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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL TERM PART: 45

JPMORGAN CHASE BANK, N.A. f/k/a The Chase Manhattan Bank,

Plaintiff,

-against-

JRS GROUP INC. And JAY SCHWERD,

Defendants.

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INDEX NO.: 19907/09

MOTION DATE:5-17-10
SUBMIT DATE:7-19-10
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 4-16-10.....1
Affirmation in Opposition, dated 6-25-10.....2
Reply Affirmation, dated 7-14-10.....3

This motion by plaintiff for an order pursuant to CPLR § 3212 for summary judgment against the defendants is granted in part and denied in part. Entry of judgment granted in this order shall await the conclusion of the action.

This is an action by a lender, JP Morgan Chase Bank, N.A., ("JP Morgan"), against the corporate defendant, JRS Group, Inc. ("JRS"), based on a default under three promissory notes. The action against Jay Schwerd ("Schwerd") is based on his guaranty of the debt of JRS, as well as his guaranty of the debt of Datadeals, Inc., from a prior

transaction.

The plaintiff contends that, on September 4, 1997, Datadeals Inc. executed and delivered to JP Morgan a Business Checking Credit Line agreement ("BCCL "), wherein it promised to pay the principal sum of $25,000 with interest to the loan holder. On the same day, defendant Schwerd executed and delivered to JP Morgan a guarantee of all obligations of Datadeals under the BCCL. As of the filing of this action, the defendant has allegedly failed to make any payments under the guaranty, leaving a remaining balance of $16,365.70.

On January 9, 2003, JRS executed and delivered to JP Morgan a BCCL ("Note-1"), wherein it promised to pay the principal sum of $25,000 with interest at a rate per annum at Prime plus 1.5 %. As per submitted documentation, the agreement was modified on April 27, 2009, but did not alter the fundamental obligation noted. Plaintiff alleges that JRS made no payments on the BCCL after June 9, 2009, and that Schwerd made no payments under the BCCL personal guaranty, leaving an outstanding balance of $24,070.58, plus interest.

On February 15, 2005, JRS executed and delivered to JP Morgan a Business Installment note ("Note-2") wherein it promised to pay the principal sum of $50,000 with interest at a fixed rate per annum of 6.25%. On the same day, defendant Schwerd executed a personal guaranty for the loan. The note was modified on April 27, 2009, but the modification did not alter the amounts due. Plaintiff contends that the defendants have failed to pay the amounts due under the Business Installment Note since June 15, 2009, leaving an outstanding balance of $9,187.47, plus interest.

On January 9, 2003, JRS executed and delivered a BCCL to JP Morgan ("Note-3"), wherein it promised to pay a principal sum of $25,000 plus interest at a rate per annum of Prime plus 1.50%. On the same day, Schwerd executed a personal guarantee for the loan. The plaintiff claims that the defendants defaulted on the loan, leaving an outstanding balance of $4,467.60, with interest.

The Court notes that the defendant Schwerd discharged counsel after filing an answer, and filed an affidavit in opposition on his own behalf.

The standards applicable to summary judgment motions are well-settled. Generally speaking, the movant must establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrel Lines,* 64 NY2d 1092 (1985). However, standing alone an attorney's affirmation that is not based upon personal knowledge is of no probative value or of evidentiary significance. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 (2005); *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 (2d Dept. 2006). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, the burden shifts to the non-moving party. To defeat a motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 [b]; *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.* 66 NY2d

965 (1985); *Zuckerman v City of New York*, 49 NY2d 577 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York, supra)* , and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 AD2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

In performing its review of the record, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1993). It should not attempt to resolve matters of credibility. *Heller v Hicks Nurseries, Inc.,* 198 AD2d 330 (2d Dept. 1993).

The Court finds that plaintiff has submitted sufficient documentation proving a *prima facie* entitlement to the outstanding balance on Note-1 and Note-3. However, the plaintiff has failed to prove *prima facie* entitlement to the balance of the BCCL or Note-2.

In proving entitlement to the balance of Note-1, the plaintiff has submitted an affidavit of lost note, attested to by Michele Weeks ("Weeks"), an Assistant Vice President of JP Morgan. The plaintiff has also provided an account history for the loan, with the appropriate account number and date of first transaction, January 9, 2003, along with the original approval letter and a line of credit transaction history. A note modification agreement, which is signed by Schwerd as guarantor, along with a default and acceleration notice, both of which were addressed to Schwerd, have been submitted.

These documents bear the account number of the loan.

In proving entitlement to the outstanding balance of Note-3, made the same day as Note-1, the plaintiff has submitted an affidavit of lost note, also attested to by Weeks, as well as an account history bearing the appropriate account number and date of first transaction, January 9, 2003. Also submitted is a loan approval letter, along with a default and acceleration notice, addressed to Schwerd. The plaintiff has also submitted the personal guarantee of the loan, which is signed by Schwerd.

The plaintiff has failed, however, to submit sufficient *prima facie* proof of entitlement to the outstanding balances of the BCCL and Note-2.

While the plaintiff has submitted the BCCL agreement and guarantee, which are signed by Schwerd, along with a loan application approval letter, the plaintiff has failed to provide an account history for this specific loan. Furthermore, the plaintiff has failed to provide any evidence of default on the part of the defendant. Without a showing of default or account history, the plaintiff has not proved a *prima facie* entitlement to the claimed outstanding balance on the loan.

With regard to Note-2, the plaintiff has submitted an appropriate account history, default notice, loan approval letter and transaction history. However, the affidavit of lost note submitted by plaintiff states an incorrect amount as to the original loan. In plaintiff's affidavit, Weeks claims that the loan was executed for $25,000. However, all other documents submitted identify the loan as having a value of $50,000. This casts doubt on the affidavit of lost note, and constitutes a failure of *prima facie* proof on the part of the plaintiff.

Accordingly, the Court finds that the plaintiff is entitled to judgment as a matter of

law with respect to Note-1 and Note-3, unless the defendants can demonstrate that issues of fact exist meriting a trial. However, the defendants have failed to do so.

The first and second affirmative defenses, alleging the plaintiff's termination of the credit line was a breach of contract causing damages to the defendants and that the plaintiff demanded a sum in excess of the funds being paid by defendant JRS, are unsubstantiated by documentation or any other factual allegations or proof.

The defendants' third defense claims that this action is barred by the doctrine accord and satisfaction. However, this defense is unsubstantiated by any factual allegations or proof and thus is conclusory in nature. It therefore is not sufficient to defeat a motion for summary judgment. *Cohen Fashion Optical, Inc. v V & M Optical, Inc.* 51 AD3d 619, 620. (2d Dept. 2008).

Defendants' fourth defense alleges that the defendant JRS has paid all sums to the plaintiff. This defense fails to raise an issue of fact, as the plaintiff has submitted documentation showing an outstanding balance on Note-1 and Note-3, while the defendant has failed to provide any proof that is contradictory in nature.

Defendant Schwerd, in his affidavit in opposition, requests that this motion be denied, to allow additional time for the defendant to file a separate answer *pro se* and conduct further discovery, as his prior counsel failed to raise appropriate affirmative defenses on his behalf. However, the defendant has not provided any evidence to demonstrate that other valid defenses to these notes may exist but were not stated by his attorney. Furthermore, in order to provide a basis pursuant to CPLR 3212 [f] for postponing a decision, a party must show more than a mere hope that it might be able to

uncover some evidence during the discovery process, and that reasonable attempts were made to discover that evidence which would give rise to an issue of fact. *Companion Life Ins. Co. of New York v All State Abstract Corp.* 35 AD3d 519, 521 (2d Dept. 2006). The defendant has failed to meet this standard.

The defendant also alleges that he was not aware that he was guaranteeing each of the four loan agreements, as they were not presented in a fair and clear format that a lay person would understand. However, it is well-established law that the failure of a guarantor to read or to ascertain the meaning of the obligation undertaken is not a valid legal defense. *See, Chemical Bank v Masters,* 176 AD2d 571 (1st Dept. 1991); *Norstar Bank of Upstate NY v Office Control Systems, Inc.,* 165 AD2d 265 (3d Dept. 1991); *Dunkin' Donuts of Amercia, Inc. v Liberatore,* 138 AD2d 559 (2d Dept. 1988). Furthermore, the Court interprets contracts "so as to give effect to the intention of the parties as expressed in the unequivocal language employed." *Morlee Sales Corp. v Mfrs. Trust Co.*, 9 NY2d 16 (1961). Where the intention of the parties is clearly and unambiguously set forth (in writing), effect must be given to the intent as indicated by the language used. *Frank B. Hall and Co. v Orient Overseas Assoc.*, 65 AD2d 424 (1st Dept. 1978).

Finally, the Court finds that under the notes the plaintiff is entitled to attorney's fees incident to the prosecution of this action (eighth cause of action). An assessment will await the conclusion of the case as a whole.

Accordingly, the motion is granted as to both defendants on the outstanding balance of Note-1 and Note-3, the second, third, sixth and seventh causes of action. The

motion is denied as to the BCCL and Note-2, the remaining causes of action. Judgment may be entered on Note-1 in the amount of $24,070.58, and on Note-3 in the amount of $4,467.60, both with interest at Prime plus 1.5% from that September 21, 2009. Entry of such judgment shall await the conclusion of the action, including an assessment of attorneys' fees.

This shall constitute the Decision and Order of this Court.

DATED: July 30, 2010

ENTER

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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