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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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FLUSHING SAVINGS BANK, FSB,

Plaintiff,

-against-

YOSSI'S HEIMISHE BAKERY INC.,

Defendant.

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TRIAL/IAS PART 21

INDEX # 003820/11

Motion Seq. 1
Motion Date 7.15.11
Submit Date 9.12.11

XXY

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

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This motion by the plaintiff Flushing Savings Bank, FSB ("the Bank") for an order pursuant to CPLR 3212 granting it summary judgment on its complaint and an order pursuant to CPLR 3211(a)(7) dismissing the defendant Yossi's Heimishe Bakery Inc.'s ("the Bakery") counterclaim is **granted.**

The facts relevant to the determination of this motion are as follows:

On October 10, 2007, the defendant Bakery executed and delivered a United States Small Business Administration Term Note to the Bank by which it promised to pay the holder of the loan the principal sum of up to $100,000.00 with interest on the unpaid principal balance at the

rate equal to prime plus 2.25% per annum. That same day, the Bakery executed and delivered a line of credit agreement to the Bank whereby it promised to pay the holder of the loan the principal sum of up to $25,000.00" with interest at the rate of prime plus 2.25% and a default interest rate of prime plus 4.5%.

"On a motion for summary judgment pursuant to CLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Shepard-Morley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Shepard-Morley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

"To make a prima facie showing of entitlement to judgment as a matter of law in an action to recover a note . . . a plaintiff must establish 'the existence of a note . . . and the defendant's failure to make payments according to [its] terms.' " JP Morgan Chase Bank, N.A. v Galt Group, Inc., 84 AD3d 1028 (2nd Dept. 2011), quoting Verela v Citrus Lake Development Inc., 53 AD3d 574 (2nd Dept. 2008), citing Gullery v Imburgio, 74 AD3d 1022 (2nd Dept. 2010).

Via the affidavit of Joseph Baldasare, a Vice President of the Bank, the Bank has established that the Bakery has defaulted under both notes since December 1, 2010 and that it has not recovered on the loan from any other entity.

Via the affidavit of Joseph Baldasare and the notes themselves, the Bank has established its entitlement to summary judgment, thereby shifting the burden to the Bakery to establish the existence of a material issue of fact. The court notes that notices of default were not required by either note. Furthermore, the court will not require the Bank to disprove the myriad affirmative defenses advanced by the Bakery in order to establish its entitlement to summary judgment but will instead defer to the Bakery to demonstrate their validity by establishing that they give rise to a material issue of fact.

The Bank has also established its entitlement to summary judgment dismissing the Bakery's purported counterclaim sounding in temporary commercial impracticability. The Bakery alleges that in view of the "unprecedented global credit freeze," its obligations under the notes should be temporarily suspended and extended "until such time that the current and continuing unprecedented global credit freeze has dissipated and for a reasonable time thereafter..." More specifically, the Bakery alleges that it was assumed that it would be able to obtain financing to pay off its debt to the Bank but it has not been able to do so due to the present "unforeseeable" state of financial affairs.

"[W]hile defenses [such as impossibility of performance] have been recognized in the common law, they have been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances." Kel Kim Corp. v Central Markets, Inc., 70 NY2d 900, 902 (1987), citing Wallach, *The Excuse Defense in the Law of*

Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability, 55 Notre Dame Law 203, 207 (1979). "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." Kel Kim Corp. v Central Markets, Inc., supra, at p. 902, citing 407 East 61st Garage, Inc. v Savoy Fifth Ave. Corp., 23 NY2d 275 (1968); Ogdensburg Urban Renewal Agency v Moroney, 42 AD2d 639 (3rd Dept. 1973). The Court of Appeals has stated: "where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused (citations omitted)." 407 East 61st Garage v Savoy Fifth Ave. Corp., supra, citing Central Trust Co. of Illinois v Chicago Auditorium Ass'n, 240 U.S. 581 (1916); Cameron-Hawn Realty Co. v City of Albany, 207 NY 377, 380-381 (1913).

Succinctly put, that the Bakery may be one of a multitude of business entities which has suffered severely as a result of the global financial crisis does not excuse its performance under the contract. Urban Archaeology Ltd. v 207 E. 57th Street LLC, 68 AD3d 562 (1st Dept. 2009); DiScipio v Sullivan, 30 AD3d 660 (3rd Dept. 2006).

In opposition to the Bank's motion, the Bakery alleges that its loan was guaranteed by the United States Government or the Small Business Association and that the Bank has recovered from them and if not, is in fact required to seek recovery from them on the notes. The note clearly permits the Bank to recover of the Bakery without pursuing remedies from those other entities. In any event, the documentation submitted by the defendant seeking recovery on behalf of the Small Business Administration references a loan to another entity, "Yossie's Sweet

House," not the defendant, and the amount sought is not equal to the amount due here. In contrast, Baldasare has established that the Bank has not sought recovery nor has it recovered of the United States Government or the Small Business Administration.

The cases the Bakery relies on in support of their commercial impracticability defense are easily distinguished. In Bank of Boston Intern. of Miami v Arguello Tefel, (644 F. Supp 1423 [E.D.N.Y. 1986]), the court found only a temporary impossibility based upon currency restrictions imposed by the Nicaraguan government which prevented the defendants from repaying their debt in United States dollars but was rendered inconsequential when the defendants departed from Nicaragua. In Bush v Protravel Intern., Inc. (192 Misc2d 743 [New York City Civil Court 2002]), the court excused the plaintiff's failure to cancel a trip after the 9/11 terror attacks on account of the ensuing extraordinary aftermath which crippled their ability to cancel due to the disruption in telephone service. The court there pointed out the extreme and unforeseeable circumstances that gave rise to the plaintiff's inability to perform as per the parties' agreement.

Finally, while CLR 3212(f) permits denial of a motion for summary judgment where discovery remains outstanding, the defendant Bakery has not "demonstrate[d] that discovery may lead to relevant evidence or that the facts essential to oppose the motions [are] exclusively within the knowledge and control of the [plaintiff] (citations omitted)." Haque v Daddazio, 84 AD3d 940, 942 (2nd Dept. 2011). "The 'mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion.' " Haque v Daddazio, supra, quoting Oasis v City of New York, 35 AD3d 533, 533-534 (2nd Dept. 2006).

The plaintiff Bank's motion for summary judgment on its complaint and dismissing the Bakery's counterclaim is **granted**.

Submit judgment on notice.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: October 18, 2011

ENTER:

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