

BPD Bank v Pena Multi Serv., Inc.

2009 NY Slip Op 31715(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 103553/2009

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUDITH J. GISCHE, J.S.C.

PRESENT: _____

PART 10

Index Number : 103553/2009
BPD BANK
VS.
PENA MULTI SERVICE CTR., INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU OF COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

BPD BANK,

Plaintiff,

-against-

PENA MULTI SERVICE, INC.,
FRANCISCO PENA AND MARGARITA PENA

Defendant.

Decision/Order

Index No.: 103553/2009

Seq. No.: 001

Present:

Hon. Judith J. Gishe

J.S.C.

FILED

AUG 03 2009

COUNTY CLERK'S OFFICE
NEW YORK

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Recitation, as required by CPLR § 3213, of the papers considered in the review of this (these) motion(s):

Papers

Summons, Afd service, notice of motion, PCG afd, exhs 1

Numbered

Upon the forgoing papers, the decision and order of the court is as follows:

Plaintiff BPD Bank (BPD) moves for summary judgment in lieu of complaint to recover on a secured installment promissory note and a credit agreement. CPLR § 3213. This motion has been submitted to the court without any opposition.

The summons, notice of motion and supporting documents were served on defendant, Pena Multi Service Center Inc. ("Pena Multi") pursuant to BCL § 306 (b)(1). The same documents were also served on the individual defendants Francisco Pena and Margarita Pena by affixing the documents to the door of their respective residences, pursuant to CPLR § 308 (4), after four diligent attempts were made to personally serve these defendants. Service is sufficient for the court to have acquired personal jurisdiction over all defendants.

Defendants have not opposed the motion within the time provided under the CPLR. Therefore, the motion is considered on default.

Plaintiff claims the following: On August 22, 2007, BPD as lender, and Pena Multi, as borrowers, executed a Credit Agreement, under which BPD extended a line of credit in the principal amount of \$70,000.00 to Pena Multi. Pursuant to the credit agreement, on August 22, 2007, BPD and Pena Multi executed a Secured Installment Promissory Note (the "Note") for the sum of \$70,000.00 together with interest thereon at a rate of 11.25 % per annum. The loan was to be repaid in monthly installments of \$ 2,300.01, with the first payment to be made on September 22, 2007. As security for the credit agreement, both Margarita Pena and Francisco Pena each executed a separate, personal guaranty dated 8/22/07, which absolutely and unconditionally guaranteed Pena Multi's obligations to plaintiff of "whatsoever nature and howsoever evidenced, whether now existing or hereafter incurred, whether direct or indirect, absolute or contingent, secured or unsecured matured or unmatured."

The Note provides that in the event of a default, interest is to accrue at a rate of 15% per annum and BPD may declare the unpaid principal of the loan and all accrued interest on this Note due immediately. Plaintiff claims that the defendants' are in breach of their payment obligations under the promissory note and personal guarantees. Plaintiff claims that Pena Multi failed to make any payments to BPD on the Note since October 22, 2008. On February 19, 2009 Plaintiff notified Pena Multi that it was in default under the Note and demanded payment thereon. Plaintiff also demanded payment of Pena Multi's obligation from the guarantors. Plaintiff asserts that the Defendants' currently owe the principal amount of \$47,524.47 due under the Note together with interest. Plaintiff further seeks attorney fees.

Discussion

In support of the instant motion plaintiff provides the court with Senior Vice President of BDP Bank, Vincent Crocitto's affidavit, a copy of the credit agreement dated August 22, 2007, a

copy of the Note, copy of the security agreement, copies of the personal guaranties signed by Mr. Francisco Pena and Ms. Margarita Pena and a copy of default notice dated February 19, 2009.

When liability is based on an instrument for the payment of money only and the defendant has failed to make payment thereunder, the plaintiff may be granted summary judgment without filing a complaint. CPLR § 3213. Plaintiff is entitled to summary judgment in lieu of complaint provided it demonstrates that it has a *prima facie* cause of action. DDS Partners, LLC v. Gelenza, 6 AD3d 347 (1st Dept 2004). The elements of a cause of action under CPLR §3213 are (i) the existence of the instrument for payment under its terms, and (ii) failure to make payment under the terms of the instruments.

A promissory note is considered a quintessential instrument for the payment of money only and meets the elements of a *prima facie* cause of action. Alard L.L.C. v. Weiss, 1 AD3d 131 (1st Dept 2003). The facts presented by plaintiff establish a *prima facie* case for summary judgment in lieu of complaint against Pena Multi. The Note executed by BPD and Pena Multi Service provides for the unequivocal and unconditional promise to pay BPD in the amount of \$47,524.47, plus interest at the rate of 11.25 %. It further provides for interest at a rate of 15% from the date of default, October 22, 2008. Therefore, the Note is an instrument for the payment of money only pursuant to CPLR § 3213.

In addition, it is also well established that an unconditional guaranty is an instrument for the payment of money only within the meaning of CPLR § 3213. European American Bank v. Lofrese, 182 AD 2d 67, 71 (2d Dept 1992). In an action on a personal guaranty, a *prima facie* case is established through proof of (1) the executed guaranty; (2) a default on the underlying obligation secured by the guaranty; and (3) the defendant's failure to honor the guaranty. Valencia Sportswear, Inc. v. D.S.G. Enterprises, Inc. 237 AD2d 171 (1st Dept 1997).

Each Guaranty executed by Francisco Pena and Margarita Pena, is an instrument for the

payment of money only within the meaning of § 3213. European American Bank v. Lofrese, *Supra*. The individual defendants defaulted under the respective guarantees by failing to pay plaintiff what Pena Multi had itself defaulted in paying under the Note. Therefore, plaintiff is also entitled to summary against Francisco Pena and Margarita Pena.

In order to recover attorneys' fees a plaintiff must demonstrate that an award of attorneys' fees is authorized by statute, contract or court rule. The party must then demonstrate that it has prevailed in the action or proceeding. *City of New York v. Zuckerman*, 234 AD2d 160 (1st Dept. 1996). The Note and the Guarantees each provide that Pena Multi and the individual defendants would reimburse plaintiff for all costs of collection and enforcement of these agreements, including reasonable attorney fees.

Since plaintiff has prevailed in this action, plaintiff is entitled to reimbursement for its attorney's fees incurred herein from each of the defendants, joint and severally. Because plaintiff has failed to provide an affirmation from its counsel detailing the services provided and costs incurred, the court hereby refers the issue of what reasonable attorneys fees plaintiff may recover from the defendant to a Special Referee to hear and determine the issue. Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference may be assigned.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by Plaintiff, BPD Bank for summary judgment in lieu of complaint, against defendant Pena Multi Serive Inc. and Francisco Pena and Margarita Pena joint and severally is hereby granted; and it is further

ORDERED that Clerk shall enter a money judgment in favor of Plaintiff, BPD Bank, against defendant Pena Multi Service Inc. and Francisco Pena and Margarita Pena in the amount of Forty Seven Thousand Five Hundred Twenty Four and 47/100 Dollars, (\$ 47,524.47) plus pre judgment interest at the rate of 15% from October 22, 2008. and it is further

ORDERED that the court hereby refers the issue of reasonable attorneys fees to a Special Referee to hear and determine. Plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference may be assigned.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied. This shall constitute the decision and order of the Court.

Dated: New York, New York
July 29, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK