

Flushing Sav. Bank, FSB v Baron Upholsterers Inc.
2011 NY Slip Op 33023(U)
November 10, 2011
Sup Ct, Nassau County
Docket Number: 003821-11
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

FLUSHING SAVINGS BANK, FSB,

Plaintiff,

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

- against -

**BARON UPHOLSTERERS INC.,
PAUL URBAN, P.J. BRICKS, LLC,**

Defendants.

**Index No.003821-11
Motion Seq. No. 1
Submitted 9/19/11**

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support, Affidavit of Merit and Exhibits.....X**
- Proposed Judgment.....X**
- Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation in Support and Exhibits.....X**

This matter is before the court on the motion filed by Plaintiff Flushing Savings Bank, FSB ("Bank" or "Plaintiff") on June 28, 2011 and submitted on September 19, 2011. For the reasons set forth below, the Court grants Plaintiff's motion to the extent that the Court grants Plaintiff summary judgment against Defendants on the first and fifth causes of action in the Complaint. The Court will sign the proposed Judgment submitted by Plaintiff awarding Plaintiff judgment against Defendants, jointly and severally, in the principal sum of \$149,251.62, together with interest from and after December 31, 2010 and costs and disbursements.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR § 3212, for the entry of summary judgment in favor of Plaintiff and against Defendants Baron Upholsterers Inc., Paul Urban (“Urban”) and P.J. Bricks, LLC (“PJ Bricks”) based on their default on a Line of Credit Note and Guarantees.

Defendants oppose Plaintiff’s motion.

GB. The Parties’ History

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

Defendant Baron Upholsterers Inc. (“Borrower”) executed a Line of Credit Note in the principal amount of \$150,000.00 dated April 20, 2009 (“LOC Note”) (Ex. A to Compl.). Pursuant to the terms of the LOC Note, Borrower promised to make interest-only payments at the initial rate of 5.5% per annum, and to pay the balance due thereon, and any accrued interest on April 20, 2016. The interest rate on the LOC Note is adjustable each calendar quarter to a rate that is 2.25% above the Prime Rate, as defined in the LOC Note, per annum (“Current Interest Rate”). The LOC Note further provides that, upon the occurrence of an Event of Default, as defined in the LOC Note, payment shall bear interest from the due date until paid in full at a rate of 2.25% about the Current Interest Rate per annum. Interest is paid through December 30, 2010.

In consideration for the Bank’s entering into the loan (“Loan”) with Borrower, Urban (“Guarantor No. 1”) executed and delivered to the Bank an Unconditional Guarantee (“Guarantee No. 1”) dated April 20, 2009, which unconditionally and absolutely guaranteed to the Bank payment of all amounts due under the LOC Note. In addition, in consideration for the Loan, PJ Bricks (“Guarantor No. 2”) executed and delivered to the Bank a Guaranty (“Guarantee No. 2”) dated November 22, 2010, which unconditionally and absolutely guaranteed to the Bank payments of all amounts due under the LOC Note. Copies of the Guarantees are annexed to the Complaint as Exhibit B.

As additional consideration for the Loan, Borrower executed a Security Agreement (“Security Agreement”) (Ex. C to Compl.) in favor of the Bank, pursuant to which Borrower granted to the Bank a lien and security interest in the Collateral, as defined in Section 2 of the Security Agreement. The Bank perfected its security interest in the Collateral by filing a Uniform Commercial Code (“UCC”)-1 financing statement (*id.* at Ex. D).

The Complaint further alleges that Guarantor No. 2 previously executed an Amended, Consolidated and Restated Mortgage Note in the principal amount of \$3,500,000.00 dated October 23, 2008 ("Mortgage Note"). The Mortgage Note is secured by a Consolidation, Modification and Extension Agreement ("Mortgage") on real property ("Property") located at 545 West 45th Street, Unit 3, New York, New York. Guarantor No. 2 is the obligor and borrower under the Mortgage Note and Mortgage. Payment of the Mortgage Note and Mortgage is guaranteed by Borrower and Guarantor No. 1. The Mortgage Note, Mortgage and guaranty are annexed as Exhibit E to the Complaint.

Paragraph 1 of Guarantee No. 1 provides that Urban "unconditionally guarantees payment of Lender of all amounts owing under the Note." Guarantee No. 2 and the guarantee executed with the Mortgage Note and Mortgage, which refers to Urban and Baron jointly as the "Guarantor," provide that the guarantor:

[H]ereby guarantees to Flushing and its successors, endorsees, transferees and assigns the prompt and complete payment, as and when due and payable (whether at stated maturity or by required prepayment, acceleration, demand or otherwise), of all of the Guaranteed Obligations now existing or hereafter incurred. Guarantor hereby guarantees that the Guaranteed Obligations will be paid strictly in accordance with their terms.

The LOC Note is in default pursuant to the cross-default provision in paragraph 7(h) of the LOC Note due to the failure to pay the amounts due under the Mortgage Note and Mortgage on December 1, 2010, and thereafter. Pursuant to the terms of the LOC Note and Guarantee No. 2, a default under any other obligation due to the Bank by the Borrower, Guarantor No. 1 or Guarantor No.2 is a default under the terms of the LOC Note. Paragraph 7(h) of the LOC Note provides as follows:

Upon the occurrence and continuance of any of the following (each an "Event of Default"):

(h) default in the punctual payment or performance of this or any other obligation to the Bank or to any other lender at any time;

then this Note shall, at the sole option of the Bank, become due and payable without notice or demand[.]

In addition, pursuant to the LOC Note, Borrower agreed to pay all of the Bank's costs and expenses, including reasonable counsel fees, in connection with the collection of any amounts due to the Bank in connection with the enforcement of its rights under the LOC Note.

By letter dated February 18, 2011 (Ex. F to Compl.), the Bank notified Borrower, Guarantor No. 1 and Guarantor No. 2 of the default ("Default") under the LOC Note and made demand for payment. Borrower has failed to repay the outstanding principal and accrued interest due and payable under the Loan Documents, and is in default under those Documents.

The Complaint contains five (5) causes of action: 1) against the Borrower for breach of contract with respect to the LOC Note, 2) against the Borrower for unjust enrichment with respect to the LOC Note, 3) against the Borrower for replevin of the Collateral, 4) against Borrower for access to inspect the premises and Borrower's books and records, and 5) against Guarantor No. 1 and Guarantor No. 2 for breach of their Guarantees with respect to the LOC Note. On the first, second and fifth causes of action, Plaintiffs seeks judgment against Borrower, Guarantor No. 1 and Guarantor No. 2 in the amount of the outstanding principal in the sum of \$149,251.62, plus interest at the rate set forth in the LOC Note from and after December 30, 2010 to the date of entry of judgment, plus attorney's fees and costs.

In his Affidavit in Support, Joseph Baldasare ("Baldasare") affirms that he is a Vice President of the Bank and makes his affidavit based on records maintained by the Bank in the ordinary course of its business. Baldasare affirms the truth of the allegations in the Complaint regarding 1) Borrower's execution and deliver of the LOC Note, 2) payment of interest through December 30, 2010, 3) Borrower's default under the LOC Note, pursuant to the cross-default provision in paragraph 7(h), by virtue of Defendants' default under the Mortgage Note and Mortgage by failing to tender required payments, 4) Plaintiff's correspondence to Defendants advising them of the default, 5) the sums owed, consisting of the current unpaid principal balance of \$149,251.62, together with interest at the rate of prime plus 2.25% per annum from and after December 31, 2010, 4) the Guarantors' execution and delivery of the Guarantees, 5) the Bank's provision of the Loan in reliance on the Guarantees, and 6) the Bank's entitlement to judgment against the Borrower and Guarantors.¹

Plaintiff provides a copy of Defendants' Verified Answer to Complaint ("Answer") (Ex. B to Sheehan Aff. in Supp.). In their Answer, Defendants deny, or deny knowledge and

¹ Baldasare also affirms the truth of the allegations in the Complaint regarding the Security Agreement, and Plaintiff's entitlement to possession of the Collateral. In her Affirmation in Support, however, counsel for Plaintiff affirms that if Plaintiff's motion for a judgment is granted, and a judgment is duly entered, Plaintiff "waives all entitlement to legal fees and drops its cause of action for replevin" (Sheehan Aff. in Supp. at ¶ 52).

information sufficient to form a belief as to the truth of, many of the allegations in the Complaint. Defendants also assert six (6) affirmative defenses: 1) the Complaint fails to state causes of action on which relief can be granted; 2) Plaintiff's causes of action are barred by the doctrines of waiver, estoppel, laches and unclean hands; 3) Plaintiff's causes of action are barred by the defenses of ratification and equitable estoppel; 4) Plaintiff's causes of action are barred due to Plaintiff's failure to give proper notice under the Loan Documents; 5) Plaintiff's causes of action are barred due to Plaintiff's failure to avoid or mitigate its damages; and 6) Defendants reserve their right to assert future affirmative defenses.

In her Affirmation in Support, Plaintiff's counsel affirms that Defendants were properly served with the Complaint. Plaintiff's counsel provides Affidavits of Service, as well as Notices pursuant to BCL § 306 and CPLR § 3215, in support. *See* Exhibit C to Sheehan Affirmation in Support.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment against the Defendants by 1) pleading the existence of the LOC Note and the Guarantees; and 2) establishing the Defendants' breach of those instruments. Plaintiff contends, further, that Defendants have failed to raise an issue of fact sufficient to defeat Plaintiff's right to judgment. Plaintiff argues that 1) the first affirmative defense is not viable, in light of Plaintiff's demonstration of its right to judgment on the LOC Note and Guarantees; 2) Defendants have provided no support for their second affirmative defense based on the doctrines of waiver, estoppel, laches and unclean hands, and Plaintiff notes that it commenced this action expeditiously after Defendants' default; 3) Defendants have failed to set forth facts supporting their third affirmative defense of equitable estoppel and ratification; 4) the fourth affirmative defense, based on Plaintiff's alleged failure to provide required notice, is "patently false" (Sheehan Aff. in Supp. at ¶ 39), both in light of the language in the LOC Note pursuant to which Plaintiff waived notice, and the fact that Plaintiff nonetheless provided Defendants with notice pursuant to correspondence dated February 17 and February 18, 2011; and 5) Defendants' fifth affirmative defense, that Plaintiff failed to mitigate its damages, is "baseless" (*id.* at ¶ 42) given Defendants' failure to offer any proof in support of this assertion.

In opposition, Urban submits, *inter alia*, that 1) the instant action is improper due to the fact that Plaintiff filed a related foreclosure action ("Related Action") in the Supreme Court of New York County titled *Flushing Savings Bank, FSB v. P.J. Bricks, LLC et al.*, New York County Index Number 810087-11 in which Plaintiff alleges that it is entitled to foreclose on the

Property; 2) as set forth in Defendants' opposition to the Bank's pending summary judgment motion in the Related Action, Defendants believe they have meritorious defenses including the fact that the Mortgage was never executed by PJ Bricks, in violation of General Obligations Law § 5-703; 3) as the Courts in the above-captioned action ("Instant Action") and Related Action will have to determine whether the Mortgage is valid and whether PJ Bricks defaulted on the Mortgage, there exists the possibility of one Court's determination having a collateral estoppel or *res judicata* effect on the other's determination and, therefore, Plaintiff should withdraw its motion in the Instant Action; and 4) in light of Baldasare's failure to state that he is "otherwise familiar with this matter" (Ds' Memorandum of Law at p. 6) or has reviewed the documentation at issue, he is not a person having knowledge of the facts within CPLR § 3212.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

An affidavit based on documentary evidence is sufficient to support a motion for summary judgment. *Barclay's Bank of New York, N.A. v. Smitty's Ranch, Inc.*, 122 A.D.2d 323, 325 (3d Dept. 1986). *See also First Interstate Credit Alliance, Inc. v. Sokol*, 179 A.D.2d 583 (1st Dept. 1992) (affidavit based on documentary evidence sufficient to comply with requirement that summary judgment motion be supported by affidavit from person having personal knowledge).

B. Promissory Notes and Guarantees

To make a *prima facie* showing of entitlement to judgment as a matter of law in an action to recover on a note, and on a guaranty thereof, the plaintiff must establish the existence of a

note and guaranty and the defendants' failure to make payments according to their terms. *JPMorgan Chase Bank, N.A. v. Galt Group, Inc.*, 84 A.D.3d 1028, 1029 (2d Dept. 2011), quoting *Verela v. Citrus Lake Dev., Inc.*, 53 A.D.3d 574, 575 (2d Dept. 2008) and citing *Gullery v. Imburgio*, 74 A.D.3d 1022 (2d Dept. 2010). Once the movant establishes its *prima facie* entitlement to judgment as a matter of law, the burden shifts to the defendants to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense. *Id.* at 1029-1030, quoting *Gullery, supra*, at 1022 and citing *Verela, supra*, at 575.

C. Application of these Principles to the Instant Action

Plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law on the first and fifth causes of action, for breach of contract with respect to the LOC Note and Guarantees, by submitting, *inter alia*, 1) the LOC Note and cross-default provision therein, 2) the Mortgage Note and Mortgage, and 3) the Guarantees. This documentation establishes that PJ Brick guaranteed payment of the LOC Note, and Baron and Urban unconditionally guaranteed PJ Brick's payment obligations under the Mortgage Note. Although neither Urban nor Baron was a party to the Mortgage Note and/or Mortgage, the LOC Note plainly states that a default involving any obligations owed by Baron to the Bank would trigger a default under the LOC Note, authorizing acceleration of the sums then due thereunder. In addition, Baldasare has sworn to the default of PJ Bricks under the Mortgage Note and Mortgage by his failure to make the required December 1, 2010 payment, and any payments thereafter. The Baldasare Affidavit, which is based on documentary evidence, is sufficient to support Plaintiff's motion for summary judgment. The Court also concludes that Defendants have failed to raise a triable issue of fact that would defeat Plaintiff's entitlement to summary judgment.

It is undisputed that 1) Baron and Urban unconditionally guaranteed repayment of PJ Brick's obligations under the Mortgage Note and/or Mortgage; 2) Urban and PJ Bricks guaranteed Baron's LOC Note debt; and 3) none of the Defendants have remitted the payments demanded by Plaintiff on any of the debts allegedly in default. Nor have the Defendants disputed Plaintiff's claim that the December, 2010 payment was not timely made in accord with the provisions of the Mortgage Note and Mortgage.

With respect to Plaintiff's commencement of the Related Action, the Court notes that, although the Related and Instant Actions are based on Defendants' default under the Mortgage Note, the relief sought in the two Actions is different. In the Related Action, the Bank is suing in equity to foreclose on the Mortgage given as collateral to secure repayment of the Mortgage

Note. In the Instant Action, the Bank is suing at law to recover, *inter alia*, the sum of \$149,251.62, plus interest, due on the LOC Note.

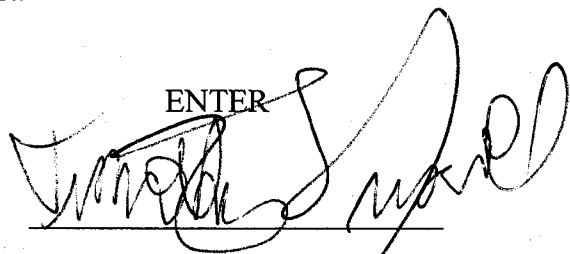
Moreover, assuming *arguendo* that there is merit to Defendants' claim that there is a defect in the mortgage instrument, that fact would not preclude the entry of judgment in this action. The Bank's claims under the LOC Note are not based on the validity of the Mortgage, but rather are founded on a separate, payment-based default, the existence of which is unaffected by the validity of the Mortgage that is the subject of the Related Action. The Court notes, in further support of its determination that the Instant Action may proceed notwithstanding Defendants' alleged defenses in the Related Action, that the Defendants do not deny that the foregoing payment-based default has occurred. Finally, the Court has considered the Defendants' remaining contentions and concludes that they are insufficient to defeat Plaintiff's right to summary judgment.

In light of the foregoing, the Court grants Plaintiff's motion to the extent that the Court grants Plaintiff summary judgment against Defendants on the first and fifth causes of action in the Complaint. The Court directs Plaintiff to submit, via the Clerk's office, a Proposed Judgment on five (5) days notice reflecting the Court's decision herein, which will result in the Court awarding Plaintiff judgment against Defendants, jointly and severally, in the principal sum of \$149,251.62, together with interest from and after December 31, 2010 and costs and disbursements.

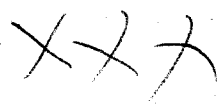
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
November 10, 2011



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



ENTERED
NOV 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE