

PMG Holdings, Inc. v Messinger

2009 NY Slip Op 32632(U)

October 29, 2009

Supreme Court, Nassau County

Docket Number: 013234-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
PMG HOLDINGS, INC.,

Plaintiff,

-against-

JOEL MESSINGER,

Defendant.

-----x

TRIAL/IAS PART: 25

NASSAU COUNTY

Index No: 013234-09

Motion Seq. No: 1

Submission Date: 9/4/09

The following papers having been read on this motion:

Notice of Motion, Affidavit in Support and Exhibits.....x

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff PMG Holdings, Inc. on July 13, 2009 and submitted on September 4, 2009. Defendant has not submitted any response to Plaintiff's motion. The Court grants Plaintiff's motion. For the reasons set forth below, the Court awards Plaintiff judgment against Defendant in the principal amount of \$150,000, representing the sum that Defendant owes to Plaintiff pursuant to a guaranty that Defendant executed, plus interest since October 1, 2007, together with costs and expenses, including counsel fees. The Court directs that an inquest shall be held to determine interest, counsel fees and other costs and expenses, if appropriate, that Defendant owes to Plaintiff.

BACKGROUND

A. Relief Sought

Plaintiff PMG Holdings, Inc. (“PMG”) requests an Order, 1) pursuant to CPLR § 3213, directing the entry of summary judgment in lieu of complaint in favor of Plaintiff and against Defendant Joel Messinger (“Messinger”), in light of the judgment entered in favor of PMG and against Messinger in the related matter of *PMG Holdings, Inc. v. Community Association Services, Inc. and Joel Messinger, individually*, Case Number 07-14055, District Court of Dallas County of Texas, 14th Judicial District (“Texas Action”); and 2) awarding to Plaintiff the sum of \$174,761.25, plus costs and interest, due under the judgment in the Texas Action (“Texas Judgment”); or 3) in the alternative, awarding Plaintiff judgment against Defendant in the principal amount of \$150,000 due and owing under the personal guaranty that Defendant executed, plus interest since October 1, 2007, together with costs and expenses, including counsel fees.

Defendant has submitted no response to Plaintiff’s motion.

B. The Parties’ History

In support of its motion, Plaintiff provides an affidavit of Chad Kluever (“Kluever”), Assistant General Counsel for Corporate for Associations, Inc. (“Associa”), dated May 26, 2009. Kluever affirms that PMG is a wholly owned subsidiary of Associa and that, in his capacity as Assistant General Counsel, he has reviewed the business records of PMG that are maintained in the ordinary course of business, and bases his knowledge on his review of those records. Kluever affirms the following:

In September of 2007, PMG and Community Association Services, Inc. (“CAS”), a Florida corporation with its principal place of business in Boca Raton, Florida, discussed a proposed stock purchase transaction, pursuant to which PMG would acquire all the issued and outstanding stock of CAS (“Stock”). At all relevant times, Messinger was the president of CAS and the holder of all the Stock.

On or about September 20, 2007, in connection with this proposed transaction, PMG loaned CAS the principal sum of \$150,000 (“CAS Loan”). The CAS Loan was evidenced by a) a loan agreement between PMG and CAS (“Loan Agreement”), b) a promissory note in the principal amount of \$150,000, naming PMG as payee and CAS as maker (“Note”), c) a security

agreement, in which CAS pledged certain collateral as security for its obligations under the Note and Loan Agreement (“Security Agreement;” collectively with the Note and Loan Agreement, “CAS Loan Documents”), and d) a personal guaranty that Messinger executed, in which he guaranteed PMG the full performance by CAS of its obligations under the CAS Loan (“Guaranty”). Kluever provides copies of the CAS Loan Documents and the Guaranty. The Loan Agreement lists the Borrower as “[CAS], 951 Broken Sound Parkway, # 250, Boca Raton, Florida 33487, Attn: Joel Messinger,” with a facsimile number with a 561 area code, which is the area code for Boca Raton, Florida.

¶ 13(c) of the Loan Agreement, titled “Governing Law,” provides that Texas substantive law would govern the validity, construction, enforcement, and interpretation of the CAS Loan Documents. ¶ 14(d) of the Loan Agreement, titled “Venue; Service of Process,” reflects, *inter alia*, 1) CAS’ irrevocable submission to the nonexclusive jurisdiction of the state and federal courts of Texas, 2) CAS’ consent to service of process pursuant to Texas law, and 2) CAS’ consent to venue in the district courts of Dallas County, Texas for litigation with respect to the CAS Loan Documents.

Kluever affirms that Messinger executed the CAS Loan Documents in his capacity as president of CAS, and executed the personal Guaranty in his individual capacity. The copies of the Loan Documents and Guaranty contain Messinger’s signature in those capacities.

Kluever affirms that the CAS loan was primarily intended as a “bridge loan,” which was to be repaid at the time of closing on the contemplated purchase and sale transaction. If the purchase and sale transaction did not occur, the CAS loan was to be repaid within ninety (90) days, with monthly interest payments due, beginning on October 1, 2007 and on the first day of each month thereafter until the CAS loan was paid in full. CAS failed to make the interest payment that was due on October 1, 2007.

The contemplated purchase and sale transaction did not occur. Neither CAS nor Messinger ever made any payment related to the CAS loan. By letter dated October 31, 2007, Associa, in its capacity as the parent company of PMG, sent a letter (“Default Letter”) to Messinger at CAS advising CAS that it was in default of its obligations pursuant to the Note, and demanding payment of the entire unpaid principal of \$150,000, plus accrued interest. Despite this demand, neither CAS nor Messinger made payments on the Note.

With respect to PMG's application for counsel fees, ¶13(k) of the Loan Agreement, titled "Expenses of Lender," provides that CAS will reimburse PMG for expenses, including court costs and reasonable counsel fees, that Lender incurs in connection with the enforcement of the CAS Loan Documents.

On or about November 30, 2007, PMG filed the Texas Action against CAS and Messinger to recover the principal and interest owed pursuant to the Loan and Guaranty. The Texas Judgment, dated July 28, 2008, reflects that 1) on June 10, 2008, the court (Murphy, J.) signed an Order declaring that CSA was in default, and thereby had admitted the allegations of Plaintiffs's Original Petition as to liability; 2) on July 28, 2008, Judge Murphy signed an Order granting PMG's Motion for Summary Judgment; and 3) these Orders were incorporated and merged into the Texas Judgment for all purposes.

The Texas Judgment awarded PMG a judgment against CSA and Messinger, jointly and severally, for the following sums: 1) \$150,000 in actual damages, 2) contract interest of \$22,265.75, calculated at the maximum legal rate of 18 percent from October 1, 2007 through July 28, 2008,¹ 3) attorneys' fees of \$2,1520.50 for legal services rendered in the prosecution of the suit, pursuant to Section 13(k) of the Loan Agreement and Section 17.50(d) of the Civil Practice and Remedies, 4) \$10,000 for legal services if the case is appealed to the Court of Appeals and Plaintiff prevails, 5) \$5,000 for legal services if the case is appealed to the Supreme Court of Texas and Plaintiff prevails, 6) \$343 in court costs, and 7) post-judgment interest on the total amount of the Texas Judgment at the rate of 18 percent per annum from the date of rendition until paid.

On or about August 2008, the Texas Judgment was domesticated in the State of Florida, where Messinger purported to reside, and where CAS was incorporated. After PMG initiated supplemental proceedings to enforce the Texas Judgment in Florida, Messinger advised PMG that 1) he no longer resided in Florida; 2) CAS had been taken over by CAS Realty, LLC; and 3) CAS' assets had been transferred to CAS Realty, LLC.

Kluever affirms that, upon information and belief, Messinger currently resides in Nassau

¹ Pursuant to ¶ 2(b) of the Note, "[a]t the election of [PMG] during the continuance of a Default..., all past-due principal of and interest on [the Note] shall bear interest at the per annum rate of interest that is the lesser of (i) the Highest Lawful Rate or (ii) eighteen percent (18%)."

County, New York. With respect to service of the instant action, PMG provides an Affidavit of Service reflecting that it served copies of the following documents upon Messinger by delivering the documents to Messinger personally, on at 36 Cain Drive, Plainview, New York: 1) Request for Judicial Intervention, 2) Affirmation for Assignment to the Commercial Division, 3) Summons and Notice of Motion in Lieu of Complaint Pursuant to CPLR § 3213 and Affidavit of Kleuver, and 4) Memorandum of Law in Support. Finally, Kluever submits that Messinger has no defense to this action.

C. The Parties' Positions

PMG asks the Court to enter summary judgment in its favor, pursuant to CPLR § 3213, and order Messinger to pay PMG the full amount of the Texas Judgment. Alternatively, also pursuant to CPLR § 3213, PMG asks the Court to order Messinger to pay to PMG the full amount due and owing under the terms of the Guaranty that he executed in favor of PMG.

PMG submits that it is entitled to this relief in light of its submissions which demonstrate that 1) PMG made the CAS Loan in the principal amount of \$150,000; 2) Messinger personally guaranteed the CAS Loan; 3) pursuant to the Guaranty, Messinger guaranteed CAS' obligations pursuant to the CAS Loan; 4) CAS' failure to repay the Loan constitutes a default that permits PMG to declare the entire unpaid principal of, and accrued interest on, the Note immediately due and payable; 5) CAS' default triggered Messinger's obligation to pay the sums owed pursuant to the Note; 6) PMG notified CAS and Messinger of the default and demanded payment; and 7) despite the demand for payment, CAS and Messinger have made no payment.

Messinger has submitted no response to PMG's motion.

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum

time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept. 2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). 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).

C. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must

prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Effect of Texas Judgment

The full faith and credit clause of the Federal Constitution requires the courts of each State to give to the judgments of other States the same conclusive effect between the parties as

such judgments are given in the States in which they are rendered. *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 204 (1985). New York courts, however, do not accord full faith and credit to a default judgment because it is not regarded as a disposition on the merits. *All Terrain Properties v. Hoy*, 265 A.D.2d 87, 92 (1st Dept. 2000); CPLR § 5401. Thus, in light of the language in the Texas Judgment reflecting that it was, at least in part, a default judgment, the Court declines to give full faith and credit to the Texas Judgment.

F. Conclusion

The Court concludes that PMG has met its burden of demonstrating the existence of the Note and CAS' failure to make payment pursuant to that instrument, which Messinger personally guaranteed. PMG has also demonstrated all of the elements to recover as a matter of law on the Guaranty here. Moreover, Messinger has interposed no defense to PMG's action.

The Court awards Plaintiff judgment against Defendant in the principal amount of \$150,000, representing the sum due and owing under the Guaranty, plus interest since October 1, 2007, together with costs and expenses, including counsel fees. The Court directs that an inquest shall be held to determine interest, counsel fees and other costs and expenses, if appropriate, that Defendant owes to Plaintiff.

In light of the foregoing, it is hereby:

ORDERED, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is granted; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace to hear and determine all issues relating to the determination of interest, counsel fees and other costs and expenses, if appropriate, on November 23, 2009 at 9:30 a.m.; and it is further

ORDERED, that Plaintiff's attorney file a Notice of Inquest or a Note of Issue and pay the appropriate filing fees on or before November 9, 2009; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant in accordance with the decision of the Special Referee.

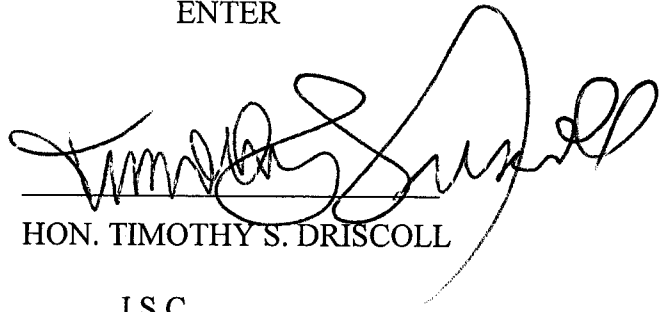
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

October 29, 2009

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

NOV 04 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**