SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17
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JPMORGAN CHASE BANK, N.A.,

Plaintiff,

- against -

MANSUKH R. PATEL, THERESA MURPHY and JOHN LECHNER a/k/a JOHAHN LECHNER,

Defendants.
---------- X

DECISION AND ORDER

Index No.: 26215/2009

Original Return Date: 06/11/10
Motion Seq. Nos.: 001 and 002

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 8 were submitted on this Motion and Cross-Motion on November 5, 2010:

	Papers numbered:
Notice of Motion, Affidavit, and Affirmations (2) in Support	1-4
Notice of Cross-Motion, Affidavit and Affirmation	5-7
Reply Affirmation	8

Plaintiff, JPMorgan Chase Bank, N.A., moves for an Order: (1) pursuant to CPLR 3212, granting it summary judgment as against defendant Theresa Murphy; (2) pursuant to CPLR 3215, granting it a default judgment as against defendant Mansukh R. Patel; (3) amending the complaint *nunc pro tunc* to discontinue the second cause of action against defendant Patel; and (4) severing its claims as against defendant John Lechner a/k/a Johann Lechner.

Defendant Theresa Murphy ("Murphy") cross-moves for an Order: (1) pursuant to CPLR 3025(b) permitting her to serve and file a proposed verified amended answer; (2) pursuant to CPLR 3211(a)(7) dismissing the verified complaint herein as it pertains to her; and (3) pursuant to CPLR

3212 granting her summary judgment dismissal of plaintiff's complaint as asserted against her.

The motion and cross-motion are decided as hereinafter set forth:

This action was commenced on or about December 23, 2009 by JPMorgan Chase Bank, N.A. ("JPMorgan Chase") to collect monies allegedly due and owing to it arising out of: (1) a Promissory Note executed by non-party Sky-Lift Corporation ("Sky Lift"), and defendants Murphy and Lechner's allegedly absolute, personal, unconditional and continuing guarantee(s) of each and every obligation of Sky Lift to the plaintiff; and (2) a Business Revolving Credit Agreement ("BRCA") with non-party MRP-SKY Corporation ("MRP"), and defendants Patel and Lechner's allegedly absolute, personal, unconditional and continuing guarantee of each and every obligation of MRP to the plaintiff, a national banking association.

Non-party Sky Lift was a New York corporation involved in the construction industry. It filed a certificate of dissolution with the New York State Department of State on April 29, 2009 and is therefore not a party to this action. Non-party MRP was also a New York corporation that filed its certificate of dissolution with the New York State Department of State on June 30, 2004 and is therefore not a party to this action. The founder and chief executive officer of Sky Lift was defendant John Lechner a/k/a Johann Lechner ("Lechner"). Defendant Lechner has not appeared in this action but has filed for Chapter 7 bankruptcy protection. Defendant Theresa Murphy ("Murphy") was the secretary of Sky Lift.

Defendants Mansukh Patel ("Patel") and Theresa Murphy are alleged to have personally guaranteed the liability and obligations of non-parties MRP and Sky Lift, respectively. Notably, defendant Patel (the president of MRP) has not appeared in this action.

On or about May 27, 1997 (and then again on February 14, 2001), defendant Murphy made,

executed and delivered to the plaintiff, JPMorgan Chase, absolute, personal, unconditional and continuing guarantees of each and every obligation of non-party Sky Lift. On or about June 18, 1997, Sky-Lift applied and was approved for a Business Revolving Line of Credit with the plaintiff in the principal amount of $35,000.00, with interest thereon from the date each draw was made. On or about February 16, 2001, Sky Lift made a request to JPMorgan Chase for an increase in the credit line to the amount of $50,000.00. On June 13, 2008, the credit lines entered into by Sky Lift on June 18, 1997 and February 16, 2001 were modified to a Promissory Note (the "Note") in the principal amount of $27,656.24, with interest thereon at a fixed rate per annum equal to 6.00% and a default rate of 9.00%. On April 29, 2009, Sky Lift filed a certificate of dissolution with the New York State Department of State (and is therefore not a party to this action).

On or about October 5, 1999, non-party MRP applied and was approved for a Business Revolving Credit Account Agreement ("BRCA") with JPMorgan Chase in the principal amount of $30,000.00, with interest thereon from the date each draw was made, at a fluctuating rate per annum equal to Prime plus 1.00%. On the same day, defendant Patel made, executed and delivered to Chase an absolute, personal, unconditional and continuing guarantee of each and every obligation of MRP. On June 30, 2004, MRP filed a certificate of dissolution with the New York State Department of State.

On September 5, 2009, defendants Patel and Lechner defaulted under the guarantees to BRCA entered into by MRP. Plaintiff claims that defendants Patel and Lechner defaulted under the terms of the BRCA Personal Guarantee by failing to pay $20,137.26 in principal due on the BRCA since September 5, 2009, the default date, together with interest at the BRCA Interest Rate from August 5, 2009.

On November 10, 2009, defendants Murphy and Lechner also defaulted under the Note from Sky Lift.. Plaintiff claims that defendants defaulted under the terms of the personal guarantees by failing to pay $19,810.15 in principal due on the Note since November 10, 2009, together with interest at a fixed rate of 6.00% from October 10, 2009 to November 9, 2009, and at a default fixed rate of 9.00 % from November 10, 2009, together with late charges at the rate of 5.00% of each payment due as set forth in the Note.

By Order dated September 27, 2010, the Court adjourned the motion to provide for service of the motion papers upon the defendant Murphy.

Default Judgment: Mansukh Patel

As a preliminary matter, the plaintiff requests that its second cause of action against defendant Patel (based upon a Sky Lift guarantee), which was erroneously included in the complaint, be stricken and that the complaint be deemed amended *nunc pro tunc*. This unopposed motion is granted.

Plaintiff, JPMorgan Chase, seeks an Order, *inter alia*, pursuant to CPLR 3215, granting it a default judgment as against defendant Mansukh R. Patel. The motion is unopposed.

A party may seek a default judgment against a defendant who fails to make an appearance (CPLR 3215[a]). On an application for a default judgment, the moving party must present proof of service of the summons and complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due (CPLR 3215[f]). The moving party must also make a prima facie showing of a cause of action against the defaulting party (*Joosten v. Gale*, 129 AD2d 531 [1st Dept. 1987]).

When a defendant has failed to appear, the plaintiff does not have the benefit of discovery.

Thus, "the affidavit (of merit) or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists" (*Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]). Moreover, "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inference that flow from them" (*Id.*; *see also, Rokina Optical Co. v. Camera King*, 63 NY2d 728, 730 [1984]).

Here, plaintiff has established a *prima facie* case showing this Court's jurisdiction over defendant Mansukh Patel. The affidavit of service establishes service upon defendant Patel pursuant to CPLR 308(4) and 313. Moreover, plaintiff's motion for a default judgment is supported by an affidavit made by Shirley White, the Assistant Vice President of JPMorgan Chase, a person who has first hand knowledge of the facts constituting the cause of action (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept. 1997]; *Adkins v. Lipner, Gordon & Co.*, 10 Misc.3d 1062[A] [Sup. Court. Nassau Co.. 2005]).

As against defendant Patel, plaintiff claims that on or about October 5, 1999, defendant Patel made, executed and delivered to Chase an absolute, personal, unconditional and continuing guarantee of each and every obligation of MRP and that defendant Patel failed to pay each and every installment due under the BRCA since September 5, 2009 and every month thereafter.

A *prima facie* case for breach of a guarantee is established by showing the existence of the guarantee, the obligations therein and the failure of the guarantor to make the necessary payments (*Verela v. Citrus Lake Development, Inc.*, 53 AD3d 574 [2nd Dept. 2008]); *Physician's Domain, Inc. v. Grosso*, 288 AD2d 362 [2nd Dept. 2001]). Submission of an unconditional guarantee along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212 (*European American Bank & Trust Co. v. Schirippa*, 108 AD2d 684 [1st Dept. 1985]).

JPMorgan Chase has established the existence of the personal guarantee by attaching an executed copy of the Guarantee, signed by defendant Patel and dated September 27, 1999. JPMorgan Chase, by affidavit of its Assistant Vice President, has also established that defendant Patel failed to make the payments specified in the BRCA and the Personal Guarantee.

Finally, JPMorgan Chase has established defendant Patel's obligations under the BRCA and the Guarantee thereunder dated September 27, 1999. The terms of the Personal Guarantee outlined in the BRCA state:

> If this application is approved, I/we individually and jointly, absolutely and unconditionally guarantee to The Chase Manhattan Bank and its assigns the prompt payment of each and every obligation and liability of every nature or description of the Applicant to the Bank, whether now existing or arising I the future ("Obligations"). *I agree that all Obligations will become immediately due without notice or demand from the Bank if the Applicant at any time breaches any term or condition fo the note or Account Agreement(s) for which the Applicant has applied.* This Guarantee will continue even if the Bank is unable, for whatever reason, to obtain payment from the Applicant or other guarantor, or of any of the Obligations have been released or such Obligations are renewed or time for payment is extended. I waive presentment, demand, protest, notice of non-payment or protest thereof, and furthermore waive all Rules of Suretyship law, rights of subrogation and any defense which could be asserted by the Applicant, the undersigned or other guarantor. This Guarantee shall continue in effect with respect to any and all Obligations incurred prior to the time the Bank receives such notice, including the amount of any undrawn revolving credit line or commitment to land, whether or not conditional.
>
> As collateral security for the payment of any and all Obligations of the Applicant to the Bank, I grant to the Bank a security interest in and a lien upon and right of offset against all moneys, deposit balances, securities or other property or interest therein of mine now or ant any time hereafter held or received by or for or left in the possession or control of the Bank or any of its affiliates, whether of deposit, safekeeping, custody, transmission, collection, pledge or for any other or different purpose

By the very terms of the Guarantee, no notice was required by JPMorgan Chase to enforce the Guarantee. Specifically, the Guarantee stated, in pertinent part: "I agree that all Obligations will become immediately due without notice or demand from the Bank if the Applicant at any time

breaches any term or condition of the note or Account Agreement(s) for which the Applicant has applied."

All notice requirements set forth in CPLR 3215(g) have been satisfied and although served with the motion papers, defendant Patel has failed to respond thereto. A *prima facie* cause of action has been established. The motion for a default judgment against defendant Patel is granted.

Severance: John Lechner

Plaintiff also seeks an Order severing its claims as against defendant John Lechner and discontinuing the action against him without prejudice. The motion is also unopposed.

On or about April 13, 2010, defendant Lechner filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court in the Southern District of New York under Case Number 10-22715-rdd. Plaintiff submits that as a result of Lechner's bankruptcy proceeding [and the resulting automatic bankruptcy stay in effect under 11 USC § 362], the present action should be severed and discontinued without prejudice.

CPLR §603 provides:

> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

The decision whether to sever various issues and claims or to dismiss a third party complaint without prejudice, or to conduct a bifurcated trial, rests within the discretion of this court (CPLR 603; CPLR 1010; *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726, 727 [2nd Dept. 2006]; *Wright v. New York City Hous. Auth.*, 273 AD2d 378 [2nd Dept. 2000]). However, the Court of Appeals has advised that "[a]lthough it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly" (*Shanley v. Callanan Indus.*, 54 NY2d 52, 57 [1981]). Severance

should not be ordered where "there are common factual and [legal] issues involved in the claims ..., and the interests of judicial economy and consistency will be served by having a single trial" (*Ingoglia v. Leshaj*, 1 AD3d 482, 485 [2nd Dept. 2003]; *Vierya v. Briggs & Stratton Corp.*, 184 AD2d 766, 767 [2nd Dept. 1992]).

With these guidelines in mind and under the circumstances of this case, this Court deems it appropriate to sever the plaintiff's claims as against defendant Lechner (*Rosenbaum v. Dane & Murphy, Inc.*, 189 AD2d 760 [2nd Dept. 1993]; *see also Centrust Services, Inc. v. Guterman*, 160 AD2d 416 [1st Dept. 1990]). Granting a severance pursuant to CPLR 603 will prevent any prejudice to the plaintiff stemming from any delay as a result of defendant Lechner's bankruptcy proceedings and the automatic stay (*Golden v. Moscowitz*, 194 AD2d 385 [1st Dept. 1993]). Therefore, plaintiff's motion for an Order severing its claims against defendant Lechner and dismissing such claims without prejudice is granted.

Cross-motion to Amend: Theresa Murphy

Defendant, Theresa Murphy, who is now represented by counsel, cross-moves for an Order, *inter alia*, pursuant to CPLR 3025(b) permitting her to serve and file a proposed verified amended answer on the grounds that her original answer was advanced in a *pro se* capacity. Counsel for Murphy maintains that the *pro se* answer was prepared by defendant Murphy without the assistance of an attorney and among other things, does not comply with the pleading requirements of CPLR §3018 and is not verified as it should have been pursuant to CPLR §3020. Counsel for defendant Murphy submits that the proposed amended verified answer seeks to bring defendant Murphy's pleading into compliance with the CPLR and sets forth five meritorious defenses.

Consistent with the general rule favoring amendments of pleadings in the absence of

prejudice or surprise (CPLR 3025 [b]; *Valdes v. Marbrose Realty, Inc.*, 289 AD2d 28, 29 [1st Dept. 2001]), this Court, in its discretion, herewith grants defendant Murphy's motion to amend her initial *pro se* answer to a verified amended answer wherein she is represented by counsel.

Summary Judgment: JP Morgan Chase and Theresa Murphy

Finally, both plaintiff JPMorgan Chase and defendant Theresa Murphy move for an Order granting them summary judgment against each other. Specifically, plaintiff, JPMorgan Chase, seeks summary judgment against defendant Murphy on the grounds that she is liable for the amounts due and owing under a certain Promissory Note and the absolute, personal, unconditional guarantee of each and every obligation thereunder. Defendant Murphy, on the other hand, seeks dismissal pursuant to CPLR 3211(a)(7) and 3212 of the plaintiff's complaint as against her.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). CPLR 3212(b) provides that a prima facie showing is made by supporting the motion with affidavits, a copy of the pleadings and by other available proof.

A *prima facie* case for breach of a guarantee is established by showing the existence of the guarantee, the obligations therein and the failure of the guarantor to make the necessary payments (*Verela v. Citrus Lake Development, Inc., supra.*). Submission of an unconditional guarantee along with an affidavit of nonpayment is sufficient for a judgment under CPLR 3212 (*European American Bank & Trust Co. v. Schirippa, supra.*).

JPMorgan Chase has established the existence of the personal guarantee and the promissory

note by attaching executed copies of same to the pleadings. JPMorgan Chase, by affidavit of its Assistant Vice President, has also established that defendant Murphy has failed to pay the amounts due under the Note and the Personal Guarantee. Finally, JPMorgan Chase has established defendant Murphy's obligations under the Note and the Guarantee. The terms of the Personal Guarantee outlined in the Note confirm that the "Guarantor's obligation under the Guaranty is UNLIMITED;" that "[t]he Guaranty is a continuing guaranty and will continue to be in effect until final payment and performance in full of all Indebtedness and the termination of any commitment of Lender to make loans or other financial accommodations to Borrower;" and that "[t]he Guaranty is an absolute guarantee of payment and performance and not of collection" [page 4 of Promissory Note].

Having submitted an unconditional guarantee along with an affidavit of nonpayment, plaintiff has established its *prima facie* burden fo entitlement to judgment as a matter of law (*European American Bank & Trust Co. v. Schirippa*, *supra*).

Once the plaintiff has met its burden, it is incumbent upon the defendant to establish, by admissible evidence, that a triable issue of fact exists with respect to a bona fide defense (*SCP (Bermuda) Inc. v. Bermudatel Ltd.*, 224 AD2d 214 [1st Dept. 1996]; *Silber v. Muschel*, 190 AD2d 727 [2nd Dept. 1993]). Here, however, in response to JPMorgan Chase's *prima facie* showing, defendant Murphy's averments are insufficient to create a triable issue of fact, or to constitute a defense that would defeat JPMorgan Chase's motion. Thus, JPMorgan Chase's motion must be granted (*Lorenz Diversified Corp. v. Falk*, 44 AD3d 910 [2nd Dept. 2007]; *Takeuchi v. Silberman*, 41 AD3d 336 [1st Dept. 2007]).

Specifically, defendant Murphy's argument that as JPMorgan Chase does not submit any proof that the 2001 application by Sky Lift to Chase Manhattan for an additional revolving line of

credit for $50,000.00 was ever approved and that therefore no guarantee took effect pursuant to the 2001 application, is entirely misplaced. The fact is that in 2008 Sky Lift executed the Note which was a modification of an earlier loan between JPMorgan Chase and Sky Lift. Defendant Murphy's argument that unlike defendant Lechner, she never personally guaranteed the Note is also misplaced.

Based upon a plain and simple reading of the second provision of the June 2008 Note entitled "RENEWAL NOTE," it is clear that:

> RENEWAL NOTE: This Note is a renewal of an earlier loan or credit extension to Borrower from Lender, or from a JP Morgan Chase & Co. Affiliate which transferred the loan to Lender, and is identified in Lender or the affiliate's internal records...This Note shall not release or affect the liability of any guarantor, surety or endorser of the loan, or release any security interest granted by any owner or of any collateral securing the loan. This Note shall be considered a modification only, and not a novation.

Thus, it is clear to this Court that defendant Murphy's obligations under the credit line(s) entered into by Sky Lift and JPMorgan Chase on June 18, 1997 and February 16, 2001 were not released or otherwise abrogated upon the execution of the Promissory Note by Sky Lift in June 2008.

Defendant Murphy also argues that she is relieved from any obligations under the guarantees at issue herein because the terms of the underlying obligations were modified without her consent. This argument is entirely meritless. In the 1997 Personal Guarantee, defendant Murphy clearly acknowledged and agreed to "absolutely and unconditionally guarantee to The Chase Manhattan Bank...and its assigns the prompt payment of each and every obligation and liability of every nature and description of [Sky Lift] to the Bank, whether now existing or arising in the future." Taken together with the fact that defendant Murphy fails to proffer any evidence or support for the claim that any modification to the loans between Sky Lift and The Chase Manhattan Bank or its assigns -- namely, JP Morgan Chase – would in any way release her from her obligations thereunder, this

Court finds defendant Murphy's argument based upon consent to be entirely unavailing.

Therefore, inasmuch as defendant Murphy's defenses and arguments as to the validity of the personal guarantee are belied by the documentary evidence, JPMorgan Chase's motion for summary judgment on defendant Murphy's personal guarantee must also be granted.

Thus, defendant Murphy's cross- motion for an Order pursuant to CPLR 3211(a)(7) and/or 3212 dismissing plaintiff's complaint is denied.

Accordingly, after due deliberation, it is

On Motion of CULLEN AND DYKMAN LLP by MELISSA H. FIELD, ESQ.,

ORDERED, that due to the filing of a Petition for Chapter 7 bankruptcy relief by the defendant JOHN LECHNER a/k/a JOHAHN LECHNER in the United States Bankruptcy Court for the Southern District of New York (under case number 10-22715-rdd), the plaintiff's Third, Fifth and Sixth Causes of Action seeking judgment against him individually based upon the purported Guarantee(s) are **severed** and **discontinued without prejudice**; and it is further

ORDERED, that the Second Cause of Action against defendant MANSUKH PATEL is **severed and discontinued**; and it is further

ORDERED, that the motion of the Plaintiff, JPMORGAN CHASE BANK, N.A. for an Order pursuant to C.P.L.R. 3215 for entry of a default judgment on its Fourth Cause of Action against the defendant MANSUKH PATEL. is **granted,** and the Court hereby awards the Plaintiff a judgment in the principal sum of $20,137.26 as against defendant MANSUKH PATEL, with interest at the BRCA interest rate from October 10, 2009 through the date of entry of the Judgment, together with late charges of 5.0% of each payment due pursuant to the terms and conditions of the BRCA; and it is further

ORDERED, that the cross-motion by the defendant THERESA MURPHY to amend her answer in the form annexed to the cross-motion as Exhibit "A" is **granted**, but in all other respects, said cross-motion is **denied**; and it is further

ORDERED, that the motion of the plaintiff, JPMORGAN CHASE BANK, N.A., for an Order pursuant to C.P.L.R. 3212 as against the defendant THERESA MURPHY is **granted,** and the Court hereby awards the plaintiff summary judgment in the principal sum of $19,810.15 as against defendant THERESA MURPHY, with interest at the rate of 6% from October 10, 2009 through November 9, 2009, and at the default rate of 9% from November 10, 2009 through the date of entry of the Judgment, together with late charges of 5.0% of each payment due pursuant to the terms and conditions of the Note; and it is further

ORDERED, that within SIXTY (60) DAYS of the date hereof, the plaintiff shall settle a proposed Judgment on notice to the defendants; and it is further

ORDERED, that in accordance with the provisions of the Note, BRCA, and guarantees, the plaintiff is hereby awarded attorneys' fees in the reasonable sum of **$1,900.00** pursuant to the Affirmation in Support of Attorneys ' Fees dated May 14, 2010 and submitted as a part of the within motion, payable $950.00 from defendant MURPHY and $950.00 from defendant PATEL.

All applications not specifically addressed herein are deemed **denied**.

This shall constitute the Decision and Order of the Court.

Dated: Mineola, New York
March 29, 2011

ENTER:

JOEL K. ASARCH, J.S.C.

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Copies mailed to:

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