STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

MARTIN KOSICH,

Plaintiff,

-against-

CATSKILL MILLENNIUM TECHNOLOGIES, INC., SURFERZ.NET, INC., and STEPHEN M. RENAULT, ARNIE CAVALLARO, and HENRY QUIGLEY,

Defendants.

DECISION and ORDER
INDEX NO. 08-1919
RJI NO. 19-09-4122

Supreme Court Greene County All Purpose Term, April 14, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Plaintiff commenced this action, in part and as is relevant to his motion herein, to recover the sums of money he claims due under a Promissory Note, dated May 15, 2000 (hereinafter "Note") and its later modifications. Issue was joined by defendants Arnie Cavallaro (hereinafter "Cavallaro"), Surferz.Net, Inc. (hereinafter "Surferz") and Stephen M. Renault (hereinafter

"Renault")[1]. Discovery is complete and a trial date certain is set. Plaintiff now moves and Defendants cross-move for summary judgment. Because Plaintiff demonstrated his entitlement to judgment as a matter of law against Cavallaro and Renault on their guarantee of the Note, and no issue of fact was raised, Plaintiff's motion is granted to that extent. Defendants similarly demonstrated their entitlement to judgment as a matter of law dismissing Plaintiff's third cause of action, but otherwise failed to submit sufficient proof for the balance of their summary judgment motion.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"A party is entitled to a judgment on a guaranty of a note if it proves that there has been a default on the payment of a promissory note and the party against whom judgment has been sought has executed a valid guaranty warranting the payment of the amount due under that note." (Overseas Private Investment Corp. v. Kim, 69 AD3d 1185, 1187 [3d Dept. 2010]). Moreover, "the liability of [an] indorser [under the words "payment guaranteed" on a negotiable instrument

[1] Cavallaro, Renault and Surferz will hereinafter collectively be referred to as Defendants.

is] indistinguishable from that of a co-maker." (Official Comment to NY UCC §3-416[1], see also 63 NY Jur §11 [2006]).

On this record, despite a defect in Plaintiff's proof, he has demonstrated his entitlement to judgment on the note. Plaintiff properly supports his motion with a copy of the Note, his own affidavit, and the informal admissions contained in Defendants' discovery response. (Morel ex rel. Hernandez v. Schenker, 64 AD3d 403 [1st Dept. 2009], Matter of Union Indem. Ins. Co. of N.Y., 89 NY2d 94 [1996]). The partial deposition transcripts Plaintiff relies upon, however, are unsigned, unsworn and uncertified; they are therefore inadmissible. (McDonald v. Mauss, 38 AD3d 727 [2d Dept. 2007], Pina v. Flik Intern. Corp., 25 AD3d 772 [2d Dept. 2006], Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2d Dept. 2008], Chisholm v. Mahoney, 302 AD2d 792 [3d Dept. 2003]).

Considering the above admissible evidence, Plaintiff sufficiently demonstrated a default in payment of the Note. The Note itself demonstrates that Plaintiff is the "Payee", CMT is its "Promisor" and that Cavallaro and Renault "guaranteed payment". The Note became "due in full" on May 15, 2003, its due date, although monthly payments could be made before that time. Plaintiff's sworn allegation of nonpayment, as it was made by a person with knowledge, is sufficient to demonstrate default under the Note. (Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

Plaintiff similarly demonstrated that Cavallaro and Renault "executed a valid guaranty warranting the payment of the amount due." (Overseas Private Investment Corp., supra). The Note has inscribed thereon, above Cavallaro and Renault's signatures, the words "PAYMENT GUARANTEED." Cavallaro and Renault admitted that they signed the Note, by operation of

Defendants' discovery response. Renault further admitted, by Defendants' discovery response, that he "physically received the funds" set forth in the note, except for a $517.00 payment. NY UCC §3-416(1) specifically provides for the use of the words "payment guaranteed" on a negotiable instrument, causing the guarantor under such term to be liable as if he were a co-maker. As the Note is a negotiable instrument (NY UCC §3-104) defendants Cavallaro and Renault are liable on its default just as if they were co-makers. Moreover, the Note's validity relative to Cavallaro and Renault is established by their status as co-makers, and is not invalidated due to the Note's non-execution by CMT.

Due to the foregoing, Plaintiff demonstrated his entitlement to judgment as a matter of law against Cavallaro and Renault on the Note.

In opposition, with the burden shifted, Defendants failed to raise a triable issue of fact. Defendants offer no affidavits to support their position and the partial, unsigned, unsworn and uncertified deposition transcripts submitted are inadmissible. (McDonald, supra; Pina, supra; Martinez, supra; Chisholm, supra). Moreover, as their attorney's affirmation is based upon "discussion of the case... [and] review of file material" it is not based upon his "personal knowledge of the operative facts [and as such is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009], Zuckerman v. City of New York, 49 NY2d 557 [1980]). Nor does Defendants submission of a "Certificate" signed by Plaintiff as president of CMT, Renault as Vice-President of CMT and Cavallaro as Treasurer of CMT, create an issue of fact on Renault and Cavallaro's liability under the Note. As set forth above, Renault and Cavallaro are liable on the Note as co-makers and CMT's liability on the note is irrelevant to their own. Similarly, Defendants proffered asset purchase agreement documents, even if

admissible, raise no issue of fact. These unexplained and partially executed documents, dated well after execution of the Note, fail to raise an issue of fact about the Note's dependence on an additional agreement. Lastly, Defendants submission of Plaintiff's cancelled checks do not raise a triable issue of fact. Rather, such canceled checks conclusively demonstrate Plaintiff's compliance with his obligations under the Note to provide funds (except the $517.00 obligation), further augmenting Plaintiff's proof on his summary judgment motion.

Accordingly, Plaintiff's motion for summary judgment against Renault and Cavallaro is granted.[2]

Turning to Defendants' motion for summary judgment, Defendants sufficiently demonstrated their entitlement to dismissal of Plaintiff's third, unjust enrichment, cause of action. The "existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in... unjust enrichment." [State v. Industrial Site Services, Inc., 52 AD3d 1153 [3d Dept. 2008], quoting Eagle Comtronics v. Pico Prods., 256 AD2d 1202 [4th Dept. 1998], lv. denied 688 N.Y.S.2d 372 [1999]). Because the parties' Note is valid and governs the same subject matter as Plaintiff's unjust enrichment claim, the unjust enrichment claim is not viable and must be dismissed.

The balance of Defendants' motion for summary judgment, however, is not properly supported by admissible evidence. First, because Defendants failed to demonstrate that Plaintiff's alleged oral agreement contained a "restriction against prepayment within one year"

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[2] Although Plaintiff motion's "wherefore" clause seeks summary judgment against Surferz and a default judgment against CMT, he failed to demonstrate his entitlement to such relief. Surferz was not a signatory to the Note, and Plaintiff set forth no further evidence demonstrating its liability. Nor, on this record, did Plaintiff demonstrate strict compliance with CPLR §3215 in its motion for a default judgment against CMT, requiring its denial.

they failed to demonstrate that the oral agreement was void pursuant to GOL §5-701(1). (Moon v. Moon, 6 AD3d 796 [3d Dept. 2004]). Nor have Defendants offered any evidentiary proof demonstrating their entitlement to judgment dismissing Plaintiff's claim against Surferz, CMT or Quigley. As set forth above, Defendants' attorney's affirmation is of no probative value and no other admissible proof supports this portion of Defendants' motion.

Accordingly, Defendants' summary judgment motion is granted only to the extent that Plaintiff's third cause of action is dismissed, and is otherwise denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: May 2, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 5, 2010, Affidavit of Martin Kosich, dated February 26, 2010, Affirmation of Jon Kosich, dated March 5, 2010, with attached Exhibits A-K
2. Notice of Cross-Motion, dated March 19, 2010, Affirmation of Joshua Sabo, dated March 19, 2010, with attached Exhibits A-G.
3. Affirmation of Jon Kosich, dated April 6, 2010, with Exhibits A-G.