

**First Cent. Sav. Bank v Sugar Hill Art Ctr. (SHAC),  
LLC**

2010 NY Slip Op 32315(U)

August 18, 2010

Supreme Court, Nassau County

Docket Number: 012163-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**FIRST CENTRAL SAVINGS BANK,**

**Plaintiff,**

**-against-**

**SUGAR HILL ART CENTER (SHAC), LLC and  
DONALD WEISS,**

**Defendants.**  
-----x

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No: 012163-09  
Motion Seq. No: 2  
Submission Date: 7/1/10**

**Papers Read on this Motion:**

**Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....x**

This matter is before the court on the motion by Plaintiff First Central Savings Bank of New York ("First Central" or "Plaintiff") filed June 11, 2010 and submitted July 1, 2020. For the reasons set forth below, the Court grants Plaintiff's motion and refers the matter to an inquest on the issues of interest, late charges and attorney's fees.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves, pursuant to CPLR § 3215, for an Order directing entry of judgment in favor of Plaintiff and against Defendants Sugar Hill Art Center, LLC ("Sugar Hill") and Donald Weiss ("Weiss") for the relief demanded in the First Amended Verified Complaint ("Amended Complaint").

**B. The Parties' History**

By decision dated February 9, 2010 ("Prior Decision"), the Court granted Plaintiff's motion to amend its complaint and ordered that 1) Plaintiff was directed to file the Amended Summons and First Amended Verified Complaint within thirty (30) days of the date of the Prior

Decision; 2) Plaintiff serve a copy of the Amended Summons and First Amended Verified Complaint upon counsel for Defendants, along with a copy of the Prior Decision with Notice of Entry, via certified mail, return receipt requested, within twenty (20) days of its filing; and 3) Defendants serve their answer within twenty days after service of the Amended Summons and First Amended Verified Complaint.

In the Prior Decision, the Court outlined Plaintiff's sworn allegations in support of its motion regarding 1) money that Plaintiff lent to Defendants pursuant to the First and Second Loan Notes, 2) the Guarantees and Security Agreements executed in connection with those loans, and 3) Defendants' failure to comply with the terms and provisions of those Notes by failing to make required payments despite due demand by Plaintiff. The Court incorporates the Prior Decision herein by reference. In the Prior Decision, the Court permitted Plaintiff to amend its Complaint to address a technical error in the spelling of the name of the corporate defendant. Specifically, the corporate defendant's registered name with the New York Department of State is "Sugar Hill Art Center (SHAC) LLC," and there is no company registered in New York with the name "Sugar Hill Art Center, LLC" without the word "(SHAC)" at the end of the name, as the name had been spelled in the original complaint.

Pursuant to the Prior Decision Plaintiff filed the Amended Complaint (Ex. E to Gangemi Aff. in Supp.). In the Amended Complaint, Plaintiff seeks judgment 1) with respect to the First Loan Note for the principal balance of \$348,501.31, plus accrued interest, late charges, default interest, and counsel fees, and 2) with respect to the Second Loan Note for the principal balance of \$357,893.45, plus accrued interest, late charges, default interest and counsel fees.

In support of its current motion, Plaintiff provides an Affidavit in Support dated June 1, 2010 of Dina Axiadis ("Axiadis"), Assistant Vice President and Loan Administrator of Plaintiff First Central Savings Bank ("First Central"), who affirms as follows:

First Central commenced this action to recover monies that it loaned pursuant to 1) a Revolving Commercial Loan Note dated December 4, 2006 in the original principal amount of \$350,000 ("First Loan Note"), and 2) a Revolving Commercial Loan Note dated May 11, 2007 in the original principal amount of \$400,000 ("Second Loan Note"). Weiss signed the First Loan Note in his capacity as President of Defendant Sugar Hill Art Center (SHAC), LLC ("SHAC"). Weiss signed the Second Loan Note as the "authorized signer" for SHAC. SHAC is

a New York Limited Liability Company having a place of business at 555 West 151 Street, # 26, New York, New York 10031. On or about December 4, 2006, First Central extended a revolving line of credit to SHAC in the principal amount of \$350,000.

In connection with the First Loan Note, Weiss, on behalf of SHAC, executed a security agreement (“Security Agreement”) pursuant to which SHAC granted to First Central a security interest in its assets to secure its indebtedness to First Central. In addition, SHAC requested and received credit advances from First Central which total an outstanding principal balance of \$348,501.31, plus interest and other charges. Under the First Loan Note, SHAC was obligated to make certain monthly payments. SHAC failed to comply with the terms and provisions of the First Loan Note by, *inter alia*, 1) failing to pay the monthly payment due on the first day of October, 2008, in the amount of \$2,775.91; 2) making no further payments.

By service of a Default Notice dated April 3, 2009, First Central declared SHAC in default under the First Loan Note. Pursuant to this Default Notice, First Central also elected to declare immediately due and payable the unpaid balance of principal, plus accrued interest, unpaid late charges and all other charges due under the First Loan Note. Axamidis outlines the applicable default and payment provisions in the First Note, as well as Section 6 of the First Note in which SHAC agreed to pay counsel fees incurred by First Central in connection with the First Note.

On or about December 4, 2006, in connection with the First Note, Weiss executed, acknowledged and delivered to First Central a Commercial Loan Guaranty (“First Guaranty”). Under the First Guaranty, Weiss granted to First Central the payment of the principal sum under the First Note, together with applicable interest. Defendants owe First Central a total of \$407,310.28 under the First Note, consisting of 1) a principal balance of \$348,501.31, 2) accrued interest of \$57,132.90, and 3) late charges of \$1,676.07.

In connection with the Second Loan Note, Weiss executed a Security Agreement pursuant to which SHAC granted to First Central a security interest in its assets to secure its indebtedness to First Central. SHAC requested and received credit advances from First Central with a total outstanding principal balance of \$357,893.45, plus interest, late charges and other charges due. Under the Second Loan Note, SHAC was obligated to make certain minimum monthly payments. SHAC has failed to comply with the terms and conditions of the Second

Loan Note by, *inter alia*, 1) failing to make the monthly payment in the amount of \$3,158.91 that became due on the first day of October of 2008; and 2) making no payments thereafter.

First Central served a Default Notice dated April 3, 2009 declaring SHAC in default under the Second Note. Pursuant to this Default Notice, First Central also elected to declare immediately due and payable the unpaid balance of principal, plus accrued interest, late charges and other charges due under the Second Note. Axamidis outlines the applicable default and payment provisions of the Second Note, as well as the provision requiring Defendants to pay counsel fees incurred by Plaintiff.

On or about May 11, 2007, in connection with the Second Note, Weiss executed, acknowledged and delivered to First Central a Commercial Loan Guaranty ("Second Guaranty"). Pursuant to the Second Guaranty, Weiss guaranteed to First Central the payment of the principal sum under the First Note, plus interest. Defendants owe a total of \$423,827.85 under the Second Note, consisting of 1) a principal balance of \$357,893.45, 2) accrued interest of \$65,012.20 and 3) late charges of \$922.20. Defendants have failed to make these payments.

Plaintiff filed and served its Amended Complaint as directed by the Court in the Prior Decision. Defendants have not moved or answered with respect to the Amended Complaint, and the time for them to do so has expired. Plaintiff submits, further, that it is not aware of any defense that Defendants have to this action.

In his Affirmation in Support, counsel for Plaintiff affirms, *inter alia*, as follows:

In accordance with the Prior Decision, on March 3, 2010, Plaintiff filed and served its Amended Complaint on Defendants. Defendants failed to serve their Answer to the Amended Complaint within the time directed in the Prior Decision, and have not moved or answered with respect to the Amended Complaint. In addition, Defendants have not served discovery requests, or otherwise sought discovery in this matter.

In Defendants' Verified Answer to the initial Complaint (Ex. C to Gangemi Aff. in Supp.), *inter alia*, 1) Defendants admitted the allegations in the fifth paragraph, which were that on or about December 4, 2006, First Central extended a revolving line of credit to SHAC in the principal amount of \$350,000; 2) Weiss admitted that he signed and delivered documents to Plaintiff in connection with the First Note; 3) Weiss admitted that he signed and delivered

additional documents to Plaintiff, referring to the First Security Agreement; and 4) Defendants admitted that they accepted credit advances from Plaintiff in various amounts.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by establishing that 1) Plaintiff lent Defendants the sums at issue; 2) Defendants executed the Notes, Guarantees and Security Agreements related to those loans; 3) Defendants have failed to make required payments, despite due demand by Plaintiff; and 4) Defendants have defaulted in this matter by failing to answer the Amended Complaint or respond to the instant motion.

Defendants failed to answer the Amended Complaint as directed in the Prior Decision, and have submitted no opposition or other response to Plaintiff's motion.

## RULING OF THE COURT

### A. Default Judgment

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

### 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. disp.*, 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 (1<sup>st</sup> 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

The Court concludes that Plaintiff has demonstrated its right to a default judgment for the relief demanded in the Amended Complaint by establishing that 1) Plaintiff lent the sums of \$350,000 and \$400,000 to Defendants; 2) Defendants executed the subject Notes, Guarantees and Security Agreements in connection with those loans; 3) Defendants have defaulted on their obligations, despite due demand by Plaintiff; 4) Defendants owe the principal sums sought in the Complaint, plus interest and counsel fees; 5) Plaintiff properly effected service of process on Defendants; and 6) Defendants have failed to appear in this action. In addition, Plaintiff is entitled to counsel fees pursuant to the applicable provisions in the Loan Notes.

**ORDERED**, that Plaintiff's motion is granted; and it is further

**ORDERED**, that Plaintiff shall have judgment against Defendants 1) with respect to the First Loan Note, for the principal balance of \$348,501.31, plus accrued interest, late charges, default interest, and attorney's fees, and 2) with respect to the Second Loan Note, for the principal balance of \$357,893.45, plus accrued interest, late charges, default interest and attorney's fees; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the determination of interest, late charges and attorney's fees, pursuant to CPLR § 3215, on September 28, 2010 at 10:00 a.m.; and it is further

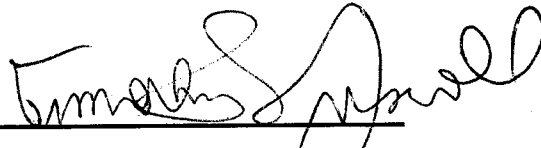
**ORDERED**, that counsel for Plaintiff shall serve upon 1) counsel for the Defendants by regular mail, and 2) the Defendants, by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before September 14, 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 Defendants 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  
August 18, 2010

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
**AUG 24 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**