

**JPMorgan Chase Bank, N.A. v Eagle Gold Stamping,
Inc.**

2011 NY Slip Op 30342(U)

February 1, 2011

Sup Ct, Nassau County

Docket Number: 11861/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA
Justice

-----X PART 8
JPMORGAN CHASE BANK, N.A.,

Plaintiff,

INDEX NO. 11861/10
XXX

-against-

MOTION DATE: 12/08/10
SEQUENCE NO: 01

EAGLE GOLD STAMPING, INC., THOMAS V. SALEMI,
PATRICIA A. SALEMI, and JOSEPH G. SALEMI,

Defendants.

-----X	
Notice of Motion, Aff & Exs.....	<u>1</u>
Memorandum of Law in Support.....	<u>2</u>
Affidavit in Opposition & Aff.....	<u>3</u>
Reply Affirmation.....	<u>4</u>

Upon the foregoing papers, the motion by plaintiff for an order, pursuant to CPLR §3212, granting summary judgment to plaintiff against defendants Eagle Gold Stamping, Inc., Thomas V. Salemi and Joseph G. Salemi is granted as directed below.

A default judgment was previously entered against defendant Patricia A. Salemi September 14, 2010.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover upon a promissory note in the form of a Business Credit Application and upon a personal guarantee executed by the individual defendants. The note in question was executed by Eagle Gold Stamping on July 20, 2005 and delivered to plaintiff in the form of a Business Credit Application. Pursuant to the terms of the Business Credit Application, Eagle Gold Stamping agreed to abide by the terms of the Business Revolving Credit Account Agreement, which was issued on or about July 21, 2005.

The Business Credit Application, loan application conditional approval letter, Credit

Summary, and Business Revolving Credit Account Agreement (hereinafter collectively called the "Note") evidence a loan initially not to exceed the sum of \$50,000. On or about July 18, 2006, Eagle Gold Stamping's line of credit was increased to \$72,000.

The Note provides that Eagle Gold Stamping promises to pay plaintiff the principal amount of the loan, with interest on the unpaid principal balance computed at the rate of 0.500% per annum above plaintiff's prime rate. The Note also provides that any principal or interest herein, which is not paid when due, shall be subject to late charges/fees of 5% of the payment due.

On or about July 20, 2005, in connection with the execution and delivery of the Note, defendants Thomas Salemi and Joseph Salemi executed and delivered to plaintiff an absolute, unconditional Personal Guarantee of payment for the debts and obligations of Eagle Gold Stamping. The Guarantee reads in bold print as follows: "By signing below, I/we also individually and personally, jointly and severally, agree to the terms of the Guarantee and Collateral Agreement, which appear in the PERSONAL GUARANTEE AND COLLATERAL AGREEMENT section of this Application." Further, the terms of the personal guarantee are recited in bold print in the center of the signature page under the heading, "Personal Guarantee and Collateral Source," and include the following statement, "I/we individually and personally, jointly and severally, absolutely and unconditionally guarantee to JPMorgan Chase Bank, N.A. (referred to as "Chase") and assigns the prompt payment of each and every obligation and liability of every nature and description of the Applicant to Chase, whether now existing or in the future." The Application containing the executed guarantee is annexed to Movant's motion.

Movant submits an affidavit executed by Tammy Lutjen, an Assistant Vice President of the plaintiff, in which Ms. Lutjen confirms the above-noted terms of the agreement and personal guarantee and also establishes defendants' default in payment in accordance with the terms and conditions set forth in the agreement. Ms. Lutjen attests that demand for payment was issued by plaintiff to defendants on or about April 29, 2010, and that the amount due and owing the plaintiff remains the principal amount of \$64,770.64, plus accrued interest to May 21, 2010 in the amount of \$1,142, plus late charges/fees in the amount of \$543.32, with additional interest on the principal from May 22, 2010 to the date of judgment. Said letters accelerating the note and notifying defendants of the default in payment are annexed to plaintiff's motion papers.

Plaintiff has established a prima facie showing of entitlement to summary judgment by demonstrating proof of the unpaid note, the guarantee, and a failure to make payments called for by its terms. (*Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791 (2d Dept. 1985); *see also, E.D.S. Security Systems, Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999)). It is well-settled that a party is entitled to summary judgment for breach of contract upon establishing proof of a contract, performance of the contract by one party, breach by the other party, and damages. (*WorldCom, Inc. v. Sandoval*, 182 Misc.2d 1021, 701 N.Y.S.2d 834 (Sup Ct. N.Y. Cty. 1999); *Rexnord Holdings, Inc. v. Biderman*, 21 F.3d 522 (2d Cir. 1994)).

The proponent of a summary judgement motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition, defendant Thomas V. Salemi submits an affidavit in which he attests that he does not remember signing the personal guarantee in question. Thomas Salemi also attests that he is a minority shareholder (owning only a 10% stake in Eagle Gold Stamping) and that he never had any knowledge that the defendant corporation utilized loans or lines of credit, nor that it was delinquent in payment of same. He further attests that he was often asked by defendant Patricia Salemi to sign “various documents” on behalf of the corporation, but never asked what the particular documents were. Defendant Thomas Salemi also attests that he never received plaintiff’s letter indicating acceleration of the note, dated April 29, 2010, as it was sent to his former address. The Court notes, however, that pursuant to the express language of the note, defendants expressly waived notice of default and demand for payment.

Defendant Thomas Salemi’s opposition fails to raise a triable issue of fact sufficient to defeat plaintiff’s prima facie showing. Defendant Thomas Salemi does not allege any fraud on the part of the plaintiff or that his signature does not appear on the guarantee. He also does not attest that he did not intend to execute a personal guarantee, only that he does not recall signing same. Thomas Salemi further does not allege that he executed the guarantee under duress. It is

well settled that a signer is responsible for reading a contract and having consented to its terms. (See, *BWI Guaranty Trust v. Banque Internationale a Luxembourg*, 567 N.Y.S.2d 731 (1st Dept. 1991)). A party who signs a document without any valid excuse for having failed to read it is 'conclusively bound' by its terms. (*Sofio v. Hughes*, 162 A.D.2d 518, 556 N.Y.S.2d (2d Dept. 1990) (citing, *Gilman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824 (1988))). Where a guarantee is clear and unambiguous on its face and, "by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (*Citibank v. Plapinger*, 55 N.Y.2d 90 (1985); (See, *Gilman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824 (1988))(holding that absent a showing of fraud, duress, or other wrongful act by a party to a contract, a signer of an agreement is deemed to be conclusively bound by its terms whether or not he or she read it)).

Summary judgment is properly granted on an action based upon promissory notes where a defendant fails to produce evidentiary facts in support of their conclusory allegations and claimed defenses. (See, *Mohegan Electric Supply Co., Inc. v. Pesach*, 94 A.D.2d 717, 462 N.Y.S.2d 250 (2d Dept. 1983)).

Accordingly, plaintiff's motion for summary judgment on its First Cause of Action against defendant Eagle Gold Stamping, its Second Cause of Action against defendant Thomas V. Salemi, and its Third Cause of Action against defendant Joseph G. Salemi, is granted.

Submit judgment on notice.

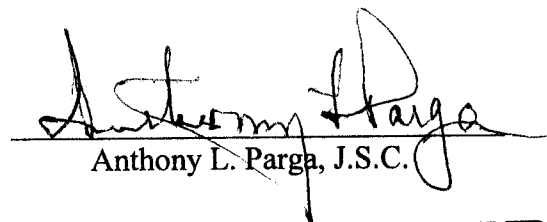
It is further Ordered that plaintiff's Fifth Cause of Action for attorneys' fees is severed and shall be determined at an inquest. Plaintiff shall serve a Notice of Inquest, together with a copy this order and the Note of Issue with receipt of payment, upon the Calendar Clerk of this court, no later than fifteen (15) days prior to the date of inquest.

Upon proof of the Note of Issue filing, the Clerk of the Calendar Control Part ("CCP"), shall place this matter on the CCP Trial Calendar of Nassau County Supreme Court on April 21, 2011, at 9:30 A. M. for a determination of attorneys' fees. The Justice presiding in CCP may refer this matter to a Justice, Special Referee or Judicial Hearing Officer as he or she may determine.

The failure to file a note of issue or appear as directed may be deemed an abandonment of the

claims giving rise to the inquest.

Dated: February 1, 2011


Anthony L. Parga, J.S.C.

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ENTERED

FEB 04 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**