

Express Serv. Forwarding, Inc. v Moha

2011 NY Slip Op 32202(U)

July 25, 2011

Supreme Court, Nassau County

Docket Number: 018178-10

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
EXPRESS SERVICE FORWARDING, INC.,

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

Plaintiff,

Index No: 018178-10

Motion Seq. No. 2

-against-

Submission Date: 5/27/11

JOSEF BEN MOHA,

Defendant.

-----x

Papers Read on this motion:

- Amended Notice of Motion, Affidavit in Support,**
- Affirmation in Support and Exhibits.....x**
- Affirmation in Opposition.....x**
- Reply Affirmation and Exhibit.....x**

This matter is before the Court on the motion filed by Plaintiff Express Service Forwarding, Inc. ("Plaintiff") on March 18, 2011 and submitted on May 27, 2011. For the reasons set forth below, the Court grants Plaintiff's motion, and awards Plaintiff a judgment against Defendant in the principal sum of \$3,250,000.00, plus interest, late fees, costs and attorney's fees to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR 3212, striking the answer of the Defendant Josef Ben Moha ("Defendant") and directing the entry of summary judgment in favor of the Plaintiff and against the Defendant for the relief demanded in the Verified Complaint ("Complaint").

Defendant opposes Plaintiff's motion.¹

B. The Parties History

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

On or about August 27, 2008, Defendant, and others, executed a Promissory Note ("Note") (Ex. A to Compl.) which was delivered to Plaintiff ("Lender"). Plaintiff is still the holder and owner of the Note. Pursuant to the Note, Defendant ("Borrower") promised to pay to Plaintiff, jointly and severally, the sum of up to five million (\$5,000,000.00) Dollars or so much of that sum as was advanced under a Letter of Credit Facility Agreement ("LCFA"), also dated August 27, 2008 (*id.* at Ex. B). The LCFA designates Defendant as a Borrower, and Plaintiff as the Lender. On or about August 29, 2008, the entire sum of Five Million (\$5,000,000.00) Dollars was advanced.

Pursuant to the LCFA, the termination date of the Facility was the earlier of thirty three (33) months from the Effective Date (August 27, 2008), or the date on which Lender terminates the Facility as the result of default. The LCFA required payment of interest equal to the greater of the then prime rate plus seven and five tenths (7.5%) percent per annum or twelve percent (12%) per annum on the first day of each calendar month during the term of the agreement. By the terms of the Note, a late charge of five per cent (5%) of any delinquent payment was immediately due and payable for any payment received by the Plaintiff after a ten day grace period. In addition, a letter of credit facility fee of \$75,000 per annum was due and payable on the anniversary date of the LCFA as long as the debt remained unpaid.

One event of default under the LCFA was the Borrower's failure to make any payment required under the Loan documents when due. In the event of such failure, the entire principal amount, accrued interest and all costs and expenses due to Plaintiff, at its option, would, without notice, become immediately due and payable. Despite demand, Defendant has failed to make the required payments when due, and the credit facility was terminated, with notice to Defendant, as of September 15, 2010.

In both the Note and LCFA, Defendant waived his right to trial by jury. In the Note, Defendant agreed that, in the event of a default, the rate of interest would be eighteen (18%) percent

¹ On June 6, 2011, the Court granted the application of Defendant's counsel to be relieved.

per annum until satisfaction of the judgment debt in full, and not at the statutory post-judgment rate of interest. Defendant also acknowledged, in the Note, that the Loan was a business loan, and not for personal, family or household purposes. Pursuant to the Note, upon default in payment, Defendant agreed to pay all costs and expenses of collection on the Note, including counsel fees and disbursements.

Plaintiff has credited to Defendant the sum of One Million Seven Hundred Fifty Thousand (\$1,750,000.00) Dollars, which was deposited with Plaintiff as partial security for Defendant's indebtedness. The amount of Three Million Two Hundred Fifty Thousand (\$3,250,000.00) Dollars in principal is currently due and payable under the Loan Agreements. In addition, a total of \$481,098.74 is owed in late payments, default interest charges and unpaid legal fees, as reflected by the schedule provided (Ex. C to Compl.). Plaintiff has made a demand on Defendant for payment of the sums due, but Defendant has failed to pay those amounts to Plaintiff. In addition, Plaintiff is entitled to counsel fees and disbursements incurred in collecting on the Note. Plaintiff seeks judgment against Defendant in the amount of Three Million Two Hundred Fifty Thousand (\$3,250,000.00) Dollars plus default interest charges to date, late payment charges to date, facility fee charges and unpaid legal fees in connection with the Loan documents in the amount of \$481,098.74, together with counsel fees and the costs and disbursements of this action.

In his Affidavit in Support, Peter Stern ("Stern"), the President of Plaintiff affirms the truth of the allegations in the Complaint regarding the execution and terms of the Note and LCFA and Defendant's default under those instruments, and confirms that Defendant owes the sum of \$3,250,00.00 in principal, plus interest and other charges. Stern affirms that the purpose of the LCFA was to provide one or more standby letters of credit to obtain a construction loan from Textron Financial Corporation to purchase and develop real estate located at 62 Madison Avenue, New York, New York, as reflected in the Recitals section of the LCFA. Stern provides a schedule ("Schedule") of payments made, including late charges (Ex. G to Stern Aff. in Supp.) and affirms that, as of March 1, 2011, a total of \$773,760.82, plus the principal, is due. Plaintiff provides a copy of the affidavit of service (Ex. B to P's motion) reflecting that Defendant was served with the Complaint on October 9, 2010.

Plaintiff provides a copy of Defendant's Verified Answer ("Answer") (Ex. C to Farber Aff. in Supp.). In his Answer, Defendant generally denies many of the allegations in the Complaint and

asserts six (6) affirmative defenses: 1) Defendant was not properly served; 2) Plaintiff failed to join a necessary party; 3) any sums to which Plaintiff claims entitlement are subject to setoff and recoupment; 4) not all of the preconditions required under the Loan documents were satisfied; 5) Plaintiff breached its obligations under the Loan documents; and 6) Plaintiff failed to mitigate its damages.

In opposition to the instant motion, Defendant submits that 1) the terms of the Loan are usurious; and 2) the Schedule cannot be understood and, therefore, Plaintiff has failed to document a sum certain owed by Defendant. Defendant contends that Plaintiff has asserted that the non-default interest rate is equal to the greater of the then prime rate plus seven and five tenths percent per annum or twelve percent per annum (Rimberg Aff. in Opp. at ¶ 3), but has failed to articulate the applicable rate of interest on the Loan, or provided a basis for that rate. Moreover, the Note provides a late charge of 5% on any delinquent payment, and Plaintiff seeks a facility fee of 1% of the Facility Amount. Thus, Defendant argues, Plaintiff is seeking interest in excess of the 16% maximum imposed pursuant to the General Obligations and Banking Laws.

Defendant contends, further, that the Schedule provided does not clearly reflect which entries represent payments, which represent charges, or how Plaintiff made the calculations reflected.

C. The Parties Positions

Plaintiff submits that it has demonstrated its right to summary judgment by establishing Defendant's execution of the Note and his failure to make required payments pursuant to that instrument.

Plaintiff contends, further, that Defendant's affirmative defenses are meritless and do not defeat Plaintiff's right to summary judgment. Specifically, Plaintiff contends that 1) Defendant has waived his right to move to dismiss on personal jurisdiction grounds in light of his failure to move for dismissal within sixty (60) days of service; 2) Defendant has failed to name the allegedly necessary parties, or explain why they should be joined; 3) this action does not present a factual situation to which set-off or recoupment would apply; 4) there is no merit to Defendant's assertion that certain preconditions to the Loan were not met; 5) Defendant has failed to articulate how Plaintiff breached its obligations; and 6) Defendant's reference to Plaintiff's failure to mitigate damages is inapposite to the matter at bar, where it is Defendant's failure to pay that has caused, and continues to cause, Plaintiff's damages.

In opposition, Defendant contends that the Court should deny Plaintiff's motion on the grounds that 1) the terms of the Loan are usurious; and 2) the Schedule is incomprehensible (Rimberg Aff. in Opp. at 2) and, therefore, Plaintiff has failed to document a sum certain.

In reply, Plaintiff submits that the Schedule adequately establishes the sums owed by Defendant given that it details every charge and lists the regular charges, default charges and late charges according to specific date. Moreover, Defendant has provided no affidavit attesting to his lack of understanding of the terms of the Loan documents or Schedule. Plaintiff contends, further, that Defendant's usury arguments are meritless in light of General Obligations Law ("GOL") § 5-501(6)(b).

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.*

B. 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).

C. Permissible Interest Rates

GOL § 5-501(6)(b) provides as follows:

No law regulating the maximum rate of interest which may be charged, taken or received, including section 190.40 and section 190.42 of the penal law, shall

apply to any loan or forbearance in the amount of two million five hundred thousand dollars or more. Loans or forbearances aggregating two million five hundred thousand dollars or more which are to be made or advanced to any one borrower in one or more installments pursuant to a written agreement by one or more lenders shall be deemed to be a single loan or forbearance for the total amount which the lender or lenders have agreed to advance or make pursuant to such agreement on the terms and conditions provided therein.

GOL § 5-501(6)(b) provides that penal usury laws do not apply where loans in excess of \$2.5 million are issued in one or more installments pursuant to a written agreement. *AJW Partners LLC v. Itronics Inc.*, 68 A.D.3d 567, 568 (1st Dept. 2009).

D. Counsel Fees

Attorney's 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 attorney's 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 attorney's 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. Defense of Lack of Personal Jurisdiction

A defendant who fails to move to dismiss on the ground of lack of personal jurisdiction within sixty (60) days after serving its answer waives that defense. *Dimond v. Verdon*, 5 A.D.3d (2d Dept. 2004); CPLR 3211(e).

F. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion for summary judgment based on the Court's conclusion that Plaintiff has demonstrated its right to judgment by establishing the existence of the Note and

Defendant's failure to make payment pursuant to the terms of that instrument. The Court concludes, further, that Defendant has failed to establish the existence of a triable issue concerning a bona fide defense. Defendant has waived his objection to personal jurisdiction by failing to file a timely motion, and Defendant's other affirmative defenses are conclusory in nature, and do not defeat Plaintiff's right to judgment. Moreover, in light of the amount of the Loan and the provisions of GOL § 5-501(6)(b), Defendant's usury argument must fail. Plaintiff has also demonstrated its right to counsel fees, but the Court has an insufficient basis on which to make such an award. Accordingly, it is hereby

ORDERED, that Plaintiff Express Service Forwarding, Inc. have judgment against Defendant Josef Ben Moha in the principal amount of \$3,250,000.00, plus interest, late fees, costs and attorney's fees to be determined at an inquest; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of interest, late fees, costs and attorney's fees on August 29, 2011 at 10:00 a.m.; and it is further

ORDERED, that Plaintiff shall serve upon the Defendant Josef Ben Moha 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 August 15, 2011; and it is further

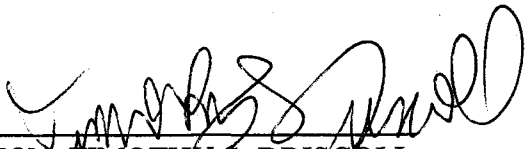
ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendant Josef Ben Moha in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
July 25, 2011


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE