

Capital One v Coastal Elec. Constr. Corp.

2011 NY Slip Op 30627(U)

March 4, 2011

Supreme Court, Suffolk County

Docket Number: 34141-2010

Judge: Emily Pines

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SHORT FORM ORDER

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INDEX NUMBER: 34141-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 11-18-2010
Motion Submit Date: 02-22-2010
Motion Sequence No.: 001 MG

[] FINAL
[X] NON FINAL

_____ X
**CAPITAL ONE, N.A. SUCCESSOR BY
MERGER TO NORTH FORK BANK,**

Plaintiff,

-against-

**COASTAL ELECTRIC CONSTRUCTION
CORP., 185 WAVERLY AVENUE, CORP,
a/k/a 185 WAVERLY AVENUE CORP., AND
KEVIN MCKOSKY,**

Defendants.
_____ X

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ORDERED, that the motion by plaintiff (motion sequence number 001) pursuant to CPLR 3213 for summary judgment in lieu of complaint is granted; and it is further

ORDERED, that pursuant to Administrative Order No. 12-08 dated December 4, 2008, issued by Hon. H. Patrick Leis, District Administrative Judge, 10th Judicial District, Suffolk County, the issue of the amount of attorneys' fees to be awarded to plaintiff is hereby referred to Principal Court Attorney Kathryn Coward as a Special Referee to hear and determine on April 25, 2011 at 11:00 a.m. at Supreme Court Building, One Court Street, Second Floor, Riverhead, New York.

Plaintiff, Capital One, N.A., successor by merger to North Fork Bank (“Capital One”) commenced this action to recover on a series of promissory notes by motion for summary judgment in lieu of complaint pursuant to CPLR 3213. Defendants have not submitted any opposition to the motion.

The papers submitted by Capital One in support of the motion reflect that on January 26, 2005, defendant Kevin McKosky executed a “Personal Guaranty of All Liability” (the McKosky Guarantee”) whereby he guaranteed to North Fork Bank (“North Fork”) the prompt and unconditional payment of claims of every nature North Fork then had against defendant Coastal Electrical Construction Corp (“Coastal”) or that were incurred in the future.

On January 27, 2005, McKosky, as President of defendant 185 Waverly Ave. Corp. (“Waverly”), executed a “Guarantee of All Liability” whereby Waverly guaranteed to North Fork and its successors “the prompt and unconditional payment of claims of every nature and description of Bank” against Coastal “whether now existing or hereinafter incurred” (the “Waverly Guarantee”).

October 26, 2007, defendant Kevin McKosky (“McKosky”), as President of Coastal, executed a promissory note (the “October 2007 Note”) in favor of North Fork, then a division of Capital One, pursuant to which Coastal agreed to pay North Fork \$46,000 plus interest. All unpaid principal and interest under the October 2007 Note was due on November 1, 2010. The October 2007 Note also provided that North Fork could declare the entire unpaid balance due and payable upon Coastal’s failure to pay any other obligation it owed to North Fork.

On December 20, 2007, McKosky, as President of Coastal, executed a promissory note (the “December 2007 Note”) in favor of North Fork, then a division of Capital One, pursuant to which Coastal agreed to pay North Fork \$50,000 plus interest. All unpaid principal and interest under the December 2007 Note was due on January 1, 2011. The December 2007 Note also provided that North Fork could declare the entire unpaid

balance due and payable upon Coastal's failure to pay any other obligation it owed to North Fork.

On May 19, 2008, McKosky, as President of Coastal, executed a promissory note (the "May 2008 Note") in favor of Capital One, pursuant to which Coastal agreed to pay Capital One \$40,000 plus interest. All unpaid principal and interest under the May 2008 Note was due on June 1, 2011. The May 2008 Note also provided that Capital One could declare the entire unpaid balance due and payable upon Coastal's failure to pay any other obligation it owed to Capital One.

On February 27, 2009, McKosky, as President of Coastal, executed a promissory note (the "February 2009 Note") in favor of Capital One, pursuant to which Coastal agreed to pay Capital One \$75,000 plus interest. All unpaid principal and interest under the February 2009 Note was due on April 1, 2012. The February 2009 Note also provided that Capital One could declare the entire unpaid balance due and payable upon Coastal's failure to pay any other obligation it owed to Capital One.

On September 11, 2009, McKosky, as President of Coastal, executed a restated promissory note (the "September 2009 Note") in favor of Capital One, pursuant to which Coastal agreed to pay Capital One the lesser of \$9,750,000 or the aggregate unpaid principal amount of all advances made to Coastal by Capital One, plus interest. All unpaid principal and interest under the September 2009 Note was due on June 1, 2010.

Each of the aforementioned notes obligated Coastal to pay North Fork's/Capital One's (hereinafter the "Bank") reasonable attorneys' fees in the event the Bank retained counsel with respect to enforcement of the Notes or any other document or instrument given to the Bank.

According to the affidavit of Ellen Barry, a Vice President of Capital One, submitted in support of the motion, Coastal did not pay all of the principal or interest due on the September 2009 Note by June 1, 2010, which constituted an event of default under that note. Barry states that the default on the September 2009 Note also

constituted an event of default under each of the other notes and that the default on the September 2009 note caused McKosky and Waverly to become liable under their respective guarantees. Capital One submits a document setting forth the amounts due and owing under each note as of September 7, 2010, and also provides the per diem interest amount on each note. Capital One requests summary judgment against the defendants in the amount of \$10,464,777.74, plus interest from September 7, 2010, costs and attorneys' fees.

As recently observed by the Appellate Division, Second Department in *Lugli v. Johnston* (78 AD3d 1133, 1134-5 [2d Dept 2010]):

In accordance with CPLR 3213, a party may commence an action in lieu of complaint when the action is "based upon an instrument for the payment of money only or upon any judgment." A promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time (citations omitted). "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" (*Weissman v. Sinorm Deli*, 88 NY2d 437, 444; citations omitted).

To establish a prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms (citations omitted).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the promissory notes signed by McKosky as President of Coastal, the "Personal Guaranty of All Liability" signed by McKosky individually, "Guarantee

of All Liability” signed by McKosky as President of 185 Waverly Avenue Corp., as well as the affidavit of Ellen Barry asserting that Coastal failed to repay the loan in accordance with the terms of the September 2009 Note, which triggered defaults under the remaining notes and liability of defendants McKosky and Waverly under their guarantees.

As noted above, defendants have not submitted papers in opposition to the motion.

Based on the foregoing, plaintiff’s motion for summary judgment in lieu of complaint is granted (*Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 AD3d 708 [2d Dept 2008]).

Submission of judgment shall abide the determination on the issue of the amount of attorneys’s fees to be awarded to plaintiff.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 4, 2011
Riverhead, New York



EMILY PINES
J. S. C.

FINAL
 NON FINAL