

**State Bank of Long Is. v Haywood-Berk Floor Co.,
Inc.**

2011 NY Slip Op 31596(U)

May 31, 2011

Sup Ct, Nassau County

Docket Number: 000467-11

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

STATE BANK OF LONG ISLAND,

Plaintiff,

-against-

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 000467-11
Motion Seq. No: 1
Submission Date: 4/1/11**

**HAYWOOD-BERK FLOOR CO., INC.
and ROGER BERK,**

Defendants.

-----X

Papers Read on this motion:

- Notice of Motion, Proposed Order and Judgment, Affirmation in Support,
Affidavit of Merit and Exhibits.....X**
- Affirmation in Opposition and Affidavit in Opposition.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation, Affidavit of Merit and Exhibit.....X**

This matter is before the court on the motion filed by Plaintiff State Bank of Long Island ("SBLI" or "Plaintiff") on March 3, 2011 and submitted on April 1, 2011. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court grants Plaintiff summary judgment on the first and third causes of action in the Complaint and awards Plaintiff judgment against Defendants Haywood-Berk Floor Co., Inc. and set Roger Berk, jointly and severally, in the amount of \$749,000, together with interest at the rate of 12% from August 1, 2010 through and including September 7, 2010, default interest at the rate of 17% from and after September 8, 2010, late charges of \$37,924.36, and costs and disbursements.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR §3212, granting summary judgment in favor of Plaintiff. Defendants Haywood-Berk Floor Co., Inc. (“Borrower”) and Roger Berk (“Guarantor”) oppose Plaintiff’s motion.

B. The Parties’ History

The Complaint (Ex. A to Soderberg Aff. in Supp.) alleges as follows:

On or about July 31, 2010, SBLI renewed its credit facility to Borrower. Borrower then made, executed and delivered to SBLI, for value received, a promissory note, in writing, in the original principal amount of \$749,000.00 (“Note”) (Ex. A to Compl.). Pursuant to the promissory note, Borrower promised to repay the principal amount, along with interest at the initial rate of 12% per annum, on August 31, 2010. The Note provides that on default, or after the maturity date, interest shall accrue at the rate of 5% in excess of the Note rate. The Note further provides that, if there is an event of default under the Note, SBLI may charge Borrower a late fee of up to five (5%) percent of the unpaid portion of the regularly scheduled payment or \$25.00, whichever is greater. Interest is payable in arrears pursuant to the Note.

On or about December 7, 2005, Guarantor made, executed and delivered to Plaintiff, for value received, a guaranty (“Guaranty”) (Ex. C to Compl.), pursuant to which Guarantor guaranteed to Plaintiff the payment of Borrower’s liabilities to Plaintiff. Plaintiff, in reliance on and in consideration of the Guaranty, extended credit to Borrower.

Borrower also executed and delivered to Plaintiff, on or about December 7, 2005, a Security Agreement (Ex. D to Compl.), pursuant to which Borrower granted to Plaintiff a security interest in Borrower’s equipment, inventory, accounts receivable, chattel paper and other personal property (collectively “Collateral”), as security for the payment of Borrower’s indebtedness to Plaintiff. Plaintiff perfected its security interest by filing a UCC-1 Assignment Statement (*id.* at Ex. E) with the Secretary of State of the State of New York on December 13, 2005. The Collateral is believed to be located at 414 West Broadway, New York, New York (“Premises”) and Plaintiff alleges that it cannot repossess the Collateral without breaching the peace.

The Note is in default due to Borrower’s failure to pay the amount due on August 31, 2010, and each month thereafter. By letter dated October 22, 2010 (“Demand Letter”) (Ex. B to

Compl.), SBLI advised Borrower and Guarantor that the loan was in default and demanded payment. SBLI further advised Defendants that if SBLI did not receive the outstanding sums due within ten (10) days of the Demand Letter, SBLI would accelerate the balance of the loan and commence an action against Defendants. As of December 31, 2010, Defendants, jointly and severally, owe SBLI \$749,000.00 in principal, plus interest from September 1, 2010 and late charges of \$37,924.36. In addition, the Note and Guaranty provide that Borrower and Guarantor will pay all costs and expenses, including reasonable attorney's fees, incurred by SBLI in collection and enforcement of the Note and Guaranty.

The Complaint contains five (5) causes of action: 1) against Borrower, jointly and severally, for judgment on the Note in the amount of \$749,000.00, with interest at the rate of 17% per annum from and after September 1, 2010, together with late charges of \$37,924.36, 2) against Borrower for attorney's fees, costs and expenses incurred by Plaintiff in enforcing and collecting on the Note, 3) against Guarantor, jointly and severally, for the sums sought against Borrower in the first cause of action, 4) against Borrower for attorney's fees, costs and expenses incurred in enforcing and collecting on the Note, and 5) against both Defendants, for a judgment directing that Plaintiff is entitled to immediate possession of the Collateral located at the Premises, or elsewhere, and directing that the Collateral be delivered to Plaintiff.

Plaintiff's counsel provides an itemized list of costs and disbursements reflecting that Plaintiff incurred total costs and disbursements in the sum of \$930.00.

In their Answer (Ex. B to Soderberg Aff. in Supp.), Defendants 1) deny, or deny knowledge and information sufficient to form a belief as to the truth of, the majority of the allegations in the Complaint; and 2) assert seven (7) affirmative defenses. Those affirmative defenses are 1) the Complaint fails to state a cause of action against the Defendants; 2) the Court lacks personal jurisdiction over Defendants; 3) Plaintiff breached all agreements entered into between Plaintiff and Defendants; 4) any damages suffered by Plaintiff are the result of Plaintiff's own culpable conduct, and were not caused by Defendants; 5) Plaintiff's claims are barred by the doctrines of waiver and estoppel; 6) the Complaint fails to alleged with adequate specificity the subject matter and terms of the alleged agreement; and 7) Plaintiff's claims are barred by the Statute of Frauds.

In his Affidavit in Support, Stephen B. Mischo ("Mischo"), a Vice President of SBLI, affirms that he is providing his Affidavit based on the records maintained by SBLI in the

ordinary course of its business. Mischo affirms the truth of the allegations in the Complaint regarding Defendants' execution of the Note, Guaranty and Security Agreement, the relevant provisions of those agreements, Defendants' default in connection with those agreements, the sums owed by Defendants to Plaintiff as a result of their defaults, and the basis for Plaintiff's request for return of the Collateral.

In his Affidavit in Opposition, Defendant Roger Berk ("Berk"), the Borrower, affirms that he is the President of Defendant Haywood-Berk Floor Co., Inc., the Guarantor. Berk affirms that he "do[es] not believe that the balance claimed by the Plaintiff is in fact accurate" (Berk Aff. in Opp. at ¶ 1) and submits that Plaintiff has not demonstrated how it calculated the balance allegedly owed by Defendants. Berk also contends that "[t]he amount of late charges is incorrect and vastly exaggerated" (*id.* at ¶ 2).

In reply, Mischo outlines the relevant provisions of the Note, including SBLI's rights upon default. Upon Borrower's default, SBLI was entitled to collect interest at the default rate of 17%. SBLI has elected to collect interest at the Note rate of 12% from August 1, 2010 through and including September 7, 2010, and interest at the default rate from September 8, 2010 and thereafter.

Mischo provides a copy of the loan history of the loan at issue ("Loan History") (Ex. A to Mischo Reply Aff.). The Loan history demonstrates that Defendants did not make the payment of \$749,000.00 that was due on August 31, 2010. Mischo disputes Berk's claim that Plaintiff has inaccurately stated the amount due, and submits that Berk's assertion is contradicted by the terms of the Note. In amplification of Plaintiff's claims regarding the sums due, Mischo affirms that Borrower failed to make the payment due on August 31, 2010, resulting in the assessment of a late charge 5 business days later. The total payment due on August 31, 2010 was \$758,487.20, consisting of \$749,000.00 in unpaid principal balance and \$9,487.20 interest at 12% from August 1, 2010 through September 7, 2010, on which the 5% late charge of \$37,924.36 (representing 5% of \$758,487.20) was assessed. Thus, Plaintiff's request for judgment against the Borrower and Guarantor, jointly and severally, for the principal amount of \$749,000.00, together with 1) interest at the rate of 12% from August 1, 2010 through and including September 7, 2010, 2) interest at the rate of 17% from and after September 8, 2010, and 3) late charges in the amount of \$37,924.36, is accurate and correctly calculated.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment on the Complaint by pleading and proving the existence of the Note and Guaranty, and demonstrating Defendants' breach of those agreements. Plaintiff notes that neither of the Defendants has disputed the default. Plaintiff affirms that, if its application is granted and judgment is entered, Plaintiff waives the second, fourth and fifth causes of action in the Complaint (Soderberg Aff. in Supp. at ¶ 76).

Plaintiff argues, further, that Defendants' Answer, which contains only general denials of the allegations in the Complaint, is insufficient to defeat Plaintiff's right to summary judgment. Plaintiff also contends that Defendants' affirmative defenses lack merit, addressing those affirmative defenses as follows: 1) Plaintiff has stated a cause of action by pleading the existence of the Note and Guaranty and demonstrating Defendants' breach of those agreements; 2) the Court has personal jurisdiction over the Defendants who were properly served as reflected by the affidavits of service provided (Ex. C to Soderberg Aff. in Supp.); 3) Defendants provide no detail in support of their third affirmative defense that Plaintiff has breached the agreements at issue; 4) Defendants provide no detail in support of their fourth affirmative defense that Plaintiff's damages are a result of Plaintiff's own culpable conduct; 5) Defendants have failed to allege any acts supporting their claim that the doctrines of waiver or estoppel apply, and estoppel is an equitable remedy that cannot be used as a defense to actions at law; 6) the Complaint describes the terms of the agreements and default with adequate specificity, and includes copies of the Notes and Guaranty that serve as the basis for Plaintiff's motion and, accordingly, the sixth affirmative defense is without merit; and 7) the Statute of Frauds is clearly satisfied by the documentary evidence submitted by Plaintiff, including the Note, Guaranty and Security Agreement.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of

fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.* Mere conclusions or unsubstantiated allegations, however, will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

C. Promissory Note

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).

D. 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. disp.*, 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).

E. Service of Process

The plaintiff has the burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained. *Powell v. Powell*, 114 A.D.2d 443, 444 (2d Dept. 1985). A process server's affidavit of service constitutes *prima facie* evidence of proper service. *Associates First Capital Corp. v. Wiggins*, 75 A.D.3d 614 (2d Dept. 2010), quoting *Scarano v. Scarano*, 63 A.D.3d 716 (2d Dept. 2009). Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits. *Scarano*, 63 A.D.3d at 716.

F. Estoppel and Waiver

The elements of estoppel are, with respect to the party estopped: 1) conduct that amounts to a false representation or concealment of material facts; 2) intention that such conduct will be acted upon by the other party; and 3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: 1) lack of knowledge of the true facts, 2) reliance upon the conduct of the party, and 3) a prejudicial change in his position. *First Union National Bank v. Tecklenburg*, 2 A.D.3d 575, 577 (2d Dept. 2003), citing *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Dept. 1980).

Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Management, L.P.*, 7 N.Y.3d 96, 104 (2006).

G. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for summary judgment on the first and third causes of action in the Complaint. Plaintiff has demonstrated its right to judgment against the Defendants, pursuant to the Note and Guaranty, by 1) producing the Note and Guaranty; and 2) establishing Defendants' default pursuant to those instruments. The Guaranty is in writing, executed by Berk and demonstrates his clear and explicit intent to guarantee the obligations of the corporate Defendant. Defendants' Answer and opposition papers contain mere conclusions and

unsubstantiated allegations that are insufficient to defeat Plaintiff's motion for summary judgment.

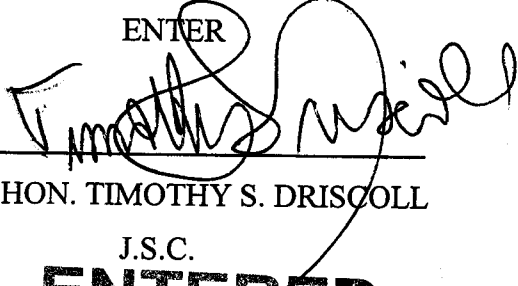
The Court grants Plaintiff's motion to the extent that the Court grants Plaintiff summary judgment on the first and third causes of action in the Complaint and awards Plaintiff judgment against Defendants Haywood-Berk Floor Co., Inc. and Roger Berk, jointly and severally, in the amount of \$749,000, together with interest at the rate of 12% from August 1, 2010 through and including September 7, 2010, default interest at the rate of 17% from and after September 8, 2010, late charges of \$37,924.36, and costs and disbursements.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Submit judgment on ten (10) days notice.¹

DATED: Mineola, NY
May 31, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.
ENTERED
JUN 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

¹ The Court is declining to sign the proposed Order and Judgment provided by Plaintiff, and instead is directing Plaintiff to submit judgment on notice.