SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T :
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

BANK OF AMERICA, N.A.,

Plaintiff,

INDEX NO.: 016932/2009
MOTION DATE: 02/17/2010
MOTION SEQUENCE: 001

-against-

ALL ISLAND TRUCK LEASING CORP. and
FRANK M. POCZATEK,

Defendant.

The following papers read on this motion:

Notice of Motion for Summary Judgment, Affidavit & Exhibits Annexed 1
Memorandum in Support of Motion for Summary Judgment 2
Affirmation in Support of Assignment to the Commercial Division 3

PRELIMINARY STATEMENT

Plaintiff, Bank of America, N.A.("BOA"), has moved for an Order pursuant to CPLR 3212 granting summary judgment on its fourth and fifth causes of action and dismissing Defendant Poczatek's affirmative defense.

BACKGROUND

Plaintiff, BOA, and defendant All Island Truck Leasing Corp.("All Island") executed a loan agreement and accompanying security agreement on February 22, 2007. Defendant Poczatek signed these two agreements, on behalf of All Island in his capacity as Vice President of All Island. In addition to the loan agreement and security agreement, Poczatek executed a guaranty agreement in his personal capacity in which he unconditionally guaranteed the prompt

payment of all debts owing from All Island to BOA when due.

Plaintiff claims All Island borrowed $500,000.00 under the loan agreement.(See Lohnes Affidavit, paragraph 7) and failed to repay it. Under the terms of the loan agreement, All Island was required to make monthly payments of interest on the loan and all principal and interest was due on February 22, 2008.(See Exhibit 1, sections 1.2 & 1.3). In support of its motion, plaintiff has submitted the affidavit of Ronald Lohnes, Vice President of Bank of America.

Defendants, served an answer which asserted an affirmative defense of lack of jurisdiction over defendants due to improper service. Defendants have not responded to the motion, which is directed at defendant Poczatek. Since the filing of the complaint, All Island has filed for chapter 11 bankruptcy in the United States Bankruptcy Court for the Eastern District of New York.(See Lohnes Affidavit, page 1, footnote 1).

Plaintiff argues the defense is wholly conclusory and factually inaccurate, and, therefore, should be dismissed. Next, plaintiff argues that defendant failed to move with 60 days of filing its pleading and therefore, under CPLR 3211(e), this affirmative defense is deemed waived. Finally, plaintiff argues that service was in fact proper. Exhibit 6 attached to the Lohnes affidavit contains an affidavit of service.

Plaintiff's fourth cause of action seeks $500,000.00 plus interest(at the loan's default rate) and late charges from Defendant Poczatek. Plaintiff's fifth cause of action seeks to recover costs, expenses and reasonable attorneys' fees expended to enforce the guaranty.

DISCUSSION

Summary judgment will only be granted if it is clear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). Summary Judgment is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept.1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept.1965]). In considering a motion for summary judgment, the court's function is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449-450 [1st Dept.1992]); See

also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]). The evidence is considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept.1964]).

Plaintiff makes a prima facie case to collect on an unpaid guarantee by establishing the "existence of a note and guaranty and the defendants' failure to make payments according to their terms." (*Verela v. Citrus Lake Development, Inc.* 53 A.D.3d 574, 575 [2d Dept 2008]). Once plaintiff makes this showing, the burden shifts to the defendant to "establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense"*Id.* The defendants have the burden to "demonstrate the existence of a bona fide defense by evidentiary facts, and not one based upon conclusory allegations" (*Layden v. Boccio* 253 A.D.2d 540 [2d Dept 1998]). The non-movant must "come forward to lay bare his proof" (*S & H Bldg. Material Corp. v Riven*, 176 AD2d 715, 717 [2d Dept 1991]), and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Such proof must be by the affidavit of an individual with personal knowledge, or with an attorney's affirmation to which material is appended in admissible form. *Id.* In *Duban v. Platt,* (23 AD2d 660 [2d Dept 1965]; aff'd 17 NY2d 526 [1966]), where the non-movant defendant submitted no proof in opposition to the partial summary judgment motion, and its answer contained mere general denials without a supporting affidavit, this was insufficient to create an issue of triable fact.

To establish a "real defense requiring a trial" the non-movant defendant must put forth more than merely bare, conclusory averments. (*RCA Corp. v. American Standards Testing Bureau, Inc.*, 121 A.D.2d 890 [1st Dept 1986]). In *RCA*, the non-movant asserted, inter alia, an affirmative defense of breach of warranty, and the Court determined the contents of the non-movant's answer and affidavit were insufficient to create an issue of fact.

CPLR 313 provides the available methods for service on nonresidents served outside the state. CPLR 313 provides in relevant part:

> "A person ... subject to the jurisdiction of the courts of the state under section 301 or 302, ... may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the

> state who is a resident of the state or by any person authorized to make service by the laws of the state ... in which service is made or by any duly qualified attorney ... or equivalent in such jurisdiction."

Under CPLR 3211(e), "an objection that the summons and complaint ... was not properly served, is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

Plaintiff, in support of its motion, has submitted the sworn affidavit of Ronald Lohnes, Vice President of BOA. Attached, as exhibit 1, is the loan agreement with All Island, signed by Poczatek in his capacity as Vice President of All Island. Attached, as exhibit 2, is the guaranty agreement, which Poczatek signed in his personal capacity. The Lohnes affidavit states that All Island borrowed $500,000.00 under the loan agreement, failed to make payments on the loan.(Lohnes Affidavit, paragraphs 7,9) In addition, it states that Poczatek has failed to pay BOA the amounts due under the loan documents and the Guaranty. (Lohnes Affidavit, paragraph 21). This amounts to a violation of the terms of loan and guaranty documents in exhibits 1 and 3 by Poczatek. Plaintiff has made out a prima facie case by establishing the existence of a note and guaranty, and the defendants' failure to make payments according to their terms.

Defendants have submitted no opposition to the present motion. Defendants answer, served October 1, 2009, contains general denials and asserts an affirmative defense. Defendants' general denials do not create an issue of fact.

Turning to defendants' affirmative defense that there was improper service, the court notes that the defense is wholly conclusory. It is dispositive that defendants have not made a motion for judgment on this issue as CPLR 3211(e) plainly requires to be filed within sixty days, nor have they sought an extension, on the ground of hardship. Under CPLR 3211(d), defendants are deemed to have waived their objection to improper service. Defendants affirmative defense of improper service is dismissed.

Plaintiff's motion for summary judgment on the fourth cause of action is hereby granted. Submit Judgment for an Order directing Defendant Poczatek to pay $500,000.00, plus interest at the default rate provided in the loan and late charges to BOA.

Plaintiffs fifth cause of action seeks to recover costs, expenses and reasonable attorneys' fees from defendant Poczatek. Section 22 of the guaranty agreement provides:

> "Guarantor agrees to pay all reasonable attorneys' fees, including allocated costs of Bank's in-house counsel to the extent permitted by applicable law, and all other costs and expenses that may be incurred by the Bank(a) in the enforcement of this Guaranty or (b) in the preservation, protection, or enforcement of any rights of Bank in any case commenced by or against Guarantor or Borrower under the Bankruptcy Code(Title 11, United States Code) or any similar or successor statute."

Applying the terms of this agreement, plaintiff is entitled to recover costs, expenses and reasonable attorneys' fees expended in the enforcement of this guaranty. Plaintiff's fifth cause of action seeking costs, expenses and reasonable attorneys' fees is granted. Plaintiff is directed to submit proof of the said expenses and fees to for a hearing before a referee.

This constitutes the Decision and Order of the Court.

Submit Judgment.

Dated: April 26, 2010

J.S.C.