evidence is a list of New Jersey Bank Mergers as of February 6, 2006, which sets forth the acquisition of Fleet National Bank by Bank of America.

Hrebenar's Affidavit also states that on October 24, 2006, Bank of America sold, assigned, and transferred to Brown Bark all of its right, title, and interest to receive all payments due and to become due from Westside pursuant to the Agreement. He annexes a

copy of an Allonge, which evidences the assignment, and refers to a Bill of Sale from Bank of America to Brown Bark.

The Allonge was executed on November 2, 2006 by Kimberly H. Blackwelder (Blackwelder), as the assistant vice-president of Bank of America, successor to Fleet Bank. The Allonge states that "[t]his Allonge is attached and made a part of that certain indebtedness dated [August] 13[,] 2001 . . . executed and given by Westside . . . in the original amount of $100,000." It provides for payment of this indebtedness to the order of Brown Bark. The Bill of Sale, dated November 1, 2006, executed by Tamara J. Massey (Massey), the senior vice-president of Bank of America (and which is notarized), provides that Bank of America, for value received, and pursuant to the terms and conditions of a loan sale agreement between Bank of America and Brown Bark dated October 24, 2006, "does hereby sell, assign and convey to [Brown Bark], its successors and assigns, all [of its] right, title and interest . . . in and to those certain loans . . . described in Exhibit 'A.'" Exhibit A, a Schedule to the Bill of Sale, lists, among these loans, one from Westside Home Development Inc.

Hrebenar also states that Westside defaulted and breached its obligations under the Agreement by failing to make the requisite payments when due pursuant to the Agreement, and that Brown Bark elected to declare all of the obligations immediately due and payable. Hrebenar states that under the Agreement, Westside is indebted to Brown

Bark for all reasonable attorneys' fees and expenses incurred by Brown Bark in collecting the amounts due and owing to it under the Agreement.

Hrebenar's Affidavit also annexes a copy of the Guaranty executed by Lapa. The Guaranty provides that Lapa unconditionally guaranteed Fleet Bank, and its successors and assigns, payment of all present and future obligations. Hrebenar asserts that demand for payment was given under the Guaranty, but no payment was made. In addition, Hrebenar's Affidavit annexes a copy of the November 8, 2006, letter upon which Brown Bark bases its cause of action for an account stated. This letter, from Brad Hrebenar, informed Westside that it had purchased a portfolio of loans from Bank of America and that the loan to it was included in this portfolio. Brad Hrebenar, in that letter, further states that according to the records received by Brown Bark, the total outstanding principal balance, at that time was $95,237, plus all accrued unpaid interest. He requests, in that letter, that Westside let Brown Bark know if it disputes the validity of the debt or any portion thereof.

Brown Bark, in further support of its motion, has also submitted the Declaration, dated October 30, 2007, of Tamara J. Laughinghouse (Laughinghouse), the senior vice-president of Bank of America. Laughinghouse states that Bank of America is the successor to Fleet National Bank, which is the successor to Fleet Bank, and that by virtue of these mergers, Bank of America acquired all of the assets of Fleet National Bank and its predecessors, including the subject loan instrument. She annexes the credit application

and authorization agreement evidencing the loan signed by Lapa, as president and owner of Westside, and refers to the written personal Guaranty executed by Lapa. She further asserts that by way of a Loan Sale Agreement dated October 24, 2006, Bank of America sold the subject loan and Guaranty to Brown Bark, and refers to the Allonge as evidence of the assignment. Laughinghouse states that at the time that the loan was sold to Brown Bark, the loan was in default and the outstanding principal balance of the loan was $95,237.11.

Since the Agreement and the Guaranty are copies of the original documents, Brown Bark has submitted a notarized Lost Instrument Affidavit, executed on November 2, 2006, by Blackwelder. Blackwelder attests, in this affidavit, that Bank of America is the lawful owner of the instrument, executed by Westside on August 13, 2001, with an obligation to pay the original principal sum of $100,000 to the order of Fleet Bank. Blackwelder has attached a copy of that instrument to this affidavit, and she explains that the original instrument has been lost, mislaid, or inadvertently destroyed. Blackwelder further states, in this affidavit, that "[t]his Affidavit [was] made for the purpose of inducing Brown Bark . . . to purchase Bank [of America's] right, title, and interest in and to the instrument and to become the holder thereof," and that "[t]he instrument . . . is transferred."

Brown Bark asserts that it has incurred legal fees of $2,100 for performing 10.5 hours of legal services relating to this matter at the regular hourly billing rate of $200 per

hour, and $745.30 for expenses, for a total sum of $2,845.30. It has submitted invoices listing in detail the dates the services were performed, a description of the services, the time spent, its billing rate, and the amount billed for the services.

Analysis

On a motion for summary judgment, the movant must make a prima facie showing, by tendering evidentiary proof in admissible form, of its entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). After the movant has made this prima facie showing, the burden shifts to the opposing party to demonstrate the existence of a genuine material triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562).

Defendants, in opposition to Brown Bark's motion, only submit their attorney's affirmation. They have not submitted an affidavit by anyone with personal knowledge to dispute the salient facts, as averred by Brown Bark, that they entered into and breached the Agreement and the Guaranty. Defendants have also failed to annex any documentary evidence to contradict the evidence that defendants executed the Agreement and the Guaranty, that they borrowed monies from Brown Bark's assignors, and that they thereafter breached the Agreement and the Guaranty. In addition, defendants do not deny the receipt of the November 8, 2006 letter, the validity of the debt, or the amount owed by them.

Defendants, instead, contend that the Hrebenar Affidavit, which was notarized in Texas, the Laughinghouse Declaration, which was notarized in North Carolina, and Blackwelder's November 2, 2006 Lost Instrument Affidavit, which was notarized in Oklahoma, are not in admissible form because each of them lacks a certificate of conformity pursuant to CPLR 2309(c). They argue that based upon the alleged inadmissibility of these submissions, Brown Bark cannot make a sufficient prima facie showing to obtain summary judgment.

Defendants' argument is without merit. An affidavit which lacks the certificate authenticating the authority of the notary who administered the oath, as required by CPLR 2309(c), may be considered on a summary judgment motion despite this technical defect since it is not "a fatal defect," but a mere defect in form which can be given nunc pro tunc effect once properly acknowledged (*Smith v Allstate Ins. Co.*, 38 AD3d 522, 523 [2007]; *see also* CPLR 2001; *Falah v Stop & Shop Cos.*, 41 AD3d 638, 639 [2007]; *Sparaco v Sparaco*, 309 AD2d 1029, 1031 [2003]; *Nandy v Albany Med. Ctr. Hosp.*, 155 AD2d 833, 834 [1989]; *Pavon v 19th St. Assoc. LLC*, 17 Misc 3d 1125 [A], 2007 NY Slip Op 52144 [U], *8 [2007]). Indeed, it has even been held that when the person administering the oath for an out-of state affidavit is a notary, the affidavit does not require a certificate authenticating the notary's authority (*see Ford Motor Credit Co. v Prestige Gown Cleaning Serv.*, 193 Misc 2d 262, 263 [2002]; *Firstcom Broadcast Servs. v New York Sound*, 184 Misc 2d 524, 525 [2000]).

Defendants have not disputed the authority of the notaries or the truthfulness and accuracy of any of the statements made in Hrebenar's and Blackwelder's Affidavits, or Laughinghouse's Declaration, or the Bill of Sale executed by Massey (which is also notarized by an out-of-state notary), nor have they demonstrated any prejudice whatsoever resulting from the sole technical defect they have identified (*see Sparaco*, 309 AD2d at 1031). Thus, since the content of the documents submitted is critical than their form, defendants cannot be permitted to seize upon the technical requirements of CPLR 2309(c) to create delay and avoid summary judgment (*see Falah*, 41 AD3d at 639; *Smith*, 38 AD3d at 523; *Nandy*, 155 AD2d at 834).

Defendants also argue that Laughinghouse's Declaration is inadmissible because it does not state that it is sworn to by her. This argument must likewise be rejected. "There is no specific form of oath [for affidavits] required in this State" (*Collins v AA Truck Renting Corp.*, 209 AD2d 363, 363 [1994]; *see also* CPLR 2309[b]; *Magro v He Yin Huang*, 8 AD3d 245, 247 [2004]; *Sparaco*, 309 AD2d at 1030; *People v Wilson*, 255 AD2d 612, 613 [1998]). While Laughinghouse's Declaration does not contain the word "sworn," Laughinghouse states that she has "personal knowledge of each of the . . . facts," and "[if] called upon to do so, [she] could and would testify to" the facts contained in her Declaration. Furthermore, Laughinghouse's Declaration is notarized. Consequently, Laughinghouse's Declaration is admissible and of probative value to demonstrate the existence of the Agreement and the Guaranty, defendants' indebtedness

thereunder, the chain of title to these instruments, and defendants' breach thereof (*see Collins*, 209 AD2d at 363; *Matter of Quintyne v Canary*, 104 AD2d 473, 475 [1984]).

Moreover, in addition to Hrebenar's Affidavit and Laughinghouse's Declaration, Brown Bark has submitted documentary evidence, which is consistent with the assertions made in the affidavit and the Declaration, and which demonstrate the existence and validity of the Agreement and the Guaranty and the sums due and owing thereunder. As noted above, defendants, in response, have submitted no evidence to dispute their entry into the Agreement and the Guaranty, the validity of the documents submitted, the amount of the debt owed, and their failure to make payment of the amount claimed to be due. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *see also Arteaga v 231/249 W 39 St. Corp.*, 45 AD3d 320, 321 [2007]; *Tortorello v Carlin*, 260 AD2d 201, 206 [1999]).

Defendants argue, though, with respect to Brown Bark's proof, that one who is not an employee of the original creditor cannot authenticate documents of the original creditor. New York appellate courts, however, have rejected "the argument . . . that the affidavit of a [custodian of the records] based on records maintained by [the corporation] in the ordinary course of business d[oes] not constitute admissible evidence sufficient to establish a valid defense" (*Hospital for Joint Diseases v ELRAC, Inc.*, 11 AD3d 432, 433 [2004]; *see also DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146, 146 [2003]; *First*

Interstate Credit Alliance v Sokol, 179 AD2d 583, 584 [1992]). Furthermore, "[i]t is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity's files" (*DeLeon*, 306 AD2d at 146; *see also First Interstate Credit Alliance*, 179 AD2d at 584; *Rose Med. Acupuncture Servs. P.C. v Specialized Risk Mgt.*, 4 Misc 3d 1027[A], 2004 NY Slip Op 51078 [U], *2-3 [2004]).

James Hrebenar, as noted above, is the executive vice-president and chief operating officer of NC Bark I, LLC (the general partner of Brown Bark), and he attests that he is one of the custodians of Brown Bark's books, records, and files, including computer records. He further attests that it is Brown Bark's custom and practice to keep such records, and that such records are kept in the ordinary course of Brown Bark's business. He, thus, has demonstrated that he is sufficiently familiar with the business records submitted to aver that they are what they purport to be and that they came out of Brown Bark's files, thereby supporting the validity and authenticity of these documents (*see Hospital for Joint Diseases*, 11 AD3d at 433; *DeLeon,* 306 AD2d at 146; *First Interstate Credit Alliance*, 179 AD2d at 584).

Defendants argue that the Lost Instrument Affidavit is deficient because Blackwelder of Bank of America does not state that she ever saw the original documents,

and does not explain the basis for her claim that the copies submitted are true copies. This argument must likewise be rejected since it appears that the records submitted were kept in the ordinary course of Bank of America's commercial business, and defendants have not denied their execution of these documents or stated that these copies of the documents in any way differ from those originally and actually executed by them.

Thus, Brown Bark, as a purchaser of commercial instruments, such as the Agreement and the Guaranty, is entitled to rely upon the representations of the assignor bank, which, based upon the custodian of its assignor's records, are sufficient to document the transactions (*see Chemical Bank of Rochester v Haskell*, 51 NY2d 85, 93 [1980]). Consequently, the affidavit of the custodian of Brown Bark's records and the affidavit of the custodian of Brown Bark's assignor's records sufficiently establish the relevant details of the underlying transactions to support Brown Bark's motion for summary judgment.

Defendants contend, however, that Brown Bark has not introduced evidence that it is the successor to the original creditor, Fleet Bank. They claim that there is an inconsistency between Hrebenar's Affidavit and Laughinghouse's Declaration because Hrebenar states that Fleet Bank merged into Bank of America, whereas Laughinghouse states that Bank of America is the successor to Fleet National Bank, and that Fleet National Bank is a successor to Fleet Bank. They state that Fleet Bank and Fleet National Bank are different entities.

Defendants' reliance on this perceived inconsistency is misplaced. It is uncontroverted and established by the documents submitted that Bank of America acquired all of the various Fleet Bank entities pursuant to a series of mergers and all of the various entities under the Fleet umbrella are now owned by Bank of America. There is no evidence of, or even any allegation that there is, any existing Fleet entity which was not acquired by Bank of America in the mergers.

Defendants further assert that the list of New Jersey Bank Mergers indicates that Fleet Bank, National Association–not Fleet Bank–was acquired by Fleet National Bank in September 2000. They argue that, therefore, at the time Westside applied for a credit line in August 2001, Fleet Bank, National Association was a non-existent entity since it was acquired by Fleet National Bank almost a year earlier.

This argument is similarly without merit. Brown Bark's documentary evidence shows that the Agreement was entered into with Fleet Bank– not Fleet Bank, National Association– and as discussed above, the New Jersey Bank Mergers document shows that Fleet National Bank, which was a successor to Fleet Bank, was acquired by Bank of America.

Defendants also contend that there is confusion as to whether (a) Fleet Bank, National Association, (b) Fleet Bank, or (c) Fleet National Bank was the original creditor. They argue that, therefore, Brown Bark has not established that it is entitled to collect any debt which was once due to Fleet Bank. Defendants maintain that demonstrating proof of

ownership of the debt is crucial since, otherwise, they will not be protected against other parties.

Defendants' argument is unavailing. Defendants have not shown that any other entity claims to own rights to the Agreement or the Guaranty at issue or has made any attempt to collect upon them. Furthermore, Brown Bark has submitted a portion of a Form 10-K405 filing of one of the Fleet entities (i.e., Fleet Boston Financial Corp.), which noted that Fleet Financial Group, Inc. was engaged in general commercial banking and trust business through its banking subsidiaries. The form lists these banking subsidiaries as including (a) Fleet National Bank, (b) "Fleet Bank ('Fleet–New York')," and (c) Fleet Bank, National Association. The form thus indicates on its face that Fleet-New York was also referred to as Fleet Bank.

Moreover, as set forth in Laughinghouse's Declaration, Bank of America acquired all of the assets of the various Fleet Bank entities, including the Agreement and the Guaranty, pursuant to a merger of the bank holding companies. Both the Allonge and the Lost Instrument Affidavit attest that after Bank of America acquired the Agreement and the Guaranty from Fleet Bank, for good and valuable consideration, Bank of America assigned all of its right, title, and interest to the Agreement and the Guaranty to Brown Bark. The Bill of Sale also demonstrates the assignment of the Agreement and the Guaranty from Bank of America to Brown Bark.

A party opposing a motion for summary judgment must assemble, lay bare, and reveal its proof, and demonstrate the existence of a genuine issue of fact that requires a trial of the action (*see Alvarez*, 68 NY2d at 324; *Northside Sav. Bank v Sokol*, 183 AD2d 816, 816 [1992]; *Sony Corp. of Am. v American Express Co.*, 115 Misc 2d 1060, 1065 [1982]). In doing so, the party "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [it] rests [its] defense" or "[it] must demonstrate [an] acceptable excuse for [its] failure to meet th[is] requirement." (*Zuckerman*, 49 NY2d at 562). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*id.*). Here, defendants have failed to raise any triable issue of fact refuting Brown Bark's prima facie showing that Bank of America acquired the Agreement and the Guaranty as part of its merger with, and acquisition of Fleet Bank, and that these instruments were subsequently transferred to Brown Bark.

Defendants' attorney argues that the Schedule attached to the Bill of Sale indicates that Brown Bark purchased a debt of Westside Home Development, Inc., rather than the named defendant, Westside Home Improvements Inc. Defendants' attorney speculates that Brown Bark purchased the debt of an entity other than the Westside entity who is the defendant herein.

This argument must be rejected. Defendants have failed to submit an affidavit by anyone with personal knowledge of the facts that Westside Home Development, Inc. is a

different entity than the named Westside defendant, and defendants' attorney's unsubstantiated speculation is insufficient to raise a triable issue as to the identity of the Westside defendant. There is thus no showing that such a minor variation in the name listed on the Schedule was other than a mere typographical error, particularly in view of the fact that all of the other documentary evidence reflects the name of the correct defendant. In addition, the affidavits and documentary evidence indicate that some of the debt had been paid by Westside since only $95,237 of the principal amount remains owed. Therefore, Brown Bark's proof regarding its purchase of the debt at issue which was incurred by Westside remains unrefuted.

Defendants also assert that the Bill of Sale and the Schedule attached to it, and the Form 10-K405 should not be considered by the court because they were first submitted in Brown Bark's reply papers. Such argument is unavailing. Brown Bark referred to the Bill of Sale in Hrebenar's Affidavit, and it annexed the Form 10-K405 to its reply affirmation to respond to specific arguments regarding the merger raised by defendants in their attorney's affirmation in opposition to the motion (*see Navarrete v A & V Pasta Prods., Inc.*, 32 AD3d 1003, 1004 [2006]). Furthermore, defendants are not in any way prejudiced by the submission of these documents in Brown Bark's reply papers because they had a fair opportunity to, and did, address them in a further affirmation in opposition to Brown Bark's motion (*see Guarneri v St. John*, 18 AD3d 813, 813-814 [2005]; *Matter*

of Hayden v County of Nassau, 16 AD3d 415, 416 [2005]; *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 477 [2001]).

Defendants additionally assert that Brown Bark has not complied with their Combined Disclosure and Discovery Demands, which they served on Brown Bark on July 3, 2007. They claim that Brown Bark has not furnished them with documents which could clarify who is the alleged original creditor and the chain of successors. Defendants contend that due to their allegedly outstanding discovery demands, Brown Bark's motion for summary judgment should be denied as premature.

Defendants' contention is without merit. The identity of the original creditor is not exclusively within Brown Bark's knowledge since defendants executed the Agreement and the Guaranty and were aware of the original entity from which Westside received a line of credit (*see Avraham v Allied Realty Corp.*, 8 AD3d 1079, 1079 [2004]; *Franklin v Dormitory Auth. of State of N.Y.*, 291 AD2d 854, 854 [2002]; *Maron v Hillside Children's Ctr.*, 247 AD2d 871, 871 [1998]).

Moreover, Brown Bark asserts that it has already produced, on this motion, all of the relevant documents in their possession relating to the Agreement and the Guaranty, which had been requested in defendants' Combined Disclosure and Discovery Demands. As discussed above, it has introduced sufficient documentary evidence regarding the chain of successors to the ownership of the Agreement and the Guaranty, and defendants have not shown an evidentiary basis to suggest that discovery may lead to any relevant

evidence to raise a triable issue of fact in this regard, or which support any defense (*see* CPLR 3212[f]; *Landes v Sullivan*, 235 AD2d 657, 658 [1997]; *Castrol, Inc. v Parm Trading Co. of N.Y.C.*, 228 AD2d 633, 634 [1996]; *Weeden v First Nat'l Bank of Long Is.*, 227 AD2d 398, 399 [1996]).

Finally, defendants argue that since Brown Bark purchased the debt and is collecting on it, Brown Bark is a debt collection agency as defined in the Administrative Code of the City of New York § 20-489(a). Defendants contend that Brown Bark, as a debt collection agency conducting business in New York City, was required to be licensed by the New York City Department of Consumer Affairs pursuant to Administrative Code § 20-490. They further contend that Brown Bark's failure to specifically plead the licensing information in its complaint, pursuant to CPLR 3015(e), requires the denial of Brown Bark's motion for summary judgment.

Defendants' contention is devoid of merit. Administrative Code § 20-489(a) defines a debt collection agency as "a person engaged in business the principal purpose of which is to regularly collect or attempt to collect debts owed as due or asserted to be owed or due *to another*" (emphasis added). Here, Brown Bark is not collecting a debt "owed or due to another," but is collecting upon the debt which it purchased from Bank of America and now owns in its own name. Therefore, Brown Bark is not a debt collection agency and is not subject to the requirements of Administrative Code § 20-490.

While Brown Bark's motion seeks an order dismissing all of defendants' affirmative defenses, no defenses have been interposed by defendants. With respect to Brown Bark's motion insofar as it seeks summary judgment, since Brown Bark has established, by the unrefuted documentary evidence, the existence of the Agreement and the Guaranty between defendants and Brown Bark's predecessor, the terms and conditions of the Agreement and the Guaranty, the chain of title of these instruments from Brown Bark's assignors to Brown Bark, and the damages sustained by Brown Bark as a result of defendants' breach of the Agreement and the Guaranty, Brown Bark is entitled to summary judgment in its favor against defendants based upon a breach of the Agreement and the Guaranty (its first and third causes of action) in the amount of $101,922.78, plus interest thereon from October 24, 2006 (*see* CPLR 3212[b]).

As to Brown Bark's fourth cause of action for an account stated, it is well settled that in order to establish a prima facie claim for an account stated, a plaintiff must show that it delivered one or more invoices for the amount claimed to the defendant, and that the defendant retained the stated account without objecting within a reasonable time (*see Manhattan Telecom. Corp. v Best Payphones*, 299 AD2d 178, 178 [2002]; *Budgewood Laundry Serv. v Dorset Hotel Corp.*, 249 AD2d 85, 85-86 [1998]; *Ruskin, Moscou, Evans & Faltischek v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1996]; *Commissioners of State Ins. Fund v Kassas*, 5 Misc 3d 1012[A], 2004 NY Slip Op 51337[U], *1-2 [2004]). Here, defendants do not deny that they received the November 8, 2006 letter, which set

forth the amount due and owing, and that they made no objection to it within a reasonable time. Consequently, summary judgment in Brown Bark's favor on its fourth cause of action is also warranted (*see* CPLR 3212[b]; *Manhattan Telecom. Corp.*, 299 AD2d at 178).

With respect to Brown Bark's second cause of action for attorneys' fees and expenses, defendants, pursuant to the Agreement and the Guaranty, expressly agreed to pay all attorneys' fees and expenses incurred by Brown Bark in collecting the amounts due and owing under the Agreement and the Guaranty. As set forth above, Brown Bark has submitted invoices which specifically document and detail the work performed and the $2,100 in attorneys' fees and $745.30 in expenses incurred by it in connection with this action. It also has submitted its attorney's affirmation, which sets forth the work performed and the time spent performing legal services. Its attorney also affirms that the hourly rate charged is consistent with the hourly rates normally charged by practitioners of commercial litigation in this locality.

While a hearing is often necessary to determine the amount of an award of reasonable attorneys' fees, "a hearing is not required in all circumstances." (*SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986, 988 [2006] quoting *Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376, 378 [1996]) (hearing is not required where the court has sufficient evidence upon which to assess the reasonable value of attorney's fees for services rendered). This should include a sufficient affidavit of services, detailing the

hours reasonably expended and the work performed (*see SO/Bluestar, LLC,* 33 AD3d at 988).

Here, defendants do not challenge the number of hours billed, the tasks performed, or the rate charged, nor do they in any way aver that the attorneys' fees requested are excessive. Thus, no issue of fact is raised which would warrant a hearing on this issue (*see Banco do Estado de Sao Paulo v Mendes Jr. Intl. Co.*, 249 AD2d 137, 139 [1998]; *Old Paris, Inc. v G.E.B.M. Intl.,* 170 AD2d 392, 393 [1991]; *Matter of Simithis v 4 Keys Leasing & Maint.*, 151 AD2d 339, 342 [1989]). In any event, based upon the court's independent review of the submitted invoices, the court finds that the total fee requested is reasonable under the circumstances (*see Banco do Estado de Sao Paulo,* 249 AD2d at 139). Thus, Brown Bark is entitled to receive the sum of $2,845.30 as requested.

Accordingly, Brown Bark's motion for summary judgment in its favor in the sum of $101,922.78, plus interest thereon from October 24, 2006, and $2,845.30 in reasonable attorneys' fees and expenses, is granted.

This constitutes the decision, order, and judgment of the court.

ENTER,

J. S.C.

HON. ANN T. PFAU
J.S.C.