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

PRESENT: O. PETER SHERWOOD PART 49
Justice

JP MORGAN CHASE, N.A.,

Plaintiff,

-against-

TRI-LINE CONTRACTING CORP., *et al.*

Defendants.

INDEX NO. 650428/2010

MOTION DATE Feb. 9, 2011

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to ____ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, plaintiff's motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: April 22, 2011

O. P. Sherwood

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

----------X

JP MORGAN CHASE, N.A.,

Plaintiff,

-against-

TRI-LINE CONTRACTING CORP. and JOSE VELAZQUEZ,

Defendants.

----------X

DECISION AND ORDER

Index No. 650428/2010

Hon. O. Peter Sherwood, J.

Plaintiff JPMorgan Chase Bank, N.A. (the Bank), a commercial lender, brings this suit against defendants Tri-Line Contracting Corp. (Tri-Line) and its president, Jose Velazquez (Velazquez) to collect (1) payment of a defaulted loan of $2,666,903.97 as of May 18, 2010, together with interest, and (2) attorneys' fees and other reasonable costs for bringing this claim. Velazquez guaranteed the company's debt. Pursuant to Article 71 of New York Civil Procedure Law and Rules (CPLR), the Bank also seeks possession of certain collateral in Tri-Line's possession and payment under the guaranty agreement.

The Bank commenced its suit in May 2010, claiming declaratory judgments against defendants for breaches of contracts and seeking a default judgment for an unanswered complaint (Motion Sequence No. 001). On August 13, 2010, defendants, however, served their answer. In their answer, defendants asserted general denials and five affirmative defenses. However, no counterclaims were asserted. On August 25, 2010, the Bank withdrew its default judgment motion, but on October 18, 2010, the Bank filed a summary judgment motion making the same breach of contract and declaratory judgment claims. The Bank argues there is no question that defendants are in default of the loan agreement . Therefore, it is entitled to summary judgment pursuant to CPLR 3212.

On November 12, 2010, the parties stipulated to an extension allowing defendants until November 17, 2010 to answer. Nonetheless, defendants have thus far failed to answer Plaintiff's new complaint. On November 16, 2010, the parties stipulated to an extension allowing defendants

to serve responsive papers to the motion for summary judgment until December 3, 2010. On November 18, 2010, defendants filed an affidavit and affirmation in opposition to the motion for summary judgment. To date, defendants have not filed any other response to the motion for summary judgment. The parties were scheduled to appear before this court on December 8, 2010 for a compliance conference. That conference was adjourned to December 14, 2010. On December 14, 2010, oral argument was held on the motion for summary judgment.

Defendants, in opposition to the Bank's motion, insist that Tri-Line's compliance with its credit obligation to the Bank is directly tied to the Bank's obligation to pay Tri-Line under the parties' separate construction contract.

For the reasons that follow, plaintiff's motion for summary judgment is granted.

Factual Background

The facts stated here are drawn from the Notice of Motion dated October 13, 2010 (with exhibits A through I); the affidavit of Esther Bullock, the assistant vice-president of the Bank, sworn to on September 24, 2010, submitted in support of the Bank's motion; the Bank's Amended Statement of Material Facts dated October 13, 2010; plaintiff's memorandum of law in support of the motion for summary judgment; Velazquez's affidavit in opposition, sworn to on November 18, 2010, and an affirmation in opposition (with exhibits 1 through 11) of Jeffrey P. Chartier, attorney for the defendants, sworn to on November 17, 2010; and the reply affidavit of John L. Babieracki, a managing director for the Bank, sworn to on December 6, 2010.

As required by Commercial Division Rule 19-a, a party moving for summary judgment must include a Statement of Material Facts with its filing; a party opposing summary judgment must then respond with a Statement of Material Facts admitting or denying each of the moving party's assertions. Plaintiff, as the moving party, properly submitted its Statement of Material Facts to which defendants offered no response. Generally speaking, the facts set forth by the moving party's statement is deemed admitted unless specifically controverted by the opposing party. Nonetheless, the court has broad discretion to determine whether to overlook a party's failure to comply with local rules. In this case, however, the court has no concern over unsupported facts; the facts relied upon by the court in plaintiff's Amended Statement of Material Facts have either been admitted by defendants or are supported by the record.

The Bank is a national banking association organized and existing under the laws of the United States of America. It is a resident of New York City, maintaining its world headquarters at 270 Park Avenue, New York, New York 10017. Tri-Line is a general construction corporation organized under the laws of the State of New York, with a last known principal place of business located at 260 West 36th Street, New York, New York 10018, and Velazquez is the founder and president of Tri-Line. Velazquez is a resident of the State of New York, with a last known residential address of 1481 Westview Drive, Yorktown Heights, New York 10598.

A. The Line of Credit, Commercial Security and Commercial Guaranty Agreements

On November 13, 2008, the Bank extended to defendants a commercial line of credit for $3 million as part of a Business Loan Agreement (the Loan Agreement). The Loan Agreement constituted a renewal and modification of earlier lines of credit agreements and loans entered into between the parties (*see* Rule 19-a Statement ¶ 11). The Loan Agreement had an initial maturity date of September 4, 2009 that was later extended by mutual consent to December 4, 2009 (*id.* ¶¶ 12-14). According to the Loan Agreement, Tri-Line was required to maintain a tangible net worth (i.e., excludes intangible assets) of $3 million. Additionally, under the Promissory Note (Note) attached to the Loan Agreement, Tri-Line's right to receive advances on the line of credit account was capped at the lesser of $3 million or 70% of the book value of all accounts the Bank has with defendants. Under the Note, defendants also promised to pay accrued interest and fees on a recurring monthly basis. The Note provides that the interest rate under the line of credit is equivalent to the Bank's prime rate plus 2% (the Interest Rate). The Note also provides that the default rate of interest is equivalent to the Interest Rate plus 3%. Pursuant to the terms of the Note, beginning on December 4, 2008, and continuing thereafter on the same calendar day of each month until the maturity date, defendant Tri-Line agreed to pay to the Bank on a monthly basis all outstanding principal and all accrued interest and fees. Under the terms of the Loan Agreement, Tri-Line also agreed to reimburse the Bank for all reasonable costs and expenses incurred in connection with the action, including attorneys' fees.

On December 4, 2009, the Note matured by its terms and all the outstanding principal and interest became due. By letter, dated May 3, 2010, the Bank provided written notice to Tri-Line and Velazquez that an "Event of Default" had occurred due to their failure to pay the then outstanding debt ($2,658,237.94, including interest and fees) and breach of the Loan Agreement for exceeding

the cap on advances and failure to maintain the minimum tangible assets of at least $3 million. Pursuant to the terms of the Loan Agreement, the Bank notified defendants it was imposing the default interest rate of 8.25% and demanded payment in full. Despite the May 3, 2010 letter, no part of the amount due has been paid and additional interest has continued to accrue. The Bank now brings this suit to collect on the unpaid outstanding debt of $2,666,903.97 as of May 18, 2010 and attorneys' fees.

B. Commercial Security Agreement

In order to secure its obligation under the Loan Agreement, pursuant to which the Bank agreed to extend, Velazquez executed and delivered to the Bank a Commercial Security Agreement (Security Agreement) entered into on November 30, 2007. This Security Agreement superceded a prior security agreement between the parties. Under the Security Agreement, Tri-Line secured the debt of the Business Loan Agreement and other prior loans using all assets of Tri-Line, including accounts receivables, attachments, property, products and proceeds. Additionally, the parties entered into a Notice of Assignment on November 13, 2008 where defendants transferred and set over to plaintiffs their right to receive all monies due to them through their accounts and contract rights. Under the Security Agreement, in the event of a default, the Bank could: (1) declare the entire indebtedness immediately due and payable; (2) require Tri-Line to assemble the collateral; and (3) proceed with the sale of the collateral. The Bank seeks to collect on the debt owed to them by asking this court to allow them to take possession of the collateral pledged under the Security Agreement.

C. Guaranty

Concurrently with the execution of the Commercial Security Agreement on or about November 30, 2007, Velazquez executed a Commercial Guaranty (Guaranty), which guaranteed Tri-Line's debt to the Bank. The Guaranty had a merger clause. It provides that the indebtedness guaranteed includes "[a]ny and all of [Tri-Line's] indebtedness to [the Bank] ... now existing or hereafter incurred or created"(affidavit of Bullock, exhibit G, Guaranty, at 1). The Guaranty also provides that the Guaranty "will continue in full force until all indebtedness incurred or contracted ... shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full" (*id.* at 1). As set forth in the Guaranty, Velazquez further agreed to reimburse the Bank for all expenses and costs incurred "in connection with the

enforcement of the Guaranty" (*id.* at 2, Complaint ¶ 23). The Bank now claims that Velazquez has failed to pay Tri-Line's outstanding debt and asks this court to enforce the Guaranty.

D. Attorneys' Fees

In addition to repayment of the defendants' outstanding debt, the Bank seeks attorneys' fees and other costs of bringing its action. The Bank has cited provisions in the Loan Agreement and the Guaranty, where defendants agreed to reimburse the Bank for attorneys' fees and all costs and expenses incurred in connection with the enforcement of the Loan Agreement and Guaranty which includes this action.

E. Plaintiff's Causes of Action

There are five causes of action: (1) a claim against Tri-Line for Breach of Contract of the Promissory Note on the Loan Agreement; (2) a claim against Tri-Line for reimbursement of costs and expenses including attorneys' fees; (3) a claim against Tri-Line for possession of the collateral; (4) a claim against Velazquez for Breach of Contract of the Guaranty; and (5) a claim against Velazquez for reimbursement of costs and expenses including attorneys' fees.

Contentions

At the onset the court notes that counterclaims for breach of contract and fraudulent misrepresentations were never interposed in this action. However, by referring to unpleaded counterclaims defendants contend that they have raised several issues of fact. In his Affidavit in Opposition to the Motion for Summary Judgment, dated November 18, 2010, Velazquez swears that the Bank's breach of a construction contract with Tri-Line purportedly bars any recovery in this action. Velazquez alleges Tri-Line was a subcontractor on a renovation project for the Bank which involved gutting its global headquarters at 270 Park Avenue and transforming the 50-story building into an environmentally-friendly redevelopment (*see* http:///www.skyscrapercity.com/showthread.phpt [accessed April 13, 2011]).

By written contract, dated October 15, 2007, the Bank and Tri-Line entered into an agreement for the infrastructure project. Under the terms of the contract, Tri-Line was to provide general condition services and construction support work for other subcontractors hired by the Bank for upgrades to lighting, heating and cooling systems in the subject building. Pursuant to the contract, Tri-Line was to receive progress payments based upon Tri-Line's application for payment submitted to the Bank. Design revisions were made and change orders allegedly were issued by the

Bank. Tri-Line claims that Bank representatives made oral misrepresentations that the construction company would be paid for the additional work. In reliance on those misrepresentations, Tri-Line allegedly executed the change orders. To finance the project while the balance of payment remained outstanding, Tri-Line alleges that it signed the Loan Agreement and drew down nearly all of the $3 million in its credit line to offset the expenses incurred on behalf of the Bank. Velazquez alleges that the additional work performed by Tri-Line for the Bank was $4, 279, 555.00 (*see* Velazquez affidavit, exhibit 3, Summary).

By December 2008, Tri-Line had performed all of its work under the contract. However, the Bank allegedly did not pay Tri-Line $954,615.00 owed under the base contract or any portion of the $4, 279, 555.00 for the additional work done. The parties allegedly entered into negotiations whereby Tri-Line was to accept a sum of money less than what was owed in return for immediate payment. Defendants assert that the payment was never made by the Bank and subsequently, defendants withdrew their offer. No action has been filed against the Bank by Tri-Line for payment.

The gravamen of defendants' defense to this action for payment seems to be that the Bank defrauded Tri-Line by inducing it to enter into a line of credit agreement and to draw upon the line of credit to fund Tri-Line's work on a construction contract with the Bank, and then failing to pay Tri-Line for its work on the construction project. Accordingly, defendants argue that their allegations raise a triable issue of fact as whether the Note was procured by fraud, requiring denial of the motion for summary judgment. In support of their argument, defendants submitted a copy of a construction contract between the parties, a cost-summary breakdown, a November 29, 2007 letter from Velazquez to Matt Miller (Miller), a Chase employee, stating that the defendant "was relieved to learn [at an emergency meeting held on November 26, 2007] that both JP Morgan Chase and Plaza Construction Corporation have no intention of causing any financial harm to Tri-Line Contracting; rather, your company intends to make TLC whole on the infrastructure project" and "I look forward to finalizing our remaining issues at next week's meeting," a letter dated September 8, 2008 from William J. Lennon (Lennon), senior vice-resident of Tri-Line to Miller, a Chase employee, related to the Certificate of Substantial Completion, the Certificate of Substantial Completion dated September 5, 2008, another letter from Lennon to Miller, dated October 30, 2008, regarding the resolution of payment for outstanding change orders, numerous e-mails and a copy of a "Counterclaim" pleading not filed with the court.

Defendants further argue that there is an issue of material fact as to whether Tri-Line breached the line of credit agreement by virtue of decreasing its minimum tangible asset base. Finally, defendants attempt to assert an unpleaded counterclaim against the Bank, arising out of the alleged breach of the construction contract in excess of any amount due the Bank in this action (*see* Chartier affirmation, ¶¶ 19, 22). Defendants claim that a counterclaim was prepared (*id.*,exhibit 11, Counterclaim), but that it was reserved while negotiations were being had by the parties.

The Bank argues that no counterclaims were ever pleaded in defendants' initial answer, and that defendants' failure to present counterclaims and specific facts establishing their reliance on alleged misrepresentations is sufficient to grant it summary judgment relief.

Discussion

A. Standard for Granting a Motion for Summary Judgment

On a motion for summary judgment, the proponent of the motion must make a prima facie showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 230 [1st Dept 2003]). The motion must be supported by "affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR 3212 [b]). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion" (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008], citing to *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212 [b]). Hence, where the moving party makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so (*see Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, 49 NY2d at 560).

B. The First, Third and Fourth Causes of Action

Tri-Line does not deny that it entered into the Loan Agreement, that it defaulted under the Loan Agreement, that the Bank demanded immediate payment of all amounts due, and that it failed to tender payment of the amounts demanded by the Bank, which are due and owing to it under the

Loan Agreement. Instead, the defendants allege that the Bank fraudulently induced them to rely upon representations from Bank representatives that they would be paid for change orders and thereby induced the defendants to sign and draw upon the line of credit to cover Tri-Line's expenses for the extra construction work requested by the Bank. Defendants further allege that they substantially complied with their construction contract with the Bank, and yet have not been paid as agreed upon for their work on the infrastructure project. In addition, defendants allege that any monies owed them is in excess of what the Bank is owed under the Loan Agreement. Consequently, defendants argue there are a number of triable issues of fact.

In an action for non-payment of loan obligations created under loan documents, a prima facie case is established through proof of the note at issue, and the failure of the obligee to make payment in accordance with the terms of the note (*see Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Prod., Ltd. v R.S.M. Lectron Power, Inc.*, 37 NY2d 151, 154 [1975], citing *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *accord Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381 [2004]).

Similarly, on a motion for summary judgment to enforce a written guaranty, all the creditor needs to prove is: (1) a guaranty; (2) a default on the underlying debt and (3) the guarantor's failure to perform under the guaranty (*see City of New York v Clarose Cinema Corp.*, 256 AD2d 69 [1st Dept 1998]; *Valencia Sportswear v D.S. G. Enters.*, 237 AD2d 171 [1st Dept 1997]). Where the language of a guaranty "specifically provides that it was absolute, unconditional, unlimited and could not be altered or discharged orally," the defendant is foreclosed, as a matter of law, from defenses and counterclaims based on fraud. (*see Citibank, N.A. v Plapinger*, 66 NY2d 90, 92 [1985]; *BNY Financial Corp. v Clare*, 172 AD2d 203 [1st Dept 1991]; *Kensington House Co. v Oram*, 293 AD2d 304 [1st Dept 2002]).

The Bank has established its prima facie entitlement to judgment with respect to its first, third and fourth causes of action, which seeks recovery against Tri-Line and Velazquez based upon their default under the Loan Agreement, Commercial Security Agreement and Guaranty (*see North Fork Bank v ABC Merchant Services, Inc.*, 49 AD3d 701 [2d Dept 2008]; *Alard, LLC v Weiss*, 1 AD3d 131 [1st Dept 2003]) . In addressing the Bank's motion, the court notes that under New York law, when presented with a clear and unambiguous contract, a court need not look beyond the four corners of the agreement, but instead must enforce the writing according to its terms (*see Continental Ins. Co. v 115-123 West 29th St.*, 275 AD2d 604, 605 [1st Dept 2000]; *Modell's N.Y.,*

Inc. v Noodle Kidoodle, Inc., 242 AD2d 248 [1st Dept 1997]). The issue of whether a contract is ambiguous is one of law for the court to decide (*see In re Wallace*, 86 NY2d 543, 548 [1995]).

The terms of the contracts underlying the Bank's claims are shown by the agreements executed by the parties: the Loan Agreement, the Commercial Security Agreement and the Guaranty. All these agreements unambiguously outline the obligations of Tri-Line and Velazquez. In the Loan Agreement, the Bank agreed to loan Tri-Line no more than $3 million and Tri-Line promised to pay the loan back. The "Remedies" section on page five (5) of the Loan Agreement expressly provides that upon an event of default by Tri-Line, all outstanding sums shall be immediately due and payable to the Bank. Bullock's affidavit and the demand letter demonstrates Tri-Line's failure to pay the loan on its extended maturity date.

Under the provisions of the Security Agreement, defendants granted the Bank a collateral interest in their assets. Defendants therefore agreed to transfer their accounts receivables and other collateral to the Bank in the event of a default. There has been a default. Accordingly, under the terms of the Security Agreement, the Bank is entitled to possession of Tri-Line's collateral.

Citibank, N.A. v Plapinger (66 NY2d 90 [1985]) is a landmark lender liability case. In that case, the court rejected the same arguments made by Velazquez related to the guaranty. There a business defaulted on its loan and Citibank sued defendant guarantors on their guaranty. The individual defendants asserted defenses based on fraud in the inducement, and counterclaims based on fraud and breach of contract. The New York Court of Appeals held that the disclaimer in the guaranty foreclosed consideration of the defenses and counterclaims, stating:

> "Fraud in the inducement of a guarantee by corporate officers of the corporation's indebtedness is not a defense to an action on the guarantee when the guarantee recites that it is absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee, or any other circumstances which might otherwise constitute a defense available to a guarantor with respect of the guarantee, those recitals being inconsistent with the guarantor's claim of reliance on an oral representation...."

(*Citibank, N.A. v Plapinger*, 66 NY2d at 92).

Here, the Guaranty specifically states that it is "absolute, unconditional and continuing, regardless of the validity, regularity or enforceability of any of the Obligations" and that the guaranty "embodies the whole agreement of the parties and may not be modified except in writing, and no course of dealing between [Velazquez] and any of the undersigned shall be effective to

change or modify this guaranty." Thus, the Guaranty shows that Velazquez intended to be bound by this agreement to cover the outstanding loan amount. The maturity date of the loan has passed, Tri-Line is in default, and Velazquez has not paid the amounts due under the Guaranty. Accordingly, summary judgment on the breach of contract causes of action must be granted unless defendants establish that there exist triable issues of fact.

As an additional basis for granting the motion, the court finds that defendants have failed to submit proof that their defenses and counterclaims are real and capable of being established at trial (*see e.g. Machinery Fund. Corp. v Stan Loman Enterprises*, Inc., 91 AD2d 528 [1st Dept 1982]). When a plaintiff brings a claim against a defendant, defendant can assert a counterclaim or bring a separate action. In this case, the second complaint was never answered by defendants. Nearly four months after their initial answer was filed, defendants attempt to tender belated and unpleaded counterclaims predicated upon allegations of breach of contract and fraudulent misrepresentations.

The court finds that defendants cannot create a triable issue of fact merely by alleging unpleaded counterclaims (*see Gelmin v Sequa Capital Corp.*, 269 AD2d 492, 493 [2d Dept 2000] ["plaintiff's contention that he raised an issue of fact by referring to unpleaded defenses of waiver, bad faith and estoppel in his opposition papers is without merit"]). In the *Bank of New York Mellon v Cobblestone Estates, Inc.* (2009 WL 2626454, 2009 NY Misc LEXIS 4309 [Sup Ct, NY County 2009]), the fraud-based claims raised and the documents cited in the affidavit of one of the defendants were not alleged or pleaded in defendants' answer. The court stated "It is well-settled that defenses which have not been pled in an answer cannot be used as a basis for opposing - or avoiding - a motion for summary judgment on a note and guarantee (*Bank of New York Mellon v Cobblestone Estates, Inc.* (2009 WL 2626454, 2009 NY Misc LEXIS 4309 , *29, citing *Gelmin v Sequa Capital Corp*, 269 AD2d 492, *supra*).

This court has jurisdiction only over counterclaims that have been interposed. Therefore, the court lacks jurisdiction over unpleaded counterclaims, whether or not they could have been interposed. Because no counterclaims were formally interposed, no counterclaims are properly before the court.

Even if the court were to assume, for the sake of argument, that the counterclaims were properly pleaded, they would not assist defendants. First, the existence of a counterclaim does not preclude granting summary judgment in favor of the Bank. Contrary to defendants' contention, instruments for the payment of money can only be enforced separately from an underlying

agreement and the alleged breach of a related contract cannot defeat summary judgment on a promissory note (*see e.g. Dresdner Bank AG v Morse/Diesel,* 115 AD2d 64, 67 [1st Dept 1986]; *Fopeco v General Coatings Technologies,* 107 AD2d 609 [1st Dept 1985]). Accordingly, where a counterclaim is unrelated and independent to the causes of action in the complaint, a plaintiff may be entitled to summary judgment on its causes of action.

A plaintiff is also entitled to sever those counterclaims pursuant to CPLR 3212 [e] and to proceed to judgment on its causes of action (*see e.g. Jovee Contracting Corp. v AIA Envir. Corp.*, 283 AD2d 398 [2d Dept 2001] [granting summary judgment and severing counterclaims for breach of contract that were not inextricably interwoven with asserted claims for account stated arising from the same project]). This is true even in those cases where the purported counterclaim asserts damages in excess of the undisputed cause of action (*see e.g. P.S. Griswold Company, Inc. v Cortland Glass Company, Inc.*, 138 AD2d 869, 870-871 [3d Dept 1988]).

Nonetheless, this rule is inapplicable where a defense has been asserted, namely, the breach of an underlying agreement, and the obligation to pay on the promissory note is intertwined with the underlying agreement. Therefore, where a genuine issue of fact exists as to whether a contract between the parties "can be viewed as being distinct and separate from the note, summary judgment must be denied" (*River Bank America v Daniel Equities Corp.*, 205 AD2d at 476 [1st Dept 1994] [affirming denial of summary judgment motion sought by lender on note and guarantee where defendants were claiming in a separate action breach of contract of the underlying loan agreement by lender], quoting *Fopeco, Inc. v General Coatings Technologies*, 107 AD2d at 609-610. Therefore, whether the Bank breached the construction contract with defendants is material to this action only if the loan documents are inextricably related to defendants' counterclaim.

If two agreements involve the same parties and are part of the same transaction, they may be found to be inextricably related (*Yo-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185 [1st Dept 1995]; *Regal Limousine, Inc. v Allison Limousine Service, Ltd.*, 136 AD2d 534 [2d Dept 1988]); *GTE Automatic Elec. Inc. v Martin's Inc.*, 127 AD2d 545 [1st Dept 1987]).

Summary judgment also may be improper where two agreements are entered into "at the same time and the instrument being sued upon is subject to the terms and conditions in the other agreement"(*see U.S. Bank N.A. v Lax*, 26 Misc 3d 1230 [A], 2010 NY Slip Op 50326 [U] [Sup Ct, Kings County 2010]), citing *Hirsch v Rifkin*, 166 AD2d 293, 294 [1st Dept 1990]).

In this instance, there are no counterclaims for the court to sever. The affirmation of counsel is of no probative value in opposing a motion for summary judgment (*see Marinelli v Shifrin*, 260 AD2d 227 [1st Dept 1999]). As well, the sworn affidavit of Velazquez and defendants' exhibits are inadequate to set up a triable issue of fact because there is no indication that the loan documents are inexorably linked to defendants' breach of contract claims. While the loan documents and the construction contract are between the same parties, the written agreements are unconditional and make no reference to the construction contract in the loan documents. Nor is there any mention of any of the loan documents in the construction contract. More importantly, there is no written communication between the parties that the two agreements are interdependent. Finally, while the amount of the alleged counterclaim exceeds the amount demanded by the Bank, the court does not find this allegation to be a bar to recovery (*see e.g. Convenient Medical Care P.C. v Medical Bus. Assocs.*, 291 AD2d 617 [3d Dept 2002] [fact that amount of counterclaim exceeded plaintiff's demand did not preclude summary judgment on counterclaim]).

As to defendants' allegation of fraudulent misrepresentation, the claim fails as a matter of law. First, Tri-Line and Velazquez were expressly barred from asserting defenses and counterclaims by the terms of the applicable loan documents for their failure to pay their debt.

Secondly, to establish a claim of fraud, defendants must prove, with competent admissible evidence, all of the traditional elements of fraud: the misrepresentation of a material existing fact, falsity of that information, scienter, justifiable reliance on the misrepresentation and damages proximately caused by plaintiff's conduct (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Shisgal v Brown*, 21 AD3d 845 [1st Dept 2005]; *Monaco v New York University Medical Center*. 213 AD2d 167 (1st Dept 1995), *lv dismissed in part, denied in part* 86 NY2d 882 [1995]). Any defense based upon fraud or misrepresentation must state in detail "the circumstances constituting the wrong" (CPLR 3016 [b]). The "mere addition of allegations that the contracting parties did not intend to meet their contractual obligations does not serve to convert a cause of action for breach of contract into one for fraud" (*Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248, 249 [1st Dept 1997] [internal citations omitted]; *see also 767 Third Avenue LLC v Greble & Finger, LLP*, 8 AD3d 75 [1st Dept 2004]).

Velazquez avers that the contracts sued upon in this action had been fraudulently induced through oral misrepresentations that led the defendants to set up the line of credit and to draw from it. The allegation provides no specific details as to why or how the Bank engaged in such conduct.

The failure to state the times and context of the alleged fraudulent statements renders the pleading insufficient to state a cause of action for fraud (*see Gickman v Alper*, 236 AD2d 230, 231 [1st Dept 1997]; *Eastman Kodak Co. v Roopak Enterprises. Ltd.*, 202 AD2d 220, 222 [1st Dept 1994]).

It is also well-settled that allegations of mere promissory statements of future performance are not actionable for fraud (*see Wilmoth v Sandor*, 259 AD2d 252, 255 [1st Dept 1999] ["No cause of action for fraud arises from allegations of a lack of intent to perform under a proposed contract... nor from expressions of hope for the future performance of entities subject to defendants' control"). Tri-Line's allegations of fraud are based on statements, promissory in nature, expressing the hope that it would be paid by the Bank for its work related to design revisions and change orders.

Moreover, the Bank has demonstrated its entitlement to summary judgment based upon the evidence showing that Tri-Line entered into a Loan Agreement and thus far has failed to pay the amounts due (*see Gangi v Solgar Co. Inc.*, 267 AD2d 350 [2d Dept 1999] [movant demonstrated its entitlement to summary judgment by submitting proof of a promissory note and related agreements, along with proof of default]). As well, the Bank has demonstrated the existence of an unconditional and absolute guaranty agreement and Velazquez's failure to perform his obligations under that guaranty (*see BNY v Financial Corp. v Clare*, 172 AD2d 203[1st Dept 1991] [where the instrument provided that it was absolute, unconditional and could not be altered orally, the defense of fraud in the inducement was barred]). Under such circumstances, defendants are foreclosed from asserting reliance upon any alleged bank representation.

C. The Second and Fifth Causes of Action

The Bank is also entitled to summary judgment with respect to the liability of defendants to pay its costs, disbursements and attorneys' fees incurred in connection with the enforcement of defendants' obligations under the Loan Agreement and Guaranty.

Under the general rule in New York, the court should not infer a party's intention to provide attorneys' fees as damages for breach of contract "unless the intention to do so is unmistakably clear" from the language of the contract (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]). Defendants, in clear language, expressly agreed to pay all attorneys' fees and expenses incurred by the Bank in collecting the amounts due and owing under the Loan Agreement and Guaranty. Thus, the Bank is entitled to an award of reasonable attorneys' fees and other costs incurred in enforcing its rights to payment.

However, the amount of attorneys' fees owed to the Bank is not clear. Accordingly, a hearing before a Special Referee is necessary to report and recommend an amount of reasonable attorneys' fees.to be included in a separate money judgment.

Conclusion

In sum, defendants' opposition to plaintiff's motion is insufficient to defeat summary judgment.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the first, third and fifth causes of action is granted; and it is further

ORDERED that the Clerk of the Court is to enter judgment in favor of plaintiff and against defendant on the first, third, and fifth causes of action in the amount of $2, 666, 903.97, together with interest at the rate of 8.25% from May 18, 2010 until the date of the decision on this motion, as well as costs and disbursements to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that pursuant to the terms of the Security Agreement, the Bank is entitled, as a matter of law, to possession of Tri-Line's assets in the amount owed; and it is further

ORDERED that plaintiff's motion for summary judgment on the second and fourth causes of action for the reasonable value of attorneys' fees is granted to the extent that the matter is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the issue of the amount of the judgment to be entered on the second and fourth causes of action is held in abeyance, pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that petitioners' counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the

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[1]Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.

Special Referee Clerk in the Motion Support Office, Room 119, at 60 Centre Street, who is directed to place this matter onto the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the court's decision in this matter does not preclude defendants from filing a separate action against plaintiff for breach of contract and fraudulent misrepresentation.

This constitutes the decision and order of the court.

DATED: April 22, 2011

ENTER,

O. PETER SHERWOOD
J.S.C.

APR 22 2011