

Capital One, N.A. v Levy
2011 NY Slip Op 32648(U)
October 3, 2011
Supreme Court, Nassau County
Docket Number: 600872-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SUPPLEMENTAL SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
CAPITAL ONE, N.A.,

Plaintiff,

-against-

**YAIR LEVY, SONY LEVY a/k/a SOSANA LEVY,
RAFAELA LEVY, AND GALIT LEVY,**

Defendants.

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

**Index No: 600872-10
Motion Seq. No: 1
Submission Date: 8/30/11**

SUPPLEMENTAL ORDER

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The following papers have been read on this motion:

- Notice of Motion, Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition and Affidavit in Opposition.....x**
- Affirmation in Further Support dated 1/12/11 and Exhibits.....x**
- Correspondence dated November 30, 2010.....x**
- Correspondence dated December 8, 2010.....x**
- Correspondence dated December 13, 2010.....x**
- Affidavit of Y. Levy dated 3/23/11.....x**
- Correspondence dated 3/25/11 with Exhibits A and B to Affidavit.....x**
- Affirmation in Further Support dated 4/21/11 and Exhibits.....x**

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff Capitol One ("Capital One" or "Plaintiff") on October 5, 2010 and initially submitted on January 13, 2011. By decision dated March 3, 2011 ("Prior Decision"), the Court 1) reserved decision on Plaintiff's motion as to Defendant Yair Levy and directed Plaintiff and Defendant Yair Levy to provide additional documentation as directed in the Prior Decision; and 2) denied Plaintiff's motion as to Defendants Sony Levy a/k/a Sosana Levy, Rafaela Levy and Galit Levy and dismissed the action as to those Defendants,

without prejudice. Following the issuance of the Prior Decision, Plaintiff initiated a second action against Defendants titled *Capital One, N.A. v. Sony Levy a/k/a Sosana Levy, Rafaela Levy and Galit Levy*, Index Number 4043-11 (“Related Action”). The above-captioned action (“Instant Action”) and Related Action were the subject of oral argument before the Court on August 30, 2011.

With respect to the motion in the Instant Action, the Court directs that the issue of whether Defendant Yair Levy was properly served with the summons, notice of motion and supporting papers in this proceeding is referred to Special Referee N. Schellace to hear and report, or hear and determine if the parties so stipulate in writing or on the record before the Special Referee pursuant to CPLR § 4317. That hearing shall take place before the Special Referee on **November 17, 2011 at 10:30 a.m.** A decision on Plaintiff’s motion for summary judgment in lieu of complaint against Defendant Yair Levy is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee. In the event that the parties do not agree to hear and determine, following the filing of the report and notice to each party of the filing of the report, Plaintiff shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If Plaintiff fails to do so, then Defendant Yair Levy shall so move within thirty (30) days after notice of the filing is given. ¹

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting Plaintiff’s motion for summary judgment in lieu of complaint in the amount of \$2,297,027.95, with interest from September 28, 2010, and attorney’s fees, costs and disbursements.

Defendants Yair Levy (“Yair”), Sony Levy a/k/a Sosana Levy (“Sony”), Rafaela Levy (“Rafaela”) and Galit Levy (“Galit”) (collectively “Defendants”) oppose Plaintiff’s motion.

¹ By a separate decision issued in the Related Action, the Court granted Plaintiff’s motion for summary judgment in lieu of complaint as to Defendants Sony Levy a/k/a Sosana Levy, Rafaela Levy and Galit Levy and referred the issues of interest, attorney’s fees, costs and disbursements to an inquest to be held before Referee Frank N. Schellace on November 17, 2011 at 9:30 a.m.

B. The Parties' History

John Kipping ("Kipping") affirms as follows in support of Plaintiff's motion:

Kipping, a Vice President of Capitol One, is fully familiar with the facts and circumstances of this matter. On July 17, 2009, Yair ("Borrower") executed a Mortgage Note ("Note") (Ex. 1 to Kipping Aff.) pursuant to which he promised to pay the sum of \$2,250,000 to Capital One on July 17, 2010, and to make monthly interest payments beginning August of 2009. On that same date, Sony, Rafaela and Galit (collectively "Guarantors") entered into a "Joint and Several Guaranty of All Liability" ("Guaranty") (Ex. 2 to Kipping Aff.).

The recitals on the Guaranty reflect that 1) Capitol One has made, and may make, from time to time, loans and other financial accommodations for the account of Yair, designated the "Borrower;" 2) the Guarantor acknowledged and agreed that Yair has received, and will receive, direct and indirect benefits from the extension of loans to the Borrower; and 3) the Guarantor wished to grant Capitol One "security and assurance" to secure the payment and performance by the Borrower of its obligations and to guarantee those obligations. The first sentence of Section 1(a) of the Guaranty states that "[t]he Guarantor hereby unconditionally and irrevocably guarantees to the Bank the full and punctual payment by the Borrower, when due, whether at the stated due date, by acceleration or otherwise, of all Obligations (as defined below) of the Borrower, howsoever created, arising or evidenced, voluntary or involuntary, whether direct or indirect, absolute or contingent, now or hereafter existing or owing to the Bank (collectively the "Guaranteed Obligations")." Section 1(a) of the Guaranty also includes the Guarantors' promise that "[i]f for any reason the Borrower shall fail or be unable duly and punctually to pay any of the Guaranteed Obligations (including, without limitation, amounts that would become due but for the operation of the automatic stay [under the Bankruptcy Code], the Guarantor will forthwith pay the same, in cash, immediately upon demand."

In addition to agreeing to repay the loan, Borrower agreed to pay reasonable attorney's fees incurred by Capitol One in collecting on the Note in the event of default (Note at § 4(d)). The Guarantors also agreed to pay all costs and expenses, including attorney's fees and disbursements, incurred by Capitol One in enforcing the Guaranteed Obligations of the Borrower, to the extent those costs were not paid by the Borrower (Guaranty at § 1(c)).

Kipping affirms that the Borrower failed to pay the amount due under the Note by

July 17, 2010 which constituted a default on his obligations under the Note. On September 28, 2010, Capital One sent notices of default and demands for payment (“Demands”) to the Defendants. In the Demands, Capital One demanded immediate payment of all amounts due under the Note and Guaranty. Notwithstanding those demands, Defendants failed to make any payments to Capital One.

The amount due and owing under the Note, as of September 28, 2010, is \$2,297,027.95, and interest continues to accrue at a per diem amount of \$1,435.87. Capital One seeks judgment in the amount of \$2,297,027.95, plus interest from September 28, 2010 and attorney’s fees incurred in enforcing the Note and Guaranty.

The Note reflects that the address of Yair is 19 Sinclair Drive, Kings Point, New York (“Kings Point Address”) (Ex. 1 to Kipping Aff. in Supp. at pp. 1 and 4). The Guaranty reflects that the address of Sony is also the Kings Point Address (Ex. 2 to Kipping Aff. in Supp. at p. 7).

Plaintiff provides Affidavits of Service reflecting the service of the Summons, Notice of Motion and supporting papers by Vincent J. Manna (“Manna”) on 1) Yair by personal delivery on October 8, 2010 at 9:45 a.m. at the Kings Point Address, 2) Sony on October 8, 2010 at 9:45 a.m. at the Kings Point Address by service on Yair, a person of suitable age and discretion, and subsequent mailing of the papers to the Kings Point Address, and 3) on Galit on October 14, 2010 at 12:45 p.m. at 2025 Broadway, Apt. 11HJ, New York, New York by service on a person of suitable age and discretion, specifically the doorman at that address, designated “John Doe,” and the subsequent mailing of the papers to Galit at the same address.

In his Affidavit in Opposition, Yair affirms as follows:

Yair affirms that he was not served with a copy of any of the motion papers, and has never been served with these papers. He avers that he only became aware of this action when his attorney “performed a search of current litigation against me and we discovered this action and the underlying papers” (Yair Aff. at ¶ 4). He disputes the veracity of the Affidavits of Service provided by Plaintiff, denying that he was ever handed a set of the motion papers.

Yair affirms that he does recall that, while leaving the Kings Point Address, he was asked by a stranger passing by him on the street to confirm that a particular street was Sinclair Drive. That “stranger” (Id. at ¶ 8) never posed any other questions, did not approach Yair, and never handed him papers for anyone at that address. Finally, Yair avers that, “[i]n any event,” he has a

valid defense to the action, and “I respectfully demand my day in court to argue it.” (Id. at ¶ 9).

In his Supplemental Affidavit (Ex. B to Murphy Aff. in Further Supp.), Mannetta provides additional details regarding his service of the motion papers on Defendants. Specifically, Mannetta affirms that on October 8, 2010, he pressed the doorbell at the Kings Point Address, but there was no answer. Mannetta saw a piece of mail in the mailbox that was addressed to Yair. Mannetta went to a residence nearby and was advised by someone at that residence that Yair did reside at the Kings Point Address. Mannetta returned to the Kings Point Address and observed Yair enter his vehicle. Mannetta called out Yair’s name and Yair responded that he was Yair Levy. Mannetta advised Yair that he had legal papers for him, at which time Yair ignored Mannetta and entered his vehicle. As Yair watched, Mannetta left a copy of the motion papers for the Defendants on the ground at the driver’s side door of Yair’s vehicle. When Mannetta returned to his office, he was shown a photograph from an article that appeared on a website, which identified Yair as the individual in the photograph (Ex. A to Mannetta Aff.). Mannetta confirmed that the individual in the photograph, identified as Yair Levy, was the individual he served with the motion papers.

Following the issuance of the Prior Decision, Yair provided an Affidavit in which he reiterates his position that he was never served, and disputes Mannetta’s claims in his affidavit. Yair affirms that, in his position as a real estate developer, he is frequently involved in litigation and is familiar with the process of serving legal papers. He affirms that his “only interaction with any stranger remotely resembling the description of [Mannetta]” (Yair 3/23/11 Aff. at ¶ 6) was on a day that an individual asked him if his street was Sinclair Drive. This individual asked Yair no other questions, and did not hand papers to Yair or ask him to accept papers.

In its Supplemental Affirmation dated April 21, 2011, Plaintiff’s counsel submits that Yair’s “vague and cryptic denials” (Murphy 4/21/11 Aff. in Further Supp. at ¶ 2) are insufficient to rebut the assertions by Mannetta.

C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to summary judgment in lieu of complaint against Yair by producing the Note, which constitutes an instrument for the payment of money only pursuant to CPLR § 3213, and submitting proof of Yair’s failure to make payment in accordance with its terms. In addition, pursuant to the terms of the Note, Plaintiff is

entitled to reasonable attorney's fees incurred in connection with its efforts to enforce the Note. Plaintiff also submits that it has established that Yair was properly served, and Yair's affidavits fail to raise an issue regarding the effectiveness of that service.

Yair opposes Plaintiff's motion submitting, *inter alia*, that Plaintiff has not obtained jurisdiction over him.

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); *Mangiatoridi 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. 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).

D. 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. In *Steiner v. Steiner*, 81 A.D.2d 725 (3d Dept. 1981), the Third Department held that where the Court was confronted with conflicting affidavits that raised questions of fact regarding the sufficiency of service of process, those issues should have been resolved by a hearing so that the trier of fact could assess the witnesses' credibility. *Id.* See also *Slomin's Inc. v. Salazar*, 192 A.D.2d 647 (2d Dept. 1993) (trial court's order reversed and case remitted for hearing on whether personal jurisdiction obtained over appellant where trial court was confronted by conflicting affidavits that raised questions of fact that should have been resolved by hearing).

E. Application of these Principles to the Instant Action

In light of the conflicting affidavits regarding service of process on Yair, the Court directs that a traverse hearing will be held to determine whether Plaintiff obtained personal jurisdiction over Yair. Accordingly, it is hereby

ORDERED, that the issue of whether Defendant Yair Levy was properly served with the summons, notice of motion and supporting papers in this proceeding is referred to Special Referee N. Schellace to hear and report, or hear and determine if the parties so stipulate in writing or on the record before the Special Referee pursuant to CPLR § 4317, which hearing shall take place before the Special Referee on **November 17, 2011 at 10:30 a.m.**; and it is further

ORDERED, that a decision on Plaintiff's motion for summary judgment in lieu of complaint against Defendant Yair Levy is held in abeyance pending receipt of the report and

recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee; and it is further

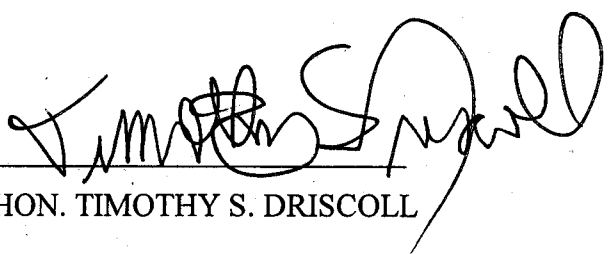
ORDERED, that in the event that the parties do not agree to hear and determine, following the filing of the report and notice to each party of the filing of the report, Plaintiff shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If Plaintiff fails to do so, then Defendant Yair Levy shall so move within thirty (30) days after notice of the filing is given.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
October 3, 2011


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE