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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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SIGNATURE BANK,

Plaintiff,

-against-

MMRGG CORP., and MARIA B. DETRANO, A/K/A MARIA DETRANO, INDIVIDUALLY,

Defendants.

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TRIAL TERM PART 47

INDEX NO.: 16608/08

MOTION DATE:1-15-09
SUBMIT DATE: 2-10-09
SEQ. NUMBER - 001 & 002

The following papers have been read on this motion:

Notice of Motion, dated 12-18-08.....1
Notice of Cross Motion, dated 1-6-09.....2
Plaintiff's Memorandum of Law, dated 1-7-09.....3
Reply and Opposition to Cross Motion, dated 1-29-09.....4
Reply in Further Support, dated 2-6-09.....5

The motion by defendants (Seq. 001) to dismiss this action pursuant to CPLR §3211(a) 8, lack of jurisdiction, is granted to the limited extent that a traverse hearing is ordered with respect to service upon the individual defendant Detrano and is denied as to the corporate defendant.

The cross motion by plaintiff (Seq. 002) for summary judgment pursuant to CPLR §3212 is granted on the First Cause of Action as to the corporate defendant for the amount

demanded in the complaint and denied as to the individual defendant Detrano, with leave to resubmit in the event jurisdiction is upheld. The findings herein, with respect to the cross motion, relate only insofar as it is asserted against the corporate defendant and not as to Detrano.

A hearing is necessary to determine amounts, if any, due and payable for plaintiff's attorneys fees, additional late fees, costs and expenses as it is well settled that when attorneys fees are payable pursuant to an agreement, they are subject to the test of reasonableness to be determined at a hearing. *Rad Ventures Corp., v. Artukmac*, 31AD3d 412 (2d Dept. 2006); *Hestnar v. Schetter*, 284 AD2d 400 (2d Dept. 2001); *Coniglio v. Regan*, 186 AD2d 708 (2d Dept. 1992).

This is an action by a lender against the corporate defendant based on a loan of $50,000.00 and against the individual defendant based on her guaranty of the debt of the corporate defendant.

The motion of the defendants addresses only the service upon Detrano. Service upon the corporation appears to have been made upon the New York Secretary of State pursuant to the Business Corporation Law and has not been challenged.

Defendant Detrano has controverted the affidavit of service pursuant to which plaintiff claims to have obtained jurisdiction. Service was made pursuant to CPLR §308(4) commonly known as "nail and mail" on the third of three attempts by affixing to defendant's door and mailing one day later. Defendant contends that on two of the three days for which service was attempted she was at the noted premises, and there were no sounds of any person

seeking entry. She also denies having seen any papers affixed to her home and receipt of any mail. The Court finds that denial of receipt of service is sufficient to place jurisdiction in issue.

An affidavit of service by a plaintiff's process server which specifies the papers served, the person who was served, and the date, time, address and sets forth facts showing that service was made by an authorized person, and in an authorized manner, constitutes prima facie evidence of proper service. *Maldonado v. County of Suffolk*, 229 AD2d 376 (2d Dept. 1996). A sworn denial of service by a defendant will rebut the presumption of proper service where it refutes factual allegations in the process server's affidavit or presents a question of fact rather than baldly denying receipt of process. *Silverman v. Deutsch*, 283 AD2d 478 (2d Dept. 2001); *European Am. Bank v. Abramoff*, 201 AD2d 611 (2d Dept. 1994). Here defendant has set forth sufficient specific facts to rebut the prima facie showing of the affidavit of service.

The motion to vacate the default on the grounds of lack of jurisdiction is granted to the extent that a traverse hearing shall be held to determine whether the defendant Detrano was properly served with process.

Plaintiff's cross motion for summary judgment is supported by copies of the pleadings verified by a representative of plaintiff, an attorney's affirmation, an affidavit of a loan administrator for plaintiff, an application for credit, a credit agreement and a guaranty.

The opposition to the cross motion is based solely on an affirmation of defendants' attorney and the individual defendant does not address the cross motion for summary judgment in her two affidavits.

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 corporate defendant to pay thereunder and a default. *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. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendants' attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence. In any event, in his opposition, counsel does not deny the loan documents. He claims that there was no consideration, no evidence of a loan or amounts loaned and that there was no demand for payment. However, defendants generalized, conclusory and nonspecific objections do not address the specific and unconditional terms of the documents which form the basis for the loan and are thus insufficient to create an issue of fact. *Cape Vincent Milk Producers Co-Op, Inc. v. St. Lawrence Food*, 43 AD3d 606 (3rd Dept. 2007); *East New York Savings Bank v. Baccaray, supra, Vernon v. Winikoff,* 182 AD2d 753 (2d Dept. 1992). In sum, defendant has failed to submit evidence in admissible form of

a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 AD3d 708 (2d Dept. 2008).

Finally, the Court notes, but must reject, the defendant's 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. The defendant merely claims that their discovery demands seek relevant information pertaining to some of the issues but fails to relate the need for discovery to the issues raised here.

A motion for summary judgment may be opposed with the claim that facts essential to justify opposition may exist but that such material facts are within the exclusive knowledge and possession of the moving party. CPLR §3212(f) However, the opposing party must make an evidentiary showing supporting this conclusion and not base the need for further discovery on speculation or conjecture. *Firth v. State*, 287 AD2d 771 (3d Dept. 2001); *Urcan v. Cocarelli*, 234 AD2d 537 (2d Dept. 1996). Defendants have not submitted sufficient evidence to support their contention that further discovery will alter the result here.

Based on the foregoing, there is need for a hearing to determine the issue of service on Detrano and the issue of damages due from the corporate defendant. In the interests of judicial economy and to minimize inconvenience to the parties, there shall be a joint hearing to determine these issues.

The hearing on the issue of service and on damages due from the corporate defendant is referred to the Calendar Control Part (CCP Part II) for April 13, 2009. Defendant and

plaintiff are each directed to file and serve a Note of Issue as to their respective motion and cross motion at least 10 days prior thereto and failure to do so shall be deemed a withdrawal by the non-filing party of their motion. A failure to appear may be deemed a default within the meaning of 22 NYCRR 202.27 and subject the non-appearing party to an appropriate sanction provided for therein or any other sanction authorized by statute, regulation or rule.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 11, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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