SUPREME COURT OF THE STATE OF NEW YORK **Index No. 101327/2010**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 001**

METROPOLITAN NATIONAL BANK

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

PAVILACK INDUSTRIES, INC.,
PAVIL CORPORATION, and
MYRTLE BEACH ABSTRACT AND TITLE AGENCY, INC.,

Defendants

The following items were considered in the review of a motion for summary judgment in lieu of complaint based upon an instrument for money only:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	4

The Decision and Order on this Motion is as follows:

The plaintiff's motion for summary judgment in lieu of complaint based upon a guaranty instrument for the payment of money only is granted for liability only. The plaintiff shall settle judgment on notice..

Facts

This is an action seeking payment from a guarantor following alleged defaults on promissory instruments. The defendant is composed of three entities, Pavilack Industries, Inc., Pavil Corporation, and Myrtle Beach Abstract and Title Agency, Inc. The pertinent instrument in this action is the guaranty made to the plaintiff, Metropolitan Merchant Bank.

On November 10, 2008, the plaintiff, Metropolitan National Bank (Metropolitan) made two loans to Harry Pavilack (Mr. Pavilack) and Mary Jane Pavilack (Ms. Pavilack) [collectively, the

Pavilacks] in the amounts of $330,000.00 for a cooperative loan and $1,590,000.00 for a promissory note respectively. The loans were memorialized in separate notes, and these loans were later modified by additional agreements.

Those additional agreements were entitled a "Cooperative Loan Promissory Note Modification and Extension Agreement" (hereafter the "cooperative loan"), and a separate "Promissory Note Modification and Extension Agreement" (hereafter the "promissory note"). Each modification was signed both by Mr. Pavilack and Ms Pavilack on November 20, 2009 and also signed by Thomas J. Mulhall and Matthew Solomon on November 30, 2009 for the lender. The cooperative loan required payments with a specified interest rate and at specified times with installment payments on principal beginning on December 10, 2009. The separate promissory note of $1,590,000.00 required payments with a specified interest rate and at specified times with installments beginning February 10, 2010. The promissory note also required the establishment of a time deposit of $100,000.00 by the borrower. No payments on the cooperative loan were made on or after January 10, 2010. No payment on the promissory note was made on or after February 10, 2010, when payments on that note were to begin.

On November 10, 2008, Pavilack Industries, Inc., Pavil Corporation, and Myrtle Beach Abstract and Title Agency, Inc. became guarantors jointly and severally as the defendant in this action. In the guaranty instrument, the defendant absolutely and unconditionally guaranteed payment to the plaintiff of all the obligations owed by the borrowers, Mr. Pavilack and Ms. Pavilack, at the time of the guaranty or thereafter.

The defendant alleges that the plaintiff is holding money in the accounts of the defendants Pavilack Industries, Inc. and Pavil Corporation. According to the defendant, the money in those accounts should be applied to whatever obligations are owed by the defendant.

The defendant asserts that the plaintiff has not proven a default of the promissory note. The defendant also asserts neither the cooperative loan nor the promissory note are appropriate

instruments upon which to move for summary judgment in lieu of a complaint.

The defendant also alleges that granting the plaintiff's motion would be "inconsistent" with decisions made by other courts. In support of the defendant's opposition, the defendant asserts that the plaintiff failed to include "key documents," a "Time Deposit Agreement," and a "Pledge and Security Agreement," each of which is necessary to determine default according to the defendant.

Further the defendant asserts that the presence of these additional agreements, indicate the instrument is not solely for payment of money.

Discussion

Initiating an action with a motion for summary judgment in lieu of a complaint, rather than with a complaint, may allow for a speedy and efficient resolution of the action.[1] This form of motion for summary judgment must be based upon an instrument, and the judgment sought must be only for the payment of money.[2] Thus, to establish a prima facie case under CPLR § 3213 there must be both a valid instrument, and a failure to make payments according to the terms of that instrument.[3]

As in all accelerated judgments, "[t]he motion shall be granted if, upon all the papers and proof submitted, the cause of the action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party."[4] Once a prima facie case

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[1]*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY 3d 381, 383 [2004]; *and Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY 2d 151,154 [1975].

[2]New York Civil Practice Law and Rules (CPLR) § 3213.

[3]*Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY 2d at155; *citing Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968]; *affd.* 29 NY 2d 617 [1971].

[4]CPLR § 3212 (b); *cited in Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY 3d at 383.

has been established, the burden is then upon the non-movant to raise defenses, and the opposing party may raise defenses to the instrument.[5] If either party raises facts sufficient to require a trial of an issue of fact accelerated judgment must be denied.[6] For example, the opposing party might attempt to show payment was made to the holder of the note.[7] If it appears that the only issue to be resolved is one of the amount of damages, such an action may go to immediate trial.[8] Here, the amount of damages is a calculable sum based upon the records.

A surety includes a guarantor as a subset.[9] The usual role of a surety is to answer for a debt owed principally by another.[10] "If the surety binds himself to pay immediately upon default of the debtor, he becomes a guarantor of payment; if he binds himself to pay only after all attempts to obtain payment from the debtor have failed, he becomes a guarantor of collection."[11] "A contract of surety does not depend upon the use of technical words but upon a clear intent that one party as surety [is bound] to the second party as creditor to pay a debt contracted by a third party."[12] A surety contract is interpreted according to general principles of contract interpretation.[13] Here, the words of the guaranty made by the defendant are, "the undersigned

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[5]*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY 3d at 383, *and Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY 2d at 155.

[6]CPLR § 3212 (b).

[7]New York Uniform Commercial Code (UCC) § 3-603; *First Nat'l Bank v Rob-Glen Enterprises, Inc.*, 101 AD 2d 848 [2d Dept 1984], *appeal denied by* 63 NY 2d 605 [1984]; *and Weissman v Sinorm Deli, Inc.*, 88 NY 2d 437, 445 [1996].

[8]CPLR § 3212 (c).

[9]New York Uniform Commercial Code (UCC) § 1-201 (40).

[10]*Chemical Bank v Meltzer*, 93 NY 2d 296, 302 [1999].

[11]*General Phoenix Corp. v Cabot*, 300 NY 87, 92 [1949]; *and Phoenix Acquisition Corp. v Campcore, Inc.*, 81 NY 2d 138, 143 [1993]..

[12]*General Phoenix Corp. v Cabot*, 300 NY at 92.

[13]*General Phoenix Corp. v Cabot*, 300 NY at 92.

absolutely and unconditionally guarantees to the Bank payment when due, whether at stated maturity, by acceleration or otherwise." Thus, the defendant has contracted to be guarantor of payment of the money owed by the Pavilacks. Moreover, each of the three defendants is jointly and severally liable for the whole amount owed to the plaintiff. Since the Pavilacks have not paid the money due from them, the defendant is obligated to pay the money owed by the Pavilacks. The money due now includes the accelerated total remaining amount of both loans.

The guaranty instrument is one seeking recovery of money only.

The guaranty instrument is a proper contract. The defendant has cited an action where summary judgment was denied because of insufficiency of a contract. In that action, letters purporting debt were not held to be a "written unconditional instrument" with an express promise to pay, or to have a specified date of payment.[14] Here, the promise of the defendant to pay is absolute and unconditional. Payment by the Pavilacks for the cooperative loan and the promissory note was due upon a schedule of payments, or was due upon maturity of the debt. Failure to meet either of those obligations was defined within the respective instruments as default of the specific loan. Additionally, the Pavilacks may have defaulted by failing to make a specified Time Deposit, but that provision is not invoked here. Payment by the guarantors was due upon the Pavilacks' default. Therefore, the guaranty here has sufficient indicia of exactitude, consisting of an express promise, the definite notice of due dates, and a written unconditional instrument.

With regard to the requirement of seeking judgment for money only, the defendant cites findings in previous actions. In one action a movant sought to recover on a mortgage note and summary judgment was denied because the instrument required invoking the mortgage.[15] Here, there is no interposed obligation between the Pavilack's default and the defendant's obligation to pay the plaintiff. In a previous action, when payment was based upon work bonuses, the

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[14]*Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD 2d, 19, 23 [1st Dept 1983].

[15]*Lakefield Manor, Inc. v KBK Enters., LLC.*, 5 AD 3d 444 [2nd Dept 2004].

conditions of earning bonuses needed to be evaluated by considering extraneous documentation, and the instrument was held to be a hybrid including non-monetary repayment.[16] Here, the condition of repayment by the guarantors is purely monetary and not related to any work-barter arrangements. When three agreements including a stock sale agreement were interwoven, a sparsely worded decision declined to apply CPLR § 3213.[17] Where a promissory note was secured by a stock pledge agreement, relief under CPLR § 3213 was denied.[18] Motion for summary judgment was denied when the motion was to collect on a bond together with a purchase money mortgage.[19] Where a mortgage was to be considered as part of the terms of a note, motion under CPLR § 3213 was denied.[20] Here, there is no interposed stock purchase or any mortgage to be assumed or to be a part of the payment associated with the guaranty in question. The defendants' guaranty is to pay money owed, not an obligation to assume a mortgage, to accept a mortgage, or to purchase stocks. There are no extraneous agreements incorporated into the guaranty instrument. Thus the facts and circumstances of each exemplar action cited by the defendant are readily distinguished from the pure monetary guaranty made by the defendant to the plaintiff in the case of default in payments by the Pavilacks.

The defendant states that the instrument is not one solely for money because the cooperative loan agreement with the Pavilack's contains a provision for security in the form of shares in a residence corporation. However, this action is founded upon the surety guaranty instrument between the defendant and the plaintiff. The cooperative loan between the Pavilacks and the plaintiff is only pertinent in so far as it defines the times and amounts of payments due to the plaintiff, the failing of which payments denotes default. Further, the plaintiff does not seek

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[16]*Tradition North America, Inc. v Sweeney*, 133 AD 2d 53, 53-54 [1st Dept 1987].

[17]*Hirsh v Rifkin,* 166 AD 2d 293, 293-294 [1st Dept 1990].

[18]*Tejada v Leblanch*, 10 Misc. 3d 139A [Supr. Ct., Appellate Term, 2d Dept 2006].

[19]*Tonkonogy v Seidenberg*, 63 AD 2d 587 [1st Dept 1978].

[20]*Manufacturers Hanover Trust Co. v Hixon*, 124 AD 2d 488, 488-489 [1st Dept 1986].

compensation in the form of the real estate security offered by the Pavilacks and the real property is not a defining component of default on the cooperative loan. Instead, the plaintiff seeks action solely for the money owed.

The defendant also states that the requirement to make a time deposit constitutes a separate agreement regarding which agreement the plaintiff makes no submission of evidence. The promissory note makes the failure of the Pavilacks to make a time deposit a cause of default. However, the default in this action is triggered by the failure of the Pavilacks to make money payments on and after the due date. There is no allegation that the Pavilacks failed to make the required time deposit. While a default based upon a failure to make a time deposit may or may not have occurred, the plaintiff does not so allege and that part of the promissory note modification is inconsequential to this instant action.

The defendant offers no valid defense as to contract formation of the guaranty, or of the underlying notes. Although there are separate provisions to those earlier notes, there are no pertinent separate provisions of the cooperative loan or of the promissory note invoked in this action. Furthermore, there are no provisions within the guaranty that refer to those separate provisions and agreements. The only pertinent named cause of action was default that came about by non-payment of money triggering the guaranty made by the defendant to the plaintiff.

The defendant does not allege payments were made or not due.

The plaintiff states payments were not made on or after specified due dates. Thus, the cooperative loan default began on January 10, 2010, and the separate promissory note default began on February 10, 2010. The defendant never alleges that payments were made, or that payment when made was refused. Instead the defendant states that no money was due on the second, promissory note on January 10, 2010. The pertinent lending contract has plain wording. The promissory note states that money was owed on and after February 10, 2010, and this money is what the plaintiff is demanding. The defendant is refuting that which is not alleged.

Further, in claiming that the promissory note is not in default, the plaintiff refers to a failure to make a time deposit, the conditions of which are in a separate agreement. However, the terms of the method of default alleged by the plaintiff result from failures to make money payments on specified dates. The defendant stating the wrong cause of action and an incorrect date of dereliction does not counter the plaintiff's cause of action.

The Pavilacks are in default and the guaranty obliges the defendant to pay the plaintiff.

The plaintiff alleges the Pavilacks are in default of their notes and the defendant makes no valid opposition. The court determines as a finding of fact that, based upon the information presented by the parties, both Harry Pavilack and Mary Jane are in default of the cooperative loan and of the promissory note, by reason of not having made payments as specified in the respective loan instruments. Because the defendant has not raised proper defenses to the guaranty instrument covering the obligations of the Pavilacks, or to the lack of payments required by the terms of that guaranty instrument, the defendant is liable to pay the plaintiff, Metropolitan National Bank, under the terms of that guaranty made by Pavilack Industries, Inc., Pavil Corporation, and Myrtle Beach Abstract and Title Agency, Inc.

There is no valid issue of inconsistent motions.

The sequence in which courts decide matters of law and fact is a matter of policy and procedure so long as constitutional rights are not abridged.[21] Here, the defendant references two additional actions that are pending. The earlier of these actions, *Metropolitan National Bank v Harry Pavilack and Mary Jane Pavilack*, Index Number 100827/2010, is before Justice McMahon. This action is currently in abeyance, without decision having been made. The second action, *Metropolitan National Bank v Harry Pavilack and Mary Jane Pavilack,* Index Number 100828/2010, is before Justice Fusco. This second action requested summary judgment for the plaintiff. Justice Fusco denied summary judgment pending a conference, with leave to renew. Both of these cited actions concern the Pavilacks, rather than the current defendant.

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[21]*People v Johnson*, 38 NY 2d 271, 281 [1975]; *People v Purdy*, 29 NY 2d 800, 801 [1971]; *Procaccino v Stewart*, 25 NY 2d 301, 305 [1969].

Neither pending procedure is *res judicata* or collateral estoppel for the instant action. Both *res judicata* and collateral estoppel must be based upon a final judgment in another action in which the parties' subject matter and cause of action are identical or substantially the same.[22] Here, there has been no definitive determination of a final judgment in either of the aforementioned actions. Instead, in one action, there is only an abeyance, and in the other action there is only a pending conference. Moreover, the defendant parties in the aforementioned actions are distinct from the defendants in the instant action. Pavilack Industries, Inc, Pavil Corporation, and Myrtle Beach Abstract and Title Agency are each separate entities and distinct from either Harry Pavilack or Mary Jane Pavilack as natural persons.

Therefore, there has been no *res judicata* or collateral estoppel established that preclude a finding in this action. Thus a finding here is not inconsistent with any prior final decision.

Based upon the information available, the court determines in justice and as a finding of fact, that the Pavilacks have defaulted on the cooperative loan and the promissory note. A valid guaranty of payment exists for which the defendant is liable. The motion for summary judgment in lieu of complaint is validly based upon the guaranty instrument. There is no *res judicata* or collateral estoppel based upon other motions before other courts to preclude the findings of this court. A final determination of the monetary amount of the defendant's liability must be settled by a judgment on notice.

Accordingly, it is hereby

ORDERED, that the motion by the plaintiff Metropolitan National Bank for summary judgment in lieu of complaint is granted; and it is further

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[22] *O'Connell v Corcoran*, 1 NY 3d 179, 184-185 [2003].

ORDERED, that the plaintiff, Metropolitan National Bank, shall settle judgment on notice.

ENTER,

DATED: October 7, 2010

Joseph J. Maltese
Justice of the Supreme Court