SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

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JPMORGAN CHASE BANK, N.A., as successor-by-assignment from The Bank of New York,

Plaintiff,

-against-

Index No.: 007999/10
Motion Sequence...01
Motion Date...07/02/10
XXX

MAPLE LEAF COTTAGE, INC., INTERNATIONAL ADVANCED MATERIALS, INC., MELISSA CARY, JOELAINE CARY, and RODGER CARY,

Defendants.

_____X

Papers Submitted:
Notice of Motion.....x

Upon the foregoing papers, the motion by the Plaintiff, JPMORGAN CHASE BANK, N.A. ("CHASE"), seeking an Order (a) granting it summary judgment, pursuant to CPLR § 3212, against the Defendants, MAPLE LEAF COTTAGE, INC. ("MAPLE LEAF"), MELISSA CARY ("MELISSA"), and JOELAINE CARY ("JOELAINE"); (b) severing and discontinuing this action, without prejudice, against the Defendants, INTERNATIONAL ADVANCED MATERIALS, INC. ("INTERNATIONAL") and RODGER CAREY ("RODGER"); and (c) granting the Plaintiff costs and attorney's fees from the Defendants MAPLE LEAF, MELISSA, and JOELAINE, is decided as provided herein.

The Plaintiff commenced this action on April 23, 2010 by filing a Summons and Verified Complaint and purchasing an index number. (*See* Exhibit A annexed to the Plaintiff's motion). Service was effectuated upon the Defendants MAPLE LEAF and INTERNATIONAL, pursuant to Business Corporation Law § 306. (*See* Exhibits B and C annexed to the Plaintiff's motion). Service was effectuated on each of the three remaining Defendants, pursuant to CPLR § 308. (*See* Exhibits D, E, F annexed to the Plaintiff's motion).

This action was commenced to collect monies allegedly due and owing to the Plaintiff arising out of (i) a Business CreditLink Agreement, between the Plaintiff and MAPLE LEAF, and personal guarantees, executed by MELISSA and JOELAINE, of each and every obligation thereunder and (ii) a Business CreditLink Agreement, between the Plaintiff and INTERNATIONAL, and personal guarantees executed by RODGER and JOELAINE, of each and every obligation thereunder.

On or about May 14, 2010, the Plaintiff received an Answer on behalf of the Defendants, MAPLE LEAF, MELISSA and JOELAINE, which contained only general denials and, allegedly, no meritorious affirmative defenses. (*See* Exhibit G annexed to the Plaintiff's motion). None of the Defendants have submitted any opposition to this instant motion.

The Court will first address the branch of the Plaintiff's motion seeking summary judgment. By way of background, on or about February 21, 2002, the Defendant, MAPLE LEAF, executed and delivered to The Bank of New York a Business CreditLink

Agreement ("BCLA") whereby it promised to pay to the order of The Bank of New York, and now to CHASE by assignment, the principal sum of up to $30,500.00, with interest thereon, at a rate per annum equal to Prime Rate plus 1.00% and at a default rate per annum of the Prime Rate plus 4.00%. (Exhibit H annexed to the Plaintiff's motion). The Defendant, MAPLE LEAF, made several advances overdrawing the BCLA, leaving a current outstanding principal balance of $33,000.00. (*See* Exhibit I, copy of the BCLA account Payment History, annexed to the Plaintiff's motion). On or about March 5, 2002, the Defendants, MELISSA and JOELAINE, each executed and delivered a personal guarantee of each and every obligation of the Defendant, MAPLE LEAF. (Exhibits J, K annexed to the Plaintiff's motion).

The Plaintiff alleges that the Defendants, MAPLE LEAF, MELISSA, and JOELAINE, have failed to make payments under the terms of the BCLA and the BCLA Personal Guarantees since June 25, 2009 and each and every month thereafter, and, as such, have defaulted. (*See* Exhibit I, copy of the BCLA account Payment History, annexed to the Plaintiff's motion).

Based upon this alleged default, the Plaintiff contends that the Defendants, MAPLE LEAF, MELISSA, and JOELAINE, owe the sum of $33,000.00, with interest at a rate per annum equal to the rate of the Prime plus 1.00% from May 25, 2009 to June 24, 2009, and at a default rate per annum equal to the rate of Prime plus 4.00% from June 25, 2009 to the date of entry of judgment, together with late charges at the rate of 5.00% of each payment due pursuant to the BCLA. In response, the Defendants, MAPLE LEAF,

MELISSA, and JOELAINE, submitted an Answer containing only general denials and no meritorious affirmative defenses.

The standards for summary judgment are well settled. A court may grant summary judgment where the moving party has made a prima facie showing that there are no genuine issues of material fact, and the moving party is, therefore, entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). The burden is on the moving party to tender sufficient evidence to demonstrate the absence of any material issue of fact. *Id.*

In order to recover under the BCLA, the Plaintiff is required give proof of its existence and of the Defendants' failure to make payments in accordance with its terms. *See Layden v. Boccio*, 253 A.D.2d 540 (2nd Dept. 1998); *Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772 (1st Dept. 1983). Where payment was guaranteed by one or more of the parties, to make a prima facie case, the Plaintiff must show proof of the note, the guarantee, and the failure to make payments in accordance with their terms. *See Key Bank of Long Island v. Burns*, 162 A.D.2d 501 (2nd Dept. 1990).

The Plaintiff has made a prima facie case against the Defendants, MAPLE LEAF, MELISSA, and JOELAINE, by submitting proof of the BCLA, the BCLA Personal Guarantees, and the Defendants' failure to make the required payments.

Once the movant has established a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate the existence of issues of fact. *Burton v. Ertel*, 107 A.D.2d 909 (3rd Dept. 1985). General denials contained

in the non-movants answer are insufficient to raise a triable issue of fact. *N.Y. Higher Educ. Servs. Corp. v. Ortiz*, 104 A.D.2d 684 (3rd Dept. 1984); *Stern v. Stern*, 87 A.D.2d 887 (2nd Dept. 1982). Further, "a shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment." *Mayer v. McBrunigan Constr. Corp.*, 105 A.D.2d 774 (2nd Dept. 1984).

The Defendants, MAPLE LEAF, MELISSA, and JOELAINE, have failed to sustain their burden to demonstrate a triable issue of fact. The Answer submitted by these Defendants makes only general denials, as such, is insufficient to defeat summary judgment. Further, these Defendants did not proffer support or evidence for any allegations contained in their Answer.

Accordingly, the branch of the Plaintiff's motion seeking summary judgment, pursuant to CPLR § 3212, against the Defendants, MAPLE LEAF, MELISSA, and JOELAINE, is **GRANTED**.

The Court will now address the second branch of the Plaintiff's motion, seeking to sever and discontinue this action, without prejudice, against the Defendants INTERNATIONAL and RODGER. By way of background, on or about June 27, 2000, INTERNATIONAL executed and delivered a Business CreditLink Agreement ("BCLA-2") whereby it promised to pay to the order of The Bank of New York, and now to CHASE by assignment, the principal sum of up to $50,000.00, with interest thereon at a rate per annum equal to Prime Rate plus 2.00% and at a default rate per annum of the Prime Rate plus 5.00%. (Exhibit L annexed to the Plaintiff's motion). Subsequently, on or about August 19,

2003, the Plaintiff granted the Defendant, INTERNATIONAL's, request and increased the BCLA-2 line of credit by $5,000.00, creating a total credit amount of $55,000 with a new interest rate of 1.25% and a default interest rate of 4.25%. (*See* Exhibit M annexed to the Plaintiff's motion). On or about June 27, 2000, the Defendants JOELAINE and RODGER each executed and delivered a personal guarantee of each and every obligation of the Defendant, INTERNATIONAL. (Exhibits N and O annexed to the Plaintiff's motion).

The Plaintiff's Complaint maintains that the Defendants, INTERNATIONAL, JOELAINE, and RODGER, defaulted on the above-mentioned BCLA-2 and the related personal guarantees. Although the next installment on the BCLA-2 was not due at the time the Plaintiff filed the Complaint, pursuant to the alleged "cross-default provision" in the BCLA and BCLA-2, where the Defendant, JOELAINE has defaulted on the BCLA, the BCLA-2 became accelerated and immediately due and owing. (*See* the Plaintiff's motion at ¶¶ 28-31; Exhibits H, M annexed to the Plaintiff's motion).

Since the filing of the Complaint and as of May 21, 2010, the Plaintiff has received sufficient payments on the BCLA-2 to satisfy said loan, leaving no outstanding principal balance on the BCLA-2. (*See* Affidavit of Marion Taylor, attached to the Plaintiff's motion, at ¶ 6).

Pursuant to CPLR § 603, the Court may sever claims in "furtherance of convenience or to avoid prejudice." Additionally, it is within the Court's sound discretion to grant or to deny an application, pursuant to CPLR § 3217 (b), for a voluntary discontinuance. *Great W. Bank v. Terio*, 200 A.D.2d 608 (2nd Dept. 1994). In the absence

of special circumstances, such as particular prejudice to the defendant, the Court should grant an application for a voluntary discontinuance. *Id.*

In the instant action, severing the claims against INTERNATIONAL and RODGER, would avoid prejudice as to those two Defendants. Further, there are no special circumstances that would prohibit the Court from granting this application for a voluntary discontinuance.

Accordingly, the branch of the Plaintiff's motion seeking to sever and discontinue this action, without prejudice, against the Defendants INTERNATIONAL and RODGER, is **GRANTED**.

The Court will now address the branch of the Plaintiff's motion seeking costs, expenses, and attorney's fees, from the Defendants, MAPLE LEAF, MELISSA, and JOELAINE. As a general proposition, "attorney's fees may not be awarded absent an agreement between the parties or a statute or court rule" which authorizes them. *Bloom v. Jenasaqua Realty Holding Co.*, 174 A.D.2d 644 (2nd Dept. 1991).

Here, the Plaintiff claims that attorneys' fees, in the amount of $1,200.00, have been incurred in this action. Pursuant to the terms of the BCLA, as signed by the Defendant, MAPLE LEAF:

> The Borrower agrees to pay all costs and expenses incurred by the Bank (including but not limited to, reasonable attorneys' fees and expenses . . .) of, or incidental to the custody, care, sale or collection . . . relating to the Bank's enforcement of the obligation with this Agreement, whether or not litigation is commenced.

(Exhibit H annexed to the Plaintiff's motion at "Enforcement Costs"). According to the terms of the BCLA Personal Guarantees, the Defendants, MELISSA and JOELAINE:

> agree[] to pay on demand, all expenses (including but not limited to, reasonable attorneys' fees and expenses, whether or not litigation is commenced . . .) of, or incidental to, the custody, care, sale or collection of . . . any of the Obligations.

(*See* Exhibits J, K annexed to the Plaintiff's motion).

The Court notes that a party seeking an award of counsel fees must demonstrate their entitlement thereto by demonstrating the "nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the result achieved." *Jordan v. Freeman*, 40 A.D.2d 656 (1st Dept. 1972). In support of its claim for costs, the Plaintiff has proffered an Affirmation in Support of Legal Fees and a copy of the invoice rendered by the Plaintiff's attorney in this action. (Exhibit Q annexed to the Plaintiff's motion).

However, both the Affirmation and the invoice lack the specificity required for an award of attorneys' fees. The Affirmation summarily states that the sum owed is for the "preparation of the Motion for Summary Judgment". Similarly, the invoice lists only one lump sum, in the amount of $1,200.00, that is owed "[f]or professional services rendered to draft, prepare, serve and file the Motion to Sever and Discontinue and for Summary Judgment."

Accordingly, the branch of the Plaintiff's motion seeking costs, expenses, and attorney's fees, is **DENIED**.

Accordingly, it is hereby

ORDERED, that the branch of the Plaintiff's motion seeking summary judgment, pursuant to CPLR § 3212, against the Defendants, MAPLE LEAF, MELISSA, and JOELAINE, is **GRANTED**; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking to sever and discontinue this action, without prejudice, against the Defendants, INTERNATIONAL and RODGER, is **GRANTED**; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking costs, expenses, and attorney's fees, from the Defendants, MAPLE LEAF, MELISSA, and JOELAINE, is **DENIED**.

Submit Judgment on notice.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
July 28, 2010

Hon. Randy Sue Marber, J.S.C.
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