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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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GRIFFON V., LLC, assignee of the rights of CHINATRUST BANK (U.S.A.),

Plaintiff,

-against-

11 EAST 36TH LLC, MORGAN LOFTS LLC, MADISON CONDOS LLC, BLUEBELL ASSETS LLC, ELI MORDECHAI BOBKER and BEN BARUCH BOBKER,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 022614-09
Motion Seq. No: 1
Submission Date: 4/12/10

The following papers have been read on this motion:

Amended Notice of Motion, Summons, Attorney Affirmation in Support, Affidavits in Support of K. Foo and M. Shah and Exhibits.....x
Affidavit in Opposition of J. Bobker and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Defendants' Memorandum of Law in Opposition.....x
Reply Memorandum of Law, Reply Attorney Affirmation and Exhibits.....x

This matter is before the Court for decision on the motion filed by Plaintiff Griffin V LLC, assignee of the rights of ChinaTrust Bank (U.S.A.) ("Griffon" or Plaintiff") on or about December 4, 2009 and submitted on April 12, 2010. For the reasons set forth below, the Court denies Plaintiff's motion and directs counsel for the parties to appear before the Court for a Preliminary Conference on June 15, 2010 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Plaintiffs moves for an Order, pursuant to CPLR § 3213, granting Plaintiff Summary Judgment in Lieu of Complaint and directing the entry of judgment for the Plaintiff in the amount of $2,183,117.52, plus interest thereon from October 27, 2009 at a rate of 13%, as well as an award of attorney's fees and costs.

Defendants oppose Plaintiff's motion.

B. The Parties' History

Plaintiff provides an Affidavit in Support of Kin-Keung Foo a/k/a Kenneth Foo ("Foo") dated October 30, 2009 in which Foo affirms as follows:

Foo is a Vice President of Chinatrust Bank (U.S.A.) ("Chinatrust"), a California bank that transacts business within New York State, who has knowledge of the relevant facts herein based on his review of the books and records maintained by Chinatrust in the ordinary course of business.

On or about April 30, 2008, Defendant 11 East 36th LLC executed an Amended and Restated Promissory Note ("Note") and Revolving Line of Credit Agreement ("Credit Agreement") (Exs. A and B to P's motion) to Chinatrust in the sum of $2,200,000.00 ("Loan"). By its terms, the Note is payable within a stated time period, specifically March 14, 2009. Pursuant to paragraph 4 of the Note, it is secured by 1) a mortgage lien on five (5) residential condominium units ("Mortgaged Property"), 2) a collateral assignment of leases and rents for the Mortgaged Property ("Assignment of Rents"), and the unlimited and conditional guaranties of Ben Baruch Bobker ("Ben"), Eli Mordecai Bobker ("Eli"), Madison Condos, LLC and Bluebell Assets, LLC. Pursuant to the terms of the Note, the interest rate was equal to 0.5% per annum over the prime rate as published in the Wall Street Journal, but in no event less than 6%.

By letter agreement dated May 6, 2009 (Ex. C to P's motion), the Defendant borrowers and each of the guarantors extended the maturity of the Credit Agreement until June 14, 2009 and agreed that no further funding would be permitted under the Note or the Credit Agreement. Thus, Foo submits, the Note has matured by its own terms.

At the same time the Note was executed, Ben executed a separate Borrower's Estoppel Affidavit (Ex. D to P's motion) in which he swore, at paragraph 5, that "there are no offsets or

defenses, nor is there any usury, fraud or adverse equity affecting the indebtedness evidence by the Note or the lien of the Mortgage." In addition, Defendants Morgan Lofts LLC, Madison Condos LLC, Bluebell Assets LLC, Eli and Ben each executed separate General and Continuing Guaranties (Ex. E to P's motion) in which they guaranteed to Chinatrust the performance by 11 East 36th, LLC, the borrower, of its obligations relating to the Loan.

On or around October 14, 2009, Chinatrust sold its rights in the Note to Griffon. Foo provides copies of the Allonge to the Note, [1] Assignment of Mortgage and Omnibus Assignment of Lender's Rights (Ex. F to P's motion) ("Assignment Documents"). The Allonge, which by its terms is attached to and made a part of the Note, includes the language "Pay to the order of [Griffon] without recourse," and is signed by Yintung (Tony) Chang, Senior Vice President of Chinatrust.

Foo affirms that, as of October 7, 2009, the total principal due on the Note was $2,116,719, which sum is exclusive of late fees, default interest and legal fees. The Note provides that the default rate of interest shall be 7% over the "standard" interest rate, which Foo submits is 6%, the minimum interest on the loan. Thus, in light of Defendants' default, interest accrues at the rate of 13%. In addition, paragraph 5 of the Note requires the Maker to pay all costs of collection, including court costs, reasonable attorney's fees and disbursements.

Plaintiff also provides an Affidavit in Support of Michael Shah ("Shah"), the managing member of Griffon, dated October 30, 2009 in which he reaffirms the statements of Foo with respect to the execution of the Note and Guaranties. Shah affirms that, on or about October 14, 2009, Chinatrust sold its rights in the Note to Griffon, as reflected by the Assignment Documents. By letters dated October 15, 2009 (Ex. G to P's motion), Griffon notified the Defendants of that assignment and demanded payment of all amounts due. To date, no payment has been received.

At the request of Defendants, Griffon sent to the Defendants a payoff letter ("Payoff Letter") (Ex. H to P's motion) which provided a "breakdown of the amounts due and owing Lender under and pursuant to the Mortgage and the Note secured thereby...as of October 28, 2009." According to the Payoff Letter, as of October 27, 2009, the total amount due and owing

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[1] The Shorter Oxford English Dictionary (5th Ed.) defines "allonge" as a slip of paper attached to the end of a bill of exchange etc. to give room for further endorsements.

on the Note, including principal, accrued interest and late fees, was $2,183,117.52. In addition, as outlined by Foo, as the note is in Default, interest accrues at the rate of 13%.

In his Attorney Affirmation in Support dated October 30, 2009 Plaintiff's Counsel affirms as follows in support of Plaintiff's application for counsel fees: 1) Plaintiff retained Counsel at an hourly rate of $375, plus court costs; 2) the costs of this action are $210.00 for the index number, $45.00 for the motion fee and $75.00 for the Request for Judicial Intervention, resulting in total fees of $330.00, plus the costs of service on the six Defendants; and 3) Counsel has spent more than ten (10) hours on this matter which included meeting with Plaintiff's representatives, reviewing documents and drafting the instant motion. Plaintiff's counsel affirms that Plaintiff has incurred approximately $3,750.00 in pursuing this motion and requests that the Court either direct a hearing to determine the appropriate counsel fee award, or direct the submission of an Affidavit of Legal Services and Costs to assist the Court in determining the appropriate counsel fee award.

Shah also provides a Supplemental Affidavit in Support dated February 12, 2010 in which he affirms as follows:

Subsequent to the filing of this action, Griffon was notified that real estate taxes were due on the property that collateralizes the Loan. The amount of the real estate taxes due was $97,550.14, which Griffon paid via wire transfer on February 3, 2010. In support, Shah provides copies of tax bills and receipts from the New York City Department of Finance (Ex. A to Shah Supp. Aff.). In light of these payments, Shah affirms that the total amount due and owing on the Note as of February 12, 2010 will be $2,285,464.41, and that default interest continues to accrue at the rate of $799.60 per day. Shah seeks the entry of a money judgment against Defendants, jointly and severally, in the sum of $2,285,464.41, plus interest at the contract rate of 13% thereafter equaling $799.60 per day.

Defendants provide an Affidavit in Opposition of Joe Bobker ("J. Bobker") dated March 16, 2010 in which he affirms as follows:

J. Bobker is a consultant with Defendant 11 East 36th Street ("Morgan") which is the owner of a residential condominium building in Manhattan known as "Morgan Lofts." Defendant Morgan Lofts LLC is developing the condominium units in that building. For years, J. Bobker has been involved with the acquisition, planning and construction of the Morgan Lofts

project. He has dealt personally with Shah, as well as many executives and representatives of Chinatrust, which he describes as "allegedly the assignor of Griffon's rights in this action" (J. Bobker Aff. in Opp. at ¶ 2).

J. Bobker submits that the Court should deny Plaintiff's motion because Plaintiff has prior, detailed knowledge of Morgan's defenses, as demonstrated, *inter alia*, by 1) a letter from Morgan's counsel to Chinatrust dated October 7, 2009 in which Morgan's counsel advised Chinatrust of its allegedly improper conduct, including that a) China Trust arbitrarily defaulted on its contractual obligations to fund the line of credit evidenced by the Note; and b) Chinatrust maliciously interfered with Morgan's attempts to refinance the underlying debt through other lenders, and 2) Shah's admission to J. Bobker on October 15, 2009 that he was aware of the October 7, 2009 letter before Griffon purchased the Note, and that Griffon used the letter as leverage to reduce the amount that it paid Chinatrust to purchase the Note and obtain a more advantageous indemnity provision from Chinatrust.

J. Bobker also contends that the Note represents only a portion of the Line of Credit loan facility ("Loan Facility"), which the parties closed in April 2008, and that Griffon should not be permitted to enforce the Note summarily. The Loan Facility consisted of a Line of Credit Note, a Revolving Line of Credit Agreement, a Mortgage with respect to the five condominium units securing the line of Credit Note, an Assignment of Rents, various Guaranties and other agreements, and other filings. J. Bobker affirms that Griffon has not provided certain relevant loan documentation, such as the Revolving Line of Credit Agreement, that bears on Plaintiff's rights under the Note.

J. Bobker further argues that Griffon should not be permitted to enforce the Note because Chinatrust 1) breached its prior agreement to sell the Note to Morgan which would have resulted in new financing for the Morgan Lofts project; and 2) hindered the release of the appraisal ("Appraisal") required for refinancing which prevented the sale from closing. J. Bobker provides copies of e-mails (Exs. 2-20 to J. Bobker Aff. in Opp.) that, he submits, support his allegations.

In his Affirmation in Opposition, Defendants' counsel affirms that certain publicly available records reflect that Griffon and a company called Black Label Residential LLC ("Black Label") are owned and/or controlled by Shah, or the real estate organization over which Shah

presides. Defendants' counsel makes reference to a matter in Supreme Court, New York County in which Black Label filed a motion to substitute itself as plaintiff, in lieu of Chinatrust, based on Chinatrust's alleged assignment of its claims to Black Label. That matter involved Chinatrust's efforts to enforce a loan. By Order dated December 7, 2009 (Ex. E to Stahl Aff. in Opp.), Judge Solomon dismissed the action, stating, *inter alia*:

> It appearing that in connection with selling its paper & position as mortgagee, Chinatrust failed to honor its obligations to court and defendant by way of discovery, so that x-motion should be granted, particularly where Chinatrust fails to appear on argument on motion by alleged successor. Notably, even upon according movant, Black Label, status as foreclosing plaintiff, Chinatrust remains (or would remain)...as a defendant because of previously asserted counterclaim by mortgagor in connection with use of escrowed funds.

Defendants' counsel submits that Griffon and Black Label are affiliated or under joint control. He contends, further, that the management of Griffon and Black Label has a relationship with Chinatrust that encompasses loans in addition to the Note to which Plaintiff's instant motion refers.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by establishing 1) Morgan's execution of the Note and Credit Agreement to Chinatrust in the sum of $2,200,000.00, 2) the execution by the borrowers and guarantors of the letter agreement dated May 6, 2009 extending the maturity date of the Credit Agreement until June 14, 2009, 3) Ben's execution of the Borrower's Estoppel Affidavit in which he swore, *inter alia*, that there were no defenses affecting the indebtedness evidenced by the Note, 4) the execution of guaranties by Defendants Morgan Lofts, Madison Condos LLC, Bluebell Assets LLC, Eli and Ben, 5) Chinatrust's assignment of its rights in the Note to Griffon on or about October 14, 2009, 6) Griffton's notification of the Defendants of the assignment and demand for payment of all amounts due, 7) Griffon's payoff letter to Defendants advising them of the sums due, and 8) Defendants' failure to make the required payments.

Defendants submit that Plaintiff has not demonstrated its right to summary judgment because the Line of Credit Note and Revolving Line of Credit Agreement on which Plaintiff relies require reference to other documents that Plaintiff has not provided. As an example, Defendants cite to the first paragraph of the Note which describes the amount of the Note as:

> [T]he aggregate principal sum of loans not exceeding TWO MILLION, TWO HUNDRED THOUSAND AND 00/100 ($2,200,000) DOLLARS, as may be advanced and re-advanced by Bank to Maker from time to time ('Loan'), together with interest thereon computed from the date of each drawdown at the 'Applicable Rate of Interest' (as hereinafter defined), pursuant to that certain Revolving Line of Credit Agreement of even date herewith between Maker and Bank.

Defendants submit that this language demonstrates that the indebtedness could be any sum between zero and $2,200,000 because the amount due is based on sums withdrawn from the account through the operation of a second instrument, specifically the Line of Credit Agreement. Thus, the variable nature of the Note and its reference to another instrument are inconsistent with the requirement that a motion for summary judgment in lieu of complaint involve an instrument for the payment of money for a sum certain.

In its Reply Affirmation, Plaintiff submits that Defendants have failed to raise viable defenses. Plaintiff notes that Defendants, while opposing Plaintiff's motion, do not dispute that 1) Defendants executed the Note and Personal Guarantees; 2) the Note and Personal Guarantees are valid obligations; 3) Defendants received the monies in issue; 4) Defendants owed $2,183,117.52 under the applicable Note and Guarantees, as of October 27, 2009; and 5) interest accrues at the rate of 13% in light of Defendants' default.

Plaintiff also characterizes as "disingenuous" (Reply Aff. at p. 18) Defendants' argument that the Note is not enforceable because it requires reference to a second document, the Line of Credit Agreement. Plaintiff submits that this argument ignores the provision in paragraph 1 of the Note which states that the terms and provisions of the Line of Credit Agreement are "incorporated herein as if set forth hereto in its entirety." Moreover, given that the Note alone sets forth a right to payment, its reference to another document does not make it inappropriate for summary judgment.

Plaintiff further contends that Borrower's claim that it has a counterclaim against Chinatrust for its alleged misconduct is specious. Plaintiff provides documentation from The Bobker Group website (Ex. G to Reply Aff.) reflecting that J. Bobker claims to have 30 years of experience in the real estate field, and Ben and Eli are attorneys. Defendants have failed to support their allegations that Chinatrust defrauded Borrower by forcing it to borrow more money than it wanted to borrow. Moreover, in the Estoppel Affidavit signed in April of 2008, over a

year after Chinatrust's alleged misconduct, Borrower acknowledged that there were no defenses or fraud in connection with the Note. Finally, Plaintiff disputes Defendants' allegations with respect to the Appraisal, noting that J. Bobker concedes that Chinatrust forwarded the existing appraisal (J. Bobker Aff. in Opp. at ¶ 56), and submitting that Borrower wanted a revised appraisal so "to mislead another lender as to the value of the real property" (Reply Aff. at p.17). Plaintiff contends that Chinatrust was under no legal obligation to issue any appraisal, particularly one that was potentially misleading.

Finally, Plaintiff makes reference to J. Bobker's testimony in an action titled *Lowy v. Bobker*, 383 F. Supp. 2d 606 (S.D.N.Y. 2005) in which J. Bobker was the named defendant. Plaintiff provides a copy of Judge Jed S. Rakoff's decision in that matter (Ex. F to Reply Aff.) in which Judge Rakoff, in discussing a particular aspect of J. Bobker's testimony, describes the testimony "partly as one more indication of [J. Bobker's] readiness to make false or misleading statements at all times" (*Id.* at fn. 14).

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

> 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).

An agreement qualifies for treatment as an instrument for the payment of money only under CPLR § 3213, even if it contains other provisions and terms, as long as those provisions and terms do not require additional performance by the lender as a condition precedent to repayment, or otherwise alter the insured's promise of repayment. *Afco Credit Corp. v. Boropark Twelfth Avenue Realty Corp.*, 187 A.D.2d 634, 634 (2d Dept. 1992) (premium finance agreement containing unconditional promise by insured to repay lender qualifies for treatment as instrument for payment of money only under CPLR § 3213). *See also Juste v. Niewdach*, 26 A.D.3d 416 (2d Dept. 2006) (mere presence of additional provisions in guaranty referring to defendant's assumption of tenant's obligations in lease did not constitute bar to CPLR § 3213 relief).

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. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept. 2001), *app. dism.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

D. 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).

E. Application of these Principles to the Instant Action

As noted by Plaintiff in its Reply Memorandum of Law, Defendant-Borrower asserts that it has a counterclaim against Chinatrust based on its purported misconduct during 2006 and 2007, resulting in Defendant-Borrower overpaying for the Note (Reply Memorandum of Law at p. 21). Thus, the Court's decision on this motion involves a determination of whether Borrower's allegations are counterclaims that arise out of the same transaction at issue in the Note, or instead constitute actual defenses to Plaintiff's claim. Summary judgment in lieu of a complaint is required in the former instance, but should be denied in the latter. *Harris v. Miller*, 136 A.D.2d 603 (2d Dept. 1988).

Borrower's allegations appear to be defenses that are inextricably intertwined with Plaintiff's right to recover under the Note. Indeed, these allegations somewhat resemble the defendant's allegations in *Fine v. DiStanti*, 79 A.D.2d 673 (2d Dept. 1980), in which the Second Department held that judgment as a matter of law on a promissory note was inappropriate when the defendant alleged fraud in the parties' financial dealings, and the defendant's allegations regarding the parties' business dealings were "intimately interrelated" to the plaintiff's claim.

In light of these principles, as well as the fact that this case is in its nascent stage, the Court is constrained to deny Plaintiff's motion for summary judgment in lieu of a complaint. Accordingly, the Court denies Plaintiff's motion and deems the moving and answering papers the complaint and answer, respectively. The Court also denies, as moot, the application for counsel fees.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on June 15, 2010 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 2, 2010

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