

NARA Bank v NYC Visual Group, LLC

2011 NY Slip Op 30390(U)

February 17, 2011

Sup Ct, New York County

Docket Number: 114361/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. _____
Justice

PART 10

Index Number : 114361/2010
NARA BANK
VS.
NYC VISUAL GROUP LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

FEB 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 17 2011

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
NARA BANK,

Plaintiff,

-against-

NYC VISUAL GROUP, LLC and SAIRA
KHALFAN,

Defendants.
-----x

DECISION/ORDER

Index No.: 114361/10
Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

FEB 18 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf n/m (CPLR § 3213) w/ JK affid, exhs1

Numbered

Upon the foregoing papers, the decision and order of the court is as follows:

This is plaintiff's motion for summary judgment in lieu of a complaint based upon a Promissory Note (the "Note"). CPLR § 3213. This motion has been submitted to the court without opposition, and is, therefore, considered by the court on default.

Plaintiff attempted service on Saira Khalfan ("Khalfan") on six different occasions during morning, daytime, and evening. Plaintiff completed service by nail and mail pursuant to CPLR § 308(4), by affixing a copy of the summons and complaint on Khalfan's door on November 18, 2010 at 3:35 p.m. and mailing a copy to Khalfan on November 18, 2010. NYC Visual Group LLC ("NYC Visual") was served through a registered agent for the limited liability company. LLC § 302.

Despite such notice, defendants have neither appeared in this action nor opposed

the motion. Defendants' time to do so has expired and has not been extended by the court. Therefore, this motion is submitted on default and plaintiff is entitled to summary judgment provided he otherwise establishes a *prima facie* case.

Discussion

CPLR § 3213 is intended to be an efficient and effective means of securing a judgment on claims that are presumptively meritorious. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151 (1975). Summary judgment in lieu of a complaint is proper when: (1) the instrument itself, and (2) proof of non-payment, without more, make out a *prima facie* cause of action. Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968), *aff'd* 29 N.Y.2d 617 (1971).

An instrument for the payment of money qualifies for CPLR § 3213 treatment if it contains an unconditional promise by the debtor to repay the lender the moneys advanced to it or on its behalf for payment. Afco Credit Corp. v. Boropark Twelfth Ave. Realty Corp., 187 A.D.2d 634, (2d Dept. 1992). An unconditional guaranty is an instrument for the payment of money only, whether or not it recites a sum certain. European Am. Bank v. Cohen, 183 A.D.2d 453, 453 (1st Dept. 1992). To defeat the motion, the guarantor must come forward with proof showing the existence of a triable issue of fact with respect to a bona fide defense. Bank Leumi Trust Co. of New York v. Rattet & Liebman, 182 A.D.2d at 542.

Although the need to consult the underlying loan documents to establish the amount of liability does not affect the availability of CPLR § 3213 [European Am. Bank v. Cohen, *supra*], to establish its *prima facie* case against a guarantor, the lender must set forth the notes, an unconditional guaranty to pay, and nonpayment thereof. Bank Leumi

* 4]
Trust Co. of New York v. Rattet & Liebman, 182 A.D.2d 541 (1st Dept. 1992).

Plaintiff has set forth the following facts in his motion and through the sworn affidavit of Justin Kim, Vice President of plaintiff:

This action is based upon the Agreements entered into between plaintiff and NYC Visual, which Khalfan commercially guaranteed. Khalfan is identified as a member of NYC Visual.

On October 23, 2007, pursuant to the Note, plaintiff loaned NYC Visual \$86,000.00, conditioned on NYC Visual's repayment of the loan in monthly installments of \$1,148.00. Khalfan executed a Commercial Guaranty (the "Guaranty") which unconditionally guaranteed NYC Visual's payment under the Note. Plaintiff sent defendants a demand for payment dated September 21, 2010.

Plaintiff alleges that defendants have failed to pay and currently owe \$72,121.56 with interest from April 21, 2010, the date of defendants' default, in the amount of \$1,329.24, late fees in the amount of \$335.30, plus costs and attorney's fees.

The instruments at issue here, the Note and Guaranty, are for payment of money only, within the meaning of CPLR § 3213, and there are no material issues of fact precluding summary judgment because it is for a sum certain.

Defendants' failure to make payments under the Note and Guaranty constitute a default. Therefore, plaintiff has established its entitlement to summary judgment against defendants, jointly and severally, in the amount of \$72,121.56. See Afco Credit Corp. V. Boropark, supra; Bonds Financial, Inc. v. Kestrel Technologies, LLC, 48 A.D.3d 230 (1st Dept 2008). Plaintiff is also entitled to pre-judgment interest from April 21, 2010 in the amount of \$1,329.24, and late fees in the amount of \$335.30.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is granted against defendants, jointly and severally.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Here, the Note expressly provides that defendants are liable for plaintiff's costs, expenses, and attorney's fees. Plaintiff has not yet provided a bill of costs or an affidavit attesting to the fees incurred and the reasonableness thereof. The Court, therefore, refers the issue of what plaintiff may recover from defendants for its reasonable attorneys fees, costs and disbursements to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference can be assigned.

Conclusion

It is hereby:

ORDERED that plaintiff NARA BANK's motion pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendants, NYC VISUAL GROUP, LLC and SAIRA KHALFAN, is granted; and it is further

ORDERED that plaintiff is entitled to a money judgment in its favor and against defendants, NYC VISUAL GROUP, LLC and SAIRA KHALFAN, jointly and severally, for the unpaid principal sum of Seventy-Two Thousand One Hundred Twenty-One Dollars and Fifty-Six Cents (\$72,121.56), with pre-judgment interest from April 21, 2010 in the amount of \$1,329.24, and late fees in the amount of \$335.30; and it is further

ORDERED that the issue of what plaintiff may recover from defendants for its

reasonable attorney's fees, costs and disbursements is hereby referred to a Special Referee to hear and determine; and it is further

ORDERED that within the next 60 days, plaintiff is directed to serve a copy of this decision and order upon the Office of the Special Referee so that the reference identified herein can be assigned; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
February 17, 2011

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED

FEB 18 2011

NEW YORK
COUNTY CLERK'S OFFICE