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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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WACHOVIA BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

SOUTH SHORE AUTO LEASING, INC. and FREDERICK L. IPPOLITO,

Defendants.

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TRIAL/IAS PART: 25
NASSAU COUNTY

Index No: 014544-08

Motion Seq. Nos: 1 & 2

Submission Date: 6/15/09

Papers Read on these Motions:

Notice of Motion, Affirmation in Support,
Affirmation in Support and Exhibits.....x
Affirmation in Opposition, Affidavit in Opposition and and Exhibit....x
Reply Affidavit, Reply Affirmation and Exhibits.....x

Order to Show Cause, Affirmation and Exhibit.....x

This matter is before the court on 1) Plaintiff's motion for summary judgment, filed on January 15, 2009 and submitted June 15, 2009, and 2) the application by counsel for Defendants to be relieved, filed on June 3, 2009 and submitted June 15, 2009. The Court 1) grants Plaintiff's motion for summary judgment and directs that a trial shall be held on damages, including principal, interest, costs and counsel fees; 2) grants the application of Klein & Vizzi, LLP to be relieved as counsel for Defendants; 3) directs that these proceedings are stayed for a period of sixty (60) days to permit Defendants to retain substitute counsel; and 4) directs counsel for Plaintiff and substitute counsel for Defendants to appear at a conference before this Court on October 27, 2009 at 9:30 a.m., at which time the Court will schedule a trial on damages.

BACKGROUND

A. Relief Sought

Plaintiff Wachovia Bank, National Association "(Wachovia") moves for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment and directing the entry of judgment for a sum certain against Defendants South Shore Auto Leasing, Inc. ("South Shore") and Frederick L. Ippolito ("Ippolito") (collectively "Defendants"), jointly and severally. Defendants oppose Plaintiff's motion.

In addition, counsel for Defendants ("Counsel") seeks to be relieved based on correspondence from Defendants, dated May 18, 2009, advising Counsel that he has been terminated as counsel for Defendants. No opposition has been filed with respect to this application.

B. The Parties' History

Wachovia seeks summary judgment against South Shore and Ippolito based on their defaults pursuant to two promissory notes ("Notes") and unconditional guaranties ("Guaranties") they executed in conjunction with two separate loans from Wachovia to South Shore. In support of its motion for summary judgment, Wachovia provides an affidavit of Peter J. Mottley ("Mottley"), Vice President of Wachovia, dated January 9, 2009. Mottley affirms as follows:

On or about August 28, 2006, South Shore, by Ippolito as South Shore's President, made, executed and delivered a Note ("First Note") in favor of Wachovia evidencing a loan in the principal sum of $98,753.58, with annual interest of 9%. In connection with the First Note, Ippolito made, executed and delivered a Guaranty ("First Guaranty"), pursuant to which Ippolito guaranteed the timely payment and performance of all liabilities and obligations of South Shore to Wachovia.

On or about September 18, 2006, Shore Shore, by Ippolito as South Shore's President, made, executed and delivered a second Note ("Second Note") in favor of Wachovia to evidence a second loan in the sum of $200,000, with interest to accrue at Wachovia's prime rate. In connection with the Second Note, Ippolito made, executed and delivered a Guaranty ("Second Guaranty"), pursuant to which Ippolito guaranteed the timely payment and performance of all liabilities and obligations of South Shore to Wachovia.

The Second Note was made to renew, extend, increase and modify South Shore's obligations pursuant to a Note dated January 27, 2005, executed in connection with a prior loan to South Shore in the principal amount of $100,000 ("2005 Note"). Ippolito executed a Guaranty in connection with the 2005 Note ("2005 Guaranty"), pursuant to which Ippolito guaranteed South Shore's obligations to Wachovia.

South Shore and Ippolito have defaulted upon their obligations to Wachovia by, *inter alia*, failing to make payments pursuant to the First and Second Notes and Guaranties. Wachovia has made demand on Defendants for payment pursuant to these instruments, and Defendants have still failed to make the required payments. With respect to the demand for payment, Wachovia provides copies of two letters ("Letters") dated May 15, 2008 , from Wachovia's counsel to South Shore and Ippolito. One Letter states that it is regarding the First Promissory Note and contains the following notation in capital letters: "NOTICE OF DEFAULT, DEMAND FOR PAYMENT AND ACCELERATION." The second Letter states that it is regarding the Second Promissory Note and contains the following notation in capital letters: "NOTICE OF DEMAND FOR PAYMENT." The Letters, *inter alia*, 1) notify Defendants that Wachovia has retained counsel with respect to the Notes and Guaranties; 2) set forth the default provisions of the Notes; 3) advise Defendants that South Shore is in default of the Notes by failing to make payments; 4) advise Defendants of the sums they owe pursuant to the Notes and Guaranties; 5) advise Defendants that counsel will commence proceedings to recover sums owed to Wachovia and that Defendants are responsible for costs that Wachovia incurs in those proceedings, including counsel fees; and 6) advise Defendants that, unless all sums due and owing under the Notes are paid in full immediately, Wachovia will take the necessary steps to collect those sums.

On or about August 6, 2008, Plaintiff filed the complaint ("Complaint") in which it seeks payment pursuant to the First and Second Notes and Guaranties, as well as interest and costs, including counsel fees. Wachovia alleges that, as of January 9, 2009, Defendants owed Wachovia 1) $75,824.13 on the First Note, plus interest and late fees, and 2) $203,918.28 on the Second Note, plus interest and late fees. In addition, the First and Second Notes and Guaranties provide that South Shore and Ippolito are responsible for costs and expenses that Wachovia incurs in seeking to collect pursuant to the Notes, including reasonable counsel fees.

Defendants oppose Plaintiff's motion and provide an Affidavit in Opposition of Ippolito dated March 3, 2009. Ippolito affirms, *inter alia*, that 1) he is the President of South Shore; 2) he executed the 2005 Note on behalf of South Shore in the sum of $100,000; 3) on September 18, 2006, South Shore entered into a new agreement with Wachovia for a loan in the amount of $200,000; 4) the $200,000 loan was not an extension or modification of the 2005 loan, but rather the parties agreed that the 2005 Note would be deemed "paid off" and the new $200,000 loan was a new and separate obligation of South Shore; and 5) he never executed a personal guaranty with respect to the Second Note, and the signature on the Second Guaranty is not his.

In its Reply Affidavit, Plaintiff submits that the documentary evidence belies Ippolito's contention that the Second Note was a new note, rather than an extension/modification of the 2005 Note. Specifically, the portion of the Second Note titled "Renewal/Modification/Increase" reads as follows:

> This Promissory Note renews, extends, increases and/or modifies that certain Promissory Note dated January 27, 2005 (the "Original Promissory Note"), evidencing an original principal amount of $100,000. This Promissory Note is not a novation to the extent of the principal balance currently outstanding under the Original Promissory Note.

Plaintiff notes further that, while Ippolito denies signing the Second Guaranty, he admits signing the 2005 Guaranty. Thus, irrespective of whether Ippolito actually signed the Second Guaranty, he is liable under the terms of the 2005 Guaranty for all of South Shore's obligations to Wachovia, including the indebtedness pursuant to the Second Note. In support thereof, Plaintiff makes reference to the following language in the 2005 Guaranty:

> ...Guarantor hereby absolutely, irrevocably and unconditionally guarantees to [Wachovia] and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of [South Shore] to [Wachovia] and its affiliates, including, but not limited to, all obligations under any notes, loan agreements, security agreements, letters of credit, instruments, accounts receivable, contracts, drafts, leases, chattel paper, indemnities, acceptances, repurchase agreements, overdrafts, and the Loan Documents, as defined below, and all obligations of [South Shore] to [Wachovia] or any of its affiliates under any swap agreement (as defined in 11 U.S.C. § 101, as in effect from time to

time), however and whenever incurred or evidenced, whether primary, secondary, direct, indirect, absolute, contingent, due or to become due, now existing or hereafter contracted or acquired, and all modifications, extensions and renewals thereof, (collectively the "Guaranteed Obligations").

C. The Parties' Positions

Plaintiff submits that the Court should grant summary judgment in its favor against both Defendants in light of Defendants' execution of the First and Second Notes and Guaranties and default with respect to the required payments pursuant to those instruments. Plaintiff submits, further, that any claim by Ippolito that he did not sign the Second Guaranty is irrelevant, in light of Ippolito's concession that he signed the 2005 Guaranty, in which he guarantees the obligations of South Shore. In addition, Plaintiff claims that the evidence clearly establishes Defendants' liability pursuant to the First Note and Guaranty.

Defendants oppose Plaintiff's motion on the grounds that 1) Plaintiff has failed to alleged when the default occurred or the manner in which Plaintiff calculated its damages; 2) Plaintiff failed to establish that the Guaranties were supported by consideration; 3) Ippolito's denial that he signed the Second Note raises an issue of fact as to whether the note referred to in the Complaint was the note that Ippolito agreed to guarantee; 4) Plaintiff has failed to establish that it is authorized to do business in New York; and 5) the Court should deny Plaintiff's motion because Defendants have served Plaintiff with discovery requests, to which Plaintiff has not responded, for documents that would aid Defendants in opposing the instant motion for summary judgment.

With respect to Counsel's application to be relieved, Counsel provides a letter dated from Defendants dated May 18, 2009 in which Defendants advise Counsel that they have terminated him, and that they have not yet retained new counsel.

RULING OF THE COURT

A. Plaintiff are Entitled to Summary Judgment on the First and Second Notes and Guaranties

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v.*

New York University Medical Center, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); and *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept.1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." In making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The Court may only grant summary judgment when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979).

To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002). Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

When the parties to a contract have set down their agreement in a clear and complete document, the document should, as a rule, be enforced according to its terms. *Heinrich v. Phazar Antenna Corp.*, 33 A.D.3d 864, 865 (2d Dept. 2006). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent [and] '[t]he best evidence of what parties to a written agreement intend is what they say in their writing.' " *Greenfield v. Phillies Records*, 98 N.Y.2d 562, 569 (2002), quoting *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Greenfield*, 98 N.Y.2d at 569.

The Court concludes, based on the documentary evidence, that Defendants are in default of the First and Second Notes, and the corresponding Guaranties. Notwithstanding Ippolito's

denial that he signed the Second Guaranty, the documentary evidence clearly sets forth that the Second Note was an extension of the 2005 loan and that Ippolito remains liable for its repayment by virtue of his execution of the 2005 Guaranty. Accordingly, the Court grants Plaintiff's motion for summary judgment, and directs counsel to appear before the Court for a conference on October 27, 2009 at 9:30 a.m., at which time the Court will schedule a trial on damages, including principal and interest, costs and counsel fees.

B. Court Grants Counsel's Application to be Relieved

Pursuant to CPLR § 321(b)(2), an attorney of record may be removed from a case by an order of the court in which the action was brought. The attorney must show good cause for withdrawal. 22 NYCRR § 1200.15(c)(6) (Code of Professional Responsibility DR § 2-110(c)(6). The decision to grant or deny permission to withdraw is within the discretion of the trial court. *Matter of Khan v. Dolly*, 39 A.D.3d 649, 650 (2d Dept. 2007). In light of the letter from Defendants advising Counsel that they are terminating him, the Court grants the application of Klein & Vizzi, LLP to be relieved from further representation of the Defendants. The Court directs outgoing Counsel to serve a copy of this order, together with a notice to appoint substitute counsel, upon his clients within twenty (20) days of this decision. All proceedings in this action are stayed for sixty (60) days from the date of this Decision to allow Defendants to retain substitute counsel.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for Plaintiff and substitute counsel for Defendants are reminded of their required appearance at a conference before this Court on October 27, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY
August 18, 2009

HON. TIMOTHY S. DRISCOLL
J.S.C.