

**Bank of Am., N.A. v Johns**

2010 NY Slip Op 32458(U)

August 31, 2010

Supreme Court, Nassau County

Docket Number: 23623/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

BANK OF AMERICA, N.A.,

Plaintiff,

- against -

JOSEPH JOHNS,

Defendant.

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 23623/09  
Motion Seq. No.: 02  
Motion Date: 06/22/10  
**XXX**

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affidavit in Opposition	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

In an action for monies due and owing under a certain Agreement pursuant to which defendant opened a checking account (the "Account") with plaintiff, plaintiff moves, pursuant to CPLR § 3212, for an order granting summary judgment on the grounds that the defendant is liable for amounts due and owing under said Agreement and under a subsequent Acknowledgment of Debt and Repayment Agreement ("Repayment Agreement"). Defendant opposes the motion.

With respect to plaintiff's motion, the complaint alleges and plaintiff's proof shows that, on or about February 15, 2005, defendant entered into an Agreement with plaintiff pursuant to which defendant opened the Account at plaintiff's bank. On or about November 14, 2006,

plaintiff made a withdrawal in the amount of \$60,000.00 against his Account and a Cashier's Check was purchased with the withdrawal funds. However, plaintiff thereafter realized that there were insufficient funds in defendant's Account to cover the amount of the Cashier's Check paid to defendant. Thus, defendant breached the Agreement with plaintiff by failing to maintain a positive balance in his Account and by failing to promptly reimburse plaintiff for the negative balance created in his Account. Defendant's Account statement for the period of November 16, 2006 through December 14, 2006, shows a negative balance of \$60,019.32. On or about January 21, 2007, defendant acknowledged the debt of \$60,000.00 which he owed to plaintiff by signing the Repayment Agreement. The Repayment Agreement provided for a full restitution in the amount of \$60,000.00 which defendant agreed to repay by making monthly payments to plaintiff in the amount of \$500.00 per month until the balance of \$60,000.00 was paid in full. The executed Repayment Agreement and an initial payment in the amount of \$500.00 in the form of a money order was received by plaintiff from defendant on or about February 1, 2007. Between March 2007 and September 2008, defendant made nineteen (19) other payments to plaintiff, each in the amount of \$500.00, reducing his balance to \$50,019.32, but defendant has made no further payments, remaining thus responsible to plaintiff in the amount of \$50,019.32.

Plaintiff submits that defendant appeared in the action on December 22, 2009 and submitted an answer consisting of general denials and boilerplate affirmative defenses. Plaintiff further submits that defendant's answer did not raise any meritorious defenses or triable issues of material fact. General denials in a defendant's answer are insufficient to raise a triable issue of fact to defeat a plaintiff's motion for summary judgment. *See New York Higher Education Service Corp. v. Ortiz*, 104 A.D.2d 684, 479 N.Y.S.2d 910 (3d Dept. 1984).

Plaintiff satisfied its initial burden of establishing its entitlement to judgment as a matter of law by submitting proof of the existence of the underlying obligation, the unconditional terms

of repayment and defendant's failure to continue to make payment in accordance with their terms. *See Famolaro v. Crest Offset, Inc.*, 24 A.D.3d 604, 807 N.Y.S.2d 387 (2d Dept. 2005). *See also Superior Fidelity Assurance, Ltd. v. Schwartz*, 69 A.D.3d 924, 893 N.Y.S.2d 256 (2d Dept. 2010); *Verela v. Citrus Lake Development, Inc.*, 53 A.D.3d 574, 862 N.Y.S.2d 96 (2d Dept. 2008). The burden then shifts to defendant to demonstrate by admissible evidence the existence of a triable issue of fact with respect to a *bona fide* defense. *See Famolaro v. Crest Offset, Inc, supra*; *MDJR Enterprises, Inc. v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 (2d Dept. 2000); *Quest Commercial, LLC v. Rovner*, 35 A.D.3d 576, 825 N.Y.S.2d 766 (2d Dept. 2006).

In opposition, defendant claims that he does not recall signing the Repayment Agreement submitted by plaintiff as Exhibit D to its Affirmation in Support. Defendant additionally states that he does not recognize the signature on said document as his own. Defendant further submits that the Social Security number contained on the Repayment Agreement is not his Social Security number. Finally, defendant submits that the purported Repayment Agreement contains release language and has a signature line for plaintiff to sign, "If Bank of America is claiming this was an agreement I entered into with it, why is there no version with the signature by a bank representative."

In reply, plaintiff states "[a]side from the fact that the signature in the Repayment Agreement is woefully similar to defendant's signature in the 'Customer Agreement' attached as Exhibit 'A' in plaintiff's motion papers, defendant does not categorically deny signing the Repayment Agreement, but merely states that he does not recall signing it. It is significant to point out that while defendant alleges that he does not recall signing the Repayment Agreement, he does not deny making 20 (twenty) payments of \$500 each to plaintiff, in accordance with the terms of that agreement. In fact, defendant does not even mention those payments in his

opposition papers. Therefore it is undisputed that defendant made twenty payments to plaintiff, pursuant to the terms of the Repayment Agreement.”

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues

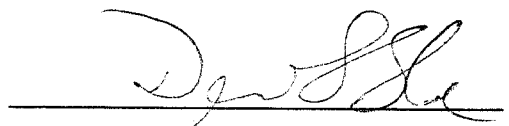
exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

The Court finds that plaintiff has established its entitlement to summary judgment against defendant for the amounts due and owing pursuant to the Agreement and the Repayment Agreement. Defendant has failed to raise an issue of fact or viable defense to the action. *See Famolaro v. Crest Offset, Inc., supra; Bankers Trust of Rockland County v. Keesler*, 49 A.D.2d 918, 373 N.Y.S.2d 637 (2d Dept. 1975).

Therefore, plaintiff's motion for summary judgment is hereby granted.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.  
XXX

Dated: Mineola, New York  
August 31, 2010

**ENTERED**  
SEP 03 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE