

M&T Bank Corp. v Cruse

2012 NY Slip Op 30524(U)

February 23, 2012

Sup Ct, Nassau County

Docket Number: 8247/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

M&T BANK CORPORATION,

Plaintiff,

- against -

DEANNA CRUSE,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTYIndex No.: 8247/11
Motion Seq. No.: 01
Motion Date: 02/23/12
XXX**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affidavits and Exhibits	1
<i>Pro se</i> Affidavit in Opposition	2
Reply Affidavit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §3212, for an order granting summary judgment in its favor and against defendant. Defendant, *pro se*, opposes the motion.

This is an action for breach of contract arising out of a breach of a certain loan obligation by defendant to plaintiff. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about June 3, 2011. Issue was joined on or about July 5, 2011.

Plaintiff submits that, on or about June 20, 2006, defendant executed a retail installment contract pursuant to which plaintiff agreed to extend to her a loan in the amount of \$40,817.44 and she agreed to repay that amount in accordance with the terms of said contract. *See* Plaintiff's

Nowicki Affidavit in Support Exhibit A. Plaintiff argues that defendant breached the terms of said contract by failing and/or refusing to make payments in accordance with the terms of the contract. Based upon defendant's breach, on March 7, 2011, counsel for plaintiff sent a letter to defendant demanding repayment of her debt. *See* Plaintiff's Nowicki Affidavit in Support Exhibit B. Plaintiff contends that defendant did not pay her debt in response to counsel's letter thus necessitating the instant lawsuit. Plaintiff claims that, as a result of defendant's breach of contract, as of October 12, 2011, it has been damaged in the amount of \$21,007.21, which consists of \$13,126.54 in principal, accrued interest of \$2,251.71 and late fees of \$5,628.96. Plaintiff further contends that it is entitled to reasonable attorneys' fees and costs for bringing this action. Plaintiff argues that defendant cannot raise a triable issue of fact as she admitted her breach of contract in her two affirmative defenses.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See*

CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Based upon the evidence and legal argument provided in their motion as detailed above, the Court finds that plaintiff has established *prima facie* entitlement to judgment as a matter of law.

As previously stated, since plaintiff demonstrated a sufficient *prima facie* showing, the burden shifts to defendant to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, *supra*.

In her *pro se* Affidavit in Opposition, defendant states, "I never intentionally bought a car. I was retired, only receiving a social security check. I never gave any personal information about myself, never saw a car or picked one out. Never had keys, or drove it off the lot. Never spoke to anyone other than the dealer that sent someone to my house to pick me up to 'co-sign' and return me home. It was more than a month before I knew what had happened. I have never driven the car. I am a senior citizen. Three people took advantage of me. Duane Wallace, the dealership and M&T Bank. All of these benefitted from my stupidity. I never saw any one to interview me. My name is the only one on the paper, yet I am the victim! I cannot really defend myself properly. I can't find an attorney. I don't have money & legal aide said it would take too long. I am on food stamps and HEAP. I am unable to get a paid attorney. At the dealership, there were no figures on the papers. M&T Bank is not telling the truth! This is fraud! Will you please allow an oral argument with or in front of you. I can explain myself better. I am being taken advantage of."

In reply, plaintiff submits that, "Ms. Cruse alleges that she was defrauded into the Contract that she signed on June 20, 2006. Ms. Cruse's original loan was for the amount of \$40,817.44. The cash price of the vehicle she purchased was \$42,032.44. She put a \$1,500 cash down payment on the automobile....After applying payments and auction proceeds of the repossessed automobile, Ms. Cruse now owes the principal amount of 13,126.54 (*sic*), plus late fees, accrued interest, and attorney fees. Despite the fact that Ms. Cruse believes she is the victim of fraud, she has never raised this issue previously. She has not made a complaint to the New York State Attorney General, sought to rescind her contract, or filed a police report. She admits signing the Contract. In her opposition, Ms. Cruse states that one of the people who 'defrauded' he (*sic*) was Duane Wallace. Upon information and belief, Duane Wallace is Ms.

Cruse's son for who (*sic*) she signed this loan. The terms of the Contract are clear and unambiguous. Ms. Cruse signed a retail installment contract for the purchase of an automobile which was registered in her name. She financed the amount of \$40,817.44. She paid \$1,500 as a down payment."

It is well settled that "[t]he signer of a written agreement is conclusively bound by its terms unless there is a showing, absent here, of fraud, duress or some other wrongful act." See *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, 487 N.Y.S.2d 105 (2d Dept. 1985). A person is presumed to have read what he signs. See *Lejkowski v. Petrou*, 178 A.D.2d 465, 576 N.Y.S.2d 816 (2d Dept. 1991). Further, a party will not be excused from an agreement by a failure or even a claimed inability to read it. See *Huang v. Cheng*, 182 A.D.2d 600, 583 N.Y.S.2d 370 (1st Dept. 1992). Thus, the law presumes that one who is capable of reading something has read the document which she/he executed, and is conclusively bound by the terms thereof. See *Marine Midland Bank, N.A. v. Embassy East, Inc.*, 160 A.D.2d 420, 553 N.Y.S.2d 767 (1st Dept. 1990). See also *Sofio v. Hughes*, 162 A.D.2d 518, 556 N.Y.S.2d 717 (2d Dept. 1990).

While defendant alleged fraud in her *pro se* Affidavit in Opposition, she fails to provide any evidence of how she was in fact defrauded. Her signature appears on the subject contract. See Plaintiff's Nowicki Affidavit in Support Exhibit A. She provided a down payment for the subject automobile. Additionally, she claims to have been defrauded by an individual named Duane Wallace who is actually her son for whom she signed the subject contract.

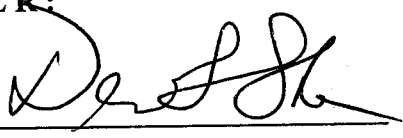
The Court therefore finds that *pro-se* defendant has offered no evidence to demonstrate the existence of any material triable issue of fact with respect to her liability for the monies due and owing pursuant to the contract entered into between plaintiff and defendant.

Accordingly, plaintiff's motion, pursuant to CPLR §3212, for an order granting

summary judgment in its favor and against defendant for the relief demanded in the Verified Complaint is hereby **GRANTED**. Plaintiff is directed to submit judgment in the amount of \$21,007.21 (which consists of \$13,126.54 in principal, accrued interest of \$2,251.71 and late fees of \$5,628.96), plus \$1,820 in attorneys fees (based on a quantum meruit basis) to the clerk in compliance with this Order.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
February 23, 2012

ENTERED
FEB 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE