

Bethpage Fed. Credit Union v Tsapelis

2010 NY Slip Op 31224(U)

May 6, 2010

Supreme Court, Nassau County

Docket Number: 010944-09

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
BETHPAGE FEDERAL CREDIT UNION,

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

Plaintiff,

-against-

**Index No: 010944-09
Motion Seq. No: 1
Submission Date: 3/19/10**

NICHOLAS TSAPELIS,

Defendant.
-----x

The following papers have been read on this motion:

**Notice of Motion, Affirmation in Support, Affidavit of Merit,
Affirmation in Support of Attorney's Fees and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Plaintiff Bethpage Federal Credit Union on March 2, 2010, and submitted on March 19, 2010. For the reasons set forth below, the Court 1) grants Plaintiff judgment against Defendant in the sum of \$246,786.05; and 2) directs that an inquest shall be held on the issues of interest, costs and disbursements, and counsel fees.

BACKGROUND

A. Relief Sought

Plaintiff Bethpage Federal Credit Union ("Bethpage" or "Plaintiff") moves for an Order dismissing the Affirmative Defenses of Defendant Nicholas Tsapelis ("Defendant") and granting Plaintiff summary judgment pursuant to CPLR § 3211(c) or, alternatively, CPLR § 3212.

Defendant has submitted no opposition or other response to Plaintiff's motion.

B. The Parties' History

The Summons and Complaint ("Complaint") (Ex. E to P's motion) alleges as follows:

For valuable consideration, Defendant made, executed and delivered to Plaintiff an Installment Promissory Note ("Note") payable in monthly installments. Defendant defaulted on the Note by failing to pay the monthly installment due on September 29, 2008 and subsequent installments, leaving a balance due of \$247,386.05. In addition, pursuant to the Note, Plaintiff owes counsel fees it has incurred in collecting payment under the Note. Plaintiff is still the holder and owner of the note. Plaintiff seeks judgment in the sum of \$296,863.26, with interest from September 29, 2008, together with costs and disbursements.

In his Answer dated August 6, 2009, Defendant denies the substantive allegations in the Complaint and asserts two (2) Affirmative Defenses: 1) the Complaint fails to state a cause of action on which relief can be granted; and 2) Plaintiff is barred from seeking relief pursuant to the doctrine of laches.

Plaintiff provides an Affidavit of Merit of Jennifer Devaul ("Devaul") dated February 16, 2010 in which Devaul affirms as follows.

Devaul, a Senior Paralegal for Bethpage, has reviewed the documents related to this action and is fully familiar with the facts and circumstances of this matter.

On or about August 31, 2005 Plaintiff extended a loan to Defendant in the sum of \$125,000.00. The Loan was secured by a mortgage on real property located at 2801 Lincoln Boulevard, Merrick, New York ("Merrick Property") that was duly recorded.

On or about February 15, 2007, Plaintiff extended another loan to Defendant in the sum of \$125,000.00 for a total of \$250,000.00 and the parties agreed to consolidate the prior loan with the new debt. This consolidated loan ("Loan") is the subject of the Note (Ex. A to Devaul Aff.) which is dated February 15, 2007 and signed by Defendant. The Note was secured by a mortgage on the Merrick Property and was duly recorded. The Consolidation and Extension Agreement regarding the Loan (Ex. B to Devaul Aff.) was also duly recorded. Defendant accepted the proceeds of the Loan and Note.

Paragraph 6 of the Note, titled "Default," provides in pertinent part as follows:

Upon any occurrence of default [which includes failure to make a required payment], and to the extent permitted by law, We may declare the entire balance of Your loan immediately due and payable, and...interest will continue to accrue...If the

entire balance is not then paid immediately upon default, [Bethpage] may exercise any or all of its rights available... To the extent permitted by law, [Bethpage] shall be reimbursed for all of its costs and expenses, including reasonable attorney fees, incurred in the course of collecting any amounts owed under this [Note] or in exercising its rights related to the Collateral...

On or about January 31, 2008, Defendant defaulted by failing to make required payments. Devaul provides a transaction history (“Transaction History”) (Ex. C to Devaul Aff.) that outlines Defendant’s payment history from February 1, 2007 to February 19, 2010. In support of Plaintiff’s reliance on the Transaction History as a business record, Devaul affirms that 1) the Transaction History is made in the regular course of Plaintiff’s business, and reflects payments made by Defendant on the Note; 2) each entry on the Transaction History is made by an employee of Plaintiff at or about the time the transactions reflected therein occurred; 3) each of Plaintiff’s employees is under a business duty to Plaintiff to record and enter each transaction accurately on Plaintiff’s books and records; and 4) it was, and is, within the regular course of Plaintiff’s business to make such records.

By letter dated March 11, 2008 (Ex. D to Devaul Aff.), Plaintiff made a final demand for payment from Defendant, and accelerated the debt. After crediting Defendant with all appropriate payments, there remains due and owing by Defendant the sum of \$246,786.05, no part of which has been paid despite Plaintiff’s demand for payment, together with interest from December 4, 2007. Plaintiff has elected to forego foreclosure on the Mortgage and, instead, sue on the Note.

On or about April 3, 2009, Plaintiff referred this matter to its attorney (“Counsel”) for collection. As of that date, Defendant owed principal in the amount of \$246,786.05 and collection fees in the amount of \$600.00. In addition, Plaintiff is seeking interest from September 29, 2008.

Plaintiff entered into a contingency fee retainer agreement (“Retainer Agreement”) with Counsel. Pursuant to that Retainer Agreement, and the Note, Plaintiff seeks counsel fees in the cum of \$49,477,21, representing 20% of all sums due.

In his Affirmation in Support of Attorney’s Fees dated February 16, 2010, Counsel affirms as follows:

This matter was referred to Counsel on or about April 3, 2009 as a result of Defendant's failure to pay to Plaintiff monies due and owing on the Note. Counsel's firm ("Firm") specializes in, and devotes a substantial part of its legal practice to, the collection of obligations due in both commercial and consumer matters. Legal and non-legal personnel of the Firm rendered the following services in this matter 1) review of the file to ensure that the Firm had all necessary documentation, 2) confirmation of the Defendant's residence, 3) preparation and filing of, and payment of filing fees for, the Complaint, 4) service of the Complaint, 5) review of Defendant's Answer, 6) preparation, service and filing of a Request for Judicial Intervention ("RJI") with Request for Preliminary Conference ("PC"), 7) attendance at a Preliminary Conference and a Compliance Conference, and 8) preparation of the instant motion.

Pursuant to the Retainer Agreement, Plaintiff is seeking 20% of all sums recovered from Defendant, which would total \$49,477.21 if the principal balance and collection fees due and owing are recovered. Counsel affirms that such a fee is fair and reasonable, and reasonably represents the value of the attorney services provided.

Counsel also provides an Affirmation in Support dated February 16, 2010 in which he affirms as follows:

Plaintiff commenced this action by filing the Complaint on June 8, 2009. On June 11, 2009, as reflected by the applicable Affidavit of Service (Ex. F to Aff. in Support), Defendant was served with the Complaint pursuant to CPLR § 308(2). On or about August 6, 2009, Defendant served his Answer. On or about September 16, 2009, Plaintiff served and filed an RJI and requested a PC. On or about October 21, 2009, a Preliminary Conference was held and a discovery schedule was set.

Defendant has not requested discovery and, Plaintiff submits, has thereby waived his right to discovery in this matter. On January 12, 2010, counsel for the parties signed a Certification Order, which the Court so-ordered, which certified that 1) all discovery and pre-trial motions were complete; 2) the matter could not be settled in its present posture; and 3) counsel for the parties were prepared to commence jury selection. The Court also directed Plaintiff to serve and file a Note of Issue within 120 days.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its entitlement to summary judgment by

establishing that 1) Plaintiff lent money to Defendant; 2) Defendant failed to repay that money as required by the Note and Mortgage; 3) Plaintiff made demand for the unpaid balance; and 3) the Note and Mortgage entitle Plaintiff to seek collection costs, including attorney's fees, incurred in pursuing this action. Plaintiff further contends that Defendant's Answer fails to state any facts or provide any evidence to support the Affirmative Defenses and, therefore, the Court should strike the Answer.

RULING OF THE COURT

A. Summary Judgment Standard

Although Plaintiff seeks relief under two alternative provisions of the CPLR, the Court is treating this motion as a motion for summary judgment pursuant to CPLR § 3212.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Promissory Note

A promissory note is an instrument for the payment of money only for the purpose of CPLR § 3213. *Davis v. Lanteri*, 307 A.D.2d 947 (2d Dept. 2003); *East New York Savings Bank v. Baccaray*, 214 A.D.2d 601 (2d Dept. 1995). 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); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a

motion for summary judgment in lieu of a complaint. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

C. Counsel Fees

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 they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

D. Affirmative Defenses

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 which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

The doctrine of laches bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered recovery inequitable. This doctrine has no application in actions at law. *Blinds To Go v. Times Plaza*, 45 A.D.3d 714 (2d Dept. 2007).

E. Application of these Principles to the Instant Action

Plaintiff has demonstrated its right to judgment by demonstrating 1) Defendant's receipt of the Loan money, 2) Defendant's execution of the Note, and 3) Defendant's default on that Note. Defendant has failed to demonstrate the existence of a triable issue concerning a bona fide defense.

Although Plaintiff has provided detailed information regarding the actions taken by Counsel and his Firm in this collection matter, the Court cannot conclude, based on the record before it, that the sum of \$49,477.21 is an appropriate counsel fee award, in part because Plaintiff's submissions do not include the hourly rate charged by the Firm for the personnel who worked on this matter. Although the Firm accepted this matter on a contingency basis, that information might assist the Court in determining whether the requested counsel fee is appropriate.

Accordingly, the Court 1) grants Plaintiff judgment against Defendant in the principal sum of \$246,786.05; and 2) directs that an inquest shall be held on the issues of interest, costs and disbursements, and counsel fees. The Court directs counsel for the parties to appear for a conference before the Court on June 3, 2010 at 9:30 a.m., at which time the Court will schedule the inquest as directed herein.

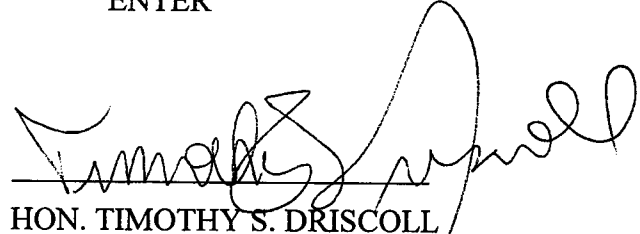
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on June 3, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
May 6, 2010


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 10 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**