

**Samuel v American Gardens Co.**

2011 NY Slip Op 30613(U)

February 28, 2011

Supreme Court, Nassau County

Docket Number: 021780-10

Judge: Timothy S. Driscoll

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SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER

SCAN

Present:

HON. TIMOTHY S. DRISCOLL  
Justice Supreme Court

-----X  
SIMON SAMUEL,

Plaintiff,

-against-

AMERICAN GARDENS COMPANY and  
THOMAS JOHN,

Defendants.

TRIAL/IAS PART: 20

NASSAU COUNTY

Index No: 021780-10

Motion Seq. No: 1

Submission Date: 1/5/11

-----X

The following papers have been read on this motion:

- Notice of Motion.....X
- Affidavit in Support and Exhibits.....X
- Affirmation in Support.....X
- Affidavits of Service.....X

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Simon Samuel on November 22, 2010 and submitted on January 5, 2011. For the reasons set forth below, the Court 1) grants Plaintiff’s motion for summary judgment in lieu of complaint against Defendants to the extent that the Court awards Plaintiff judgment in the amount of \$434,000, plus interest, counsel fees and costs; and 2) directs that an inquest be held on the issues of interest, counsel fees and costs.

BACKGROUND

A. Relief Sought

Plaintiff Simon Samuel (“Plaintiff”) requests an Order, pursuant to CPLR § 3213, in favor of Plaintiff and against Defendants American Gardens Company (“American Gardens”) and Thomas John (“John”) (collectively “Defendants”) in the sum of five hundred fourteen

thousand (\$514,000.00) dollars, together with 1) interest for the last quarter of 2007 in the sum of eighteen thousand three hundred seventy five (\$18,375.00) dollars, 2) interest from January 1, 2010 through December 31, 2010 in the amount of seventy five thousand two hundred fifty six dollars and twenty five cents (\$75,256.25) for a total of six hundred seven thousand six hundred thirty one dollars and twenty five cents (\$607,631.25). Plaintiff also seeks reasonable attorney's fees, collection costs and court costs.

B. The Parties' History

In his Affidavit in Support, Plaintiff affirms as follows:

On May 14, 2007, Plaintiff made a loan ("2007 Loan") to Defendants American Gardens Company, and John, as guarantor, in the sum of four hundred ninety thousand (\$490,000.00) dollars. As consideration for the 2007 Loan, American Gardens executed a Promissory Note and John executed a personal guaranty ("Note") on June 14, 2007 (Ex. A to P's Aff. in Supp.). The Note reflects 1) American Gardens' promise to pay to Plaintiff the principal sum of \$490,000 as well as interest at the rate of 15% per annum, 2) Plaintiff's right, upon default, to declare the entire unpaid balance of principal or interest immediately due and payable, 3) American Gardens' agreement to pay all costs of collection, including reasonable attorney's fees and court costs, and 4) John's guarantee of "prompt and full performances and payment," as well as his agreement to pay reasonable attorney's fees incurred by Plaintiff in enforcing the Note. The Note includes the handwritten language "Any Notes Given Prior to (5/14/07) this date are null and void" followed by John's signature.

Since June 30, 2007, Defendants paid the interest on the 2007 Loan in quarter installments of eighteen thousand three hundred seventy five (\$18,375.00) dollars. On November 12, 2007, Defendants tendered an interest payment, for the last quarter of 2007, in the amount of seventeen thousand dollars. The check was returned by the bank for insufficient funds. Plaintiff has not received a payment for interest accrued on the 2007 Loan for the last quarter of 2007 which is eighteen thousand three hundred seventy five (\$18,375.00) dollars.

On May 1, 2008, Plaintiff made a second loan ("May Loan") to Defendants in the sum of twenty five thousand (\$25,000) dollars. In support, Plaintiff provides a copy of check number 3943 dated May 1, 2008 and payable to American Gardens in the amount of \$25,000 (Ex. C to

P's Aff. in Supp.)<sup>1</sup>

On August 6, 2008, Plaintiff made a third loan ("August Loan") to Defendants in the sum of thirty five thousand (\$35,000) dollars. In support, Plaintiff provides a copy of check number 110414085 (Ex. B to P's Aff. in Supp.)<sup>2</sup> dated August 13, 2008 and payable to American Gardens in the amount of \$35,000.

On November 2, 2008, Plaintiff made a fourth loan ("November Loan") to Defendants in the sum of twenty thousand (\$20,000) dollars. In support, Plaintiff provides a copy of check number 4058 (Ex. C to P's Aff. in Supp.) dated November 1, 2008 and payable to Thomas John in the amount of \$20,000.

Plaintiff affirms that Defendants have repaid fifty six thousand (\$56,000) dollars. The total unpaid principal on all of the Loans is five hundred fourteen thousand (\$514,000.00) dollars.

On or about March 1, 2009, Plaintiff personally delivered to Defendants a notice (Ex. D to P's Aff. in Supp.), which Plaintiff characterizes as a "Demand Letter" (P's Aff. in Supp. at ¶ 10). In that notice, Plaintiff advised John that he "request[s] that you return my investment of \$512,000 that I have entrusted to you as soon as possible so that I can go on with buying the new house" and that he "would like to have it returned to me the latest by March 30, 2009."

Plaintiff submits that Defendants are in default, with respect to all the Loans, in the sum of five hundred fourteen thousand (\$514,000.00) dollars, together with 1) interest for the last quarter of 2007 in the sum of eighteen thousand three hundred seventy five (\$18,375.00) dollars, and 2) interest for 2010 in the amount of seventy five thousand two hundred fifty six dollars and twenty five cents (\$75,256.25). Plaintiff contends that Defendants owe Plaintiff a total of six hundred seven thousand six hundred thirty one dollars and twenty five cents (\$607,631.25). Plaintiff also seeks reasonable attorney's fees, collection costs and court costs pursuant to the terms of the Note.

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<sup>1</sup> Plaintiff affirms that Check Number 3943 is attached as Exhibit B to his Affidavit, but that Check is part of Exhibit C to his Affidavit. He also describes it as a "Receipt" of a check (P's Aff. in Supp. at ¶ 6), but the document appears to be a copy of the check itself.

<sup>2</sup> Plaintiff affirms that this check is attached as Exhibit C to his Affidavit, but it is annexed as Exhibit B to his Affidavit.

Plaintiff has provided Affidavits of Service reflecting service of the motion and supporting papers on Defendants on November 22, 2010 by 1) service of the papers on Defendant John by service on a person of suitable age and discretion at his home, and the subsequent mailing of those papers to John at his home, and 2) service of the papers on American Gardens by service on a person of suitable age and discretion at its place of business, and the subsequent mailing of those papers to American Gardens at its place of business.

C. The Parties' Positions

Plaintiff submits that relief pursuant to CPLR § 3213 is appropriate because Defendants' underlying obligations, and the amounts due, are clearly ascertainable from the Note. Moreover, Plaintiff has provided competent proof of Defendants' nonpayment. In addition, the Note was drafted by Defendants and, therefore, any ambiguities should be construed most strongly against them. Accordingly, Plaintiff submits that it has demonstrated its right to judgment in the sum of \$607,631.25, plus reasonable attorney's fees, collection costs and court costs.

Defendants have not appeared, and have submitted no opposition or other response to Plaintiff's motion.

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). Relief pursuant to CPLR § 3213 is available where a right to payment can be ascertained from the face of a document. *Boland v. Indah Kiat Finance*, 291 A.D.2d 342, 343 (1<sup>st</sup> Dept. 2002), quoting *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 (1<sup>st</sup> Dept. 2000).

If an instrument contains an unconditional promise to pay a sum certain over a stated period of time, it is considered an instrument for the payment of money only. *Bloom v. Lugli*, 2011 N.Y. App. Div. LEXIS 655, \*\* 3 (2d Dept. 2011). The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document. *Id.*, quoting *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 (1996).

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. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' 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).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. *See Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion with respect to the 2007 Loan based on the Court's conclusion that the Note, which relates to the 2007 Loan for \$490,000, is an instrument for the payment of money only, and Plaintiff's right to payment can be determined from the face of the Note. Moreover Defendant John executed a guaranty which reflects his clear and explicit intent to guarantee American Gardens' obligation on the Note. In light of the Defendants' failure to make the required payment pursuant to the Note, including the guaranty, Plaintiff is entitled to judgment with respect to the 2007 Loan. Plaintiff is also entitled to counsel fees incurred in the enforcement of the 2007 Loan but, as the Court has an insufficient record on which to base that award, the Court refers that matter to an inquest.

The Court also concludes, however, that the May, August and November Loans are not appropriate for relief pursuant to CPLR § 3213 because Plaintiff's right to payment cannot be determined from the face of the checks provided. The checks provide no details regarding the nature of the May, August and November Loans and the Note makes no reference to future loans.

Accordingly, the Court awards Plaintiff judgment against Defendants in the sum of \$434,000, representing the \$490,000 owed on the 2007 Loan less the \$56,000 paid by Defendants, plus interest, attorney's fees and costs associated with the 2007 Loan, to be determined at an inquest.

In light of the foregoing, it is hereby:

**ORDERED**, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is granted in part; and it is further

**ORDERED**, that Plaintiff shall have judgment against Defendants American Gardens Company and Thomas John in the sum of \$434,000, plus interest, attorney's fees and costs; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank N. Schellace to hear and determine all issues relating to the determination of interest, attorney's fees and costs on March 30, 2011 at 9:30 a.m.; and it is further

**ORDERED**, that Plaintiff's attorney shall serve upon the Defendants by certified mail, return receipt requested, 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 March 18, 2011; 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.

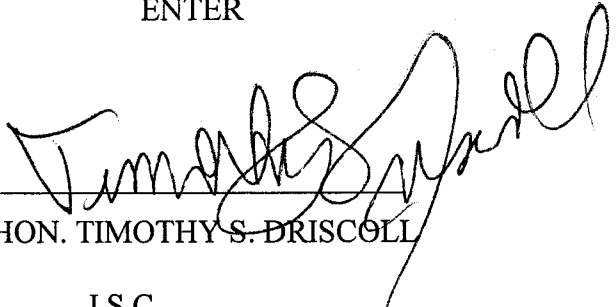
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

February 28, 2011

ENTER

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

**ENTERED**  
MAR 04 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE