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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x **GEORGE THOMAS,**	**TRIAL/IAS PART: 22** **NASSAU COUNTY**
Plaintiff,	**Index No: 002817-10** **Motion Seq. No: 1**
-against-	**Submission Date: 4/27/10**
THOMAS JOHN and **AMERICAN GARDENS REAL ESTATE COMPANY,**	
Defendants.	
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The following papers have been read on this motion:

Notice of Motion, Affidavit in Support and Exhibits.....x
Stipulation dated March 4, 2010.....x
Affirmation in Opposition and Affidavit of T. John.....x
Reply Affidavit, Reply Affirmation and Exhibits.....x
Correspondence dated 4/27/10.....x

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff George Thomas ("Plaintiff" or "George") on February 9, 2010 and submitted on April 27, 2010. By decision dated May 25, 2010, the Court directed that this motion would be the subject of a Conference in Aid of Disposition before this Court. The Court conducted that Conference but the parties were unable to resolve the matter. For the reasons set forth below, the Court 1) grants Plaintiff's motion for summary judgment in lieu of a complaint; and 2) refers the matter to an inquest for the determination of interest, attorney's fees and costs.

BACKGROUND

A. Relief Sought

Plaintiff requests an Order, pursuant to CPLR § 3213, directing the entry of summary judgment in favor of Plaintiff and against Defendants in the sum of $300,000, as well as interest, counsel fees and costs.

Defendants Thomas John ("John") and American Gardens Real Estate Company ("American Gardens") (collectively "Defendants") oppose Plaintiff's motion.

B. The Parties' History

Plaintiff provides an Affidavit in Support dated February 5, 2010 in which he affirms as follows:

Plaintiff resides in Texas. On October 4, 2007 Plaintiff made a personal loan ("First Loan") in the amount of two hundred thousand ($200,000.00) dollars to Defendant American Gardens which was personally guaranteed by Defendant John, the principal and sole shareholder of American Gardens. Defendants executed a Promissory Note ("First Note") in the sum of $200,000 ("First Note Principal"). Plaintiff provides a copy of the Note (Ex. A to P's Aff. in Supp.) which reflects that American Gardens will repay the First Note Principal:

> with interest thereon at the rate of 15 percent per annum, payable in quarterly installments of interest, commencing the 31 day of Dec, 2007, next ensuing and quarterly thereafter until demanded by payee [George] when the entire unpaid principal balance and accrued interest shall be due and payable, provided however payee gives maker [American Gardens] three (3) months written notice of such demand.

The First Note contains a guarantee ("First Guarantee"), signed by John, guaranteeing the:

> prompt and full performances and payment accounting to the tenor of the within agreement, to the holder hereto, and in the event of default, authorize any holder hereof of [sic] to proceed against the undersigned for the full amount due including reasonable attorney's fee and hereby waive presentment demand protest notice of dishonor and any and all other notices or demand of whatever character to which the undersigned might otherwise be entitled, the undersigned further consent to any extension granted to any holder and waives notice hereof.

Plaintiff affirms that Defendant paid Plaintiff seven (7) payments of interest only in the amount of $7,500.00 each, totaling $52,500.00. Defendant made the April 1, 2009 payment late,

making that payment on June 9, 2009, and never made the quarterly installment payment due on July 1, 2009. Plaintiff made written demand for payment in full of the First Note on March 17, 2009 and then again on September 25, 2009. [1] Plaintiff affirms that the total amount due him, including interest, is $222,500.00.

Plaintiff further affirms that on October 15, 2007, he made another loan ("Second Loan") to American Gardens in the sum of one hundred thousand ($100,000.00) dollars. The Second Loan was also personally guaranteed by John. Defendants executed a second Promissory Note ("Second Note") in the sum of $100,000 (Ex. C to P's Aff. in Supp.). The Second Note contains similar payment terms to the First Note, and contains a Guarantee ("Second Guarantee") signed by Defendant John. Plaintiff avers that Defendant defaulted on its obligation to repay the Second Note in that Plaintiff has received no payments towards the Second Note. Plaintiff made written demand on Defendants for full repayment on the Second Note on June 2 and September 25, 2009. Plaintiff affirms that the total amount due to him on the Second Note is $133,750.00.

The Notes also include language providing that the maker agrees to pay all costs of collection, including reasonable attorney's fees and court costs. The language of the Second Guarantee mirrors that of the First Guarantee, which is set forth above.

Plaintiff asks the Court to award him judgment on the two Notes in the total amount of $356,250.00, plus interest, costs and counsel fees. With respect to service of the Summons and Motion on Defendants, counsel for the parties entered into a stipulation dated March 4, 2010 in which they agreed, *inter alia*, that "service of the Summons and Motion for Summary Judgment in lieu of complaint on Defendants herein has been completed."

In his Affidavit in Opposition, Defendant John affirms as follows:

John is an officer of American Gardens. In 2007, original documents entitled "Promissory Notes" were executed and delivered to Plaintiff. These original notes contained several blank areas which John had not completed. John submits that the copies of the Notes

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[1] Although Plaintiff affirms that these demand letters are annexed to his initial affidavit as Exhibit B, Plaintiff's initial Affidavit in Support does not include this correspondence. As outlined *infra*, however, a letter dated September 25, 2009 from George's attorney to John and American Gardens is annexed as Exhibit B to Thomas' Reply Affidavit, and does include a demand for immediate payment of the Notes dated October 4 and October 15, 2007.

attached to Plaintiff's motion "are largely illegible and obscure material information imperative to the full resolution of this matter" (John Aff. at ¶ 3). John asks the Court to compel Plaintiff to produce the original Notes and that John be permitted to inspect those during discovery.

John further submits that, although Plaintiff affirms that he made written demand for payment and attached that demand to his Affidavit, no such exhibits were attached to the motion papers served on Defendants. John avers, further, that he has no recollection of receiving those demands.

In his Reply Affidavit, George affirms as follows:

George submits that John admitted, in his Affidavit in Opposition, executing the Notes. George characterizes as "completely false" John's affirmation that the original notes contained blank areas that weren't completed by him. George affirms that John is a sophisticated business person and contends that "[Defendant's] assertion that he tendered admittedly executed promissory notes that contained blank spaces defies credulity" (George Reply Aff. at ¶ 3).

George also disputes John's claims that the copies of the Notes submitted by George with his Affidavit in Support were illegible. George provides additional copies of the Notes (Exs. A and B to George Reply Aff.) which, he submits, are "completely legible" (George Reply Aff. at ¶ 4).

With respect to Plaintiff's demand for payment, Plaintiff provides copies of e-mails that, he affirms, he sent to Defendant demanding payment. Plaintiff affirms that these e-mails were included with Plaintiff's initial motion although, as noted above, the Court also was not in possession of these e-mails. Exhibit B to George's Reply Affidavit consists of numerous correspondence including: 1) a letter dated February 25, 2009 from "Georgekutty & Kunjumol" advising Defendant that Plaintiff has been trying to get in touch with him for two seeks, and asking Defendant to "return at least $60,000 dollars that you promised to return us within a month," 2) a letter dated March 17, 2009 from Plaintiff to Defendant John at American Gardens' regarding the First Note in which Plaintiff a) requests that Defendant John send him the principal amount of $200,000 that he received on October 4, 2007; and b) directs Defendant John to "treat this letter as three months notice as per the terms and condition of the [promissory] note," 3) a letter dated June 2, 2009 from Plaintiff to Defendants regarding the Second Note in which Plaintiff asks Defendant John to a) send him the principal amount of $100,000 which he received

on October 15, 2007; and b) "treat this letter as three months notice as per the terms and condition of the [promissory] note," and 4) a letter dated September 25, 2009 from a Texas law firm to Defendants which, *inter alia*, a) made reference to the Notes as well as a third promissory note dated August 20, 2008; b) stated that the letter "constitutes a demand for immediate payment of all three notes for a combined total of $360,000.00;" c) advised Defendants that, pursuant to the Notes, Plaintiff is entitled to interest on the payments, as well as counsel fees incurred in the enforcement of the Notes; d) advised Defendants of the outstanding sums due on the First and Second Notes; e) advised Defendants that Plaintiff provided written notice, on March 17 and June 2, 2009 respectively, that the entire principal sum was due within 90 days; and f) advised Defendant that if full payment was not made by October 25, 2009, Plaintiff might file suit.

In his Reply Affirmation, Plaintiff's counsel provides a copy of a Form 1099 (Ex. C to Reply Aff.) reflecting John's payment of interest in the sum of $29,500.000 to Plaintiff in 2009. Plaintiff's counsel submits that this documentation contradicts John's statements in his Affidavit in Opposition. In her letter to the Court dated April 27, 2010, Defendants' counsel objects to the statements by Plaintiff's counsel in his Reply Affirmation and contends that Plaintiff's counsel, by submitting this Reply Affirmation, has conceded the existence of factual issues that make summary judgment inappropriate. The Court disagrees.

RULING OF THE COURT

A. Motion for Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

> When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

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. dism.*, 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).

D. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to is terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

E. Counsel Fees

Provisions or stipulations in contracts for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977). Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

E. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated his right to judgment against Defendant American Gardens on the Notes by establishing the existence of those instruments and the Defendant's failure to make payment pursuant to the terms of those instruments. The

Court finds that Defendants' conclusory assertions are insufficient to defeat Plaintiff's entitlement to summary judgment on the Notes.

The Court concludes, further, that Plaintiff has demonstrated his right to judgment against Defendant John on the Guarantees by proving the existence of the underlying obligations, the Guarantees, and the failure of the prime obligor to make payment in accordance with the terms of the obligations. The Guarantees are enforceable as they are in writing executed by the person to be charged, and contain a clear and explicit intent to guarantee the obligation. The Court also finds that Defendants' conclusory assertions are insufficient to defeat Plaintiff's entitlement to summary judgment on the Guarantees.

In light of the foregoing, the Court grants Plaintiff's motion and awards Plaintiff judgment against Defendants in the sum of $300,000, plus interest, attorney's fees and costs to be determined at an inquest. Accordingly, it is hereby

ORDERED, that Plaintiff have judgment against Defendants in the sum of $300,000, plus interest, attorney's fees and costs; 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, attorney's fees and costs on December 16, 2010 at 10:00 a.m.; and it is further

ORDERED, that counsel for Plaintiff shall serve upon counsel for the Defendants, by regular mail, 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 December 3, 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.

ENTER

DATED: Mineola, NY
November 10, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.