

JPMorgan Chase Bank, N.A. v Goldpak, LLC

2011 NY Slip Op 33518(U)

December 19, 2011

Supreme Court, Nassau County

Docket Number: 007124/11

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

_____ X

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

Index No.: 007124/11
Motion Sequence...01
Motion Date... 10/14/11

-against-

GOLDPAK, LLC and JEFFREY E. GOLD,

Defendants.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Memorandum of Law.....X
- Affirmation in Opposition.....X
- Affirmation in Further Support.....X

Upon the foregoing papers, the motion by the Plaintiff for an order pursuant to CPLR § 3212 granting it summary judgment is determined as hereinafter provided.

This action was commenced on May 13, 2011 with the filing of the Summons and Complaint with the Nassau County Clerk. Issue was joined on or about June 21, 2011. The Plaintiff seeks money damages for an amount it claims is due and owing from the Defendants arising out of a Business Loan Agreement and Commercial Guaranty. On or about November 10, 2010, the Defendant, GOLDPAK, LLC (the LLC) executed and

delivered to Plaintiff a Promissory Note and Business Loan Agreement wherein the LLC promised to pay to the loan holder the amount of \$400,000.00 “plus interest at a rate of 4.000% over the “Index”, which is the rate of interest publicly announced by CHASE as its prime rate calculated on the basis of a 360 day year for the actual number of days elapsed, but in no event higher than the maximum permitted under applicable law”. On or about November 10, 2010, the Defendant, JEFFREY E. GOLD (Gold) executed a Commercial Guaranty in connection with the LLC’s obligations under the Promissory Note and Business Loan Agreement (herein after the “Guaranty”). The Plaintiff alleges the Defendants defaulted under the terms of the Promissory Note and the Guaranty, having failed to make any payments since November 15, 2010, the date of default.

The Defendants, in opposition¹, fail to refute the Plaintiff’s claim that no payments have been made. Nor do the Defendants offer any credible evidence to refute the Plaintiff’s allegation that the outstanding principal balance is \$400,000.00 together with past due interest.

In support of the motion, the Plaintiff submits the Affidavit of Christine Betz, sworn to on August 23, 2011, who serves as an Assistant Vice President of the Plaintiff. Ms. Betz alleges that on or about November 10, 2010, the Plaintiff and the Defendants entered into a Business Loan Agreement and Promissory Note whereby the Defendant, LLC,

¹The Defendants submitted a Cross-motion (Motion Seq. 02) seeking an adjournment of the Plaintiff’s motion. The Cross-motion was withdrawn and is being treated as opposition to the Plaintiff’s motion.

promised to repay to the Plaintiff the principal sum of \$400,000.00.

With regard to the Defendant, JEFFREY GOLD, the Plaintiff contends that he personally guaranteed the debt. Specifically, the Plaintiff alleges that the Commercial Guaranty signed by the Defendant, JEFFREY E. GOLD, states the following:

“For good and valuable consideration, Jeffrey Gold (“Guarantor”) absolutely and unconditionally guarantees and promises to pay to JPMorgan Chase Bank, NA (“Lender”) or its order, in legal tender of the United States of America, the indebtedness (as that term is defined below) of Goldpak, LLC (“Borrower”) to Lender on the terms and conditions set forth in this Guaranty.”

The Defendants’ counsel submits an Affirmation in opposition to the motion. In his Affirmation, he indicates that the LLC is in dire financial condition and that Mr. Gold already has a judgment entered against him. He requests that the Plaintiff engage in settlement negotiations and that this matter be adjourned to afford the parties an opportunity to engage in such negotiations.

The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Upon such a showing, the party opposing the motion bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Moore v. 3 Phase Equestrian Ctr., Inc.*, 83 A.D.3d 677, 679 (2d Dept. 2011).

In order to recover under the Business Loan Agreement and Promissory Note, the Plaintiff is required give proof of its existence and of the Defendants’ failure to make

payments in accordance with its terms. *See Layden v. Boccio*, 253 A.D.2d 540 (2nd Dept. 1998); *Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772 (1st Dept. 1983). Where payment was guaranteed by one or more of the parties, to make a prima facie case, the Plaintiff must show proof of the note, the guarantee, and the failure to make payments in accordance with their terms. *See Key Bank of Long Island v. Burns*, 162 A.D.2d 501 (2nd Dept. 1990).

The Plaintiff has made a prima facie case against the Defendants, GOLDBAK, LLC and JEFFREY E. GOLD, by submitting proof of the Business Loan Agreement, the Commercial Guaranty and the Defendants' failure to make the required payments.

Once the movant has established a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to demonstrate the existence of issues of fact. *Burton v. Ertel*, 107 A.D.2d 909 (3rd Dept. 1985). General denials contained in the non-movants answer are insufficient to raise a triable issue of fact. *N.Y. Higher Educ. Servs. Corp. v. Ortiz*, 104 A.D.2d 684 (3rd Dept. 1984); *Stern v. Stern*, 87 A.D.2d 887 (2nd Dept. 1982). Further, "a shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment." *Mayer v. McBrunigan Constr. Corp.*, 105 A.D.2d 774 (2nd Dept. 1984).

The Defendants, GOLDBAK, LLC and JEFFREY E. GOLD, have failed to sustain their burden to demonstrate a triable issue of fact. The Answer submitted by these Defendants makes only general denials and as such, is insufficient to defeat summary judgment. Further, these Defendants did not proffer support or evidence for any allegations

contained in their Answer.

Accordingly, the branch of the Plaintiff's motion seeking summary judgment, pursuant to CPLR § 3212, against the Defendants, GOLDBAK, LLC and JEFFREY E. GOLD, is **GRANTED**.

The Court will now address the second branch of the Plaintiff's motion, seeking to sever the Plaintiff's third cause of action for attorney's fees and granting the Plaintiff an Inquest with regard thereto.

Pursuant to the terms of the Business Loan Agreement and the Commercial Guaranty, the Defendants agreed to pay costs and reasonable attorneys' fees upon default of the terms therein. The Court notes that a party seeking an award of counsel fees must demonstrate their entitlement thereto by demonstrating the "nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the result achieved." *Jordan v. Freeman*, 40 A.D.2d 656 (1st Dept. 1972). In the instant motion, the Plaintiff has not demonstrated evidence of the extent of the work performed beyond a cursory explanation in the Affirmation in Support of the Plaintiff's motion. The Affirmation alone, without a breakdown of the actual time spent on each service (i.e., billing sheets), is insufficient to warrant an award of counsel fees.

This matter shall be set down for an Inquest to determine what amount of attorney's fees, if any, should be awarded to the Plaintiff's counsel.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion for summary judgment in the amount of \$400,000.00 plus interest of \$17,963.89, is **GRANTED**; and it is further

ORDERED, that subject to the approval of the Justice there presiding and provided a Note of Issue has been filed at least ten (10) days prior thereto, this matter shall appear on the calendar of CCP on the **16th day of February, 2012 at 9:30 a.m.** for an Inquest to determine the amount Plaintiff's attorney's fees, if any; and it is further


ORDERED, that a copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the Inquest; and it is further

ORDERED, that the directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon counsel for the Defendant pursuant to CPLR § 2103 (b) 1, 2 or 3 within twenty (20) days of the date of this Order.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
December 19, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
DEC 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE