

**TD Bank, N.A. v Certified Land Abstract, Inc.**

2010 NY Slip Op 31423(U)

May 24, 2010

Supreme Court, Nassau County

Docket Number: 18829/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

TD BANK, N.A.,

Plaintiff,

- against -

CERTIFIED LAND ABSTRACT, INC. and  
ROBERT RUSSO,

Defendants.

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 18829/09  
Motion Seq. No.: 01  
Motion Date: 02/23/10  
**XXX**

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

	Papers Numbered
Notice of Motion, Affidavit, Affirmation, and Exhibits	1
Affidavit in Opposition	2
Reply Affirmations and Affidavit and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff's motion for an order, pursuant to CPLR 3212 and U.C.C. 9-601, for summary judgment against defendants Certified Land Abstract, Inc. and Robert Russo for a money judgment with interest at the contractual per diem interest rate from April 6, 2010 through the date of entry of judgment; for an Order of Foreclosure in the security interest in certain collateral; and for an award of possession pursuant to the Promissory Note and Security Agreement and Guaranty dated April 26, 2007 is granted.

Plaintiff, TD Bank, N.A. is a successor in interest to Commerce Bank, N.A. Effective

May 31, 2009, Commerce Bank, N.A. and Commerce Bank/North merged with and into TD Banknorth, N.A., Charter Number 24096. TD Banknorth, N.A. changed its name to TD Bank, N.A. Plaintiff entered into a Promissory Note and Security Agreement with defendant Certified Land Abstract, Inc. which was unconditionally personally guaranteed by defendant Robert Russo. The loan was in the principal amount of \$25,000.00.

Pursuant to the terms of the subject Promissory Note and Security Agreement, defendant Certified Land Abstract, Inc. and defendant Robert Russo, as the guarantor, were required to make monthly installment payments of interest at the plaintiff's variable interest rate (Prime + 1.5% per annum), with the entire remaining sum of principal and interest to become due, payable and owing on demand, or if no demand made, on or before the expiration date thereof, i.e., thirty-six (36) months from April 26, 2007. Defendants failed to make the payments required under the terms of the Promissory Note and Security Agreement, the subject note having gone into default for the payment due and owing on October 15, 2009, and for each and every monthly installment payment due and owing thereafter. Following default, written demand was made on the defendants. As further consideration for making the loan and secure repayment, the defendants, pursuant to the Security Agreement, pledged to the plaintiff as further security certain collateral set forth therein, i.e., inventory, chattel paper accounts, equipment and general intangibles belonging to defendants.

The requested entry of judgment against the defendants, for the monetary sum, is for the sum of money due and owing to the plaintiff under the subject Promissory Note, and said amount can, by simple mathematical computation, be readily ascertained without the necessity of reference or further proceedings herein. Defendants defaulted with respect to the monthly

payments required thereunder, and in accordance with the terms of the said agreement, the plaintiff made due demand for, and has accelerated the balances due and owing.

The execution of the Promissory Note and Security Agreement, the defendants' default, plaintiff's ownership of the Promissory Note, demand for payment and acceleration are described in detail.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact in controversy. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). Once the plaintiff has established its case, the burden shifts to the defendant to assert any viable defenses that could properly raise a triable issue of fact as to the default. See *DiNardo v. Patcam Service Station, Inc.*, 228 A.D.2d 543, 644 N.Y.S.2d 779 (2d Dept. 1996). See also *Village Bank v. Wild Oaks Holding, Inc.*, 196 A.D.2d 812, 601 N.Y.S.2d 940 (2d Dept. 1993). Plaintiff has satisfied its *prima facie* burden of establishing entitlement to judgment as a matter of law.

*Constructamax, Inc. v. CBA Associate., Inc.*, 294 A.D.2d 460, 742 N.Y.S.2d 555 (2d Dept. 2002); *Colonial Commercial Corp. v. Breskel Associates*, 238 A.D.2d 539, 657 N.Y.S.2d 940 (2d Dept. 1997); *Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 A.D.2d 136, 295 N.Y.S.2d 752 (1<sup>st</sup> Dept. 1968), *aff'd*, 29 N.Y.2d 617, 324 N.Y.S.2d 410 (1971); *Chemical Bank v. Nemeroff*, 233 A.D.2d 239, 650 N.Y.S.2d 110 (1<sup>st</sup> Dept. 1996); *Key Bank v. Munkenbeck*, 162 A.D.2d 503, 556 N.Y.S.2d 702 (2d Dept. 1990).

The burden now shifts to the defendants to assert defenses sufficient to raise a triable issue of fact regarding the validity of the Promissory Note or the validity of the default. *See DiNardo v. Patcam Service Station, Inc., supra* at 543. Defendants present no evidence or credible legal argument to the Court regarding the validity of the default. Defendants rely on illusory, putative defenses designed to shift the Court's focus from the basic facts of the default. Defendants' attorneys' assertion that plaintiff failed to attach the pleadings is false. Nor is there any merit to the claim of a need for further discovery such as an examination before trial. Moreover, defendants' assertion that the assignment was "improper" is baseless. Plaintiff has established by credible evidence that TD Bank, N.A. is a successor in interest to Commerce Bank, N.A., the owner of, and in possession of the Promissory Note and unconditional guaranty. Although summary judgment is a drastic remedy (*see Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974)), nevertheless, a "court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*see Assing v. United Rubber Supply Co., Inc.*, 126 A.D.2d 590, 511 N.Y.S.2d 31 (2d Dept. 1987); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978)) and where there is nothing left to be resolved at trial, the case should be summarily decided. *See Andre v. Pomeroy, supra* at 364.

The motion for an order directing the entry of judgment in favor of the plaintiff against the defendants in the sum of \$21,713.72, with interest at the contract per diem rate of \$2.77 from April 6, 2010 through the date of the entry of judgment; an order of foreclosure of the plaintiff's security in the collateral and an order awarding possession, turnover and surrender of the subject personal property is granted.

Pursuant to the Promissory Note, plaintiff's attorney is entitled to reasonable attorney's fees and expenses as awarded by the Court. Plaintiff's attorney submitted an Affirmation of Legal Services requesting \$3,125.00 for legal fees and \$509.00 for expenses based on 12.5 hours at \$250.00 per hour. However, counsel failed to set forth in detail the nature of the legal services performed or submit copies of invoices sent to the client. "Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved." *In re Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974). Leave is granted to plaintiff's attorney to submit an amended affirmation for legal services on notice with the Proposed Judgement and Notice of Settlement. The judgment should include a decretal paragraph to provide an amount for legal fees and reasonable disbursements. In the event that respective counsel can agree to an amount for legal fees, a copy of a written stipulation indicating same should be included with the Judgment and Notice of Settlement. After the amount of legal fees and expenses is determined by the Court or stipulation of the parties, the Judgment with Notice of Settlement shall be forwarded to the Clerk for review, and if found to be in accord with this decision, same shall be signed.

This constitutes the decision and order of this Court.

ENTER:



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DENISE L. SHER, A.J.S.C.  
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Dated: Mineola, New York  
May 24, 2010

**ENTERED**  
JUN 02 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE