

Axis Global Sys., LLC v Ross Network, Inc.
2010 NY Slip Op 31312(U)
May 18, 2010
Supreme Court, Nassau County
Docket Number: 001305-10
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
**AXIS GLOBAL SYSTEMS, LLC d/b/a AXIS GLOBAL
LOGISTICS,**

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

Plaintiff,

**Index No: 001305-10
Motion Seq. No: 1
Submission Date: 4/9/10**

-against-

ROSS NETWORK, INC. d/b/a PRINT INTERNATIONAL,

Defendant.

-----X

The following papers have been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Plaintiff's Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Defendant's Memorandum of Law in Opposition.....X**
- Affidavit in Further Support and Exhibits.....X**
- Plaintiff's Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Plaintiff on January 20, 2010, and submitted on April 9, 2010. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court directs the entry of judgment for the Plaintiff against the Defendant in the sum of \$426,500, plus interest, costs and disbursements to be determined at a hearing before a Special Referee.

BACKGROUND

A. Relief Sought

Plaintiff Axis Global Systems, LLC d/b/a Axis Global Logistics ("Axis" or "Plaintiff") moves for an Order, pursuant to CPLR § 3213, directing the entry of judgment for the Plaintiff

and against the Defendant in the sum of four hundred seventy one thousand five hundred dollars and no cents (\$471,500.00), with interest, costs and disbursements. As outlined *infra*, as a result of certain payments made by Defendant since the filing of the motion, Plaintiff now seeks judgment in the sum of \$426,500.

Defendant Ross Network, Inc. d/b/a Print International (“Print” or “Defendant”) opposes Plaintiff’s motion.

B. The Parties’ History

Plaintiff provides an Affidavit in Support of Ralph Maschio (“Maschio”) dated January 18, 2010¹ in which he affirms as follows:

Maschio is the Chief Financial Officer of Axis who is fully familiar with the facts of this action. Maschio provides the following factual background regarding the parties:

On October 9, 2009, Print (“Debtor”), for due consideration, executed in favor of Axis (“Lender”) a Commercial Promissory Note (“Note”) in the amount of \$515,000.00. Axis provides a copy of the Note (Ex. A to P’s motion) which is signed by Thomas White (“White”), Paul Rosenblit (“Rosenblit”) and Jay Scharf (“Scharf”), the Chief Executive Officer (“CEO”), President and Secretary-Treasurer of Print, respectively. The first paragraph of the Note reflects that it was entered into “[f]or value received, and in full settlement of...invoices reflected on the attached schedule A, and in consideration for both the work already performed and services rendered by [Lender] and in partial consideration of future services to potentially be rendered...” Schedule A, which is attached, is a 2 and ½ page document containing lists of customers, invoice numbers, dates and amounts due.

Pursuant to the terms of the Note, Debtor was required to pay to Lender the sum of \$515,000.00 on or before August 1, 2012 (“Maturity Date”), to be paid out over thirty-five (35) months. The payment terms were as follows: 1) \$15,000 within one (1) week of signing the Note (“Signing”), 2) \$15,000 due on November 1, 2009, 3) thirty-two (32) additional equal successive monthly installment payments of \$15,000 on the first of each successive month, and 4) a final payment of \$5,000.00 due on or before the Maturity Date. In addition, pursuant to the Note, Debtor was required to pay a late fee of 5% on any monthly payments that were more than

¹ Mr. Maschio’s Affidavit reflects that it was sworn to on January 18, 2009 which, the Court concludes, was a typographical error.

seven (7) days late.

The Note also provides that, in the event of Debtor's default with respect to any required payment and a failure to cure that default, Lender is authorized, on five (5) days notice, to declare the entire principal sum then unpaid immediately due and payable. In addition, pursuant to the Note, Debtor agreed to pay the costs and expenses, including attorney's fees, incurred by Lender in collecting amounts due under the Note.

Maschio affirms, further, that Debtor has been "repeatedly delinquent in fulfilling its obligations under the Note" (Maschio Aff. at ¶ 7). Specifically, Debtor 1) made the first \$15,000 payment two (2) weeks late; 2) paid the \$15,000 installment due on November 1, 2009 by check dated November 10, 2009, and did not pay the 5% late charge of \$750.00; 3) paid the \$15,000 installment due on December 1, 2009 on or about December 7, 2009; and 4) failed to pay the \$15,000 installment due on January 1, 2010, and did not pay the 5% late charge of \$750.00.

By letters dated November 3 and December 3, 2009, and January 6, 2010 ("Default Notices") (Exs. B, D and E to P's motion), Lender advised Debtor of its default, and advised Debtor that if it did not cure the default on a timely basis, Lender would declare the entire balance due and owing. Maschio affirms that, as of January 18, 2010, Debtor had failed to cure its default and Lender considered the entire unpaid principal of \$470,000 immediately due and payable. In addition, Debtor remains indebted for the two (2) late charges, totaling \$1,500. Accordingly, Lender seeks judgment against Debtor in the sum of \$471,500.00.

Defendant provides an Affidavit in Opposition of Rosenblit dated March 15, 2010 in which he affirms as follows:

Rosenblit is the President of Print and is fully familiar with the facts based on his personal knowledge or records maintained by Print.

With respect to the initial \$15,000 payment due within one week of the Signing, which Lender alleges was untimely, Lender accepted the payment by Debtor and negotiated Print's check without any reservation of rights. Similarly, Lender accepted Debtor's payments for November and December 2009 and negotiated the checks without any reservation of rights.

With respect to the Default Notices, paragraph 13 of the Note requires that all notices to the Debtor shall be sent by certified mail or overnight courier. Rosenblit submits that Plaintiff has failed to provide evidence that the Default Notices complied with this requirement. In

addition, Debtor provided Lender with checks dated February 5 and February 12, and March 9, 2010 (Exs. A and B to D's motion) ("Checks"), each in the sum of \$15,000, which Lender accepted and negotiated without any reservation of rights.

In his Affidavit in Further Support dated April 8, 2010, Maschio affirms that the Default Notices were sent in the manner required by the Note, and provides proofs of service (Exs. F, G and H to Maschio Aff. in Further Support) reflecting that delivery. Maschio concedes that Lender received the three Checks to which Rosenblit referred. Maschio submits, however, that the Checks were sent to Lender more than a month after the January 6, 2010 Default Notice, well beyond the applicable cure period. Thus, Print did not timely cure its default and Axis properly accelerated the Note. Moreover, Axis' acceptance of payments does not constitute a waiver of that acceleration.

Maschio affirms that Debtor remains indebted to Lender for the balance of \$425,000, as well as \$1,500 in late charges associated with the untimely payment of the November 2009 and January 2010 installments. Accordingly, Plaintiff seeks judgment in the sum of \$426,500.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its entitlement to summary judgment by establishing 1) the existence and execution of the Note, 2) Defendant's failure to make payment in accordance with the terms of the Note, 3) Defendant's failure to timely cure its default after receiving proper notice, 4) Plaintiff's proper acceleration of the Note, and 5) Debtor's subsequent failure to pay the entire amount due.

Defendant opposes Plaintiff's motion for summary judgment, submitting that there is an issue of fact as to whether Plaintiff's acceptance of Print's payments, which did not include the late charges, without reservation of rights constituted a knowing acceptance by Plaintiff of a lesser amount.²

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

² Defendant also argues that an issue of fact exists regarding the sufficiency of the Default Notice. The Court concludes, however, that this issue has been resolved by the proofs of service provided by Maschio in his Affirmation in Further Support.

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

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. Acceleration of Payment Obligation

In *UMLIC VP, LLC v. Mellace*, 19 A.D.3d 684 (2d Dept. 2005), the Second Department affirmed the trial court's determination that the mere acceptance of a partial payment of the accelerated debt by the previous holder of a promissory note was not an affirmative act revoking the acceleration and thereby halting the running of the statute of limitations. *Id.* The Court in *UMLIC, supra*, further held that plaintiff's claim in this regard was refuted by the fact that its assignor advised the obligors on the promissory note that they would remain liable for the balance of the accelerated debt even after the partial payment was accepted. *Id.* Thus, the trial court properly dismissed the complaint as time-barred. *Id.* See also *Lavin v. Elmakiss*, 302 A.D.2d 638 (3d Dept. 2003), *app. disp.*, 100 N.Y.2d 577 (2003), *app. den.*, 2 N.Y.3d 703 (2004). (defendants' acceptance of additional payments on mortgage after plaintiff's initial default was not inconsistent with defendants' insistence that the entire debt immediately be paid and did not constitute proof of affirmative act of revocation).

D. Application of these Principles to the Instant Action

Plaintiff has demonstrated its right to judgment by demonstrating 1) Defendant's execution of the Note for valuable consideration, and 2) Defendant's failure to make payment pursuant to the terms of the Note. Moreover, Defendant has failed to demonstrate the existence of a triable issue concerning a bona fide defense.

The Court also concludes that Plaintiff's acceptance of the Checks, which were untimely pursuant to the terms of the Note, was not an affirmative act that revoked Plaintiff's right to accelerate Defendant's payments. Thus, Plaintiff was within its rights to accelerate the debt and demand full payment from Defendant.

In light of the foregoing, the Court grants Plaintiff's motion for judgment against Defendant in the sum of \$426,500, consisting of the balance of \$425,000 and late charges of \$1,500 associated with the untimely payment of the November 2009 and January 2010 installments, plus interest, costs and disbursements. The Court refers the determination of

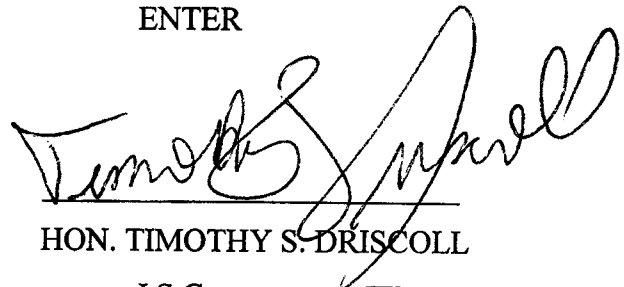
interest, costs and disbursements to a hearing before a Special Referee, which the Court will schedule at a conference to be held before the Court on June 17, 2010 at 9:30 a.m. The County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant in accordance with the decision of the Special Referee.

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 conference on June 17, 2010 at 9:30 a.m., at which time the Court will schedule the hearing as directed herein.

ENTER


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

DATED: Mineola, NY
May 18, 2010

ENTERED
MAY 20 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE