

Golden v Ameritube, LLC

2010 NY Slip Op 30461(U)

March 3, 2010

Supreme Court, New York County

Docket Number: 116687/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.
Justice

PART 10

Index Number : 116687/2009
GOLDEN, JUSTIN T.
VS.
AMERITUBE LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

n 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

FILED
MAR 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: MAR 03 2010

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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
Justin T. Golden,

Plaintiff,

-against-

Ameritube, LLC., and Khariton Gary
Ravitsky,

Defendants.
-----X

DECISION/ORDER

Index No.: 116687/09
Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Pltf n/m (CPLR § 3213) w/ JG affid, exhs	1
Stipulation	2

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

This is plaintiff's motion for summary judgment in lieu of a complaint based upon a Loan Agreement, Promissory Note, and Guarantee Agreement (the "Agreements"). CPLR § 3213. This motion has been submitted to the court without opposition, and is, therefore, considered by the court on default, although the parties entered into a written stipulation adjourning the motion for defendants to put in opposition.

Plaintiff has filed proof that the summons and motion were personally served upon Khariton Gary Ravitsky ("Ravitsky") and on Ameritube, LLC ("Ameritube") through a

3] registered agent for the company. CPLR § 308(1); LLC § 302(b), 303. Despite such notice, defendants have neither appeared in this action nor opposed the motion. Defendants' time to do so has expired and has not been extended by the court. Therefore, this motion is submitted on default and plaintiff is entitled to summary judgment provided he otherwise establishes a prima facie case.

Discussion

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). An instrument for the payment of money qualifies for CPLR § 3213 treatment if it contains an unconditional promise by the debtor to repay lender the moneys advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634, (2nd Dept. 1992).

Although the need to consult the underlying loan documents to establish the amount of liability does not affect the availability of CPLR § 3213 [European Am. Bank v. Cohen, supra], to establish its prima facie case against guarantor, the lender must set forth the notes, an unconditional guaranty to pay, and nonpayment thereof. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 AD2d 541 (1st Dept 1992).

An unconditional guaranty is an instrument for the payment of money only, whether or not it recites a sum certain. European Am. Bank v. Cohen, 183 AD2d 453, 453 (1st Dept 1992). To defeat the motion, the guarantor must come forward with proof showing the existence of a triable issue of fact with respect to a bona fide defense. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 AD2d at 542.

[* 4]

Plaintiff has set forth the following facts in his motion and his sworn affidavit in support:

This action is based upon the Agreements entered into between plaintiff and Ameritube, which Ravitsky personally guaranteed. Ravitsky is the president of Ameritube. On March 15, 2007, pursuant to the Loan Agreement and Promissory Note, plaintiff loaned defendants \$100,000.00 conditioned on Ameritube's repayment of the loan in two installments: (1) \$50,000.00 on or before June 16, 2007; and (2) \$58,453.00 on or before February 15, 2008; totaling \$108,453.00 plus interest on the entire amount. Ravitsky executed a Guarantee Agreement which unconditionally guaranteed Ameritube's payment under the Loan Agreement and the Promissory Note.

Defendants' failure to make each payment constitutes a default under the Agreements. The Agreements qualify as instruments for the payment of money under CPLR § 3213. Therefore, plaintiff has established entitlement to summary judgment against defendants in the amount of \$108,453.00 (see Afco Credit Corp. V. Boropark, supra; Bonds Financial, Inc. v. Kestrel Technologies, LLC, 48 AD3d 230 [1st Dept 2008]).

Plaintiff seeks \$130,089.60 plus pre-judgment interest from November 10, 2009 at rate of 16%, plus legal fees. Plaintiff argues that subsequent to the Agreements of March 15, 2007, in July 2008, plaintiff and defendants agreed to an Amendment to Loan Documents ("Loan Amendment"). The Loan Amendment, which names Ravitsky as personal guarantor, states that defendants are required to pay \$114,350.00, instead of \$108,453.00, on or before December 31, 2008.

Pursuant to paragraph 1 of the Loan Amendment:

“1. **Effective Date.** This Amendment shall be effective immediately upon (but in no event prior to) the payment of \$15,000 (the “Interest Payment”) by the Borrower to the Lender (the “Effective Date”), which amount represents interest accrued under the Loan Documents as of the date hereof. . .”

Although the copy of the Loan Amendment provided to the Court is not signed by either party or the guarantor, plaintiff states in his sworn affidavit that he cannot locate an executed copy. Instead, in an effort to establish the execution of the Loan Amendment, plaintiff refers to an e-mail thread he had with Ravitsky. While the e-mails state that Ravitsky sent a wire transfer of \$15,000.00 to plaintiff, they do not set forth the reason for such payment, nor do they make any reference to the Agreements or the Loan Amendment. Therefore, plaintiff has not set forth his prima facie case that he is entitled to \$114,350.00 under the Loan Amendment. The Loan Amendment is not an instrument for the payment of money only within the meaning of CPLR § 3213, because to determine its validity requires looking at e-mails, which lie outside the instrument itself.

Plaintiff's claim for the additional \$5,897.00 is hereby severed and dismissed, without prejudice to plaintiff bringing an action in lower civil court for the \$5,897.00, because this amount is below Supreme Court threshold.

6]

Plaintiff also seeks pre-judgment interest from November 10, 2009, at a rate of 16%. Paragraph (vi) of the Promissory Note states:

“If an Event of Default shall occur the Borrower shall be obligated to pay interest on the entire amount in default from the date hereof at an annual rate equal to the highest rate permitted by applicable law. . . .”

The Promissory Note allows interest to accrue at the highest rate permitted by applicable law, 16%, which is the same amount plaintiff demands. GOL § 5-501; Banking Law § 14-a. Since plaintiff acknowledges that defendant paid the interest due through March 15, 2008, notwithstanding that the principal amount of the loan still remains unpaid, plaintiff is entitled to interest from March 16, 2009, at the rate of 16% through date of entry of judgment. Thereafter, interest shall be at the statutory rate only.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Promissory Note expressly provides that defendants are liable to pay plaintiff “all reasonable costs of collection, including but not limited to, reasonable attorneys’ fees.” However, the issue of legal fees requires a determination of whether they are “reasonable.” Since a hearing is required and the sum sought is not certain, the Court cannot determine this issue under the provision of CPLR § 3213. The Court hereby severs and converts the issue of legal fees into a conventional action and plaintiff shall serve a summons and complaint on defendant. Since the court already has personal jurisdiction over

defendant, service may be by regular mail to defendant's last known residential address.

Conclusion

In accordance herewith, it is hereby

ORDERED that plaintiff Justin T. Golden's motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendants Ameritube LLC, and Khariton Gary Ravitsky is granted only to the extent that plaintiff is entitled to a money judgment in its favor and against defendants, jointly and severally, for the unpaid principal sum of \$108,453.00, together with interest at a rate of 16% per annum from March 16, 2008 until entry of judgment; and it is further

ORDERED that plaintiff's claim for an additional \$5,897.00 is hereby severed and dismissed, without prejudice to plaintiff bringing an action in lower civil court for the \$5,897.00, because this amount is below Supreme Court threshold; and it is further


ORDERED that the issue of legal fees is hereby severed and converted into a conventional action and plaintiff shall serve a summons and complaint on defendants within twenty (20) days.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 3, 2010

So Ordered:


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

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