

JPMorgan Chase Bank, N.A. v Diamant Realty & Assoc., Inc.

2011 NY Slip Op 31726(U)

June 13, 2011

Supreme Court, Nassau County

Docket Number: 8661/2010

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : I.A. PART 17

-----X
**JPMORGAN CHASE BANK, N.A., as Successor- by-
Assignment from THE BANK OF NEW YORK,**

Plaintiff,

- against -

**DIAMANT REALTY & ASSOCIATES, INC.,
HOMESIDE REALTY CORPORATION,
TRIANGLE ORANGE, LLC, MASHKANTA,
LLC, SIMCHA DIAMANT, and
KAILA DIAMANT,**

Defendants.
-----X

DECISION AND ORDER

Index No.: 8661/2010

Original Return Date: 09/10/10
Motion Seq. No.: 001

P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 5 were submitted on this Notice of Motion on December 20, 2010:

	<i><u>Papers numbered:</u></i>
Notice of Motion, Affidavit, and Affirmation in Support	1-3
Affidavit in Opposition	4
Reply Affirmation	5

This motion pursuant to C.P.L.R. 3212 by the Plaintiff JPMORGAN CHASE BANK, N.A. for summary judgment relief as against the Defendants DIAMANT REALTY & ASSOCIATES, INC., HOMESIDE REALTY CORPORATION, TRIANGLE ORANGE, LLC, and MASHKANTA, LLC, and SIMCHA DIAMANT, and KAILA DIAMANT, individually, is decided as follows:

On May 3, 2010, the Plaintiff JP MORGAN CHASE BANK, N.A. commenced this action by filing a Summons and Complaint with the Clerk of the County of Nassau, by which the Plaintiff seeks to recover on loans and guarantees in its capacity as Successor-by-Assignment to THE BANK

OF NEW YORK.

Between 2004 and 2006 the Defendants and THE BANK OF NEW YORK entered into a series of four "Business CreditLink" Loan Agreements and related personal Guarantees, which the Plaintiff now alleges are each in default. The Plaintiff further states that it obtained an assignment of the subject Agreements from THE BANK OF NEW YORK in or about October, 2006 (Lupetin Reply Affirmation, paragraphs 8-9), and claims that the cumulative principal amount due and owing on the four agreements – exclusive of contractual interest and counsel fees – is in excess of \$204,000.00, as follows:

- (1) The sum of \$54,383.34 from the Defendant DIAMANT REALTY & ASSOCIATES, INC. pursuant to the Business CreditLink Agreement dated November 9, 2004 and from the Defendant SIMCHA DIAMANT, individually, on a personal Guarantee executed simultaneously therewith (First and Second Causes of Action);
- (2) The sum of \$50,000.00 from the Defendant HOMESIDE REALTY CORPORATION pursuant to the Business CreditLink Agreement dated June 5, 2006 and from the Defendant SIMCHA DIAMANT, individually, on a personal Guarantee executed simultaneously therewith (Third and Fourth Causes of Action);
- (3) The sum of \$50,000.00 from the Defendant TRIANGLE ORANGE, LLC pursuant to the Business CreditLink Agreement dated August 16, 2006 and from the Defendant KAILA DIAMANT, individually, on a personal Guarantee executed simultaneously therewith (Fifth and Sixth Causes of Action); and
- (4) The sum of \$50,000.00 from the Defendant MASHKANTA, LLC pursuant to the Business CreditLink Agreement dated August 16, 2006 and from the Defendant

KAILA DIAMANT, individually, on a personal Guarantee executed simultaneously therewith (Seventh and Eighth Causes of Action); and

- (5) Costs, and attorneys' fees as against all of the Defendants (Ninth Cause of Action).

The Defendants have interposed an Answer generally denying the material allegations of the Complaint (*see* Exhibit "H" of the moving papers). The within application by the Plaintiff for summary judgment on the Loan Agreements and the related personal Guarantees subsequently ensued.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a Court directing judgment in its favor as a matter of law. *See* Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Rebecchi v. Whitmore, 172 A.D.2d 600 (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact" Gilbert Frank Corp. v. Federal Ins. Co., *supra* at 967; *see also* GTF Mktg. v. Colonial Aluminum Sales, 66 N.Y.2d 965 (1985); Rebecchi v. Whitmore, *supra* at 601. A mere "General Denial" contained in an Answer is insufficient to defeat an application for such relief.

The Plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law by establishing the existence of the Loan Agreements and Guarantees sued upon, together with the Defendants' failure to make payments according to their respective terms. *See generally* Signature Bank v. Galit Properties, Inc., 80 A.D.3d 689 (2nd Dept. 2011); Gullery v. Imburgio, 74 A.D.3d 1022 (2nd Dept. 2010); Pennsylvania Higher Educ. Assistance Agency v. Musheyev, 68 A.D.3d 736 (2nd Dept. 2009); Verela v. Citrus Lake Development, Inc., 53 A.D.3d 574 (2nd Dept. 2008)). In opposition to the motion, the sole contention of the Defendants is that the Plaintiff lacks standing

to maintain the action inasmuch as it allegedly failed to produce evidence establishing that it had purchased and/or obtained an assignment of the subject Agreements. *See e.g. Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 A.D.3d 239, 244-245 (2nd Dept. 2007).

It is settled, however, that a defense predicated on the absence of standing must be raised either in the Answer interposed by the Defendants or in a motion to dismiss prior to the joining of issue. C.P.L.R. 3211(a)(3); C.P.L.R. 3211(e); *see Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo, supra.* at 245; *see also Kruger v. State Farm Mut. Auto. Ins. Co.*, 79 A.D.3d 1519 (3rd Dept. 2010); *U.S. Bank Nat. Ass'n v. Eaddy*, 79 A.D.3d 1022 (2nd Dept. 2010); *Countrywide Home Loans, Inc. v. Delphonse*, 64 A.D.3d 624, 625 (2nd Dept. 2009); *HSBC Bank, USA v. Dammond*, 59 A.D.3d 679, 680 (2nd Dept. 2009). Here, the Answer of the Defendants – which contains only general denials – makes no reference to any deficiency in the standing of the Plaintiff. Nor does the record indicate that the Defendants ever timely raised the standing of the Plaintiff and/or its lack of “legal capacity to sue” in a pre-answer motion to dismiss. C.P.L.R. 3211(a)(3).

Under these circumstances, any claims predicated upon the alleged absence of standing of the Plaintiff have been waived (*U.S. Bank Nat. Ass'n v. Eaddy, supra.*), and the Court finds that the Plaintiff has the requisite standing (by assignment) to commence this litigation based upon the assertions contained in the moving papers.

Accordingly, after due deliberation, it is

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 Defendants as set forth in the Verified Complaint is **granted**, and the Court hereby awards the Plaintiff a judgment as follows:

- (1) The sum of **\$54,383.34** as against the Defendants DIAMANT REALTY &

ASSOCIATES, INC. and SIMCHA DIAMANT, jointly and severally, on the First and Second Causes of Action, together with interest and late charges pursuant to the terms of the applicable Loan Agreement and personal Guarantee, and costs and disbursements as taxed by the Clerk of the Court;

- (2) The sum of **\$50,000.00** as against the Defendants HOMESIDE REALTY CORPORATION and SIMCHA DIAMANT, jointly and severally, on the Third and Fourth Causes of Action, together with interest and late charges pursuant to the terms of the applicable Loan Agreement and personal Guarantee, and costs and disbursements as taxed by the Clerk of the Court;
- (3) The sum of **\$50,000.00** as against the Defendants TRIANGLE ORANGE, LLC and KAILA DIAMANT, jointly and severally, on the Fifth and Sixth Causes of Action, together with interest and late charges pursuant to the terms of the applicable Loan Agreement and personal Guarantee, and costs and disbursements as taxed by the Clerk of the Court; and
- (4) The sum of **\$50,000.00** as against the Defendants MASHKANTA, LLC and KAILA DIAMANT, jointly and severally, on the Seventh and Eighth Causes of Action, together with interest and late charges pursuant to the terms of the applicable Loan Agreement and personal Guarantee, and costs and disbursements as taxed by the Clerk of the Court; and it is further

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

ORDERED, that in accordance with the provisions of the respective CreditLink Agreements

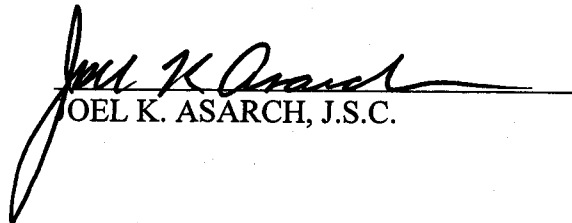
[* 6]
and Guarantees, the Plaintiff is hereby awarded attorneys' fees in the reasonable sum of **\$1,200.00** pursuant to the Affirmation in Support of Legal Fees dated August 10, 2010 and submitted as a part of the within motion.

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

The foregoing constitutes the decision and order of the Court.

Dated: Mineola, New York
June 13, 2011

ENTER:


JOEL K. ASARCH, J.S.C.

Copies mailed to:
Cullen and Dykman, LLP
Attorneys for Plaintiff

Arnold W. Blatt, Esq.
Attorney for Defendants

ENTERED
JUN 16 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE