

Golden First Bank v Madison Star Couture, Inc.

2008 NY Slip Op 31778(U)

June 16, 2008

Supreme Court, Nassau County

Docket Number: 3503-08/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

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

Present:

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

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GOLDEN FIRST BANK,

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 3503/08

MOTION DATE: 3-31-08

SUBMIT DATE: 5-28-08

SEQ. NUMBER - 001

**MADISON STAR COUTURE, INC.,
TANIEKA MISA HYLTON, AKA
TANIEKA MISA HOOTEN, CHYNA
DOLL ENTERPRISES, INC.,**

Defendants

-----X

The following papers have been read on this motion:

- Notice of Motion, dated 2-21-08.....1**
- Memorandum of Law in Support, dated 2-21-08.....2**
- Affirmation in Opposition, dated 5-23-08.....3**

This motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted. Let judgment be entered against the defendants in the amount of \$239,301.18, with interest as set forth in the note from February 15, 2008 to entry of such judgment, together with attorney's fees, as established upon inquest as directed in this order. Entry of judgment shall be held in abeyance pending the outcome of the inquest. Should plaintiff elect to waive such fees, however, judgment may be entered on this order alone upon a statement to the

Clerk of such waiver.

The plaintiff has presented a promissory note made by defendant Madison Star Couture, Inc. ("Madison Star"), and a guarantee made by defendants Tanieka Misa Hooten and Chyna Doll Enterprises, Inc., for payment of \$235,000 as the maximum credit available upon borrowing requests that might be made by the maker of the note. Pursuant to this instrument, at section 9, if any amount payable was not paid within 15 days after the due date, a default has occurred, and the lender then had the option to seek the entire debt due without notice or demand. Section 10 provides for payment of attorney's fees incurred in collection of the debt.

The plaintiff also presents the affidavit of one of its officers, Ivan Miller, who states he is personally familiar with the facts of the case. He states, *inter alia*, that the borrower has been in default since September 1, 2007, and that full payment of the outstanding amount was demanded. A letter from the plaintiff's attorney making that demand, dated January 17, 2008 is annexed, as is another letter from counsel dated January 29, 2008, acknowledging a payment of \$5,700, and stating that this would reduce the principal amount due but would not affect the default. This latter correspondence also stated that suit would be commenced for the balance owed.

The foregoing establishes the plaintiff's *prima facie* showing of entitlement to the relief requested, that is, the presence of an instrument for the payment of money only, the obligation of the defendants to pay thereunder or to guarantee such payments, and a default. *See, East N.Y. Sav. Bank v Baccaray*, 214 AD2d 601, 602 (2d Dept. 1995); *see also, Suffolk*

County Natl. Bank v Columbia Telecom. Group, Inc., 38 AD3d 644 (2d Dept. 2007). The burden thus shifts to the defendants to demonstrate that issues of fact exist meriting a trial. *Suffolk County Natl. Bank v Columbia Telecom. Group, Inc.*, *supra*.

That burden has not been met here. In her opposing affidavit, Ms. Hooten does not deny the note or the guarantees. However, she claims that there never was a default. She states that Madison Star was completely up to date in payments as of January 2007, and upon receiving a letter from the lender's attorney immediately paid the "outstanding balance," as noted above. This does not address, however, the fact that the plaintiff does not claim a default as of January of 2007,¹ but rather in September of that year.

Further, the use of the term "outstanding balance" is an admission that arrears existed as of the date of that payment. Indeed, even if one were to assume that there were no outstanding amounts owed as of the first January letter from plaintiff's attorney (in effect, treating the statement asserting up-to-date payments as of January 2007 as a typographical error, and assuming that January 2008 was meant), and that this January, 2008 payment was a regular payment and not one for arrears, such payment itself was late as a regular payment. The check annexed to the opposing affidavit is dated January 16, 2008, the note recites at section 2 that monthly payments were due on the first of each month, and as noted above default occurred if payment were not made within 15 days of the due date. This also disposes of the defendants' argument that plaintiff deliberately held payments for as much as 10 days after payment to create a default where one would otherwise not have existed.

¹ This would have been impossible under the note in any event, as pursuant to section 2 thereof payments were not to commence until February 1, 2007.

Finally, the Court notes, but must reject, the defendants' resort, in effect, to CPLR 3212(f). Under that statute, failure to present sufficient opposing proof may be forgiven and the motion denied or a continuance granted to permit disclosure on the ground that facts may exist that are essential to opposing the motion, but cannot then be stated. Here, those alleged acts are payments that may be proved by submission of checks. The defendants claim that they cannot access bank records for technical reasons, and present a copy of an email from Signature Bank to defendant Hooten (a/k/a Hylton), stating as follows:

“Because of a technical problem at Fidelity, access to Evision check images for the period August 03 to December 07 was lost. They are in the process of restoring access and they are giving priority to the more recent images. Access to images of the fourth quarter of 07 has already been restored. They expect to have all images available within a week.”


This communication is dated May 21, 2008. This motion was finally submitted on May 28, 2008. Quite aside from the fact that nothing in this email refers to defendants' accounts, the message indicates that images for the fourth quarter of 2007 – critical to defendants' argument that they never were in default before January 2008 (again assuming that the reference to 2007 was an error) – were available before this motion was submitted for decision.

Further, no request for an adjournment of the submission of this motion to obtain this documentation is to be found, even assuming that a week was too short a period of time to do so. Accordingly, the Court finds that the defendants could have but did not take reasonable steps to obtain the needed proof, and thus there is no basis for denying the motion pursuant to CPLR 3212(f). *See, Companion Life Ins. Co. v All State Abstract Co., Inc.*, 35 AD3d 519 (2d Dept. 2006); *Gillinder v Hemmes* 298 AD2d 493 (2d Dept. 2002).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 16, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: Jacobs Rosenberg, LLC
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ENTERED
JUN 19 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE