SUPREME COURT-STATE OF NEW YORK
SHORT TIME ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MARIE HOLDINGS, INC.,

Plaintiff,

-against-

S & C ENTERPRISES LLC, CHARLES CHERA and STEVEN CHERA,

Defendants.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 004596-11
Motion Sequence No. 1
Submission Date: 8/15/11

This matter is before the Court for decision on the motion filed by Plaintiff Marie Holdings, Inc. ("Plaintiff") on March 28, 2011 and submitted on August 15, 2011. The Court previously issued an Order dated July 14, 2011 that directed that this matter would be the subject of a Conference in Aid of Disposition before the Court. The Court held that conference, but the matter was not resolved. For the reasons set forth below, the Court grants Plaintiff's motion, and awards Plaintiff judgment against the Defendants in the principal sum of $499,000.00, plus default 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, directing the entry of judgment for the Plaintiff and against the Defendants in the amount of $499,000.00 with default interest from November 23, 2010, attorney's fees, costs and disbursements.

Defendants oppose Plaintiff's motion.

B. The Parties' History

Thomas Gubitosi ("Gubitosi"), the President of Plaintiff corporation, affirms as follows in support of Plaintiff's motion:

This action is based on a Mortgage Note ("Note") (Ex. A to Gubitosi Aff. in Supp.) that was given to Plaintiff by Defendant S & C Enterprises, LLC ("S & C" or "Borrower"), and guaranteed by Defendants Charles Chera ("Charles") and Steven Chera ("Steven") (collectively "Guarantors"), in return for a loan ("Loan") in the amount of Four Hundred Ninety Nine Thousand ($499,000.00) Dollars. The Note, dated November 23, 2009, was to bear interest at fifteen (15%) percent per annum, with a default interest rate of twenty four (24%) percent per annum and was payable in full on November 23, 2010. Section 5 of the Note states that the Note is secured by a mortgage ("Mortgage") with respect to premises ("Premises") located at 701 Elton Avenue, Bronx, New York.

In addition, on November 23, 2009, the Guarantors executed a Guaranty of Payment ("Guaranty") (Ex. B to Gubitosi Aff. in Supp.), pursuant to which they unconditionally guaranteed the payment of all sums due from S & C to Plaintiff. Defendants have failed to make payments pursuant to the Note and Guaranty, despite Plaintiff's demand. As a result, Defendants owe Plaintiff the sum of $499,000.00, plus accrued interest from November 23, 2010, at the default rate of twenty four (24%) percent per annum. Gubitosi affirms his belief that Defendants have no defense to Plaintiff's cause of action.

Plaintiff also seeks attorney's fees, costs and disbursements of this action. Section 10.1 of the Note requires the Borrower to pay to Plaintiff all costs incurred in enforcing the Note, including reasonable attorney's fees, costs, expenses and disbursements. In addition, pursuant to paragraph 2(c) of the Guaranty, the Guarantors agreed to pay costs and expenses, including reasonable attorney's fees, incurred by Plaintiff in connection with the enforcement of the Guaranty and Note.

In his Affidavit in Opposition, Charles affirms that, knowing that the Loan was coming due, he made arrangements to refinance the Notes with two entities, The Wheatley Harbor, LLC ("Wheatley") and The Gross Family Holdings, LLC ("Gross"). Charles provides a letter ("Letter") dated January 5, 2011 (Ex. A to Charles Aff. in Opp.) from counsel for Wheatley and Gross to S & C in which counsel advised S & C that Gross and Wheatley were "agreeable" to

advancing a loan securing the principal sum of $525,000 to S & C for the purpose of paying off a mortgage on the Premises. The Letter also reflects that repayment of the proposed loan would be guaranteed by Charles and Steven.

Charles avers, further, that after receiving the Letter, counsel for the Defendants sent a letter to Plaintiff dated January 13, 2011 (Ex. B to Charles Aff. in Opp.) that advised Plaintiff that 1) S & C retained counsel ("Defendants' Counsel") to close a new mortgage to replace the Mortgage referred to in the Note; 2) a title search had been ordered and they expected to be able to close in approximately two weeks; and 3) S & C wished to handle the refinancing by way of an assignment of the Mortgage to the new lenders, specifically Wheatley and Gross. Counsel for S& C also requested from Plaintiff an up-to-date statement of the amount due.

Plaintiff's counsel responded by sending to Defendants' Counsel a letter dated February 11, 2011 (Ex. D to Charles Aff. in Opp.). In that letter, Plaintiff's counsel advised Defendants' Counsel that, "in accordance with your request," he was providing copies of 1) a payoff letter from Plaintiff computing the principal and interest charges through February 11, 2011, with a per diem interest rate charge thereafter, 2) the Note and Mortgage, and 3) the proposed assignment to Wheatley and Gross. Plaintiff's Counsel also advised Defendants' Counsel that Plaintiff was not in possession of the originally recorded mortgage and that Defendants' Counsel should, therefore, advise the new lender to order a certified copy of the Mortgage through its title company. Finally, Plaintiff's Counsel asked Defendants' Counsel to schedule the Loan closing and advise Plaintiff's Counsel of the date, time and place of that closing.

Plaintiff's Counsel's February 11, 2011 letter included a second document, also dated February 11, 2011 (*id.* at Ex. E) which was another letter from Plaintiff's Counsel to Defendant's Counsel. This second letter included the following language: "In accordance with your request[,] kindly permit this letter to be considered a payoff letter. The outstanding principal balance and interest due for the loan is $517,053.13 through February 11, 2011. The per diem interest after said date is $332.66." Charles submits that this second letter "included no breakdown of the calculation and on information and belief, was in excess of the amount lawfully due and did not credit Defendants for all interest payments made to and retained by Plaintiff" (Charles Aff. in Opp. at ¶ 9).

Charles affirms, further, that on March 18, 2011, Gubitosi sent to Charles an email (Ex. F to Charles Aff. in Opp.) in which Gubitosi acknowledged the receipt of certain payments between November of 2010 and March of 2011. Charles submits that Gubitosi's affidavit in support of Plaintiff's instant motion fails to provide Defendants with credit for these payments.

In reply, Gubitosi submits, *inter alia*, that 1) it is "ludicrous" for Defendants to argue that Plaintiff has an obligation to assist Defendants with their efforts to refinance; 2) notwithstanding the fact that Plaintiff has no obligation to assist Defendants in their refinancing efforts, Plaintiff did provide Defendants with the documentation they requested; 3) the Loan was made to S & C which, pursuant to the General Obligations Law and Banking Law, may be charged an interest rate of 24%; and 4) even if the rate charged were excessive, the remedy would be to reduce the interest rate to the maximum amount permitted by law.

Gubitosi acknowledges that Plaintiff has received $19,125.00 in partial interest payments through March 18, 2011 since the loan was due on November 23, 2010. Plaintiff requests judgment against Defendants in the sum of $499,000.00 with interest from November 23, 2010, together with attorney's fees, costs and disbursements.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its entitlement to judgment against Defendants by producing the Note and Guaranty, which are instruments for the payment of money pursuant to CPLR § 3213, and establishing Defendants' failure to make payment in accordance with the terms of those instruments despite due demand.

Defendants oppose Plaintiff's motion for summary judgment in lieu of complaint, submitting, *inter alia*, that 1) the 24% default interest rate is unlawful as S & C is a limited liability company, not a corporation that would be exempt from the usury laws; and 2) the Court should deny Plaintiff's motion in light of Plaintiff's delayed response to Defendants' efforts to refinance and Plaintiff's failure to provide an accurate statement as to the amount due.

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. dism.*, 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. Default Interest

The defense of usury does not apply where the terms of a promissory note impose a rate of interest in excess of the statutory maximum only after maturity of the note. *Klapper v. Integrated Agricultural Management Company, Inc.*, 149 A.D.2d 765, 767 (3d Dept. 1989), citing *Flynn v. Dick*, 13 A.D.2d 756, 757 (1st Dept. 1961). *See also Hicki v. Choice Capital Corp.*, 264 A.D.2d 710 (2d Dept. 1999) (defense of usury not applicable where terms of mortgage and note impose rate of interest in excess of statutory maximum only after default or maturity).

F. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion based on the Court's conclusion that Plaintiff has demonstrated its right to judgment by 1) establishing the existence of the Note and the Borrower's failure to make payment pursuant to the terms of that instrument; and 2) proving the existence of the underlying obligation, the Guaranty, and the failure of the Borrower to make payment in accordance with the terms of its obligation. The Guaranty is enforceable, as it is in writing executed by the persons to be charged and reflects their clear and explicit intent to guaranty the primary obligation. The Court also concludes that Defendants have failed to establish by admissible evidence the existence of a triable issue concerning a bona fide defense.

Plaintiff is also entitled to attorney's fees incurred in enforcing their rights under the Note and Guaranty, but the Court has an insufficient record on which to base such an award. Finally, the Court concludes that Defendants have not demonstrated that the 24% default interest rate is impermissible. Thus, Plaintiff shall be awarded default judgment at the 24% rate, pursuant to the applicable instruments. In light of the foregoing, it is hereby

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

ORDERED, that Plaintiff shall have judgment against Defendants in the principal sum of $499,000.00, plus default interest from November 23, 2010, 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 (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of default interest, attorney's fees, costs and disbursements on October 18, 2011 at 9:30 a.m.; and it is further

ORDERED, that Plaintiff shall serve upon Defendants' counsel, by regular mail, 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 October 7, 2011; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of Plaintiff and against Defendants, 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
September 14, 2011

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

ENTERED
SEP 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE