

<b>TD Bank, N.A. v Age Mgt. Assoc. of NY, LLC</b>
2011 NY Slip Op 33676(U)
June 27, 2011
Sup Ct, New York County
Docket Number: 00285-11
Judge: Timothy S. Driscoll
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**TD BANK, N.A.,**

**Plaintiff,**

**-against-**

**TRIAL/IAS PART: 20**

**NASSAU COUNTY**

**Index No: 002885-11**

**Motion Seq. No: 1**

**Submission Date: 5/6/11**

**AGE MANAGEMENT ASSOCIATES OF NEW YORK  
LLC, TAMESHWAR AMMAR and ELLEN AMMAR,**

**Defendants.**

-----x

**The following papers have been read on this motion:**

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....x**
- Affidavits of Service.....x**

This matter is before the Court for decision on the Motion for Summary Judgment in Lieu of Complaint filed by Plaintiff TD Bank, N.A. ("Plaintiff") on February 28, 2011 and submitted on May 6, 2011. For the reasons set forth below, the Court grants Plaintiff's motion and refers the determination of damages, interest, attorney's fees and costs to an inquest.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting Plaintiff summary judgment in lieu of complaint and directing entry of judgment against Defendants Age Management Associates of New York LLC, Tameshwar Ammar and Ellen Ammar, in the sum of \$111,657.99, plus interest from October 29, 2010, together with attorney's fees, costs and disbursements.

Defendants have submitted no opposition or other response to Plaintiff's motion.

B. The Parties' History

Carolyn Cote ("Cote"), an Assistant Vice President in the Commercial Workout Department of Plaintiff, affirms that she is fully familiar with the facts and circumstances of this matter. She affirms that on February 12, 2008, Defendant Age Management Associates of New York LLC ("Age Management" or "Borrower") executed two (2) promissory notes ("Notes") in the amounts of One Hundred Thousand (\$100,000) Dollars and Fifty Thousand (\$50,000) Dollars, respectively, made payable to Commerce Bank, N.A. ("Lender") (Exs. 1 and 2 to Cote Aff. in Supp.). On the same date, February 12, 2008, Defendants Tameshwar Ammar and Ellen Ammar ("Guarantors") executed unconditional guarantees ("Guarantees") in favor of Lender (*id.* at Exs. 3 and 4), in which they guaranteed and promise to pay the indebtedness of Borrower. On June 1, 2008, Commerce Bank, N.A. was merged into Plaintiff TD Bank, N.A.

The \$100,000 Note requires the Borrower to make consecutive monthly payments of all accrued unpaid interest and principal payments of not less than 1/36 of the outstanding principal balance as of the monthly statement date, or a total principal and interest payment of \$250, whichever is greater, beginning March 15, 2008 and the 15<sup>th</sup> day of each month thereafter. The interest rate on the \$100,000 Note is variable, and is set at 1.50 percentage points above the Wall Street Journal Prime Rate. At its inception, the interest on the \$100,000 Note was 7.50% per annum. The \$100,000 Note permits the Lender, in the event of default, to declare the entire unpaid principal balance, and all accrued unpaid interest, immediately due. It further provides that, in the event of default, interest shall accrue at a per annum rate equal to the aggregate of 3% plus the rate provided in the Note. Borrower defaulted under the terms of the \$100,000 Note by failing to make the payment required on November 15, 2009, and each subsequent month thereafter.

The \$50,000 Note requires the Borrower to make sixty (60) regular monthly payments of principal and interest of \$969.03 beginning on March 15, 2008, and on the same day of each month thereafter. The interest rate on the \$50,000 Note is 6% per annum. In the event of default, interest accrues at a per annum rate equal to the aggregate of 3.0% plus the rate provided in the Note. Borrower defaulted under the terms of the \$50,000 Note by failing to make the payment required on November 15, 2009, and each subsequent month thereafter.

By letter dated August 26, 2010 (Ex. 5 to Cote Aff. in Supp.), Plaintiff demanded payment of the loans in full from Borrower and Guarantors. Defendants have failed to pay the demanded payment pursuant to the Notes and Guarantees.

Plaintiff provides a Loan History with respect to the \$100,000 Note (Cote Aff. in Supp. at Ex. 6). Cote affirms that there remains due and payable under the \$100,000 Note, and Guarantees, the sum of \$73,757.24 as of October 29, 2010, together with interest at the rate of 7.75% per annum. The Loan History provided, however, reflects a “payoff” figure of \$73,757.14. Cote affirms that the per diem interest is \$14.79 for each day after October 29, 2010 and the Loan History confirms that figure.

Plaintiff also provides a Loan History with respect to the \$50,000 Note (Cote Aff. in Supp. at Ex. 7). Cote affirms that there remains due and payable under the \$50,000 Note, and Guarantees, the sum of \$37,900.85, together with interest at the rate of 9.00% per annum. She also affirms that the per diem interest is \$8.77 for each day after October 29, 2010 but the Loan History provided reflects a per diem interest rate of 8.73.

The Notes and Guarantees provide, further, that the Borrower and Guarantors agree to pay the costs of collection, including reasonable attorney’s fees.

Plaintiff has provided Affidavits of Service reflecting service of the Summons and Notice of Motion of Summary Judgment in Lieu of Complaint, Request for Judicial Intervention (“RJI”), and Commercial Division Attorney’s Affirmation on Defendants on February 25, 2011.

### C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to summary judgment in lieu of complaint by producing the Notes and Guarantees, which constitute instruments for the payment of money only pursuant to CPLR § 3213, and submitting proof of the Defendants’ failure to make payment in accordance with their terms. In addition, pursuant to the terms of the Notes and Guarantees, Plaintiff is entitled to reasonable attorney’s fees incurred in connection with its efforts to enforce those instruments.

## 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 (1<sup>st</sup> Dept. 2002), quoting *Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 (1<sup>st</sup> 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); *Mangiatordi 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. Guaranty

A personal guarantee qualifies as an instrument for the payment of money only pursuant to CPLR § 3213. *Council Commerce Corp. v. Paschalides*, 92 A.D.2d 579 (2d Dept. 1983). To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dism.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

#### D. 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).

E. Application of these Principles to the Instant Action

Plaintiff has demonstrated its right to judgment against Defendants by 1) establishing the existence of the Notes and Borrower's failure to make payment pursuant to the terms of those Notes; and 2) proving the existence of the underlying obligation, the Guarantees, and the Borrower's failure to make payment in accordance with the terms of its obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). In addition, the Guarantees are enforceable as they are in writing executed by the persons to be charged and the intent to guaranty the Borrower's obligation is clear and explicit, in part due to the language of the Guarantees which reflects Guarantors' agreement to "absolutely, unconditionally and irrevocably" guarantee Borrower's obligations to Plaintiff. The Notes and Guarantees also entitle Plaintiff to attorney's fees incurred in pursuing collection under those instruments, but the Court has an insufficient basis on which to make a counsel fee determination. Accordingly, it is hereby:

**ORDERED**, that Plaintiff's Motion for Summary Judgment in Lieu of Complaint is granted; and it is further

**ORDERED**, that this matter is respectfully referred to Special Referee Frank N. Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of damages, interest, attorney's fees and costs on August 4, 2011 at 9:30 a.m.; and it is further

**ORDERED**, that Plaintiff shall serve upon the Defendants by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before July 22, 2011; and it is further

**ORDERED**, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against Defendants in accordance with the decision of the Special Referee.

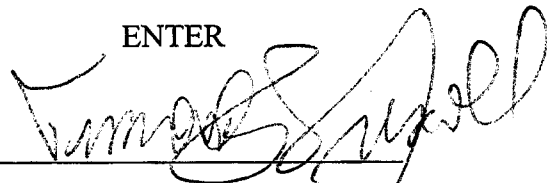
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

June 27, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

JUL 05 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**