

JPMorgan Chase Bank, N.A. v F.C.M. Constr. Servs. Co., Inc.
2011 NY Slip Op 30792(U)
March 22, 2011
Sup Ct, Nassau County
Docket Number: 14706/10
Judge: Anthony L. Parga
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SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

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

Plaintiff,

INDEX NO. 14706/10

-against-

MOTION DATE: 2/17/11
SEQUENCE NO. 001

F.C.M. CONSTRUCTION SERVICES CO., INC.
d/b/a CONSTRUCTION SERVICES CO. and
FRANK C. MACCHIO,

Defendants.

-----X

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

Upon the foregoing papers, the motion by plaintiff for an order, pursuant to CPLR § 3215, granting default judgment against defendant, FCM Construction Services Co., Inc., d/b/a Construction Services Co., and granting summary judgment, pursuant to CPLR § 3212, against defendant Frank C. Macchio on plaintiff's first and second causes of action, is granted as directed below.

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 collect monies allegedly due and owing to Plaintiff under a business loan issued to defendant FCM Construction Services Inc. d/b/a Construction Services Co. (hereinafter "FCM") and an unconditional guarantee executed by defendant, Frank C. Macchio, which guaranteed FCM's obligations thereunder.

In support of its motion, plaintiff submits the affidavit of Roxanna Brinker, a Managed Assets Officer employed by the plaintiff. Ms. Brinker attests that on or about May 19, 2000, the defendant FCM executed and delivered to plaintiff a promissory note in the form of a Business

CreditLink Agreement (hereinafter referred to as "the note"). The note evidences a loan, initially not to exceed \$40,000.00, by means of FCM writing checks supplied by plaintiff. The note provides that if plaintiff makes any advances in excess of \$40,000.00 to FCM, then said excess shall be deemed to constitute an increase in FCM's loan and shall be due and payable immediately upon demand. Ms. Brinker attests that the principal amount of the loan was subsequently increased to \$47,500.00.

The note provided that FCM promises to pay plaintiff the principal amount of the Loan, with interest computed at the rate of 2% per annum above plaintiff's prime rate. The note also provides that any principal or interest which is not paid when due shall be subject to a late payment charge of 5% of the amount of any payment of principal and/or interest not received when due.

In addition, on May 19, 2000, in connection with the execution and delivery of the note, the defendant, Frank C. Macchio, executed and delivered to plaintiff an absolute and unconditional General Guarantee (hereinafter referred to as "the guarantee") of payment for the debts and obligations of FCM. The guarantee was executed by Frank C. Macchio in the presence of a Notary Public on the same date as the note.

Ms. Brinker attests that defendants have defaulted on the note by failing to make the required payments of principal and interest. She further attests that demand for payment was issued to the defendants on or about July 12, 2010. Ms. Brinker attests that there is an unpaid principal balance in the amount of \$46,664.16 due, plus interest of \$988.40 and late charges/fees in the amount of \$102.34 to July 12, 2010, making a sub-total of \$47,754.90 due and owing to plaintiff. Plaintiff also submits that defendants owe additional interest on the principal from July 13, 2010 to the date of judgment, computed at 5.25%.

Plaintiff served the summons and complaint for this action upon defendant FCM on or about August 9, 2010. Additional service pursuant to CPLR §3215(g) was effectuated upon all defendants on September 24, 2010. Plaintiff contends that to date, FCM has not answered the complaint or appeared in the action. Accordingly, plaintiff argues that it is entitled to default judgment against defendant FCM. As plaintiff has submitted proof of timely service of the summons and complaint on FCM, proof of additional service upon FCM, and an affidavit of Ms. Brinker setting forth proof of the facts constituting the claim and the amount owed, plaintiff has

demonstrated a prima facie showing of entitlement to default judgment against defendant FCM. (See, CPLR §3215).

In addition, service of the summons and complaint was timely made upon defendant Frank C. Macchio, and defendant Frank C. Macchio served an answer to the complaint, by his attorneys, on or about October 26, 2010. Plaintiff contends that defendant Macchio's answer consists solely of general denials and three unsupported affirmative defenses. Accordingly, plaintiff argues that the affirmative defenses of defendant Macchio should be stricken. Plaintiff also argues that it is entitled to summary judgment against defendant Macchio based upon his unconditional guarantee of FCM's obligations under the loan.

Plaintiff has established a prima facie showing of entitlement to summary judgment by demonstrating proof of the unpaid note, proof of 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); see also, *DMJR Enterprises v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 (2d Dept. 2000)). 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)).

Defendant Frank C. Macchio submits an affidavit in opposition in which he attests that he does not recall signing the guarantee. He requests that the court deny summary judgment to afford him with an opportunity to conduct discovery to determine if the signature is fraudulent. Defendant Frank C. Macchio's opposition fails to raise a triable issue of fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment. Mr. Macchio does not

attest that he did not sign the guarantee or that he executed same under duress, but attests that he does “not recall” signing the guarantee. His signature on the guarantee, however, is notarized, and the guarantee was executed on the same date as the loan. Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” (*Beitner v. Becker*, 24 A.D.3d 406, 824 N.Y.S.2d 155 (2d Dept. 2006)); *see, North Fork Bank Corp. v. Graphic Forms Associates, Inc.*, 36 A.D.3d 676, 828 N.Y.S.2d 194 (2d Dept. 2007); *see also, Banco Popular v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381, 806 N.E.2d 488 (2004)(holding that defendants affidavit alone, without factual assertions supporting a claim of forgery, was inadequate to raise an issue of fact necessitating a trial). Here, Mr. Macchio’s affidavit fails to raise factual assertions which support his self-serving attestation that he does not recall signing the guarantee. Further, 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)). 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)).

In addition, defendant Frank C. Macchio’s answer contains affirmative defenses that are insufficient to defeat summary judgment. General defenses without proof of their validity are unacceptable and insufficient in preventing summary judgment. (*Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791 (2d Dept. 1985). 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)).

Lastly, defendant Macchio has failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence sufficient to defeat the plaintiff’s motion. The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered” by further discovery is an insufficient basis for denying the motion. (*Woodard v.*

Thomas, 2010 WL 4008451 (2d Dept. 2010); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006)).

Accordingly, plaintiff's motion for default judgment against defendant FCM and summary judgment against defendant Frank C. Macchio on plaintiff's first two causes of action is granted. Submit judgment on notice.


In addition, plaintiff's third cause of action for attorneys fees is severed. Plaintiff shall serve file a Notice of Inquest, together with a copy of this order and the Note of Issue upon defendants, by certified mail, and shall serve copies of same, together 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 **May 20, 2011** at 9:30 A.M., for a hearing to determine plaintiff's entitlement to, and amount 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.

This shall constitute the Decision and Order of this Court.

Dated: March 22, 2010


Anthony L. Parga, J.S.C.

Cc: Bonchonsky & Zaino, LLP
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ENTERED
MAR 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE