SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

- against -

MICHAEL HERSKOWITZ,

Defendant.

INDEX NO.: 18068/09

MOTION SEQ. NO.: 001

MOTION DATE: 6/7/10

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Affirmation in Reply.....3

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This is an action in which plaintiff JPMORGAN CHASE BANK, N.A. ("CHASE") seeks to recover an amount allegedly due from defendant MICHAEL HERSKOWITZ arising out of a promissory note evidencing a business line of credit. CHASE moves for summary judgment against defendant pursuant to **CPLR §3212**. CHASE also seeks attorneys' fees together with costs and expenses.

On or about November 30, 2006, defendant executed a promissory note evidencing a business line of credit with CHASE (the "Prior Note") in the principal sum of $50,000. By promissory note, executed on June 1, 2007 by defendant, CHASE modified the Prior Note and increased the amount of the business line of credit to the principal sum of $100,000 (the "Note"). CHASE alleges that defendant has defaulted under the Note by

failing to make payments on the Note since March 1, 2009 and, consequently, is indebted to CHASE in the amount of $96,617.26, together with interest, late charges, attorneys' fees, costs and expenses. CHASE asserts that on or about November 2, 2009, after filing of the summons and complaint, it exercised its right of offset under the Note and collected $9,777.45 from defendant's account with CHASE. After such offset, CHASE contends that defendant is indebted to CHASE for $86,839.81 together with interest, late charges, attorneys' fees, costs and expenses. Since filing of the Notice of Motion, CHASE has corrected the amount of the interest charges sought to reflect the offset.

In support of its motion, CHASE submits (1) the summons and verified complaint filed on September 3, 2009 [Motion Exh. A]; (2) the verified answer of defendant, dated October 27, 2009, which includes thirty-three affirmative defenses (the "Answer") [Motion Exh. C]; (3) the Prior Note [Motion Exh. D]; (4) the Note [Motion Exh. E]; (5) an Affidavit of Esther Bullock (the "Bullock Affidavit"), an Assistant Vice President of CHASE, sworn to on January 4, 2010 [Motion Exh. A]; (6) an Affidavit of Bullock, sworn to on May 6, 2010, revising the amount of interest claimed due and owing to reflect the offset (submitted in reply) (the "Further Bullock Affidavit"); (7) a copy of a Transaction History covering the period November 28, 2006 through August 26, 2009 [Motion Exh. F]; and (8) an Affirmation by CHASE's counsel in support of attorneys' fees [Motion Exh. G].

The Court notes that the Bullock Affidavit and the Further Bullock Affidavit are notarized by an out of state notary but are not accompanied by a Certificate of Conformity, which is required for an affidavit signed and notarized outside of New York State. *See* **CPLR §2309(c)**. The Court finds, however, that failure of CHASE to provide a Certificate of Conformity in compliance with **CPLR 2309(c)** is not a fatal defect. *See* **Fatah v. Stop & Shop Companies, Inc.**, 41 AD3d 638; **Smith v. Allstate Insurance Co.**, 38 AD3d 522; **Sparaco v. Sparaco**, 309 AD2d 1029.

In support of its motion for summary judgment pursuant to **CPLR §3212** against defendant, the Court finds that CHASE has presented sufficient evidence of proper service of the summons and verified complaint. CHASE has submitted an affidavit of service, sworn to on September 17, 2009, attesting to service of the summons and verified complaint on defendant at "1971 E 33rd Street, Private House, Brooklyn, NY 11234", defendant's "place of residence within the state" pursuant to **CPLR §308(4)**. The process server attempted personal service four times, on four different weekdays: Tuesday, 9/8/09 at 7:17 a.m.; Wednesday, 9/9/09 at 2:35 p.m.; Thursday, 9/10/09 at 7:46 p.m.; and Friday, 9/11/09 at 1:53 p.m., the last being the date and time that the papers were affixed to the door. The Court finds these attempts sufficient to satisfy the diligence requirements of **CPLR §308(4)**. In any event, the Court notes that although defendant has raised lack of

personal jurisdiction as an affirmative defense in his Answer [Motion Exhibit C], insofar as he has failed to move for summary judgment on that ground within 60 days following service of the Answer, this affirmative defense is waived. **CPLR §3211(e)**.

The Court thus turns to the question of whether CHASE has established, *prima facie,* its entitlement to judgment as a matter of law. To prevail on a motion for summary judgment, the movant must establish its right to judgment as a matter of law, by tender of evidentiary proof in admissible form. **CPLR §3212(b)**; **Winegrad v. New York University Medical Center,** 64 NY2d 851; **Zuckerman v. City of New York,** 49 NY2d 557. Upon such proof, the burden shifts to the opponent to "show facts sufficient to require a trial of any issue of fact." **CPLR §3212(b)**.

On the totality of the evidence, including the Further Bullock Affidavit and supporting documentation, the Court finds that CHASE has established entitlement to judgment pursuant to **CPLR §3212**. In the Note, defendant acknowledges his obligation to pay to CHASE the total principal amount of $100,000, or so much as may be outstanding, together with interest as set forth therein. The Revised Bullock Affidavit attests to the failure of defendant to pay the principal amount due under the Note since March 1, 2009, of $86,839.81, together with $608.72 in past due interest from February 1, 2009 through February 28, 2009, and $7,358.13 from March 1, 2009 through November 2, 2009. In addition, the submitted Transaction History reflects active use of the line of credit. The burden thus shifts to defendant to raise an issue of material fact with respect to CHASE's motion for summary judgment pursuant to **CPLR §3212** as against defendant requiring a trial. **Zuckerman v. City of New York,** 49 NY2d 557.

The Court finds that defendant's Answer raises no triable issues of fact and contains no legally cognizable defense. The general denials set forth in the Answer are insufficient to defeat summary judgment [*See, e.g.,* **J.F.J. Fuel, Inc. v. Ortiz**, 234 AD2d 424; **Bank of Long Island v. Tand**, 178 AD2d 628] and the affirmative defenses raised by defendant are conclusory and without merit. *See generally* **Becher v. Feller**, 64 AD3d 672; **Cohen Fashion Optical, Inc. v. V & M Optical, Inc.**, 51 AD3d 619.

In opposition, defendant submits the affirmation of his counsel, dated April 29, 2010 (the "Affirmation in Opposition"), and his own affidavit, sworn to on April 26, 2010. Counsel for defendant argues that the Bullock Affidavit fails to comply with **CPLR §2309(c)** as it is notarized by an Arizona notary and therefore cannot be considered. As noted above, the Court finds, however, that failure of CHASE to provide a Certificate of Conformity in compliance with **CPLR 2309(c)** is not a fatal defect. *See* **Falah v. Stop & Shop Companies, Inc.**, *supra*; **Smith v. Allstate Insurance Co.**, *supra*; **Sparaco v. Sparaco**, *supra*.

In his affidavit, defendant attests that "even if this court were to presume everything to [m]e true which plaintiff alle[d]ges, which is no ways conce[e]ded, plaintiff by removing approximately $9,7745.45 from an account of mine after the within suit was filed would have made any account alleged current and not in default." The Court notes that defendant has come forth with no evidence, admissible or otherwise, to support this contention. The Revised Bullock Affidavit attests that the election by CHASE to offset an account of defendant at CHASE after the filing of the summons and complaint, has no bearing on the fact that CHASE's cause of action accrued on March 1, 2009, when defendant defaulted on the Note. The Court notes that the Note by its terms permits CHASE, in the event of default, to transfer accounts and deposits of defendant held by CHASE, to CHASE's name.

Counsel for defendant also argues that summary judgment must be denied on grounds that, (1) CHASE failed to produce the original Note and any related application; and (2) the Bullock Affidavit fails to address the Note or Transaction History. The Court finds that the Bullock Affidavit and Revised Bullock Affidavit sufficiently establish the authenticity of the Note and Transaction History. The Bullock Affidavit is sufficiently referable to the Note and the Revised Bullock Affidavit clarifies that the Note and Transaction History are records kept and maintained by CHASE in the ordinary course of its business.

On the basis of the foregoing, it is

ORDERED, that the motion by plaintiff JPMORGAN CHASE BANK, N.A. for summary judgment against defendant MICHAEL HERSKOWITZ pursuant to **CPLR §3212** is **granted**. Submit judgment, including proof in admissible form substantiating current amount owed, together with an affirmation of counsel justifying the requested fee amount, on fifteen (15) days notice.

CHASE shall serve a copy of this Order on defendant HERSKOWITZ by personal service pursuant to **CPLR §308(1)** or **§308(2)**, and if pursuant to subsection **(2)**, the affidavit of service shall identify the person of suitable age and discretion and his or her relationship to the person being served. CHASE shall submit proof of such service with the proposed judgment.

This constitutes the Order of the Court.

Dated: Aug 17, 2010

J.S.C.