SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

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JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

Index No.: 022479/09
Motion Sequence...01
Motion Date...06/04/10
XXX

APT IDEAS, INC., ALEX KAPLAN a/k/a ALEXANDER M. KAPLAN a/k/a ALEXANDER KAPLAN, GUY RENKOVSKI a/k/a GUY K. RENKOVSKI and DIMITRY SAVRANSKI a.k.a SMITRY SAVRANKSY,

Defendants.

_____X

Papers Submitted:
Notice of Motion.....x

Upon the foregoing papers, the motion by the Plaintiff, JPMORGAN CHASE BANK, N.A. (hereinafter referred to as "JPMORGAN"), seeking an Order (a) granting it summary judgment pursuant to CPLR § 3212; (b) deeming the Complaint corrected *nunc pro tunc*; and (c) granting the Plaintiff costs and attorney's fees, is decided as provided herein.

By way of background, on or about June 7, 2004, the Defendant, APT IDEAS INC. (hereinafter referred to as "INC."), executed and delivered a Business Revolving Credit Agreement (hereinafter referred to as "BRCA") whereby it promised to pay to the order of

JPMORGAN, the principal sum of $150,000.00 with interest on the unpaid principal BRCA balance at the Prime Rate plus 2.25%. (Exhibit G annexed to the Plaintiff's motion). On or about December 20, 2004, the Defendants, ALEX KAPLAN a/k/a ALEXANDER M. KAPLAN a/k/a ALEXANDER KAPLAN, GUY RENKOVSKI a/k/a GUY K. RENKOVSKI and DIMITRY SAVRANSKI a.k.a SMITRY SAVRANKSY, each executed and delivered a personal guarantee of each and every obligation of INC. to the Plaintiff, JPMORGAN. (Exhibit H annexed to the Plaintiff's motion).

The Plaintiff commenced this action on December 15, 2009 by filing a Summons and Verified Complaint and purchasing an index number. (*See* Exhibit A annexed to the Plaintiff's motion). Service was effectuated upon INC., pursuant to Business Corporation Law § 306 and CPLR § 3215. (*See* Exhibit B annexed to the Plaintiff's motion). Service was effectuated on each of the three remaining Defendants, pursuant to CPLR § 308 (4). (*See* Exhibits C, D, E annexed to the Plaintiff's motion). The Plaintiff commenced this action to collect monies allegedly due and owing to the Plaintiff arising out of the aforementioned BRCA and BRCA Personal Guarantees.

The Complaint alleges that the Defendants have failed to make payments under the terms of the BRCA and the Personal Guarantees since December 28, 2008 and each and every month thereafter, and, as such, have defaulted. (*See* Exhibit J, copy of the Defendants' BRCA account Payment History, annexed to the Plaintiff's motion). Based upon this alleged default, the Plaintiff contends that the Defendants are liable to the Plaintiff in the sum of $132,444.10 plus accruing interest at the BRCA Interest Rate from December 28, 2008

together with late charges at the rate of 5.00% of each payment due.

On or about December 2, 2009, the Plaintiff received an answer from the Defendants, collectively. This answer contains general denials and affirmative defenses alleging that the Defendants did not individually, nor collectively, issue personal guarantees, and that venue is improper in the County of Nassau. (*See* Exhibit F annexed to the Plaintiff's motion). The Defendants have not submitted any opposition to the instant motion.

The standards for summary judgment are well settled. A court may grant summary judgment where the moving party has made a prima facie showing that there are no genuine issues of material fact, and the moving party is, therefore, entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). The burden is on the moving party to tender sufficient evidence to demonstrate the absence of any material issue of fact. *Id.*

In order to recover under the BRCA, the Plaintiff is required give proof of its existence and of the Defendants' failure to make payments in accordance with its terms. *See Layden v. Boccio*, 253 A.D.2d 540 (2nd Dept. 1998); *Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772 (1st Dept. 1983). Where payment was guaranteed by one or more of the parties, to make a prima facie case the Plaintiff must show proof of the note, the guarantee, and the failure to make payments in accordance with their terms. *See Key Bank of Long Island v. Burns*, 162 A.D.2d 501 (2nd Dept. 1990).

The Plaintiff has made a prima facie case against the Defendants by submitting proof of the BRCA, the BRCA Personal Guarantees, and the Defendants' failure to make the required payments.

Once the movant has established a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate the existence of issues of fact. *Burton v. Ertel*, 107 A.D.2d 909 (3rd Dept. 1985). General denials contained in the non-movants answer are insufficient to raise a triable issue of fact. *N.Y. Higher Educ. Servs. Corp. v. Ortiz*, 104 A.D.2d 684 (3rd Dept. 1984); *Stern v. Stern*, 87 A.D.2d 887 (2nd Dept. 1982). Further, "a shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment." *Mayer v. McBrunigan Constr. Corp.*, 105 A.D.2d 774 (2nd Dept. 1984).

The Defendants have failed to sustain their burden to demonstrate a triable issue of fact. The answer submitted by the Defendants makes only general denials and conclusory allegations and, as such, is insufficient to defeat summary judgment. Further, the Defendants did not proffer any support or evidence for the allegations contained in their answer.

Accordingly, the branch of the Plaintiff's motion seeking summary judgment, pursuant to CPLR § 3212, is **GRANTED**.

The Court will now address the branch of the Plaintiff's motion seeking an Order to correct the Complaint *nunc pro tunc*. Pursuant to CPLR § 3025 (b), the court has discretion to grant leave to amend a pleading at any time. Leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay. *Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404 (1st Dept. 2009). Here, the errors in the pleading were merely clerical. The Plaintiff's proposed amendments would not result in

prejudice or surprise to the Defendants since the corrections are intended to conform the pleading with the information stated in the loan documents of the BRCA and the BRCA Personal Guarantees, which were signed by the Defendants.

Accordingly, the branch of the Plaintiff's motion seeking to correct the Complaint *nunc pro tunc* is **GRANTED**.

The Court will now address the branch of the Plaintiff's motion seeking costs, expenses, and attorney's fees. As a general proposition, "attorney's fees may not be awarded absent an agreement between the parties or a statute or court rule" which authorizes them. *Bloom v. Jenasaqua Realty Holding Co.*, 174 A.D.2d 644 (2nd Dept. 1991).

Here, the Plaintiff claims attorney's fees, in the amount of $1,200.00, have been incurred in this action. Pursuant to the terms of the BRCA, as signed by the Defendant, INC., "each grantor agrees to pay on demand: . . . (b) costs, expenses and reasonable attorneys' fees if and when this Agreement is placed in the hands of an attorney for collection or enforcement." (*See* Exhibit G annexed to the Plaintiff's motion). According to the terms of the BRCA Personal Guarantee, the Defendants, ALEX KAPLAN a/k/a ALEXANDER M. KAPLAN a/k/a ALEXANDER KAPLAN, GUY RENKOVSKI a/k/a GUY K. RENKOVSKI and DIMITRY SAVRANSKI a.k.a SMITRY SAVRANKSY, agreed to guarantee each and every obligation of INC. to the Plaintiff, JP MORGAN. (*See* Exhibit H annexed to the Plaintiff's motion).

The Court notes that a party seeking an award of counsel fees must demonstrate their entitlement thereto by demonstrating the "nature and extent of the services,

the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the result achieved." *Jordan v. Freeman*, 40 A.D.2d 656 (1st Dept. 1972). In support of its claim for costs, the Plaintiff has proffered an Affirmation in Support of Legal Fees and a copy of the invoice rendered by the Plaintiff's attorney in this action. (Exhibit K annexed to the Plaintiff's motion). However, both the Affirmation and the invoice lack the specificity required for an award of attorney's fees. The Affirmation summarily states that the sum owed is for the "preparation of the Motion for Summary Judgment and Motion for Default Judgment, any reply papers and associated appearance(s) therewith, together with the preparation of the papers associated with the entry of Judgment." Similarly, the invoice lists only one lump sum, in the amount of $1,200.00, that is owed "for the professional services rendered to draft, prepare, serve, and file the Motion for Summary Judgment."

Accordingly, the branch of the Plaintiff's motion seeking costs, expenses, and attorney's fees is **DENIED**.

Accordingly, it is hereby

ORDERED, that the branch of the Plaintiff's motion seeking summary judgment, pursuant to CPLR § 3212, is **GRANTED**; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking to correct the Complaint *nunc pro tunc*, is **GRANTED**; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking costs, expenses, and attorney's fees, is **DENIED**.

Submit Judgment on notice.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
July 19, 2010

Hon. Randy Sue Marber, J.S.C.
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