

Wells Fargo Bank, N.A. v Diakite

2011 NY Slip Op 32660(U)

October 11, 2011

Supreme Court, New York County

Docket Number: 101655/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 101655/2011
WELLS FARGO BANK, N.A.
VS.
KIAKITE, MOHAMED
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 101655/11
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 10/11/11

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: IAS Part 10

-----X
WELLS FARGO BANK, N.A., successor-by-merger
to WACHOVIA BANK, NATIONAL ASSOCIATION,

Plaintiff (s),

Decision/ Order
Index No.:101655/10
Seq. No.: 001

-against-

Present:
Hon. Judith J. Gische
J.S.C.

MOHAMED DIAKITE, individually and d/b/a K.M.D.
COURIER SERVICE,

Defendant (s).

-----X

Recitation, as required by CPLR * 2219(a) if the papers considered in the review
of this (these) motion(s):

Papers	Numbered
Pltf's n/m (3212), affirm JRM	1
Defs opp w/ JRM affirm.....	2
Pltf's reply w/ AMR affid, exhs.....	3

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Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") to recover the unpaid balance on a promissory note from the defendant Mohamed Diakite ("Diakite") doing business as K.M.D Courier Service (" K.M.D."). Wells Fargo has brought this pre-note of issue motion seeking summary judgment in its favor. Diakite has opposed the motion, arguing that Wells Fargo has failed to establish material facts regarding its stated claim. Since issue has been joined, but the note of issue has not been filed, summary judgment relief is available and this motion will be decided on the

merits (CPLR § 3212 Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

Arguments Presented:

Wells Fargo is suing on a promissory note, dated February 22, 2007, in the principal amount of \$100,000. The note, which identifies Diakite as the promissor and Wachovia Bank, National Association ("Wachovia") as the promisee, and is signed by Diakite. The promissory note was later assigned to Wells Fargo, when the two lending institutions merged.

According to the affidavit of Wells Fargo's portfolio manager, Robert E. Froshaug ("Froshaug"), Diakite, acted on behalf of himself and K.M.D when executing the promissory note. The promissory note provides that the interest rate to be charged is the bank's prime rate on the date the promissory note was made. In the event of a default by Diakite, the note provides that the interest payable will be increased by an additional 3 percent.

Wells Fargo demanded payment on the note on September 14, 2010. At that time, according to Froshaug, the unpaid balance on the note was \$100,683.42. This amount consisted of unpaid principal in the amount of \$98,125, plus interest through August 27, 2010 in the amount of \$2,462.66, and late fees in the total amount of \$94.76.

Contemporaneously with the making of the promissory note, the parties executed a security agreement, in which Diakite assigned to Wells Fargo collateral in

the form of "all personal property of debtor of every kind...." Due to Diakite's default on the promissory note, Wells Fargo has now secured a lien and security interest in the collateral.

Wells Fargo is now seeking summary judgment holding Diakite liable for the amount of \$100,682.42 plus interest and the additional 3 percent default rate accrued the on the promissory note after August 27, 2010, Wells Fargo's reasonable attorney's fees, and the costs and disbursements of the action.

Diakite contends that summary judgment should be denied because Wells Fargo has failed to prove a *prima facie* case, which should include a demand. Diakite also argues that the interest rate indicated on the promissory note is vague, because it does not specify the bank's prime rate applicable to it. Diakite additionally argues that Wells Fargo fails to adequately explain the formula it used to calculate the amount due on the note.

Discussion

A movant Seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 8530 [1985]). The evidentiary proof tendered , however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y. 2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y. 2d 320, 324

[* 5] .
[1986]; Zuckerman v. City of New York, 49 N.Y. 2d 557 [1980]).

Upon reviewing the documents provided by Wells Fargo in its motion for summary judgment, Wells Fargo has presented sufficient evidence in support of its claims and that it is entitled to summary judgment in its favor.

Wells Fargo has provided the court with copies of the promissory note setting forth the terms of Diakite's obligations and the security agreement, which describes the form, and nature of the collateral given in return for the note. Furthermore, Wells Fargo has provided tangible copies of the computer bank records reflecting unpaid balances from November 2009 through August 27, 2010. These documents establish Diakite's indebtedness to Wells Fargo. There is no question of fact as to whether the promissory note exists or the meaning of its terms.

Contrary to the Diakite's claims, the terms and conditions of the promissory note are unambiguous. (WWW.ASSOCIATES.INC. v. Giacontieri, 77 NY2d 157 [1990]). The note states that interest shall be at the bank's prime rate as of the date of execution. Thus, the interest would be whatever the bank's prime rate was on February 22, 2007. This is a readily ascertainable amount. Due to the default, Diakite's interest rate on this motion is the prime rate plus 3%. The computer records provided by Wells Fargo clearly identify the applicable interest rate at 3.25%. Due to the default, the interest rate collectable is 6.25%. Moreover, the documents provided detail about the missed payments and the calculation of principle and interest.

Diakite argues that Wells Fargo has not proven it made a demand upon him for the payment of the note. In reply, Wells Fargo has provided a copy of the demand letter it sent to Diakite on September 14, 2010. Diakite has not provided any affidavit denying

receipt of the demand letters. Therefore, this argument is rejected.

Plaintiff's motion is granted, in that it is entitled to a money judgment in the amount of \$100,683.42, consisting of unpaid principal in the amount of \$98,125, together with interest through August 27, 2010 in the amount of \$2,462.66, plus late fees in the total amount of \$94.76.

In its complaint, Wells Fargo also seeks immediate possession of the collateral pledged, an order of replevin and an injunction granting them possession of collateral. However, Wells Fargo only moves for summary judgment on the monetary claim. Since a monetary judgment for the full amount owed will make Wells Fargo whole, and it does not seek a judgment for any of the collateral, the court, in the interest of justice, dismisses the causes of action for additional relief, without prejudice.

The promissory note provides that Wells Fargo is entitled to its legal fees. Diakite does not challenge entitlement. The court, however, has no evidence on which to determine the amount of the fees. Therefore, the issue of the reasonable legal fees Wells Fargo may recover is referred to a Special Referee to hear and report its findings back to the court.

Conclusion

It is hereby:

Ordered that on the first cause of action plaintiff is entitled to a money judgment against defendant in the principal amount of \$100,683.42, plus interest thereon from August 28, 2010 at the rate of 6.25% until the entry of judgment together

with the costs and disbursements of their action and as taxed by the clerk of the court, and it is further

Ordered on the fourth cause of action plaintiff is entitled to summary judgment on the issue of liability, the amount of damages, (reasonable attorney's fees) is respectfully referred to a special referee for hearing and to report his/her findings back to the court and it is further

Ordered that in the interest of justice the remaining causes of action are dismissed without prejudice, and it is further

Ordered that entry of judgment is held in abeyance pending confirmation of the report and recommendations of the Special Referee or other final resolution of the fourth cause of action and it is further

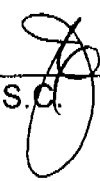
Ordered that plaintiff shall within 60 days of the date of this order file it with the Special Referee Clerk (Room 119 at 60 Centre Street) so that the matter may be calendered, and it is further

Ordered that any relief requested that has not been expressly addressed herein has nonetheless been considered by the court and is hereby denied. This constitutes the decision and order of the court.

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OCT 12 2011
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Dated: New York, NY
October 11, 2011

SO ORDERED:



J.G. J.S.C.