

<b>Bank of Am., N.A. v Geodata Plus, LLC</b>
2010 NY Slip Op 31145(U)
April 26, 2010
Supreme Court, Nassau County
Docket Number: 025213-09
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**

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**BANK OF AMERICA, N.A.,**

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

**Plaintiff,**

**-against-**

**Index No: 025213-09  
Motion Seq. No: 1  
Submission Date: 3/9/10**

**GEODATA PLUS, LLC,  
REAL PROPERTY TECHNOLOGIES, LLC,  
S.T.S. OF NEW YORK CITY INC.,  
GEORGE VINSKY,  
SANTO BARRETTA,**

**Defendants.**

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**The following papers have been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affidavit in Support of B. Pietrzak.....X**
- Affidavit in Opposition of G. Vinsky.....X**
- Affidavit in Opposition of S. Barretta.....X**
- Affirmation in Support.....X**

This matter is before the Court for decision on the motion filed by Plaintiff Bank of America, N.A. ("BOA" or "Plaintiff") on January 28, 2010 and submitted on March 9, 2010. For the reasons set forth below, the Court denies Plaintiff's motion and directs the parties to proceed to arbitration.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting summary judgment in

favor of Plaintiff and against the Defendants.

Defendants oppose Plaintiff's motion.

B. The Parties' History

The Complaint (Ex. A to Muth Aff.), dated November 20, 2009 and filed December 10, 2009, alleges as follows:

BOA is a national banking association authorized to transact business in New York. Defendant Geodata Plus, LLC ("Borrower"), Real Property Technologies, LLC ("Real Property") and S.T.S. of New York City Inc. ("STS") are New York entities with their principal place of business at 1 Old Country Road, Suite 302, Carle Place, New York ("Carle Place Office"). Defendant George Vinsky ("Vinsky") is an individual residing in Westbury, New York and Defendant Santo Barretta ("Barretta") is an individual doing business at the Carle Place Office.

On January 10, 2008, Borrower executed and delivered to BOA ("Lender") a Loan Agreement establishing a line of credit ("Line of Credit") with Lender in the principal amount of \$200,000.00 ("Line Note"). Lender provides a copy of the Line Note which is signed by Vinsky in his capacity as President of Borrower and by Barretta in his capacity as President/Secretary of Borrower. As security for the repayment of the amount due under the Line Note, Real Property, STS, Vinsky and Barretta (collectively "Guarantors") each executed and delivered to Lender a Continuing and Unconditional Guaranty ("Guarantees") dated January 10, 2008. Lender provides a copy of the Guarantees which are signed by 1) Sanford Blaich and Barretta, Members of Real Property, 2) Theresa Drake, Secretary of STS, 3) Vinsky, and 4) Barretta. Plaintiff refers to the Line Note and Guarantees collectively as the "Loan Documents."

On February 16, 2009, at which time the principal amount borrowed on the Line Note totaled \$193,000.00, the Line Note matured. Despite due demand, the Borrower and Guarantors failed to make required payment. Plaintiff alleges that this failure constitutes an event of default under the Line Note, triggering the acceleration of all amounts due pursuant to that instrument. Lender alleges that it has properly accelerated all amounts owing under the Line Note.

The Complaint contains two (2) causes of action. The first is for breach of contract based on Defendants' failure to comply with the terms of the Loan Documents. The second is for costs, disbursements and reasonable attorney's fees incurred in connection with collecting

amounts due under the Line Note. Specifically, Section 8.6 of the Line Note, titled “Attorneys’ Fees,” provides in pertinent part as follows:

The Borrower shall reimburse the Bank for any reasonable costs and attorneys’ fees incurred by the Bank in connection with the enforcement or preservation of any rights or remedies under this Agreement...In the event of a lawsuit..., the prevailing party is entitled to recover costs and reasonable attorneys’ fees incurred in connection with the lawsuit..., as determined by the court...

On the first cause of action, Plaintiff requests an Order granting judgment against Defendants for all amounts owing under the Line Note in the amount of \$194,498.18,<sup>1</sup> plus additional interest accruing after November 11, 2009 at a per diem rate of \$17.42. On the second cause of action, Plaintiff requests an Order awarding judgment to Plaintiff for all costs, disbursements and reasonable attorney’s fees incurred by Plaintiff.

Defendants interposed an Answer in which they, *inter alia*, 1) deny knowledge or information sufficient to form a belief as to the authentication of the signatures appearing on the Guarantees; and 2) deny the allegations regarding their failure to make required payments and “admit that [Borrower] continued to make payments through at least September 2009, which payments were accepted by [Lender]” (Answer at ¶ 11).

Defendants also assert seven (7) Affirmative Defenses: 1) the Complaint fails to state a claim for relief as to each of the Defendants; 2) Plaintiff has failed to obtain personal jurisdiction over each of the Defendants; 3) Plaintiff has materially breached the loan agreement in question; 4) Plaintiff is barred by the doctrines of estoppel, waiver and ratification; 5) subsequent to the alleged breach of the loan agreement, Plaintiff entered into a new agreement with the Defendants and subsequently unilaterally breached the terms of that agreement, barring the Plaintiff from recovery under the Guarantees; 6) Plaintiff is barred from recovery by the doctrine of unclean hands; and 7) Plaintiff’s unilateral seizure and control of monies belonging to various Defendants constitutes an offset and credit towards any damages alleged.

Plaintiff provides an Affidavit in Support of Barbara Pietrzak (“Pietrzak”), an officer of BOA, dated January 14, 2010 in which she affirms as follows:

Pietrzak affirms the truth of the allegations in the Complaint regarding the Defendants’

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<sup>1</sup> As noted *infra*, BOA exercised its right to offset against other Barretta accounts at BOA and has adjusted its demand accordingly.

execution of the Line Note and Guarantees. The Line of Credit was open and available through December 16, 2008, designated the "Expiration Date," subject to an early termination in the event of Borrower's default and subject to extensions at the sole option of BOA.

The Expiration Date was extended from the original date to February 16, 2009 at which time, barring further extensions, the full balance owed on the Line of Credit ("Balance") came due. At that time, the principal amount borrowed on the Line of Credit was \$193,000.00. Despite due demand, Borrower and the Guarantors failed to repay the Balance. The parties engaged in "protracted discussions" (Pietrzak Aff. at ¶ 10) about a possible forbearance agreement, but those discussions ended in September of 2009.

Borrower made interest-only payments on the Balance through August 16, 2009, at which time its payments ceased and unpaid interest began to accrue. On November 10, 2009, BOA exercised its right of offset against two accounts held by Barretta with BOA and recovered the sum of \$70,524.21. BOA has received no other payments from the Defendants.

Based on her review of BOA records, Defendants owe a total of \$126,664.43 as of January 13, 2010, consisting of the following: 1) principal in the sum of \$122,475.79, 2) accrued interest from August 16, 2009 through November 10, 2009 on the principal balance of \$193,000.00 at 3.25% *per annum* in the sum of \$1,481.01, 3) accrued interest from November 10, 2009, after reduction of principal, through January 13, 2010 at 3.25% *per annum* in the sum of \$707.63, and 4) estimated attorney's fees in the sum of \$2,000.

With respect to Defendants' seventh Affirmative Defense based on offset and credit, Pietrzak affirms that the Complaint was prepared prior to BOA's exercise of its right to offset against the other Barretta accounts. In light of that offset, Pietrzak submits that this Affirmative Defense is moot. Pietrzak affirms that BOA now seeks summary judgment against Defendants in the amount of \$126,664.43, together with interest of \$11.056841 per day until the date of judgment, and the costs and disbursements of pursuing this action.

Paragraphs 8.4(a) and (b) of the Line Note, and Paragraphs 24(a) and (b) of the Guarantees, titled "Dispute Resolution Provision," ("Arbitration Clauses") provide as follows:

This Dispute Resolution Provision concerns the resolution of any controversies or claims between the parties, whether arising in contract, tort or by statute, including but not limited to controversies or claims that arise out of or relate to: (i) this agreement (including any renewals, extensions or modifications); or

(ii) any document related to this agreement (collectively a “Claim”). For the purposes of this Dispute Resolution Provision only, the term “parties” shall include any parent corporation, subsidiary or affiliate of the Bank involved in the servicing, management or administration of any obligation described or evidence by this agreement.

At the request of any party to this agreement, any Claim shall be resolved by binding arbitration in accordance with the Federal Arbitration Act [citation omitted]. [This statute] will apply even though this agreement provides that it is governed by the law of a specified state.

Defendants provide Affidavits in Opposition of Vinsky and Barretta in which they affirm, *inter alia*, that 1) Borrower has “an absolute right to insist upon and hereby demand[s] the arbitration of this dispute” pursuant to Paragraph 8.4 of the Line Note (Vinsky Aff. at ¶ 3(a)); and 2) Guarantors “hereby...make demand...to submit the controversy set forth in BOA’s motion to arbitration” (Barretta Aff. at ¶ 8) pursuant to Paragraph 24 of the Guarantees. Barretta makes reference to paragraph 24(g) of the Guarantees which provides as follows:

The filing of a court action is not intended to constitute a waiver of the right of any party, including the suing party, thereafter to require submittal of the Claim to arbitration.

Vinsky also submits that BOA should be “estopped” (Vinsky Aff. at ¶ 3(b)) from declaring a default in this action as of September 2009 in light of 1) BOA’s repeated representations regarding the extension of the Expiration Date on the condition that Borrower continue to make interest payments, 2) the fact that Borrower continued to make interest payments on the loan after the alleged Expiration Date of December 16, 2008, 3) BOA’s apparent concession that the Expiration Date was extended through February of 2009, and again at least through September of 2009, and 4) Borrower’s continued performance pursuant to the parties’ agreements.

Vinsky affirms that in September of 2009, BOA continued to have discussions with Borrower regarding extensions for interest payments but then unilaterally terminated those conversations in order to initiate this action, after inducing Borrower to make additional interest payments for almost nine months. Borrower seeks the extension that it negotiated with BOA for the continued payment of interest payments and a new Expiration Date for the repayment of the principal amount under the parties’ agreements.

Barretta reaffirms Vinsky's claims that 1) BOA twice extended the Expiration Period for the purpose of allowing Borrower to continue to make interest payments while foregoing the repayment of the principal on the loan; 2) Borrower relied on those extensions in agreeing to make subsequent interest payments; and 3) BOA unilaterally terminated discussions in September of 2009 regarding the extension of the Extension Period to justify the instant action. Thus, Barretta joins in Vinsky's argument that BOA is estopped from obtaining judgment against Defendants in this action.

In its Reply Affirmation, Plaintiff submits that the Arbitration Clauses do not prohibit this action because, as the Defendants acknowledge the enforceability of the loan documents and amount of the obligation, there is no claim or controversy as between the parties. Plaintiff further relies on the following provision, paragraph 24(f) of the Loan Documents, in support of her argument that the matter should not proceed to arbitration:

[The Dispute Resolution Provision] does not limit the right of any party to: (i) exercise self-help remedies, such as but not limited to, setoff; (ii) initiate judicial or non-judicial foreclosure against any real or personal property collateral; (iii) exercise any judicial or power of sale rights, or (iv) act in a court of law to obtain an interim remedy, such as but not limited to, injunctive relief, writ of possession or appointment of a receiver, or additional or supplementary remedies.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its entitlement to summary judgment by 1) demonstrating Defendants' execution of the Loan Documents; and 2) establishing Defendants' default with respect to their payment obligations on those Loan Documents. Plaintiff also contends that Defendants' Affirmative Defenses lack merit.

With respect to Defendants' demand for arbitration, Plaintiff submits that the Arbitration Clauses do not prohibit this action because, "as the Defendants acknowledge the enforceability of the loan documents and amount of the obligation, there is no claim or controversy as between the parties" (Reply Aff. at ¶ 8)." Thus, Plaintiff argues, there is no existing controversy or claim within the meaning of the Arbitration Clauses.

Defendants oppose Plaintiff's motion on the ground that they are entitled to arbitrate the instant dispute, and hereby assert their right to that arbitration. Defendants also contend that, by inducing Borrower to continue to make interest payments by extending the Expiration Period,

Plaintiff should be estopped from seeking judgment against Defendants.

RULING OF THE COURT

CPLR § 7501, titled “**Effect of arbitration agreement**” provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General*, *supra*, at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator’s reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299 (1984). Additionally, where there is a broad arbitration clause, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator. *Schlaifer v. Sedlow*, 51 N.Y.2d 181 (1980); *Inryco, Inc. v. Parsons & Whittemore Contractors Corp.*, 55 N.Y.2d 666 (1981).

The Arbitration Clauses at issue “[concern] the resolution of any controversies or claims between the parties, whether arising in contract, tort or by statute, including but not limited to controversies or claims that arise out of or relate to: (i) this agreement (including any renewals, extensions or modifications); or (ii) any document related to this agreement (collectively a

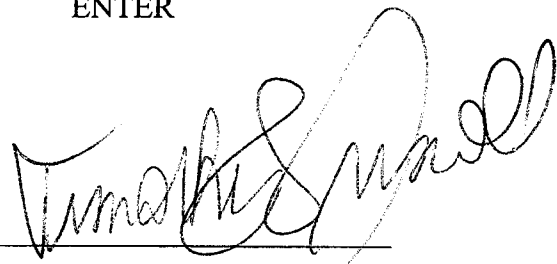
“Claim”).” This action concerns Defendants’ alleged failure to make payment pursuant to the Loan Documents, and Defendants’ claim that the Plaintiff extended the Expiration Period for the purpose of obtaining additional interest payments from Defendants and then unilaterally terminated those extensions so that it could claim that Defendants defaulted on their obligations, and initiate the instant action. The Court concludes that this dispute comes within the purview of the Arbitration Clauses and rejects, as question-begging, Plaintiff’s claim that arbitration is inappropriate because Plaintiff has demonstrated its right to relief. That determination will be made by the arbitrator, pursuant to the mandatory Arbitration Clauses in the parties agreements. Moreover, the arbitrator will decide what effect, if any, Plaintiff’s alleged extension of the Expiration Periods and receipt of additional interest payments will have on its right to relief. Accordingly, the Court denies Plaintiff’s motion and directs the parties to proceed to arbitration.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
 April 26, 2010



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

**ENTERED**  
**APR 29 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**