

**Commercial Bank, N.A. v Logan**

2008 NY Slip Op 33343(U)

December 9, 2008

Supreme Court, New York County

Docket Number: 109675/07

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn

PART 49

Index Number : 109675/2007

**COMMERCE BANK, N.A.**

vs.

**LOGAN, VICKI**

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

\_\_\_\_\_ tice \_\_\_\_\_

INDEX NO. 109675-07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ id on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

DEC 15 2008

COUNTY CLERK'S OFFICE

NEW YORK

**MOTION IS DECIDED IN ACCORDANCE**

**WITH ACCOMPANYING MEMORANDUM**

**DECISION IN MOTION SEQUENCE .....**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

Dated: 12/9/08

Alan Cahn

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
COMMERCE BANK, N.A.,

Plaintiff,

- against -

Index No. 109675/07

VICKI LOGAN a/k/a VICKI D. LOGAN individually  
and d/b/a ADVERTISING CONSULTING,

Defendant.

LF  
DEC 15 2008  
COUNTY OF NEW YORK

-----X  
HERMAN CAHN, J.:

This is an action to recover amounts allegedly owed on two promissory notes, in an aggregate principal amount of approximately \$325,000.00. Plaintiff moves for summary judgment on each of the complaint's five causes of action, CPLR 3212.

**BACKGROUND**

Defendant Vicki Logan a/k/a Vicki D. Logan, individually and d/b/a Advertising Consulting, executed four documents in which she agreed to repay various sums loaned to her by plaintiff Commerce Bank, N.A.: (1) a promissory note and security agreement dated June 15, 2006 (the First Note) in an amount of up to \$250,000.00; (2) an unconditional guaranty of payment dated June 16, 2006 (the Guaranty), pursuant to which Logan guaranteed her payment obligations under the First Note; (3) a change in terms agreement dated October 11, 2006 (the Amendment; the First Note, as amended by the Amendment, the Amended First Note), which increased the amount of the First Note from \$250,000.00 to \$300,000.00; and (4) a promissory note dated May 30, 2006 (the Second Note; collectively, with the Amended First Note, the Notes) in the principal amount of \$30,000.00.

Logan allegedly defaulted under the terms of the Notes by failing to make the monthly payments due on March 15, 2007 on the Amended First Note and on March 30, 2007 on the Second Note, and by failing to make the monthly payments due on the Notes thereafter. By letter dated June 4, 2007, Commerce advised Logan that she was in default under each of the Notes, and that it was accelerating the outstanding principal balance and all other sums due under the

Notes. The complaint asserts five causes of action. The first three causes of action -- each of which seeks to recover the amounts allegedly owed on the Amended First Note, comprised of principal in the amount of \$300,000.00, accrued interest and late fees in the amount of \$8,387.13 and interest at a default rate from the date of default -- allege claims for breach of the Amended First Note, an account stated and breach of the Guaranty. The fourth and fifth causes of action -- each of which seeks to recover the amounts allegedly owed on the Second Note, comprised of principal in the amount of \$24,626.82, accrued interest and late fees in the amount of \$709.41 and interest at a default rate from the date of default -- allege claims for breach of the Second Note and an account stated.

Logan was originally represented by counsel, who interposed an answer asserting 13 boilerplate affirmative defenses, without any supporting factual allegations: (1) that plaintiff's damages were caused by its own culpable conduct; (2) failure to state a cause of action; (3) failure to mitigate damages; (4) lack of personal jurisdiction on account of failure to serve defendant with the summons and complaint in accordance with the CPLR; (5) usury; (6) illegality; (7) lack of consideration; (8) unconscionable conduct; (9) bad faith; (10) unclean hands; (11) waiver; (12) estoppel; and (13) payment. The court subsequently granted a motion by Logan's counsel to withdraw from this action. Logan, acting pro se, has served an affidavit opposing Commerce's motion for summary judgment.

### **DISCUSSION**

Commerce has made a prima facie showing of its entitlement to summary judgment on the complaint's first, third and fourth causes of action -- which allege breach of the Amended First Note, the Guaranty and the Second Note -- by submitting proof of Logan's execution of each of those documents and of her failure to make the payments called for thereunder upon proper demand (*Verela v Citrus Lake Dev.*, 53 AD3d 574, 575 [2d Dept 2008]; *Eastbank v Phoenix Garden Rest.*, 216 AD2d 152, 152 [1st Dept 1995]). Logan, in opposition to Commerce's motion, has failed to submit evidentiary proof sufficient to raise a triable issue of

material fact with respect to any of her asserted defenses (*Eastbank v Phoenix Garden Rest.*, 216 AD2d at 152).

Logan does not assert any arguments or allege any facts with respect to her first, second, third, seventh, ninth, eleventh, twelfth and thirteenth affirmative defenses -- either in her answer or in her opposing affidavit -- which would support or explain the basis for those defenses. Inasmuch as those defenses plead wholly unsupported conclusions of law, they are insufficient to raise any issue of fact precluding summary judgment (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 319 [1st Dept 2006]).

Although Logan's affidavit does assert arguments which are based upon, or at least use some of the same words as are used in, the fourth, fifth, sixth, eighth and tenth affirmative defenses, she has failed to raise a triable issue of fact with respect to any of those defenses. The fourth affirmative defense asserts lack of personal jurisdiction on account of Commerce's purported failure to serve Logan with the summons and complaint in accordance with the CPLR. Logan's affidavit states that she "was not served according to the law" because "[t]he proof of service to me has the wrong apartment on it" (Logan Aff., ¶ 12). Although Logan does not further clarify the alleged discrepancy, Commerce has submitted an affidavit of service which indicates that one of two copies of the summons and complaint that were mailed to her at her address was addressed to apartment "# 841," whereas the apartment number indicated in the address provided by her at the end of her affidavit is "# 8-41."

The minimal difference between # 841 and # 8-41 would presumably not have prevented the mailed summons and complaint from reaching her, and Logan does not deny that she received the mailing. In any event, CPLR 3211 (e) provides that "an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading . . . ." Thus, Logan waived her objection based upon allegedly improper service because she raised that objection in her answer, which was served on September 4, 2007,

but did not move for judgment on that ground on or before November 3, 2007, or even at any time thereafter.

With regard to the fifth affirmative defense, usury, Logan asserts in her affidavit that “[p]laintiff did not disclose what payments would be [on the First Amended Note]. I assumed the payment on 10% interest on a \$300,000 loan would be \$2500 per month. In reality the payments were \$10,000 a month, clearly a case of usury” (*id.*, ¶ 11).

Logan’s assertion to the contrary notwithstanding, the terms of the Amended First Note clearly disclosed what her payment obligations under that instrument would be, namely, that she would be required to pay “consecutive monthly payments of (i) accrued unpaid interest on the outstanding principal balance and consecutive monthly principal payments in an amount not less than . . . 1/36th . . . of the outstanding principal balance as of the monthly statement date or (ii) a total principal and interest payment of \$250.00, whichever is . . . greater,” with a variable interest rate being “applied to the unpaid principal balance of [the Amended First] Note . . . at a rate of 1.0 percentage points over” an “index which is the Prime Rate as published in the ‘Money Rates’ Section of The Wall Street Journal” (Compl, Ex. A at 1). While Logan asserts that her payments on the Amended First Note amounted to \$10,000.00 per month, she has submitted no documentary evidence which would substantiate that allegation or which would indicate that the \$10,000.00 amount was attributable only to interest rather than to a combination of principal and interest. Thus, Logan has failed to raise an issue of fact with respect to the fifth affirmative defense, by not submitting any evidence which would indicate that a monthly payment obligation of approximately \$10,000.00 on the Amended First Note would necessarily be inconsistent with the payment terms clearly set forth in that note, or that such a payment would necessarily involve the assessment of a rate of interest that was usurious.

With respect to the sixth affirmative defense, illegality, Logan’s affidavit asserts that “[t]he copy of the ‘[First Note]’ submitted by the Plaintiff is illegal” (Logan Aff., ¶ 6). However, inasmuch as Logan fails to identify any particular manner in which the First Note is illegal, she

has failed to raise a triable issue of fact as regards the sixth affirmative defense.

With respect to the eighth affirmative defense, unconscionable conduct, Logan's affidavit asserts: "[t]he '[First Note]' says it was . . . secured by property which I absolutely did not agree to. It was an unsecured loan. This deception violates my rights to due process and my property rights. This is unconscionable conduct" (*id.*, ¶ 9). The First Note contained a provision pursuant to which the "Borrower" granted a security interest to Commerce in all of the "Borrower's" assets. The First Note also contained a provision pursuant to which the "Borrower" waived his or her right to a trial by jury in any action arising in connection with the First Note, and Logan asserts in her affidavit that "[t]he 'agreement' 'waiving my right[]' to a jury trial is an outrageous violation of my constitutional rights. I did not agree to that" (*id.*, ¶ 8).

Logan's conclusory assertions aside, she does not dispute that she executed the First Note, and the First Note does contain provisions pursuant to which Logan granted Commerce a security interest, and pursuant to which she agreed to waive her right to a jury trial in any action arising in connection with the First Note. Logan does not allege that Commerce has made any attempt to enforce or take advantage of the security interest and/or jury trial waiver provisions, or allege any manner in which those provisions are implicated by the instant motion. However, neither of those provisions is inherently unenforceable or unconscionable, and an individual is generally presumed to have read and understood a document which he or she signed, and to have agreed to the agreements set forth therein (*Liberty Mut. Ins. Co. v Famous Overseas*, 224 AD2d 254, 254 [1st Dept 1996]; *Marine Midland Bank v Idar Gem Distribs.*, 133 AD2d 525, 526 [4th Dept 1987]). Indeed, the First Note itself contained a provision entitled "Borrower Acknowledgment" pursuant to which Logan agreed that, "[p]rior to signing this Note, Borrower read and understood all the provisions of this Note, and agrees to the terms of the Note" (Compl. Ex. A at 4). Accordingly, she has failed to raise any triable issue of fact with respect to the eighth affirmative defense.

The tenth affirmative defense asserts unclean hands. Logan's affidavit contains assertions that unclean hands "abound" because, in the complaint, "the same loan amount is listed three different times under three different actions, implying [that] the amount owed is triple what the 'note' says," and "another amount is double counted" (Logan Aff., ¶ 10). Logan is apparently asserting that Commerce is trying to achieve a double or triple recovery, because each of the first, second and third causes of action seeks to recover the amount allegedly owed on the Amended First Note, and each of the fourth and fifth causes of action seeks to recover the amount allegedly owed on the Second Note. However, while a plaintiff may plead multiple causes of action which seek substantially the same recovery under different legal theories, and may even prevail on more than one of those causes of action, the plaintiff would not thereby be entitled to a double or triple recovery of the amount claimed. Thus, for example, the fact that Commerce has established its entitlement to summary judgment on both the first cause of action, for breach of the Amended First Note, and the third cause of action, for breach of the Guaranty, Commerce is entitled only to a single recovery of the amount owed under the Amended First Note.

Logan's affidavit contains various additional arguments in opposition to Commerce's motion which do not appear to be based on the affirmative defenses contained in the answer. She argues that Commerce failed to prove that it is the owner of the Notes, because Commerce has submitted only photographic copies of the Notes and has not submitted the original Notes themselves. Logan argues that, because Commerce has failed to prove its ownership of the Notes: Commerce has no standing to bring this action to enforce payment under the Notes; Commerce is not the real party in interest and the proper parties are not before the Court; the court has no jurisdiction to adjudicate this action; and the court's adjudication of this action would violate her right to due process and her property rights.

However, Logan has failed to raise an issue of fact with respect to Commerce's ownership of the Notes. Commerce is the lender named in the Notes, and Logan does not allege any fact which would indicate or suggest that Commerce transferred the Notes to any other

person or party. She merely speculates that some person or party other than Commerce could hypothetically be in physical possession of, and own, the Notes. Logan does not dispute the existence of the Notes, or the authenticity or accuracy of the copies of the Notes submitted by Commerce, or allege that the amounts due under the Notes have already been paid. “Copies of promissory notes and guaranties are admissible under the best evidence rule, where, as here, the existence of the original writings and the authenticity and accuracy of the copies are not disputed” (*Cavendish Traders v Nice Skate Shoes*, 117 F Supp 2d 394, 399 n 8 [SDNY 2000], citing *Chamberlain v Amato*, 259 AD2d 1048, 1048-49 [4th Dept 1999]; see also *Johnson-McClean Tech. v Millenium Info. Tech. Group*, 2003 WL 192175, \*7 [SDNY Jan 27, 2003] [applying New York law]). Moreover, the First Note contains a provision pursuant to which Logan expressly agreed that “[a] photographic or other reproduction of this Note may be made by the Lender, and any such reproduction shall be admissible in evidence with the same effect as the original itself in any judicial . . . proceeding, whether or not the original is in existence” (Compl. Ex. A, at 4).

Logan’s affidavit also contains assertions, in opposition to Commerce’s motion, that “[t]he balance claimed owed, is not owed, and is the wrong amount,” and that Commerce has violated her “rights under NYC’s Debt Collection Law,” her “rights and state law under the New York State Debt Collection Procedures Law,” and her “rights and federal law under the . . . Fair Debt Collection Practices Act” (Logan Aff., ¶¶ 10, 13). However, those contentions are wholly conclusory and, therefore, fail to raise any triable issue of fact precluding summary judgment. Logan gives no indication as to why or how the amounts claimed to be owed are incorrect, which provisions of the specified laws were allegedly violated, or the manner in which they were allegedly violated.

With respect to the third cause of action in the complaint, which alleges breach of the Guaranty, Logan’s assertion of any of the defenses previously discussed would, in any event, be barred by the terms of the Guaranty. The Guaranty, which Logan executed as “Guarantor,”

provided that: “each Guarantor . . . irrevocably, absolutely and unconditionally guarantees . . . all of Borrower’s Obligations (as defined in the [First] Note)”; “[t]he liability of each Guarantor hereunder is absolute, primary, unlimited and unconditional”; and “[e]ach Guarantor promises and undertakes to make all payments hereunder free and clear of any deduction, offset, defense, claim or counterclaim of any kind” (Compl, Ex. A at 5). Even assuming that Logan had raised a triable issue of fact with respect to any of her purported defenses to her liability under the Guaranty, which she has not, the broadly worded language of the Guaranty would have constituted a waiver of her right to assert any such defense (*Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-10 [1st Dept 2007]; *Palm Beach Mtge. Mgt., LLC v Red Tulip, LLC*, 18 AD3d 379, 380 [1st Dept 2005]).<sup>1</sup>

For the foregoing reasons, Commerce has established its entitlement to summary judgment on the complaint’s first, third and fourth causes of action. However, Commerce’s motion is denied with respect to the complaint’s second and fifth causes of action, which allege accounts stated with respect to the Amended First Note and the Second Note. “An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due” (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007] [internal citations omitted]). “Such an agreement . . . may be express or . . . implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances” (*J.B.H., Inc. v Godinez*, 34 AD3d 873, 874-75 [3d Dept 2006] [internal citations omitted]).

The second cause of action alleges that, based upon Commerce’s rendering of monthly statements of account to Logan with respect to the Amended First Note and her retention of those statements without dispute, an account stated exists. Logan alleges that this is with respect to the

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<sup>1</sup> Although Commerce does not seek to enforce the Guaranty with respect to the Second Note, the Guaranty provides that the “Guarantor . . . guarantees . . . all of Borrower’s Obligations (as defined in the [First] Note), *as well as any other existing or future debts, liabilities, and obligations of the Borrower to Lender . . .*” (Compl, Ex. A at 5 [emphasis added]).

Amended First Note “in the principal amount of \$300,000.00 plus accrued interest thereon in the amount of \$8,387.13, with interest continuing to accrue at the default interest rate authorized by the [Amended First Note] and late fees from the date of default, March 16, 2007 to the date of entry of judgment, plus attorneys’ fees and costs of this Action” (Compl, ¶¶ 17-19).

However, Commerce has submitted copies of the monthly statements which were allegedly sent to Logan with respect to the Amended First Note. The statements do not clearly reflect or indicate a balance owed in the foregoing amounts such that Logan’s retention of the statements implied any agreement on her part that she owed those amounts, even assuming that she retained them without any objection. Indeed, the last of the monthly statements that Commerce submitted, which is dated July 31, 2007, indicates, inter alia: that there has been a “principal payment” in the amount of \$301,200.00; that the “loan balance” is 0.00; that the “minimum payment” due is 0.00; and that the “total due on account” is 0.00 (Lembo Aff., Ex. 4).

The fifth cause of action alleges an account stated claim, based upon Commerce’s rendering of monthly statements of account to Logan with respect to the Second Note, and her retention of those statements without dispute. Logan asserts this claim with respect to the Second Note “in the principal amount of \$24,626.82 [plus] accrued interest and late fees in the amount of \$709.41, with interest continuing to accrue at the default interest rate authorized by the [Second] Note, 11.490% per annum from the date of default, April 1, 2007, attorneys’ fees and costs” (Compl, ¶¶ 36-38). Commerce has not submitted copies of the monthly statements which are the purported basis of the account stated alleged with respect to the Second Note. It has only submitted a copy of a purported “accumulated transactions” report, dated September 10, 2007, which (a) does not appear to set forth any of the particular amounts with respect to which Commerce’s fifth cause of action claims an account stated and (b) is not alleged to have been sent to Logan (Lembo Aff., Ex. 5).

“An essential element of an account stated is an agreement regarding the amount of the balance due” (*Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282 [4th Dept 1997]).

Accordingly, inasmuch as the documentation submitted by Commerce does not indicate an agreement as to the amounts of the accounts stated alleged in the second and fifth causes of action, Commerce has failed to establish its entitlement to summary judgment on those causes of action (*Reid & Priest v Realty Asset Group*, 250 AD2d 380, 380 [1st Dept 1998]; *Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d at 282-83).

Finally, Commerce is entitled to recover the reasonable costs, including attorneys' fees, it incurred in bringing this action. The Guaranty provides that, "[i]f Lender institutes any legal action or proceeding against any Guarantor, each Guarantor agrees to pay any and all expenses, including reasonable attorneys fees, incurred by Lender" (Compl, Ex. A at 5). The Second Note contains a provision pursuant to which Logan agreed "to pay all costs and expenses Lender incurs to collect this Note," including "Lender's reasonable attorneys' fees and Lender's legal expenses . . ." (Compl, Ex. C at 1). Accordingly, the issue of the amount of such fees and expenses will be referred to a Special Referee, to hear and report with recommendations, and the portion of Commerce's motion which seeks to recover those fees and expenses will be held in abeyance pending receipt of the report and recommendations of the Special Referee.

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted partial summary judgment against defendant as follows:

(1) plaintiff is granted judgment on the first and third causes of action in the amount of \$300,000.00, together with interest at the rate of 4.00 percentage points per annum over the Prime Rate as published in the "Money Rates" Section of The Wall Street Journal from March 16, 2007 until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs;

(2) plaintiff is granted judgment on the fourth cause of action in the amount of \$25,336.23, together with interest at the rate of 11.49% per annum from June 4, 2007 until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and

(3) the first, third and fourth causes of action are severed, except for the portion of those causes of action which seeks to recover the reasonable attorneys' fees and other expenses plaintiff incurred in bringing this action, and the Clerk is directed to enter judgment accordingly in favor of plaintiff against defendant;

and it is further

ORDERED that the issue of the amount of the reasonable attorneys' fees and other expenses plaintiff incurred in bringing this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that any portions of plaintiff's motion that seeks summary judgment on the portions of the first, third and fourth causes of action which seek to recover the attorneys' fees and other expenses plaintiff incurred in bringing this action is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet<sup>2</sup>, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date. Plaintiff's counsel is directed to advise defendant, by mail, at her

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<sup>2</sup> Copies are available in Room 119 at 60 Centre Street and on the Court's website.

last known address, of the date and place of the counsels' fees hearing.

Dated: December 9, 2008

ENTER:

  
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J.S.C.

**FILED**  
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