[*1] SCANNED ON 7/2/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead Justice

PART 35

Index Number : 113717/2009
JPMORGAN CHASE BANK, N.A.
vs.
BILLINGS TUROFF, CO.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO.

MOTION DATE 6/3/10

MOTION SEQ. NO.

MOTION CAL. NO.

this motion is for

FILED
JUL 07 2010
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

**Cross-Motion:** ☑ Yes ☐ No

**Upon the foregoing papers, it is ordered that this motion**

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the cross-motion of defendants Brian F. Billings, a/k/a Brian Frederick Billings, and Nathan K. Turoff, a/k/a Nathan Turoff for leave to amend the Answer is denied, and it is further

ORDERED that the branch of the motion of plaintiff JPMorgan Chase Bank, N.A. for an entry of judgment by default as to its first, second, and third causes of action against Billings Turoff, Co., and its fourth cause of action against Brian F. Billings, a/k/a Brian Frederick Billings is granted, on the issue of liability; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on its fourth cause action against defendant Nathan K. Turoff, a/k/a Nathan Turoff is granted as to liability; and it is further

ORDERED that the parties shall appear in Part 40 located at 60 Centre Street, New York, New York, for a hearing on damages and attorneys' fees against defendants on Monday, July 26, 2010 at 9:30 a.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 6/29/10

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**Check one:** ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

**Check if appropriate:** ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

JPMORGAN CHASE BANK, NA,

Index No. 113717/09

Plaintiff,

-against-

**DECISION/ORDER**

BILLINGS TUROFF, CO., BRIAN F. BILLINGS, a/k/a BRIAN FREDERICK BILLINGS, and NATHAN K. TUROFF, a/k/a NATHAN TUROFF,

Defendants.

----------x



HON. CAROL ROBINSON EDMEAD, J.S.C.

**MEMORANDUM DECISION**

In this action to collect on a promissory note against defendants Billings Turoff, Co. ("Corp."), Brian F. Billings, a/k/a Brian Frederick Billings ("Mr. Billings"), and Nathan K. Turoff, a/k/a Nathan Turoff ("Mr. Turoff") (collectively "defendants"), plaintiff JPMorgan Chase Bank, N.A. ("plaintiff") moves for (1) summary judgment, pursuant to CPLR §3211, against Mr. Turoff, and (2) a default judgment, pursuant to CPLR §3215, against Corp. and Mr. Billings.

Mr. Billings and Mr. Turoff ("co-defendants") cross move for an order granting them permission to amend the Answer, joining Mr. Billings to the amended answer, or, alternatively, deeming Mr. Billings as having answered plaintiff's Complaint.

*Background*

On September 30, 2009, plaintiff commenced this action by filing a Summons and Complaint. Plaintiff alleges that on or about November 14, 2007, Corp. entered into a Promissory Note with plaintiff in the principal sum of $100,000 (*see* the "Note" and the affidavit of Marion Taylor ("Mr. Taylor"), plaintiff's Assistant Vice President of the Portfolio

Management Center [the "Taylor Affd."]).[1] Pursuant to the terms and conditions of the Note, payments are due on the 14th day of each month, and the failure to make any payment when due constituted a default. The Note further provides that, in the event of default, Corp. is to pay interest on the outstanding principal balance of the loan, on demand, at a rate per annum equal to the sum of the rate set forth in the Note, plus 3% (for a total of prime rate plus 3.75%), but not to exceed the maximum rate permitted by law. Further, plaintiff can: (1) declare all principal, interest and other amounts owing and shall become owing to be immediately due and payable without notice of any kind (including notice of acceleration), and (2) set off the amount owed by taking possession of any amount held for Corp. on deposit.

As its first cause of action against Corp., plaintiff alleges that Corp. made payments through and including April 14, 2009, but then failed to make the payments due on May 14, 2009 and thereafter. Corp.'s failure and refusal to make the payment due on May 14, 2009 has been deemed a default under the Note. As a result, all amounts due and to become due became immediately due and payable to plaintiff. Accordingly, Corp. remains indebted to plaintiff for $99,976.95, plus interest at the plaintiff's prime rate plus 3.75% (the "default rate") from May 14, 2009.

As its second cause of action against Corp., plaintiff alleges that the Note provides that if the required monthly payment is not made within 10 days of its due date, Corp. must pay a late fee equivalent to 5% of the payment due, but not less than $25, for a maximum late charge of $250 per occurrence. Prior to its default, Corp. made untimely payments on one or more

[1]While the Note is dated November 14, 2007, it is signed by Mr. Billings and Mr. Turoff on November 15, 2007.

occasions. As a result, late charges in the sum of $428.94 became due and owing to plaintiff.

As its third cause of action against Corp., plaintiff alleges that the Note provides that Corp. shall reimburse plaintiff for any collection costs, including but not limited to reasonable attorneys' fees and expenses incurred in enforcing the Note. As a result of Corp.'s default, plaintiff has incurred and will continue to incur attorneys' fees and expenses. Therefore, plaintiff is entitled to recover reasonable attorneys' fees in the amount of $3,712.50, plus the costs and disbursements of this action (*see* plaintiff's motion and the "Invoice" from Helfand & Helfand).

As its fourth cause of action against co-defendants, plaintiff alleges that on or about November 14, 2007, co-defendants executed and delivered a written personal guaranty to plaintiff whereby co-defendants unconditionally guaranteed the prompt payment, when due, of all existing or thereafter arising indebtedness or obligations of Corp. (*see* the "Guaranty"). Following Corp.'s default, a demand was made upon co-defendants to honor the Guaranty and perform the obligations of Corp. However, co-defendants ignored and refused said demand. Accordingly, co-defendants remain indebted to plaintiff to the same extent as Corp., *i.e.* owing the sum of $100,405.89, plus interest on $99,976.95 at the default rate from May 14, 2009, and reasonable attorneys' fees, and costs.

In an Answer filed December 15, 2009 solely on behalf of Mr. Turoff, Mr. Turoff asserts the affirmative defenses of (1) payment, (2) estoppel/unclean hands, (3) "co-defendant's[2] breach of agency authority," and (4) plaintiff's prior breach of contract. He also asserts a counterclaim for breach of contract and indemnification. In his counterclaim, Mr. Turoff alleges that in or

[2]Although the Answer does not specify which co-defendant, based on the context, the co-defendant is likely Mr. Billings.

about November 2007, and prior to any draw on the alleged Note, he canceled and revoked his alleged Guaranty within three business days of execution by written notice to plaintiff. At the same time, Mr. Turoff, by written notice, advised Mr. Billings and Corp. that he would not be liable for any borrowing on the Note. Upon information and belief, from time to time, Mr. Billings and/or Corp. borrowed monies from plaintiff, without the express or implied permission or consent of Mr. Turoff. In permitting the draw on the Note, and taking the draw, plaintiff, Mr. Billings and Corp. breached the agreements of the parties, Mr. Turoff alleges.

In its motion, plaintiff, relying on the Taylor Affd., first argues that summary judgment should be granted as against Mr. Turoff. Plaintiff contends that its evidence establishes that Mr. Turoff is jointly and severally liable on the Note, the existence of an underlying debt, and his respective act of default. Further, Mr. Turoff fails to adequately contest any of plaintiff's evidence. Instead, his Answer contains generic denials and inadmissible claims regarding his obligation to pay, without providing any facts or documents to support such denials. Mere denials, however, cannot preclude summary judgment in its favor, plaintiff contends.

Further, Mr. Turoff's affirmative defenses are insufficient as a matter of law, plaintiff argues. Mr. Turoff's first affirmative defense – "payment"– is one word and incomprehensible as stated. Plaintiff contends that the defense is "frivolously offered" solely to delay the litigation process at the expense and time of the Court and plaintiff. As Mr. Turoff has neither substantiated his first affirmative defense nor brought forth any evidence to establish it, the defense should be dismissed, plaintiff argues.

Also, Mr. Turoff's second affirmative defense – "estoppel/unclean hands"– can be utilized only in the context of a proceeding in equity, plaintiff contends. The causes of action

upon which plaintiff seeks summary judgment herein are actions at law for a breach of a loan agreement. Mr. Turoff failed to make the necessary payments to plaintiff under the Guaranty. Consequently, the defense of estoppel does not apply. Further, the conclusory allegation of estoppel/unclean hands lacks the requisite particularity. Mr. Turoff fails to point to any specific actions taken or statements made by plaintiff that would constitute an estoppel with respect to the instant claims. Thus, Mr. Turoff cannot invoke a defense of estoppel/unclean hands against plaintiff, and the second defense fails as a matter of law.

Mr. Turoff's third affirmative defense – Mr. Billings's "breach of agency authority" – constitutes an unsupported legal conclusion and improperly pleaded cross-claim, plaintiff argues. Not only are averments merely stating conclusions of fact or law insufficient to defeat a motion for summary judgment, but also, as a general rule, the signer of a written agreement is conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract, plaintiff contends. The Taylor Affd. provides *prima facie* evidence that Mr. Turoff executed the Note and Guaranty. Therefore, Mr. Turoff's third affirmative defense should be dismissed.

Mr. Turoff's fourth affirmative defense – "plaintiff's prior breach of contract" – is also inadequately pleaded, plaintiff argues. Mr. Turoff fails to point to any specific action taken by plaintiff, or any evidence of the specific conduct showing plaintiff's breach. As Mr. Turoff's fourth affirmative defense is nothing more than an unsubstantiated conclusory allegation, it must be dismissed, plaintiff argues.

Finally, plaintiff argues that Mr. Turoff's counterclaim of breach of contract and indemnification is a "hybrid counterclaim/cross-claim" demanding indemnification from

co-defendants and ostensibly alleging as a counterclaim breach of contract against plaintiff. No such form of action is permitted under the CPLR, plaintiff contends. Further, Mr. Turoff's claim that he rescinded the agreement in a timely manner lacks merit. There is no right of rescission in this commercial loan context, plaintiff contends. In any event, Mr. Turoff fails to provide any documentary evidence that he provided notice at any time sufficient to negate the effect of the Guaranty. He only makes a series of conclusory statements, none of which is supported or supportable. Therefore, Mr. Turoff's hybrid counterclaim must be dismissed, plaintiff argues.

Second, citing CPLR §3215, plaintiff argues that it is entitled to judgment by default against Corp. and Mr. Billings. Plaintiff contends that the first, second, and third causes of action in its Complaint set forth claims against Corp. for breach of the Note, late charges and attorney's fees. The fourth cause of action sets forth a claim against Mr. Billings for defaulting on the Guaranty and attendant obligations of Corp. Mr. Taylor attests that more than 30 days have elapsed since the serving and filing of plaintiff's Summons and Verified Complaint, and plaintiff has not received either an Answer or request for an extension of time within which to file an Answer from either. Further, neither Corp. nor Mr. Billings has appeared in this action. Since plaintiff's damages are easily calculated with reference to the Note and Guaranty, they qualify as a sum certain. As Corp. and Mr. Billings have failed to appear, plaintiff is entitled to a default judgment on its first, second, and third causes of action against Corp., and the fourth cause of action against Mr. Billings.

In a cross-motion and opposition filed on behalf of both Mr. Turoff and Mr. Billings, Mr. Turoff's counsel, Joseph Sanchez ("Mr. Sanchez") explains that since the filing of the instant action, he has been retained to represent Mr. Billings, who previously was unrepresented and in

danger of default (*see* the "Notice of Appearance"). Although previously adversarial, co-defendants have resolved their differences and waived in writing any conflicts of interest as to Mr. Sanchez's dual representation. In addition, dual representation is "natural and to be expected" by plaintiff, as both are principals in Corp., and co-guarantors of the Note. Finally, the dual representation speeds the determination of this matter, Mr. Sanchez argues.

Co-defendants seek leave to amend the Answer as set forth in the proposed Amended Verified Answer (the "Proposed Amended Answer"), joining Mr. Billings as an answering defendant. In the event that the Court denies co-defendants' request, they seek an order deeming Mr. Billings as having answered the Complaint in the form set forth in the Proposed Amended Answer (cross-motion, ¶ 4). Co-defendants point out that the Proposed Amended Answer removes Mr. Turoff's counterclaim, denies the sums due as a result of payment, and denies that either Mr. Billings or Mr. Turoff received notice of default.

Co-defendants first argue that plaintiff fails to provide any supporting evidence indicating the actual balances due. Citing Mr. Turoff's affidavit (the "Turoff Affd."), co-defendants also argue that plaintiff fails to provide any evidence to support Mr. Taylor's claim that a demand was made upon co-defendants to honor the Guaranty. Mr. Turoff attests that he did not receive from plaintiff any demand that Corp. "was late, in danger of default, or had defaulted" (Turoff Affd., 2). He further attests that he would have liked the option of using his "persuasion" to force his "ex-employer" to pay the approximate monthly payment of $400, rather than now face litigation for in excess of $100,000. Plaintiff has already seized the balances Mr. Turoff held in his personal checking account, and now seeks the balance due under the purported Guaranty, as well as his personal assets secured pursuant to the security agreement provisions of the Note.

Co-defendants argue that while under common law, a creditor is under no duty to give a guarantor notice of the principal's default, notice is required herein because the Note and Guaranty perfect collateral pledged by co-defendants (*see* Article 9 of the Uniform Commercial Code ["UCC"]). Here, co-defendants pledged their bank accounts and assets as collateral. Therefore, they should have been accorded proper notice of default, co-defendants argue.

In its reply and opposition to co-defendants' cross-motion, plaintiff first argues that it is entitled to summary judgment against Mr. Turoff on the Guaranty because the following facts are undisputed: Corp. made the payments on the Note through and including April 14, 2009, but then failed and refused to make the payments due on May 14, 2009 and afterward; Corp.'s failure and refusal to make the May 14, 2009 payment is an act of default under the Note; and as a result of Corp.'s default, all amounts due and to become due under the Note became immediately due and payable to plaintiff. Plaintiff further contends that it is undisputed that on November 14, 2007, co-defendants executed the Guaranty; following Corp.'s default, a demand was made on co-defendants to honor the Guaranty; said demand was ignored and refused by co-defendants; co-defendants remain indebted to plaintiff to the same extent of Corp.; and defendants are jointly and severally indebted to plaintiff for $100,405.89 (including late charges), interest on $99,976.95 at the default rate from May 14, 2009, and reasonable attorneys' fees and costs.

Meanwhile, co-defendants' opposition and cross-motion fail to contain admissible evidence sufficient to create a triable issue of material fact defeating summary judgment. Mr. Sanchez's affirmation fails to state that he has personal knowledge of the alleged transactions between the parties. Therefore, Mr. Sanchez's statements have no probative value, plaintiff argues. Further, contrary to Mr. Turoff's claim that he never received a demand from plaintiff

regarding Corp.'s default, Notices of Acceleration dated August 17, 2009 were sent to each defendant, including Mr. Turoff (*see* the "Notices of Acceleration"). Finally, on page 4 of the "Additional Terms" governing the Note and Guaranty, Mr. Turoff waived notice of acceleration or demand in the event of default (*see* the "Additional Terms," p. 4). Therefore, even if plaintiff had not sent the Notices of Acceleration to each defendant, Corp.'s default on this business loan allowed plaintiff to proceed against defendants to collect its debt, plaintiff argues. Further, the Proposed Amended Answer, like the Answer, contains no admissible evidence sufficient to overcome plaintiff's *prima facie* case for summary judgment against Mr. Turoff.

Second, plaintiff argues that Mr. Billings is subject to default judgment for failing to timely interpose an Answer or otherwise respond to plaintiff's Complaint. While Mr. Billings seeks leave to amend the Answer interposed by Mr. Turoff, Mr. Billings has failed to provide an affidavit in opposition to plaintiff's motion, in support of the cross-motion, or by verification of the untimely Proposed Amended Answer. Because Mr. Billings failed to submit an Answer, he is subject to entry of a default judgment.

Third, plaintiff argues that co-defendants' request for leave to amend should be denied because the Proposed Amended Answer is nearly identical to Mr. Turoff's Answer, without the counterclaim. Plaintiff dealt with each of the affirmative defenses in Mr. Turoff's Answer in its motion and Memorandum of Law ("MOL"). Requiring plaintiff to re-notice, re-file and re-serve its motion would be a waste of the Court's time and plaintiff's resources, plaintiff argues. Therefore, granting co-defendants' request to amend would only delay and hinder the prosecution of this case. Accordingly, co-defendants' request should be denied.

Finally, nothing in co-defendants' cross-motion, Mr. Turoff's Answer or the Proposed

Amended Answer would affect the outcome of plaintiff's motion for default against Corp., which still has not appeared in this action. Therefore, a default judgment should be entered against Corp. forthwith.[3]

*Discussion*

*Co-Defendants' Cross-Motion*

The Court first considers co-defendants' request for leave to amend the Answer, and join Mr. Billings as an answering defendant, or, alternatively, deem Mr. Billings as having answered plaintiff's Complaint. In essence, co-defendants are seeking permission for Mr. Billings to file a late Answer. Both requests are denied.

Pursuant to CPLR §3012(d), the Court may compel the acceptance of an untimely served Answer upon a showing of an acceptable excuse for the delay in appearing and answering, and a potentially meritorious defense to the action (*Ralko Contr. Inc. v 90th Realty, LLC*, 2009 NY Slip Op 31411U, 11 [Sup Ct New York County 2009]; *JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362, 869 NYS2d 451 [1st Dept 2008]). Further, while leave to amend an Answer should be freely granted, absent prejudice to the non-moving party, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]).

[3]In a June 17, 2010, conference call with the parties, co-defendants' counsel confirmed that he had not submitted a reply to plaintiff's opposition.

Meanwhile, the party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]).

Here, it is undisputed that Mr. Billings failed to respond to plaintiff's Complaint. Yet, the record is devoid of any excuse for Mr. Billings's tardiness. First, co-defendants provide no explanation for Mr. Billings' failure to appear or file a timely Answer. Mr. Billings submits no affidavit in opposition to plaintiff's motion, or in support of the cross-motion. Further, neither Mr. Sanchez nor Mr. Turoff offers an excuse or explanation for Mr. Billings's non-appearance. Instead, in his affirmation, Mr. Sanchez contends only that Mr. Turoff and Mr. Billings, who "was unrepresented, and in danger of default," have "resolved their differences, and waived in writing any conflicts of interest as to my dual representation" (cross-motion, ¶ 2-3). Mr. Turoff, in his brief affidavit, states only the following regarding Mr. Billings: "I join with my attorney in asking the Court to permit the amendment of the answer, joining [Mr. Billings] as an answering defendant, removing our counter claim, and asserting such other defenses as set forth therein" (Turoff Affd., ¶ 4). Mr. Turoff makes no other reference to Mr. Billings by way of background or excuse.

Second, co-defendants have failed to set forth any meritorious defenses in their Proposed Amended Answer. The Proposed Amended Answer is identical to Mr. Turoff's Answer, with the following exceptions: It contains no counterclaim, and changes the third affirmative defense from "co-defendant's breach of agency authority" to "plaintiff's failure to provide predicate

notice of default."

In its Complaint, plaintiff alleges that Corp. defaulted on the Note by failing to make any payments after April 14, 2009, resulting in co-defendants' liability under the Guaranty (*see* the Complaint and Taylor Affd.). The first affirmative defense in the Proposed Amended Answer comprises one word: "payment."[4] However, co-defendants provide no factual allegations explaining or supporting this purported defense. Therefore, they have failed to demonstrate that the defense has merit.

Co-defendants' second affirmative defense, "estoppel/unclean hands,"[5] lacks merit. "The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages," such as the action herein (*Manshion Joho Center Co., Ltd. v Manshion Joho Center*, Inc., 24 AD3d 189, 190 [1st Dept 2005]). Further, co-defendants fail to allege any facts in support of either claim.

Co-defendants' third affirmative defense – "plaintiff's failure to provide predicate notice of default"[6] – also lacks merit. Mr. Turoff attests that he has "not received any demand from the plaintiff that the primary obligor of the Note, [Corp.], was late, in danger of default, or had defaulted" (Turoff Affd., ¶ 2). Co-defendants' cross-motion is silent as to whether *Mr. Billings* received such notice. Nevertheless, documentary evidence demonstrates that Mr. Turoff and Mr. Billings waived such notice. The Additional Terms, which apply to the "Note, Guaranty and Security Agreement" (Additional Terms, p.1), state: "If any Event of Default occurs the Note

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[4]Proposed Amended Answer, ¶ 32.

[5]Proposed Amended Answer, ¶ 33.

[6]Proposed Amended Answer, ¶ 34.

shall become due and payable immediately, *without notice or demand*, at Lender's option, *and Borrower hereby waives notice of intent to accelerate maturity of the Note and notice of acceleration of the Note*" (Additional Terms, p. 4) (emphasis added). Further, in reply, plaintiff provides copies of three Notices of Acceleration, each dated August 17, 2009 and addressed to each defendant. Each letter states in boldfaced type: "This Letter is Notice of the Acceleration of the Note." The letters further state:

> You have failed to make payments as required under the terms of the Note. *This letter is notice* that we have accelerated the note and the unpaid principal and lawfully accrued paid interest and charge, if any, is now due.
> [Emphasis added].

The Court notes that co-defendants failed to submit a reply contesting such evidence. Therefore, plaintiff has demonstrated that the facts alleged and relied upon in co-defendants' cross-motion are "obviously unreliable or insufficient to support" the proposed affirmative defense of lack of notice (*Peach Parking Corp.* at 86, *supra*).

Finally, co-defendants' fourth affirmative defense, "plaintiff's prior breach of contract"[7] lacks merit. Co-defendants fail to allege any facts in support of such defenses. The Court notes that Mr. Turoff's original Answer contains a counterclaim for breach of contract, in which Mr. Turoff alleges that he had revoked the Guaranty, and plaintiff breached "the agreements of the parties" by allowing Corp. and Mr. Billings draw on the Note (Answer, ¶¶ 36-40). However, co-defendants removed Mr. Turoff's counterclaim as well as the supporting allegations from the Proposed Amended Answer (cross-motion, ¶ 8). Further, co-defendants fail to allege any facts in support of this defense in either their cross-motion or the Turoff Affd. As the Proposed

[7]Proposed Amended Answer, ¶ 35.

Amended Answer contains no factual support for a claim of breach of contract, the second affirmative defense fails.

As co-defendants have failed to demonstrate an acceptable excuse for Mr. Billings's delay in answering plaintiff's Complaint, as well as a potentially meritorious defense, the branch of co-defendants' cross-motion requesting that Mr. Billings be allowed to file a late Answer is denied. Further, as each of the affirmative defenses in the Proposed Amended Answer lacks merit, the branch of the cross-motion seeking leave to amend their Answer is also denied.

*Plaintiff's Motion*

*Default Judgment Against Corp. and Mr. Billings*

It is well settled that CPLR §3215 "does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action" (*Guzetti v City of New York* , 32 AD3d 234, 235 [1st Dept 2006] (McGuire, J., concurring), *quoting Joosten v Gale*, 129 AD2d 531, 535 [1st Dept 1987]). On an application for default judgment, the following proofs are required:

> [P]roof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. (CPLR §3215[f])

Here, plaintiff has provided sufficient proof establishing the *prima facie* validity of its causes of action against Corp. and Mr. Billings. First, plaintiff demonstrated that it served the instant Summons and Complaint upon Corp. on October 14, 2009, in accordance with CPLR

§311(a)(1), and upon Mr. Billings *via* a suitably aged person on December 1, 2009, pursuant to CPLR §308(2) (*see* the "Affidavits of Service"). Plaintiff established that Corp. has not appeared in this action, and Mr. Billings' application for leave to serve a late Answer has been denied. Second, plaintiff has demonstrated sufficient proof of the facts constituting its claims, and the defaults.

*The Note*

To state a cause of action for breach of an agreement, the proponent of the pleading must specify the (1) making of an agreement, (2) the performance by that party, (3) breach by the other party, and (4) resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 2006 NY Slip Op 50497 [U] [NY Sup 2006], *citing Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v Soleo Communications Inc.*, *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

Here, Mr. Taylor, plaintiff's Assistant Vice President of the Portfolio Management Center, attests that Mr. Billings and Mr. Turoff executed the Note for a business loan on behalf of Corp. on or about November 15, 2007, for a principal sum of $100,000 (*see* the Note and the Taylor Affd.). Pursuant to the terms of the Note, payments were due on the 14th of each month, and the failure to make any payment when due shall constitute a default (Taylor Affd., ¶¶ 11-14; Note, p. 1). The Note further provides that, in the event of default, Corp. will pay interest on the outstanding principal balance at the default rate, and plaintiff can: (1) declare all principal,

interest and other amount owing and shall become owing to be immediately due and payable without notice of any kind (including notice of acceleration), and (2) set off the amount owed by taking possession of any amount held for Corp. on deposit by plaintiff (Taylor Affd. at 15-16). Mr. Taylor attests that Corp. failed and refused to make any payments due on May 14, 2009 and thereafter, resulting in a default (Taylor Affd. at 17-19).

The Note further provides that if the required monthly payment is not made within 10 days of its due date, Corp. must pay a late fee equivalent to 5% of the payment due, but not less than $25, for a maximum late charge of $250 per occurrence (Taylor Affd. at 22-23; Note, p. 1). Prior to its default, Corp. made untimely payments on one or more occasions, Mr. Taylor attests. As a result, Corp. owes late charges (Taylor Affd. at 24-25).

Corp. also is liable for attorneys' fees and expenses, pursuant to the Note, Mr. Taylor attests (*see* the "Additional Terms," p. 4; Taylor Affd. at 26). As a result of Corp.'s default, plaintiff has incurred and will continue to incur attorneys' fees and expenses (*see* the Invoice from Helfand & Helfand). Therefore, plaintiff is entitled to recover reasonable attorneys' fees in the amount of $3,712.50, plus the costs and disbursements of this action, Mr. Taylor attests.

As the evidence in the record demonstrates that Corp. is liable on the Note, plaintiff's motion for entry of default judgment on plaintiff's first, second, and third causes of action against Corp. is granted on the issue of liability.

*The Guaranty*

Mr. Taylor further attests that on or about November 15, 2007, Mr. Billings executed the Guaranty (Taylor Affd. at 29; Guaranty, p. 2).[8] Pursuant to the terms of the Guaranty, Mr.

[8]The Guaranty actually was executed by Mr. Billings and Mr. Turoff.

Billings "absolutely and unconditionally guarantees to the Lender the performance of and full and prompt payment of the Indebtedness when due, whether at stated maturity, by acceleration or otherwise" (Guaranty at 1). Following Corp.'s default, a demand was made upon Mr. Billings (Taylor Affd., at 30). Mr. Billings ignored and refused said demand, thereby breaching the Guaranty (Taylor Affd. at 31). As a result, Mr. Billings remains indebted to plaintiff to the same extent as Corp. As, the evidence in the record demonstrates that Mr. Billings is liable on the Guaranty, plaintiff's motion for entry of default judgment on plaintiff's fourth cause of action against Mr. Billings is granted, on the issue of liability.

As to plaintiff's claim that the defaulting defendants are liable for a sum certain, CPLR §3215(a) provides in relevant part:

> If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest.

A sum certain has been defined as "a situation in which, once liability has been established, there can be no dispute as to the amount due" (*Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568 [1978]; *PDQ Aluminum Products Corp. v Smith*, 20 Misc 3d 94, 96, 864 NYS2d 681, 683 [2008]). Here, plaintiff fails to submit sufficient documentary evidence to support Mr. Taylor's attestation as to the amounts due and owing, including the amounts allegedly paid to plaintiff. Therefore, a hearing on damages is warranted.

*Summary Judgment Against Mr. Turoff*

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in

its favor (CPLR §3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman* at 563; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562).

Here, plaintiff has established a *prima facie* case entitling it to summary judgment against Mr. Turoff. It is undisputed that on the same day Mr. Turoff executed the Note, he also executed

the Guaranty. The Court notes that the terms of either agreements are detailed in the discussion of plaintiff's motion for default judgment, *supra*.

Mr. Taylor attests that following Corp.'s default, plaintiff made a demand on Mr. Turoff to honor the Guaranty (Taylor Affd. at ¶ 30). Mr. Turoff "ignored and refused" such demand (*id.* at 31). As a result of Mr. Turoff's breach of the Guaranty, plaintiff has suffered in damages (*id.* at ¶ 33).

Thus, the Taylor Affd. and supporting documents establish a *prima facie* case that Mr. Turoff is liable for the amount due on the Note. Accordingly, the burden shifts to Mr. Turoff to demonstrate that issues of material fact exist requiring a trial. However, Mr. Turoff fails to meet his burden.

In his affidavit, Mr. Turoff neither contests that he executed the Note and the Guaranty, nor disputes the terms of either agreement. Instead, Mr. Sanchez, *in his affirmation*, contends that "plaintiff has attached no supporting evidence indicating actual balances due, asserting bald amounts, without showing the basis therefore" (cross-motion, ¶ 9). However, it is well settled that an affidavit from a person having knowledge of the facts constitutes sufficient evidence supporting a motion for summary judgment (*First Interstate Credit Alliance, Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992]). As in *First Interstate*, plaintiff herein relies on an affidavit from Mr. Taylor, "a corporate officer who averred to the genuineness and authenticity of the documentary evidence" (*id.*). And, contrary to Mr. Sanchez's claim, the Taylor Affd. details the bases for all of the amounts due, including interest, late fees and attorneys' fees (Taylor Affd., ¶¶ 9-28). Further, the Court notes that the allegation challenging the balances due is raised only in Mr. Sanchez's affirmation; Mr. Turoff fails to mention same in his affidavit. It is well settled

that an attorney's affirmation that is not made on the basis of personal knowledge of the facts or supported by evidence in admissible form is insufficient to defeat a motion for summary judgment (*Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006], citing *Diaz v New York City Tr. Auth.*, 12 AD3d 316 [1st Dept 2004] and *Ramos v New York City Hous. Auth.*, 264 AD2d 568 [1st Dept 1999]; *see also Zuckerman v City of New York*, 49 NY2d 557, 563 *supra*). As Mr. Sanchez does not state that he has personal knowledge of the parties' transactions, and as his claims are not supported by admissible evidence, his affirmation is insufficient to raise an issue of material fact regarding the balances due on the Note (*First Interstate* at 584 [holding that "unsubstantiated allegations and assertions raised by defendants were insufficient to withstand" plaintiff's motion for summary judgment in lieu of complaint]).

Second, Mr. Turoff has failed to raise an issue of material fact regarding notice. Mr. Turoff alleges: "I have not received any demand from the plaintiff that the primary obligor of the Note, Billings Turoff Co., was late, in danger of default, or had defaulted" (Turoff Affd. at ¶ 2). The Court notes that the Turoff Affd. conflicts with the Taylor Affd. as to whether Mr. Turoff received notice. However, such conflicting evidence is immaterial, since, as mentioned in the discussion of co-defendants' cross-motion, *supra*, the documentary evidence demonstrates that Mr. Turoff waived such notice of demand (*see* the Additional Terms, p. 4). As the terms of the terms of the Guaranty are undisputed, Mr. Turoff fails to raise an issue of material fact requiring a trial.

Further, nothing in Mr. Turoff's Answer raises an issue of material fact. Mr. Turoff denies liability for Corp.'s default (Answer, ¶¶ 5-13), and alleges that "by written notice to plaintiff," he canceled and revoked his Guaranty within three business days of execution (*id.* at

36). However, Mr. Turoff fails to provide any proof of such notice of cancellation, and "[g]eneral denials in an answer are insufficient to raise triable issues" (*Iandoli v Lange*, 35 AD2d 793, 793 [1st Dept 1970]).

Regarding Mr. Turoff's affirmative defenses, as noted in the discussion of co-defendants' cross-motion, *supra*, Mr. Turoff's first affirmative defense of "payment," and second affirmative defense of "estoppel/unclean hands" lack merit. Mr. Turoff provides no evidence supporting such defenses. His third affirmative defense – Mr. Billings's breach of agency authority (Answer, ¶ 34) – fails for the same reason.[9]

Mr. Turoff's fourth affirmative defense and counterclaim against plaintiff for breach of contract also fail to raise an issue of material fact. In his Answer, Mr. Turoff alleges:

> Upon information and belief, from time to time, defendant Billings and/or defendant Billings Turoff, Co. borrowed monies from the plaintiff, and without the express or implied permission consent of defendant Turoff. In permitting the draw on the note, and taking the draw, the *plaintiff* and the co-defendants *breached the agreements* of the parties.
> (Answer, ¶ 38) (emphasis added).

However, Mr. Turoff fails to specify the "provisions of the [agreements] upon which liability is predicated" (*Volt Delta Resources LLC v Soleo Communications Inc., supra*). He also fails to provide any evidentiary support for this defense and counterclaim in his affidavit.[10]

As Mr. Turoff has failed to raise an issue of material fact defeating plaintiff's *prima facie* case against him, plaintiff's motion for summary judgment against Mr. Turoff is granted as to liability.

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[9]As mentioned in the discussion of co-defendants' cross-motion, *supra*, co-defendants' removed this defense from their Proposed Amended Answer.

[10]As mentioned in the discussion of co-defendants' cross-motion, *supra*, co-defendants' removed this counterclaim from their Proposed Amended Answer.

*Hearing to Assess Damages*

According to CPLR §3212(c), "[i]f it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, [or] before the court." If the only issues of fact that exist in the case relate to damages rather than to liability, summary judgment will be granted on the liability question. If the plaintiff has prevailed, then Court is then required to direct a hearing of the damages question (*Lloyd v Imperial Auto Collision, Inc.*, 120 AD2d 354, 355 [1st Dept 1986]).

Here, the Court finds liability on the part of Mr. Turoff as guarantor. And, as stated above, plaintiff's submissions fail to establish the amount due and owning, including the amounts allegedly paid to plaintiff. Accordingly, a hearing on damages on plaintiff's claims is warranted.

*Attorneys' Fees*

It is well settled that a plaintiff is not entitled to an award of an attorneys' fee absent an agreement between the parties, statutory authorization, or Court rule (*Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]). Here, it is undisputed that the Additional Terms governing the Note and the Guaranty provide that defendants are liable to plaintiff "for all Collection Amounts" (*see* the Additional Terms, "Acceleration/Remedies," p. 4; Taylor Affd. at 26). It is further undisputed that so far, plaintiff has incurred $3,712.50 in attorneys' fees and expenses (*see* the Invoice from Helfand & Helfand). Defendants also are liable to plaintiff for the costs and disbursements of the instant action, in an amount to be

determined by the Court (*see* motion, ¶¶ 29-32 [detailing the terms of the retainer agreement between plaintiff and Helfand & Helfland]; Taylor Affd. ¶¶ 27-28). Accordingly, a hearing on attorneys' fees is warranted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the cross-motion of defendants Brian F. Billings, a/k/a Brian Frederick Billings, and Nathan K. Turoff, a/k/a Nathan Turoff for leave to amend the Answer is denied, and it is further

ORDERED that the branch of the motion of plaintiff JPMorgan Chase Bank, N.A. for an entry of judgment by default as to its first, second, and third causes of action against Billings Turoff, Co., and its fourth cause of action against Brian F. Billings, a/k/a Brian Frederick Billings is granted, on the issue of liability; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on its fourth cause action against defendant Nathan K. Turoff, a/k/a Nathan Turoff is granted as to liability; and it is further

ORDERED that the parties shall appear in Part 40 located at 60 Centre Street, New York, New York, for a hearing on damages and attorneys' fees against defendants on Monday, July 26, 2010 at 9:30 a.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 29, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD