

Bank v L.I. Fine Antique Gallery, Inc.

2010 NY Slip Op 32355(U)

August 24, 2010

Sup Ct, Nassau County

Docket Number: 003875-09

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
NARA BANK,
Plaintiff,

TRIAL/IAS PART: 22
NASSAU COUNTY

-against-

Index No: 003875-09

**L.I. FINE ANTIQUE GALLERY, INC.,
MOSHEH KHODADADIAN and
JANET KHODADADIAN,**

Motion Seq. No. 2

Submission Date: 7/6/10

Defendants.
-----x

Papers Read on this Motion:

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

This matter is before the court on the motion by Plaintiff Nara Bank (“Nara” or “Plaintiff”), filed June 24, 2010 and submitted July 6, 2010. For the reasons set forth below, the Court grants Plaintiff’s motion for a judgment against Defendants L.I. Fine Antique Gallery, Inc., Moshesh Khodadadian and Janet Khodadadian on the first, second and third causes of action in the Verified Complaint (“Complaint”) in the principal sum of \$77,221.24, plus interest and late fees to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiff Nara seeks an Order, pursuant to CPLR § 3215, granting Plaintiff a default judgment against Defendants L.I. Fine Antique Gallery, Inc. (“L.I.”), Moshesh Khodadadian (“M. Khodadadian”) and Janet Khodadadian (“J. Khodadadian”) on the first, second and third

causes of action in the Verified Complaint (“Complaint”).¹

Defendants have not appeared in this action, and have submitted no opposition or other response to Plaintiff’s motion.

B. The Parties’ History

The parties’ history is outlined in a prior decision (“Prior Decision”) of the Court dated August 11, 2009 which granted Plaintiff’s motion for an order of seizure (“Replevin Order”) and preliminary injunction related to collateral for a promissory note (“Note”) executed by Defendant L.I. and guarantees (“Guarantees”) executed by Defendants M. Khodadadian and J. Khodadadian (“Individual Defendants”). In the Prior Decision, the Court outlined the Defendants’ execution of the relevant instruments and their defaults thereunder. The Court incorporates that Prior Decision herein by reference.

The first, second and third causes of action in the Complaint (Ex. 4 to Perlstein Aff.) seek the following relief:

First Cause of Action Against LI: Plaintiff alleges that L.I. defaulted pursuant to the terms of the Note by failing to make required payments and owes Plaintiff the following sums: 1) the unpaid principal balance of \$77,221.24, 2) interest since January 15, 2009, the date of default, at the rate provided for in the Note, and 3) late fees.

Second Cause of Action Against M. Khodadadian: Plaintiff alleges that M. Khodadadian is in default of the Guarantee that he executed, in which he guaranteed L.I.’s payment under the Note, by failing to make required payments under the Note. Plaintiff alleges that M. Khodadadian owes Plaintiff the following sums: 1) the unpaid principal balance of \$77,221.24, 2) interest since January 15, 2009, the date of default, at the rate provided for in the Note, and 3) late fees.

Third Cause of Action Against J. Khodadadian: Plaintiff alleges that J. Khodadadian is in default of the Guarantee that she executed, in which she guaranteed L.I.’s payment under the Note, by failing to make required payments under the Note. Plaintiff alleges that J. Khodadadian

¹ Although paragraph 27 of Plaintiff’s Affirmation in Support includes an application for relief on the fourth cause of action, which relates to counsel fees, paragraph 26 of Plaintiff’s Affirmation in Support states that “Plaintiff hereby withdraws its third [sic] cause of action for attorneys’ fees.” Accordingly, the Court will not address the issue of counsel fees.

owes Plaintiff the following sums: 1) the unpaid principal balance of \$77,221.24, 2) interest since January 15, 2009, the date of default, at the rate provided for in the Note, and 3) late fees.

In his Affidavit in Support of Default Judgment dated May 21, 2010, Justin Kim (“Kim”) affirms as follows:

Kim is the vice president of Nara who is fully familiar with the facts and circumstances of this matter. On or about June 15, 2007, L.I. executed and delivered the Note (Ex. A to Kim Aff.) to Nara in the principal sum of \$100,000. L.I. defaulted pursuant to the Note by failing to make the monthly payment due under the Note on January 15, 2009 (“Default Date”), and all payments thereafter. Nara is the holder of the Note. At the time of its default, L.I. owed Nara the unpaid principal balance of \$77,221.24, plus interest at the default rate set forth in the Note from the Default Date. As of May 20, 2010, L.I. owes Nara the sum of \$85,856.37, plus interest through May 21, 2010, calculated as follows: 1) an unpaid principal balance of \$77,221.24, 2) unpaid interest through May 21, 2010 in the amount of \$7,144.61, and 3) late charges of \$1,490.52.

In addition, the Individual Defendants are in default of their obligations under the Guarantees that they executed (Exs. 2 and 3 to Kim Aff.) by failing to make the payments due under the Note. As of May 21, 2010, the Individual Defendants owe Nara the sum of \$85,856.37, plus interest through May 21, 2010, calculated as follows: 1) an unpaid principal balance of \$77,221.24, 2) unpaid interest through May 21, 2010 in the amount of \$7,144.61, and 3) late charges of \$1,490.52.

In his Affirmation in Support, counsel (“Counsel”) for Plaintiff alleges as follows:

Plaintiff filed the Summons and Complaint on March 4, 2009. Plaintiff provides Affidavits of Service (Exs. 7, 8 and 9 to Perlstein Aff.) reflecting the service of the Summons and Complaint on Defendants. Due to Defendants’ default in answering, moving or otherwise appearing with respect to the Complaint, Plaintiff served an additional copy of the Summons and Complaint on Defendant pursuant to CPLR § 3215(g)(4)(i) and provides a copy of a document titled “3215 Affidavit” (Ex. 10 to Perlstein Aff.) confirming that additional service.

Plaintiff submits that it has demonstrated a reasonable excuse for its failure to move for the default judgment within one year of the default, as prescribed in CPLR § 3215(a), by establishing a reasonable excuse for the delay and the meritorious nature of the Complaint.

Plaintiff's reasonable delay is based on Plaintiff's efforts to settle the action, and execute upon the Replevin Order issued in the Prior Decision. After the Replevin Order was granted, and Plaintiff served Notice of Entry on Defendants, the Defendants contacted Plaintiff in an effort to settle this matter. After approximately three (3) months of settlement negotiations, no settlement was reached. Counsel provides a copy of correspondence and a proposed forbearance agreement (Ex. 11 to Perlstein Aff.) related to those settlement negotiations.

Following the breakdown of settlement negotiations, on or about October 7, 2009, Plaintiff directed Counsel to proceed with execution of the Replevin Order. On October 7, 2009, Counsel faxed correspondence to the Nassau County Sheriff ("Sheriff") (Ex. 12 to Perlstein Aff.) regarding the scheduling of execution on the Replevin Order. Counsel did not receive a response from the Sheriff for approximately one month and, on November 10 and 12, 2009, telephoned the Sheriff regarding the execution of the Replevin Order. On November 17, 2009, the Sheriff advised Counsel that the posting of a bond was required and on January 6, 2010, Plaintiff obtained a bond ("Bond") from the Fidelity and Deposit Company of Maryland (Ex. 13 to Perlstein Aff.).²

On January 15, 2010, Counsel forwarded to the Sheriff a package containing certified copies of all documents, including the Bond, that the Sheriff had requested. As reflected on Counsel's cover letter (Ex. 14 to Perlstein Aff.), the Sheriff received that letter on January 26, 2010. By letter dated March 5, 2010 (Ex. 15 to Perlstein Aff.), the Sheriff advised Plaintiff that the Sheriff would not execute on the Replevin Order because there was an "insufficient specific description of collateral to be seized."

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to a default judgment against the Defendants by establishing 1) Defendants' execution of the Note and Guarantees, 2) Defendants' failure to make required payments pursuant to the Note and Guarantees, 3) Plaintiff's service of the Summons and Complaint on Defendants, and 4) Defendants's default in answering, moving or otherwise appearing with respect to the Complaint. In addition, Plaintiff contends that it has

² Although the Prior Decision did not include a requirement that Plaintiff post a bond, this omission was an oversight and the Sheriff properly required Plaintiff to post a bond.

demonstrated a reasonable excuse in its delay in filing the instant motion, and the meritorious nature of the Complaint.

None of the Defendants has submitted a 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. dismiss.*, 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. Timeliness of Motion

CPLR § 3215(c), titled “Default not entered within one year,” provides as follows:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

When a plaintiff fails to seek leave to enter a default judgment within one year after the default has occurred, the action is deemed abandoned. To avoid dismissal of the complaint pursuant to CPLR § 3215(c), the plaintiff must demonstrate a reasonable excuse for his delay in seeking a default judgment, and that the complaint was meritorious. *Solano v. Castro*, 72 A.D.3d 932, 932-933 (2d Dept. 2010). In *Icon Equipment v. Gordon Environmental*, 272 A.D.2d 579 (2d Dept. 2000), the Second Department rejected appellant’s contention that plaintiff had abandoned its action where, within one year of appellant’s default, plaintiff filed a notice of pendency with the Kings County Clerk and moved for a severance and transfer of the action from Richmond County to Kings County. *Id.*

E. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its right to a default judgment by establishing proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. Plaintiff has made a *prima facie* showing

of a cause of action against L.I. on the Note by establishing its execution of the Note and its failure to make payment pursuant to the Note. Plaintiff has also made a *prima facie* showing of a cause of action against M. and J. Khodadadian on the Guarantees by establishing the existence of the underlying obligation, producing the Guarantees in writing executed by the persons to be charged reflecting their clear and explicit intent to guaranty, and demonstrating the failure of LI to make payment in accordance with the terms of its obligation. Defendants have failed to answer or otherwise appear in this action.

The Court also concludes that Plaintiff has demonstrated sufficient cause for its delay in filing the instant motion by establishing 1) the meritoriousness of its claim, and 2) a reasonable excuse for its delay. Specifically, Plaintiff has established that it was actively involved in attempting to enforce the Replevin Order, and in negotiating a settlement with the Defendants. Under the circumstances, the Court concludes that Plaintiff did not abandon the action, and is entitled to the requested relief.

In light of the foregoing, it is hereby:

ORDERED, that Plaintiff have judgment by default against Defendants L.I. Fine Antique Gallery, Inc., Moshesh Khodadadian and Janet Khodadadian for the relief demanded in the first, second and third causes of action in the Complaint; and it is further

ORDERED, that Plaintiff have judgment, pursuant to CPLR § 3215, against Defendants L.I. Fine Antique Gallery, Inc., Moshesh Khodadadian and Janet Khodadadian, in the principal sum of \$77,221.24, plus interest and late fees to be determined at an inquest; 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 and late fees on September 24, 2010 at 9:30 a.m.; and it is further

ORDERED, that counsel for Plaintiff shall serve upon 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 13, 2010; and it is further

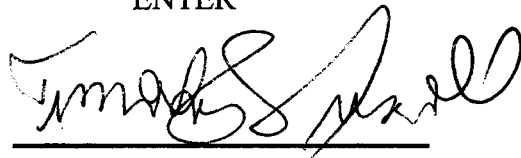
ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendants in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
August 24, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

AUG 27 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**