

JPMorgan Chase Bank, N.A. v Nicoletta Homes, Inc.
2010 NY Slip Op 30710(U)
March 25, 2010
Supreme Court, Nassau County
Docket Number: 019911-09
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
JPMORGAN CHASE BANK, N.A.,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

-against-

**Index No. 019911-09
Motion Seq. No. 1
Submission Date: 2/1/10**

**NICOLETTA HOMES, INC. and VLADIMIR
NABUTOUSKY a/k/a VLADIMIR NABUTOVSKY,**

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support and Memorandum of Law.....x**
- Affirmation in Opposition and Exhibit.....x**

This matter is before the Court for decision on the motion filed by Defendants Nicoletta Homes, Inc. (“Nicoletta”) and Vladimir Nabutousky a/k/a Vladimir Nabutovsky (“Vladimir”) (collectively “Defendants”) on December 10, 2009, and submitted on February 1, 2010. For the reasons set forth below, the Court denies Defendants’ motion in its entirety.

BACKGROUND

A. Relief Sought

Defendants moves for an Order 1) pursuant to CPLR § 3211(a)(7), dismissing the verified complaint (“Complaint”); and 2) awarding Defendants attorney’s fees and costs incurred in pursuing the instant motion.

Plaintiff JP Morgan Chase Bank, N.A. (“Chase” or “Plaintiff”) opposes Defendants’ motion.

B. The Parties’ History

Plaintiff alleges the following in the Complaint (Ex. 1 to Aff. in Opp.):

Chase is a national banking association with a place of business at 1985 Marcus Avenue,

New Hyde Park, New York 11042. Nicoletta is a corporation organized under the laws of the State of New York (“New York”) with a place of business at 614 Richmond Road, Staten Island, New York 10304. Vladimir is, upon information and belief, a resident of New York with a residence at 26 Hanover Avenue, Staten Island, New York 10309.

On or about October 24, 2007, Al Medical & Surgical Supplies, Inc. (“Al Medical”), a corporation organized under New York laws, applied and received approval in writing for a promissory note (“Note”) pursuant to which Al Medical promised to pay the principal sum of \$100,000 with interest on the unpaid principal balance of the Note at a *per annum* rate equal to Prime Plus 4.35% and a default interest rate of Prime Plus 7.35%. A copy of the Note is provided as Exhibit A to the Complaint. Al Medical filed a Certificate of Dissolution with the New York Department of State on or about June 22, 2009 and is no longer an active corporation. Accordingly, it is not a party to this action.

In the first cause of action, asserted against Vladimir, Plaintiff alleges that on or about October 24, 2007, Vladimir made, executed and delivered to Chase a guarantee (“Note Personal Guaranty”) of the obligations of Al Medical. That Note Personal Guaranty, Exhibit B to the Complaint, includes the language, in capital letters, that “GUARANTOR AGREES THIS IS A CONTINUING GUARANTY OF PAYMENT OF ALL INDEBTEDNESS OF BORROWER [Al Medical] AND IS NOT LIMITED TO A SPECIFIC LOAN.” The Note Personal Guarantee contains Vladimir’s signature. Plaintiff alleges that Vladimir failed to pay the installments due on the Note since April 23, 2009 (“Vladimir Default Date”). Plaintiff alleges that Vladimir owes Chase 1) principal in the sum of \$76,635.04, 2) interest at a rate of Prime plus 4.35% from March 23, 2009 to April 22, 2009 and at a default rate of Prime plus 7.35% from the Default Date through date of entry of judgment, and 3) late charges at the rate of 5% of each payment due pursuant to the Note.

In the second cause of action, asserted against Nicoletta, Plaintiff alleges that on or about August 15, 2007, Nicoletta made, executed and delivered to Chase, for value received, a promissory note (“Nicoletta Note”) in writing, pursuant to which Nicoletta promised to pay the principal sum of \$65,000. The Nicoletta Note was modified via a second promissory note (“Note-2”) dated on or about November 6, 2007 to form a single lien in the sum of \$100,000 with interest thereon on the unpaid principal balance of the Note-2 at a *per annum* rate of Prime

Plus 3.20% and a default interest rate of Prime Plus 6.20%. Plaintiff alleges that Nicoletta failed to pay the installments due under the Note-2 since May 6, 2009 (“Nicoletta Default Date”). Plaintiff alleges that Nicoletta owes Chase 1) principal in the sum of \$99,683.02, 2) interest at a rate of Prime plus 3.20% from April 6, 2009 to May 5, 2009 and at a default rate of Prime plus 6.20% from the Nicoletta Default Date through the date of entry of judgment, and 3) late charges at the rate of 5% of each payment due pursuant to the Note-2.

In the third cause of action, asserted against Vladimir, Plaintiff alleges that on or about August 15, 2007, Vladimir made, executed and delivered to Chase a guarantee of Nicoletta’s obligations (“Note-2 Personal Guaranty”). Plaintiff provides a copy of this Note-2 Personal Guaranty (Ex. D to Complaint) which contains Vladimir’s signature and includes the following language in capital letters: GUARANTOR AGREES THIS IS A CONTINUING GUARANTY OF PAYMENT OF ALL INDEBTEDNESS OF BORROWER [Nicoletta] AND IS NOT LIMITED TO A SPECIFIC LOAN. Plaintiff alleges that Vladimir failed to pay all installments due under the Note-2 since the Nicoletta Default Date. Plaintiff alleges that Vladimir owes Chase 1) principal in the sum of \$99,683,02, 2) interest at a rate of Prime plus 3.20% from April 6, 2009 to May 5, 2009 and at a default rate of Prime plus 6.20% from the Nicoletta Default Date through the entry of judgment, and 3) late charges at the rate of 5% of each payment due pursuant to the Note-2.

In the fourth cause of action, asserted against all Defendants, Plaintiff alleges that pursuant to the relevant Notes and Guarantees, Defendants are obligated to pay reasonable attorney’s fees, plus costs and expenses incurred by Plaintiff in commencing a proceeding to collect the amounts due pursuant to those agreements. Pursuant to those provisions, Plaintiff seeks reasonable attorney’s fees, as well as costs and expenses, that it has incurred in prosecuting the instant action.

In their Affirmation in Support, Defendants affirm that 1) the documents (Notes and Guarantees) annexed as exhibits to the Complaint do no contain initials on every page; 2) the documents annexed as Exhibits to the Complaint “are absent a signature at the end of the alleged contract” (Aff. in Opp. at ¶ 7); and 3) the Complaint does not contain documents reflecting Plaintiff’s demand for payment from the borrowers. Defendants submit that, in light of these alleged deficiencies, Plaintiff has failed to make allegations sufficient to establish a *prima facie*

cause of action for breach of contract.

In its Affirmation in Opposition, Plaintiff submits that Plaintiff has sufficiently alleged a valid cause of action on the Note, Note-2, Note Personal Guaranty and Note-2 Personal Guaranty. Plaintiff disputes Defendants' contention that Plaintiff has failed to attach as exhibits to the Complaint copies of the Note, Note-2, Note Personal Guaranty and Note-2 Personal Guarantee and directs the Court's attention to Exhibits A through D of the Complaint.

Plaintiff also submits that, in light of the section in the relevant agreements titled "Acceleration/Remedies," Plaintiff was not required to demand payment prior to declaring a default. The first sentence of that section reads as follows:

If any Event of Default occurs, the Note shall become due and payable immediately, without notice or demand, at Lender's option, and Borrower hereby waives notice of intent to accelerate maturity of the Note and notice of acceleration of the Note.

C. The Parties' Positions

Defendants submit that Plaintiff has failed to plead a *prima facie* cause of action for breach of contract and, therefore, that the Court should dismiss the Complaint.

Plaintiff opposes Defendants' motion, submitting that 1) Plaintiff has sufficiently alleged valid causes of action on the Note, Note-2, Note Personal Guaranty and Note-2 Personal Guaranty; 2) there is no requirement that the agreements pursuant to which Plaintiff seeks payment contain the borrower/guarantor's initials on every page; and 3) pursuant to the terms of the applicable agreements, Plaintiff was not required to demand payment from Defendants before instituting this action for payment.

RULING OF THE COURT

A. Standards for Dismissal

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion,

however, the Court will not presume as true bare legal conclusions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. The Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

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); *Mangiatoridi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

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. disp.*, 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).

Provisions or stipulations in contracts for payment of attorney's 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). 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).

C. Application of these Principles to the Instant Action

The Complaint alleges 1) the existence of the Notes and the Defendants' failure to make payment pursuant to the terms of those instruments, 2) the existence of the underlying obligations and Guarantees, which are duly executed and clearly reflect the intent to guarantee the underlying obligations, and the failure of the prime obligor to make payment in accordance with the terms of the obligations, and 3) the existence of provisions in the applicable instruments for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection. Accordingly, the Court concludes that the Complaint states a cause of action for Defendants' breach of the terms of the Notes and Guarantees as well as a cause of action for Defendants' payment of counsel fees, costs and expenses incurred by Plaintiff in pursuing the instant action and denies Defendants' motion in its entirety.

All matters not decided herein are hereby denied.

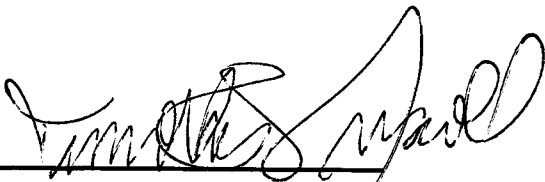
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on April 26, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

March 25, 2010



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

ENTERED
MAR 30 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE