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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
GLENN FELDMAN,	**NASSAU COUNTY**
Plaintiff,	**Index No: 001932-10**
	Motion Seq. No: 1
-against-	**Submission Date: 3/23/10**
ANTHONY CHION,	
Defendant.	
----------x	

The following papers have been read on this motion:

Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....x
Correspondence dated May 14, 2010.....x
Correspondence dated May 18, 2010.....x
Affidavit in Further Support and Exhibits.....x

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Glenn Feldman ("Feldman" or "Plaintiff") on February 11, 2010 and submitted on March 23, 2010. By decision dated May 10, 2010 ("Prior Order"), the Court directed oral argument on the motion, and invited the parties to provide the Court with any additional documentation they believed relevant to the Court's determination of the motion. The Court conducted the oral argument as directed in the Prior Order. For the reasons set forth below, the Court grants Plaintiff's motion and awards Plaintiff judgment against Defendant in the amount of $500,000, plus interest, costs and disbursements, and counsel fees to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiff requests an Order, pursuant to CPLR § 3213, directing the entry of summary judgment in favor of Plaintiff and against Defendant Anthony Chion ("Chion" or "Defendant")in the sum of $500,000, together with interest thereon at the contract rate of eight (8%) percent from August 1, 2008 through March 6, 2009, and at the default rate of sixteen (16%) percent from March 7, 2009, plus attorney's fees, costs and disbursements.

B. The Parties' History

In his Affidavit in Support dated January 20, 2010, Feldman affirms as follows:

Defendant executed a guaranty ("Guaranty") dated April 17, 2008 (Ex. A to P's motion) in which he guaranteed payment of a promissory note ("Note") (Ex. B to P's motion) dated April 1, 2008 in the principal sum of $500,000 given by Van Chion of Huntington, LLC ("VCH"). As outlined *infra*, the Guaranty and Note were executed in connection with a loan ("Loan") that Feldman extended to VCH in the sum of $500,000. The Guaranty is signed by Chion in his personal capacity, and the Note is signed by Chion and Feldman in their capacities as Managing Members of VCH. Under the terms of paragraph 4 of the Guaranty, Plaintiff is not required to proceed against VCH on the Note prior to commencing an action against Defendant on the Guaranty. Pursuant to paragraph 6 of the Guaranty, Chion agreed to pay reasonable attorney's fees and all other costs and expenses that Feldman may incur in enforcing the Guarantee or any claim thereunder.

VCH made the first four (4) interest payments required by the terms of the Note. VCH then defaulted under the terms of the Note by failing to pay the installment due on September 1, 2008 and has made no payments since the payment due on August 1, 2008, despite due demand. The balance due and owing by VCH to Feldman on the Note is Five Hundred Thousand Dollars ($500,000), plus interest thereon at the contract rate of eight (8%) percent from August 1, 2008 through March 6, 2009, and at the default rate of sixteen (16%) percent from March 7, 2009. Feldman sent a demand for payment and notice of default and acceleration to VCH, and mailed copies of that documentation (Ex. C to Feldman Aff.) to Chion.

Following the Court's issuance of the Prior Order, Plaintiff submitted an Affidavit in Further Support of Feldman in which he provided additional information regarding the history of

the parties' business relationship and the circumstances under which the Loan was made. In his Affidavit in Further Support, Feldman affirmed as follows:

Chion is a jeweler who has worked in the retail jewelry business for nearly forty (40) years. In 2006, he was President and sole shareholder of Van Chion of Huntington, Inc., ("Van Chion, Inc.") which operated a retail jewelry store at 720 East Jericho Turnpike, Huntington, New York. As Chion was interested in forming a partnership, and Feldman was seeking to make an investment, Chion and Feldman decided to form VCH. Feldman and Chion were members of VCH, along with a third individual named Ron Fiore ("Fiore").

Feldman provides documentation executed in connection with the formation of VCH including 1) an affidavit executed by Chion on November 30, 2006, which provided that Van Chion, Inc. would sell its inventory to VCH, and Feldman would invest $400,000 in VCH and lend $500,000 to VCH (Ex. A to Feldman Aff.), 2) the Closing Statement regarding the sale ("Sale") of Van Chion, Inc. to VCH (Ex. B to Feldman Aff.), 3) the Operating Agreement regarding the Sale, signed by Feldman, Chion and Fiore (Ex. C to Feldman Aff.), and 4) an executed Consent of the Members of VCH, dated April 17, 2008, consenting to the Loan and Note (Ex. E to Feldman Aff).

Feldman made several loans to VCH: 1) the initial loan of $500,000 made on November 30, 2006 in connection with the formation of VCH, 2) subsequent loans for $95,000 and $175,000, and 3) the Loan at issue, for $500,000, the specifics of which were outlined in detail in Plaintiff's initial motion papers. Feldman avers, further, that he and Chion formed several other limited liability companies ("LLCs"), each of which operated a single retail jewelry store. Feldman invested in and made loans to these other LLCs as well. Feldman affirms that all of these loans are in default, although he only seeks relief in this motion as to the $500,000 Loan pertaining to the Note and Guaranty.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the relief sought by 1) providing copies of the Note and Guaranty, 2) demonstrating a default on the underlying obligation secured by the Guaranty; and 2) establishing Defendant's failure to honor the Guaranty.

Following the Court's issuance of the Prior Order, Defendant provided the Court with a letter dated May 18, 2010. In that letter, Defendant, *inter alia*, 1) "fully admit[ted]" signing the

personal guarantees on the loan obligations;" and 2) outlined the prior business relationship between Plaintiff and Defendant, including the circumstances under which that relationship ended.

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).

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). An unconditional guaranty is an instrument for the payment of money only within the meaning of CPLR § 3213. *EAB v. Schirippa*, 108 A.D.2d 684 (1st Dept. 1985).

D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' 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).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Application of these Principles to the Instant Action

Preliminarily, the Court concludes that the Note and Guaranty are instruments for the payment of money only within the meaning of CPLR § 3213. The Court concludes that Plaintiff has demonstrated its entitlement to summary judgment against Defendant by 1) providing copies of the Note and Guaranty, 2) demonstrating a default on the underlying obligation secured by the Guaranty; and 2) establishing Defendant's failure to honor the Guaranty. Moreover, Defendant has not established the existence of a triable issue concerning a bona fide defense.

The Court also grants Plaintiff's application for counsel fees, pursuant to the relevant provisions of the Guaranty. The Court concludes, however, that it does not have sufficient information to make an informed assessment of the value of the legal services and, accordingly, refers that matter to an inquest.

Accordingly, the Court grants Plaintiff summary judgment against Defendant on the Guaranty in the principal sum of $500,000, plus interest, costs and disbursements, and attorney's fees, and refers those matters to an inquest. The Court is mindful that Plaintiff has requested that the Court grant judgment to Plaintiff for the principal, interest, and costs and disbursements owed, and sever the attorney fee claim for separate inquest, but declines to proceed in that fashion.

In light of the foregoing, it is hereby:

ORDERED, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is granted; and it is further

ORDERED, that Plaintiff have judgment against Defendant in the principal sum of

$500,000, plus interest, costs and disbursements, and attorney's fees; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank N. Schellace to hear and determine all issues relating to the determination of interest, costs and disbursements, and attorney's fees on August 31, 2010 at 9:30 a.m.; and it is further

ORDERED, that Plaintiff's counsel shall serve upon the Defendant by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before August 17, 2010; and it is further

ORDERED, that 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.

ENTER

DATED: Mineola, NY
July 23, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUL 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE