

Signature Bank v New Roads Realty Corp.

2011 NY Slip Op 31408(U)

May 13, 2011

Sup Ct, Nassau County

Docket Number: 002165-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
SIGNATURE BANK,

Plaintiff,

-against-

NEW ROADS REALTY CORP.,

Defendant.

TRIAL/IAS PART: 20

NASSAU COUNTY

Index No: 002165-11

Motion Seq. No: 1

Submission Date: 3/28/11

-----X

The following papers have been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Affidavit of Service.....X**
- Notice Pursuant to CPLR §§ 3215(g)(4)(i) and (ii).....X**

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Signature Bank (“Signature” or “Plaintiff”) on February 28, 2011 and submitted on March 28, 2011. For the reasons set forth below, the Court grants Plaintiff’s motion for summary judgment and directs that Plaintiff shall recover from Defendant New Roads Realty Corp. the sum of \$1,416,825.92, plus interest, attorney’s fees, costs and disbursements to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting Plaintiff summary judgment against Defendant New Roads Realty Corp. (“New Roads”) in the amount of \$1,456,441.21, together with statutory interest of 9% per annum from September 14, 2010, together with costs, disbursements and reasonable attorney’s fees as provided for in the

underlying promissory note and guaranty.

B. The Parties' History

Salvatore Trifiletti ("Trifiletti") affirms as follows in support of Plaintiff's motion:

Trifiletti is the Manager of Special Accounts of Signature, a bank authorized to transact business in New York. Trifiletti is familiar with the facts and circumstances of this matter, either from his personal knowledge or his review of books and records maintained by Signature in the ordinary course of its business.

Signature brings this action to enforce the terms of a guaranty of a promissory note made by Nebraska Meat Corp. ("Nebraska"). Signature has already obtained a judgment against Nebraska ("Nebraska Judgment") for the underlying debt, a copy of which is provided (Ex. A to Trifiletti Aff. in Supp.). Pursuant to the Nebraska Judgment, dated September 14, 2010, Signature is authorized to recover from Nebraska the sum of \$1,456,441.21, consisting of 1) \$1,416,825.92, representing the amount claimed in the first cause of action, 2) \$32,188.82 in interest at the rate of 10.5% per annum from June 28, 2010 until entry of judgment,¹ 3) \$6,921.47 in accrued and unpaid interest as of June 28, 2010, and 4) \$505.00 in costs and disbursements.

On or about June 29, 2001, New Roads executed a Continuing Guaranty ("Guaranty") (Ex. B to Trifiletti Aff. in Supp.), pursuant to which New Roads guaranteed all of Nebraska's obligations to Signature. On or about March 15, 2010, Nebraska executed a promissory note ("Note") (*id.* at Ex. C) in the principal amount of \$1,480,825.92, payable to Signature on the terms set forth in the Note. Nebraska defaulted on its obligations under the Note by failing to make the payment due on May 29, 2010, resulting in the Nebraska Judgment. New Roads is in default of its obligations under the Guaranty, by failing to pay the amounts due.

Paragraph 9 of the Guaranty, titled "Attorneys Fees," reflects that Guarantor New Roads agreed to pay reasonable attorney's fees, including the allocated costs of Signature's in-house counsel, and all other costs and expenses that Signature may incur in enforcing the Guaranty.

Plaintiff provides an Affidavit of Service dated February 23, 2011 reflecting that, on

¹ The first page of the Nebraska Judgment reflects interest from June 28, 2010 until entry of judgment in the sum of \$32,188.82, while the second page of the Nebraska Judgment reflects that the same interest award is \$32,198.82. The \$32,188.82 figure is apparently correct, given the total.

February 17, 2011, New Roads was served, pursuant to Business Corporation Law § 306, with the Summons, Notice of Motion and supporting papers. That service was effected via personal service of the papers at the office of the New York State Secretary of State, by delivery to an authorized representative in the Corporation Division of the Department of State empowered to receive such service.

Plaintiff also provides a Notice Pursuant to CPLR §§ 3215(g)(4)(i) and (ii) reflecting that the Summons and Notice of Motion were served on New Roads, pursuant to BCL § 306, by service on the Secretary of State as an agent of the Defendant corporation.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment in lieu of complaint by producing the Note and Guaranty, which constitute instruments for the payment of money only pursuant to CPLR § 3213, and submitting proof of Nebraska's failure to make payment in accordance with the terms of the Note and New Roads' failure to make payment in accordance with the terms of the Guaranty. In addition, pursuant to the terms of the Guaranty, Plaintiff is entitled to reasonable attorney's fees incurred in connection with its efforts to enforce the Guaranty.

Defendant has not submitted any 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 (1st Dept. 2002), quoting *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 (1st Dept. 2000).

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

A personal guarantee qualifies as an instrument for the payment of money only pursuant to CPLR § 3213. *Council Commerce Corp. v. Paschalides*, 92 A.D.2d 579 (2d Dept. 1983). 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. dismiss.*, 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 concludes that Plaintiff has demonstrated its right to judgment against New Roads by producing the Note and Guaranty, which is in writing executed by the President of New Roads and reflects New Roads' clear and explicit intent to guarantee the obligation of Nebraska., and demonstrating Nebraska's default under the Note and New Roads' default under

the Guaranty. The Court, however, has insufficient evidence on which to base a counsel fee award and, therefore, refers that matter, as well as the determination of interest, costs and disbursements, to an inquest.

In light of the foregoing, it is hereby:

ORDERED, that Plaintiff's motion for summary judgment is granted; and it is further

ORDERED, that Plaintiff shall recover from Defendant New Roads Realty Corp. the sum of \$1,416,825.92, plus interest, attorney's fees, costs and disbursements to be determined at an inquest; 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, costs and disbursements on June 20, 2011 at 10:00 a.m.; and it is further

ORDERED, that Plaintiff's attorneys shall serve upon the Defendant 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 June 3, 2011; and it is further

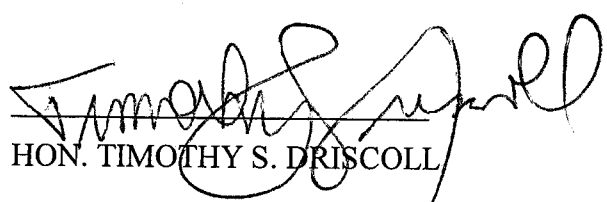
ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
May 13, 2011


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
MAY 17 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE