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

PRESENT: HON JOAN A. MADDEN PART 11

Index Number : 111174/2006
FARMERS DEPOSIT BANK
VS.
FOX, LAWRENCE H.
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. 111174/06
MOTION DATE 5-21-08
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 is decided in accordance with the annexed Memorandum Decision + Order.

FILED
OCT 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 13, 2009

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 11

FARMERS DEPOSIT BANK,

Plaintiff,

- against -

LAWRENCE H. FOX, a/k/a LARRY FOX,

Defendant.

Index No.: 111174/06

DECISION/ORDER

MADDEN, JOAN, J.:

In this action, plaintiff Farmers Deposit Bank (Farmers) sues to recover on seven unpaid promissory notes, which allegedly were signed, co-signed, or guaranteed by defendant Lawrence Fox (Fox). Plaintiff moves for partial summary judgment on the first cause of action, which alleges non-payment of one promissory note signed by defendant on April 22, 2003 (April 2003 note); and seeks attorneys' fees in connection with collection of the note.

Defendant first argues that the motion should be denied because the promissory note provides that Kentucky law governs the note, and plaintiff has cited no Kentucky law in support of its motion. However, defendant, who fails to cite any Kentucky law, provides no legal authority to support denial of the motion where, as here, defendant not only fails to show how and in what relevant manner the law of Kentucky and the law of New York differ, but also has himself relied on New York law. *See AIG Trading Corp. v Valero Gas Mktg., L.P.*, 254 AD2d 117, 118 (1st Dept 1998). It is well settled that "in the absence of a strong

countervailing public policy, the parties to litigation may consent by their conduct to the law to be applied." *Heller & Co. v Video Innovations, Inc.*, 730 F2d 50, 52 (2d Cir 1984), citing *Martin v City of Cohoes*, 37 NY2d 162, 165-66 (1975); *Trophy Prods., Inc. v Cinema-Vue Corp.*, 53 AD2d 18, 22 (1st Dept 1976). Accordingly, the court will consider the merits of the motion based on New York law.

In support of its motion, plaintiff submits a copy of the executed April 2003 note, in the principal amount of $183,942.00 (*see* Promissory Note, Ex. D to Yates Aff. in Support). Under the terms of the note, payments were to be made beginning June 1, 2003, in 54 monthly installments of $3,988.91, with final payment due on November 1, 2007 (*id.*). Plaintiff submits evidence showing that defendant made payments on the note through February 2006, but failed to make any payments after that date. Plaintiff now seeks the principal balance due on the note, in the amount of $87,524.01, plus interest and late fees, for a total sum of $108,740.91.

By establishing proof of the note and failure to make payment pursuant to the terms of the note, plaintiff has made a prima facie showing of entitlement to summary judgment on the April 2003 note. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791, 791-792 (2d Dept 1985), *affd* 67 NY2d 627 (1986); *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31

AD2d 136, 137 (1st Dept 1968), *affd* 29 NY2d 617 (1971); *Silver v Silver*, 17 AD3d 281, 281 (1st Dept 2005); *Simoni v Time-Line, Ltd.*, 272 AD2d 537, 538 (2d Dept 2000); *Mariani v Dyer*, 193 AD2d 456, 457 (1st Dept 1993). To defeat summary judgment, defendant must come forward with evidence establishing a triable issue of fact as to a bona fide defense to the note. *See Bronsnick v Brisman*, 30 AD3d 224, 224 (1st Dept 2006); *Silver*, 17 AD3d at 281; *State Bank of Long Is. v O'Brien*, 298 AD2d 576, 576-577 (2d Dept 2002); *Simoni*, 272 AD2d at 538; *Gateway State Bank*, 113 AD2d at 792; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Defendant does not deny that he executed the April 2003 note, that he made no payments after February 2006, and that the outstanding balance on the note remains unpaid. Of the principal amount of the loan, defendant acknowledges that he received $50,000, and that approximately $39,000 was used to pay off a prior loan that he had with Farmers. He claims, however, that he did not receive and does not owe approximately $90,000 of the loan amount, which was used to pay off nine third-party pre-existing bank loans to clients of defendant, at least some of which were co-signed or guaranteed by defendant. Defendant, an attorney and a professional sports agent who represents various professional basketball players, does not dispute that the third-party loans were made to his clients, but he contends that he did

not authorize payment of those loans out of the proceeds of the April 2003 loan. He also asserts that he did not question and was not concerned that he did not personally receive the full amount of the loan, because he knew that about $39,000 was being used to pay off one of his prior loans, and he believed that he could make multiple draws from the loan as funds were needed.

Defendant's conclusory assertions that he did not authorize payment of the third-party loans, and that he did not know that the entire amount was disbursed at the closing of the loan, are insufficient to raise a triable issue of fact as to his liability for the amount due on the loan (*see Silver*, 17 AD3d at 281; *Simoni*, 272 AD2d at 538), especially in view of evidence submitted by plaintiff, in reply, that defendant knew and agreed that this loan was going to be used to pay for defaulted loans of his clients and others (*see* Facsimile, Ex. A to Yates Reply Aff.). In correspondence from defendant to Carroll Yates (Yates), plaintiff's president, dated November 12, 2003, defendant advised Yates that the April 2003 loan was "a consolidation of many different loans of mutual clients that matured or were past due ... [and] other loans which I volunteered to honor" (*id.*). He also expressly acknowledged that he "agreed to consolidate these loans in my name," "to be the conduit to collect on these outstanding defaulted loans and to make the monthly payments ..." (*id.*). Even assuming that there

is some dispute as to which defaulted loans the note was intended to be used for, that dispute fails to demonstrate that defendant is not liable for payment of the April 2003 note.

Similarly, defendant's claim that Farmers defrauded him, when it paid the third-party loans from the April 2003 loan, is unsubstantiated and fails to raise a triable issue of fact as to a fraud defense to the note. *See Bank of China v Chung Tai Enterprise (U.S.A.), Inc.*, 202 AD2d 306, 306 (1st Dept 1994). Defendant's apparent argument is that evidence that plaintiff's prior president, William Covington (Covington), was indicted on charges of defrauding the bank, shows that defendant was defrauded, because Covington signed the bank check used to pay his $39,000 loan and the third-party loans. Defendant's allegations of fraud are not only unsupported by the documents submitted, but are insufficiently specific to identify what fraud was perpetrated upon him. *See Mariani*, 193 AD2d at 457; *Gateway State Bank*, 113 AD2d at 792; *see generally Cape Vincent Milk Producers Coop., Inc. v St. Lawrence Food Corp.*, 43 AD3d 606 (3d Dept 2007); *First Nationwide Bank v 965 Amsterdam, Inc.*, 212 AD2d 469 (1st Dept 1995). Defendant does not claim that he was fraudulently induced into signing the agreement or identify any material misrepresentation made by plaintiff. To the extent that defendant claims that the fraud against him was based on Covington's concealment of the nature and purpose of Farmer's

loans, he makes no showing that the nature and purpose of the loans to him were concealed. By his own correspondence, in which he clearly states that the purpose of the April 2003 note was to consolidate other existing loans that were in default, he reveals that he knew the nature and purpose of the loan. Moreover, the documents defendant submits in support of his fraud defense, including a copy of an indictment against Covington and a plea agreement, reflect no connection between Covington's activities and plaintiff's loans to defendant.

Rather, the documents, to the extent that they have any relevance to the instant matter, reflect that Covington was indicted on charges of schemes to defraud the bank by loaning money to fictitious borrowers while knowing that the loan proceeds were going to favored clients. There are no allegations here that defendant's loans were made to any fictitious borrowers, and the documents pertaining to Covington therefore fail to raise a triable issue of fact as to any fraud perpetrated against defendant.

As to plaintiff's claim for attorneys' fees, the April 2003 note expressly provides that plaintiff is entitled to reasonable attorneys' fees and legal expenses incurred in connection with collecting on the note (*see* Promissory Note, Ex. D to Yates Aff. in Support). Plaintiff therefore is entitled to summary judgment as to liability on its claim for attorneys' fees, with an

assessment to be held at the time of trial or after other disposition of the case.

The branch of plaintiff's motion which seeks dismissal of defendant's affirmative defenses is denied as moot with respect to the first cause of action. With respect to the remaining causes of action, that branch of the motion is denied without prejudice. On the instant motion, plaintiff addresses only the first cause of action, and does not specifically address the affirmative defenses as they apply to the remaining causes of action.

Accordingly, the motion is granted in part and denied in part, and it is

ORDERED that the motion is granted to the extent of granting summary judgment in favor of plaintiff on the first cause of action; and it is further

ORDERED that judgment is granted in favor of plaintiff Farmers Deposit Bank and against defendant Lawrence H. Fox a/k/a Larry Fox in the amount of $108,740.91 (including late fees and interest through December 10, 2008), with interest at the rate of 7% from December 11, 2008, together with costs and disbursements, as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion which seeks attorneys' fees is granted to the extent of awarding summary judgment as to

liability and directing a hearing on the reasonable amount of attorneys' fees, to be held at the time of trial or after other resolution of the underlying matter; and it is further

ORDERED that the remaining claims are severed and shall continue.

Dated: October 13, 2009

J.S.C.