

**JPMorgan Chase Bank, N.A. v Complete
Env't. Serv., Inc.**

2008 NY Slip Op 32758(U)

September 29, 2008

Supreme Court, Nassau County

Docket Number: 11186-07

Judge: Leonard B. Austin

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

INDEX
No. 11186-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 12-7-07
Submission Date: 1-29-08
Motion Sequence No.: 001/MOT D

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Pittoni, Bonchonsky & Zaino, LLP
226 Seventh Street, Suite 200
Garden City, New York 11530

COMPLETE ENVIRONMENTAL
SERVICES, INC. d/b/a COMCO and
LOUISE FORESE,

Defendants.

COUNSEL FOR DEFENDANT
(for Louise Forese)
The Weinstein Group, P.C.
Ten Newton Place, Suite 201
Hauppauge, New York 11788

x

NO APPEARANCE
(for Complete Environmental Services,
Inc. d/b/a Comco

ORDER

The following papers were read on Plaintiff's motion for a default judgment against Defendant Complete Environmental Services, Inc. d/b/a Comco and for summary judgment and to strike the answer and affirmative defenses of Defendant Louis Forese.

- Notice of Motion dated November 13, 2007;
- Affidavit of Alfred Casino sworn to on November 7, 2007;
- Plaintiff's Memorandum of Law;
- Affidavit of Louise Forese sworn to on January 2, 2008;

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.

Index No. 11186-07

Defendant's Memorandum of Law;

Affidavit of Alfred Casino sworn to on January 16, 2008;

Affidavit of M. John Pi Honi sworn to on January 22, 2008.

Plaintiff, JP Morgan Chase Bank, N.A. ("Chase"), moves pursuant to CPLR 3215, for an order granting it a default judgment against Defendant, Complete Environmental Services, Inc. d/b/a Comco ("Comco"), for an order granting summary judgment against Defendant, Louis Forese ("Forese"), pursuant to CPLR 3212; and for an order striking Forese's answer and affirmative defenses and directing the entry of a Clerk's Judgment against the Defendants jointly and severally. Chase also seeks an award of counsel fees for the prosecution of this action.

BACKGROUND

In this action, Chase seeks to enforce its rights pursuant to the terms of two promissory notes both issued on November 30, 2006 ("Notes 1 and 2") and one promissory note issued on March 21, 2006 ("Note 3") by Comco in the amounts of \$300,000, \$100,000 and \$200,000, respectively. Chase also seeks to enforce two separate personal guarantees executed by Forese, Comco's president in favor of Chase to induce the loans made to Comco and to secure a loan made in the amount of \$200,000.

On August 30, 2004, Comco, executed and delivered to Chase a promissory note in the form of a Master Demand Note Secured in the principal amount of \$400,000. Thereafter, on October 20, 2005, Comco, executed and delivered to Chase another

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES,
INC.
Index No. 11186-07

promissory note in the form of a Master Demand Note Secured in the principal amount of \$400,000. This Note provided, in pertinent part, as follows:

“ON DEMAND, but in no event later than **August 31, 2006** for value received, [Comco] hereby promises to pay to the order of [Chase] . . . , in immediately available funds, the principal sum of the aggregate unpaid principal amount of all Advances . . . made by [Chase] to [Comco]. [Comco] further promises to pay interest at a rate of **1.50%** above [Chase’s] Prime Rate which rate shall be computed for the actual number of days elapsed on the basis of a 360-day year and shall be adjusted as of the date of each such change, but in no event higher than the maximum permitted under applicable federal or State law” (Moving Papers, Ex. B).

Thus, based upon this language, the October 20, 2005 Note had a maturity date of August 31, 2006. While Plaintiff alleges that the “Master Demand Secured Note dated October 20, 2005 was given in replacement, renewal and/or extension of, but [did] not extinguish[] the indebtedness of the Master Demand Secured Note dated August 30, 2004” (Complaint, ¶15), there is no such language to this effect in the Note itself.

On March 21, 2006, Comco, executed and delivered to Chase a promissory note in the form of a U.S. Small Business Administration Note (Note 3) evidencing a loan in the principal amount of \$200,000. While this Note does not unequivocally set forth the time line for the payment of the obligation, it provides that Comco promised to pay Chase principal and interest payments, in consecutive monthly installments of \$4,966.62 each, with interest on the unpaid principal balance computed at the rate of 1.25% per annum above Chase’s prime rate calculated in accordance with the Note.

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.

Index No. 11186-07

Note 3 also provides that if a payment is more than ten days late, then a late fee of up to 5% of the unpaid portion of the regularly scheduled payment may be charged.

On November 30, 2006, the October 20, 2005 loan was split into two separate loans; to wit: a \$300,000 line of credit and a \$100,000 term loan. Specifically, Comco executed and delivered to Chase a promissory note in the form of: a line of credit (Note 1) entitled "Endorsement No. 1 to Promissory Note"; and, a "Master Demand Note Secured" (Note 2). Note 1 evidenced a loan in the principal amount of \$300,000 and Note 2 evidencing a term loan in the principal amount of \$100,000.

Note 1, entitled "Endorsement No. 1 to Promissory Note" and dated November 30, 2006, in the principal amount of \$300,000, represents a portion of the October 20, 2005, \$400,000 loan which was due "ON DEMAND, but in no event later than August 31, 2006". Note 1 states in pertinent part, as follows:

ENDORSEMENT NO.1 dated as of November 30, 2006 to the Promissory Note in the original principal amount of \$400,000.00 dated as of August 31, 2006 . . . by [Comco] . . . in favor of [Chase] (Moving Papers, Ex. C).

Note 1 provides that Comco promised to pay Chase the principal amount of \$300,000 in sixty consecutive monthly installments of \$5,000 each, "payable on the 30th day of each month . . . , commencing on December 30, 2006 and ending on December 30, 2011" with interest paid on the unpaid principal balance computed at the rate of 1.25% per annum above Chase's prime rate. Note 1 also provides that interest on any past due amount, whether at the due date thereof or by acceleration, would be paid at

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.

Index No. 11186-07

the default rate of 4% per annum in excess of the stated loan rate, but in no event higher than the maximum permitted under applicable law.

Note 2, entitled "Master Demand Note Secured" and dated November 30, 2006, in the principal amount of \$100,000 represents the second piece of the October 20, 2005 loan in the amount of \$400,000 due "ON DEMAND, but in no event later than August 31, 2006." Note 2 provides that Comco promised to pay Chase the principal amount of \$100,000, with interest on the unpaid principal balance computed at the rate of 1.25% per annum above Chase's prime rate. Note 2 also provides that interest on any past due amount, whether at the due date thereof or by acceleration, would be paid at the default rate of 1% per annum in excess of the above stated rate, but in no event higher than the maximum permitted under applicable law. Note 2 was payable "**ON DEMAND, but in no event later than November 30, 2007**" (Moving Papers, Ex. D).

Prior to the execution and delivery of the August 30, 2004 Master Demand Note Secured, on August 17, 2004 and on March 21, 2006, in connection with the execution and delivery of the Notes, Comco's president, Forese, executed and delivered to Chase absolute, unconditional and continuing guarantees of payment for the debts and obligations of Comco. The August 17, 2004 guaranty states, in pertinent part, as follows:

NOW, THEREFORE, in consideration of the promises and of other good and valuable consideration and in order to induce the Bank from time to time, in its discretion, to extend or continue credit or other financial accommodations to the

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES,
INC.

Index No. 11186-07

Borrower, the undersigned hereby guarantees, absolutely and unconditionally, to the Bank the payment of all liabilities of the Borrower to the Bank of whatever nature, whether now existing or hereafter incurred, whether created directly or acquired by the Bank by assignment or otherwise, whether matured or unmatured, joint, several or joint and several, secured or unsecured and whether absolute or contingent, including, without limitation, all interest or other claims which may accrue or arise after the commencement of bankruptcy, insolvency, reorganization, liquidation or other similar proceedings (all of which are hereinafter referred to as the "Liabilities of the Borrower").

* * *

This guaranty is a continuing guaranty and shall remain in full force and effect irrespective of any interruptions in the business relations of [Comco] with [Chase] (Moving Papers, Ex. F).

The March 21, 2006 guaranty entitled, "U.S. Small Business Administration

Unconditional Guarantee" states, in pertinent part, as follows:

1. **GUARANTEE:**
Guarantor unconditionally guarantees payment to Lender of all amounts owing under the Note. This Guarantee remains in effect until the Note is paid in full. Guarantor must pay all amounts due under the Note when Lender makes written demand upon Guarantor. Lender is not required to seek payment from any other source before demanding payment from Guarantor.
2. **NOTE:**
The "Note" is the promissory note dated March 21, 2006 in the principal amount of Two Hundred Thousand & 00/100 Dollars from Borrower to Lender. It includes any assumption, renewal, substitution, or

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.

Index No. 11186-07

replacement of the Note, and multiple notes under a line of credit (*Id.*).

Plaintiff alleges that, as a result of Comco's failure to make the required payments of principal and interest, on May 16, 2007, it made a written demand for payments in full on the Loan Obligations arising from Notes 1, 2 and 3 (Moving Papers Ex. G). Plaintiff alleges that Comco has defaulted under the terms and conditions of the Notes by failing to make the required payments of principal and interest and that by reason of the guaranty agreements executed herein, Forese is personally obligated for the debts and obligations of Comco to Chase.

Chase commenced this action on June 14, 2007, seeking to recover on said Notes. Plaintiff served process on Comco by serving the summons and complaint upon the Secretary of State pursuant to Business Corporation Law §306 and also by mailing an additional summons by first-class mail to Comco at its last known address pursuant to CPLR 3215(g)(4)(I).

On September 5, 2007, Forese served his Verified Answer denying the material allegations of the complaint and asserting four affirmative defenses alleging: (1) failure to state a cause of action; (2) that he is not responsible for any bills or services or other damages claimed by Plaintiff; (3) improper service; and (4) granting Plaintiff's demand in the complaint would result in the Plaintiff receiving more money that it is entitled to.

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES,
INC.
Index No. 11186-07

DISCUSSION

A. Default Judgment against Comco

A party may seek a default judgment against a Defendant who fails to make an appearance. CPLR 3215(a). On an application for a default judgment, the moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR 3215(f). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. Joosten v. Gale, 129 A.D.2d 531 (1st Dept. 1987).

CPLR 321(a) provides that a corporation shall appear by attorney in prosecuting or defending a civil action. This statute allows for certain exceptions, none of which are applicable in the instant case. Even though Forese individually served an answer to the complaint in which he denies the essential allegations of the complaint, he cannot serve an answer for Comco. Du-Art Film Labs., Inc. v. Wharton Intl. Films, Inc., 91 A.D.2d 572 (1st Dept. 1982). Thus, Comco has not served an answer and is in default. Moreover, a corporation cannot assign its status as a Defendant to an individual to circumvent CPLR 321(a). Rembrandt Personnel Grp. Agency v. Van-Go Transport Co., 162 Misc.2d 64 (App. Term.1994).

The elements of a cause of action for breach of contract are the existence of a contract between the Plaintiff and Defendant, consideration, performance by the

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.
Index No. 11186-07

Plaintiff, breach by the Defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986).

A *prima facie* claim for breach of contract is established by setting forth the terms of the agreement, performance, and alleged breach. *Id.* The affidavit of Alfred Casino, Vice President of Chase, describes the terms of the various Notes and guarantees with Comco and Forese. It is undisputed that Chase, in connection with the execution and delivery of the Notes and guarantees, extended credit to Comco. The letter dated May 16, 2007, together with the terms of the Notes and guarantees demonstrate that Chase made a written demand for the payments in full on the Loan Obligations arising from Notes 1, 2 and 3, and also demonstrates that Chase is in default of approximately \$589,940.02 which is owed to Chase. Breach of the three loan obligations has been established.

Service on Comco is proper. All notice requirements set forth in CPLR 3215(g) have been satisfied. A *prima facie* cause of action has been established. The motion for a default judgment against Comco must therefore be granted.

B. Summary Judgment against Forese

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.
Index No. 11186-07

CPLR 3212(b) provides that a *prima facie* showing is made by supporting the motion with affidavits, a copy of the pleadings and by other available proof.

A *prima facie* case for breach of a guaranty is established by showing the existence of the guaranty, the obligations therein and the failure of the guarantor to make the necessary payments. Verela v. Citrus Lake Development, Inc., 53 A.D.3d 574 (2nd Dept. 2008); Physician's Domain, Inc. v. Grosso, 288 A.D.2d 362 (2nd Dept. 2001); E.D.S. Security Systems, Inc. v. Allyn, 262 A.D.2d 351 (2nd Dept. 1999). Submission of an unconditional guaranty along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212. European American Bank & Trust Co. v. Schirippa, 108 A.D.2d 684 (1st Dept. 1985).

Chase has established the existence of the personal guarantees by attaching executed copies to the pleadings. Chase, via the affidavit of its Vice President, Alfred Casino, has also established that Comco failed to make the payments specified in the Notes thereby compelling Plaintiff to issue a demand letter on May 16, 2007.

Finally, Chase has established Forese's obligations under the two guarantees dated August 17, 2004 and March 21, 2006. The terms of the guarantees required that the Forese be given notice of a default. The May 16, 2007 letter, stating, "[i]f Chase does not receive the full amounts due and owing...Chase may, without further notice, impose the default rate of interest as permitted in the Note(s) and take such further action as permitted under the Note(s), related loan and security documents and at law

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.

Index No. 11186-07

[including], without limitation, enforcing its rights against the collateral pledged to secure payment of the Note(s) and any guaranties” provides sufficient notice of the default of payment.

Once the plaintiff has met its burden, it is incumbent upon the defendant to establish, by admissible evidence, that a triable issue of fact exists with respect to a bona fide defense. SCP (Bermuda) Inc. v. Bermudatel Ltd., 224 A.D.2d 214 (1st Dept. 1996); and Silber v. Muschel, 190 A.D.2d 727 (2nd Dept. 1993). Here, however, in response to Chase’s *prima facie* showing, Defendant’s averments are insufficient to create a triable issue of fact, or to constitute a defense that would defeat Chase’s motion. Thus, Chase’s motion must be granted. Lorenz Diversified Corp. v. Falk, 44 A.D.3d 910 (2nd Dept. 2007); and Takeuchi v. Silberman, 41 A.D.3d 336 (1st Dept. 2007).

In opposition to Chase’s motion, Forese, in his affidavit in opposition, states that “[he] did not personally guarantee the loans at issue in this matter” and that while “[t]he loans at issue in this matter were signed myself, ... said signature was affixed only in my capacity as a representative and agent of [Comco] and did not take on individual liability” (Forese Aff., ¶¶ 4, 5). Forese argues that “[n]owhere in these Notes does the lender make it clear that I was signing as personal Guarantor and not a representative of [Comco], and at no time did I think I was signing for these business loans personally” (*Id.*, ¶6).

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.
Index No. 11186-07

Forese's arguments are directly contradicted by the documentary evidence -- the guarantees -- which clearly state that "[t]he undersigned [Louis Forese] hereby guarantees, **absolutely and unconditionally**, to the Bank the payment of all liabilities of the Borrower [Comco] to the Bank of whatever nature, whether now existing or hereafter incurred..." (Emphasis added). The document also specifically states that "[t]his guaranty is a **continuing guaranty** and shall remain in full force and effect irrespective of any interruptions in the business relations of the Borrower with the Bank..." (Emphasis Added). The unconditional guaranty dated March 21, 2006 also states that the Guarantor [Forese] **unconditionally** guaranties payment to the Lender [Chase] of all amounts owing under the Note and that the guaranty **remains in effect** until the Note is paid in full. Thus, Forese's denial as to the execution of the personal guarantees is belied by the documentary evidence.

Accordingly, Chase's motion for summary judgment on the two personal guarantees must also be granted.

Inasmuch as the amount due under the Notes cannot be calculated with precision on the papers submitted inasmuch as the prime rate fluctuates, an inquest is required to determine the proper interest rate and late fees due and owing to Plaintiff.

The Notes and guarantees provide that Comco and Forese would be liable for any expenses incurred by Chase in connection with the enforcement of the Notes and guarantors' obligations under the guarantee including reasonable attorney's fees.

JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.
Index No. 11186-07

Such provisions in an agreement are valid and will be enforced. Arent, Fox, Kinter, Plotkin & Kahn, PLLC v. Lurzer GmbH, 297 A.D.2d 590 (1st Dept. 2002). Legal fees are awarded on a *quantum meruit* basis. 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). See also, NY Jur2d *Attorneys-at-Law* §216. The matter must be referred to a Special Referee to here and determine the amount of legal fees to which Chase is entitled in connection with the prosecution of this action. CIT Group/Equipment Financing, Inc. v. Riddle, 31 A.D.3d 477, 478 (2nd Dept. 2006).

Accordingly, it is,

ORDERED, that Plaintiff's motion for an order pursuant to CPLR 3215 for a default judgment against Defendant, Complete Environmental Services, Inc. is **granted** as to liability only; and it is further,

ORDERED, that Plaintiff's motion for summary judgment against Defendant Louis Forese is **granted** as to liability only; and it is further,

ORDERED, that the matter is respectfully referred to Special Referee Frank Schellace on November 6, 2008 at 10:00 a.m. to hear and determine all issues relating to establishing the amount due, the amount of interest due to the date of entry of the judgment and the reasonable attorney's fees for Plaintiff's attorney; and it is further,

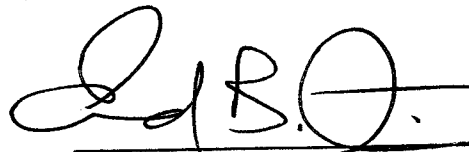
JPMORGAN CHASE BANK, N.A. v. COMPLETE ENVIRONMENTAL SERVICES, INC.
Index No. 11186-07

ORDERED, that Plaintiff's counsel shall serve upon the attorney for the Defendants and file with the Clerk of the Court a copy of this order, a Notice of Inquest and a Note of Issue and shall pay the appropriate filing fees on or before October 16, 2008; and it is further,

ORDERED, that upon the Special Referee determining the amount due, the amount of interest due to the date of entry of judgment and the fair and reasonable value of the attorney's fees to be awarded herein that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendants, Complete Environmental Services, Inc. and Louis Forese in the sum and interest to the date of entry of the judgment in the amount to be established by the Special Referee and reasonable attorney's fees as determined by the Special Referee and costs and disbursements as taxed by the Clerk.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
September 29, 2008



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

ENTERED

OCT 03 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**