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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

JPMORGAN CHASE BANK N.A.,

Plaintiff,

- against -

GEORGE PONTE, INC. d/b/a GPI EQUIPMENT CO. and GEORGE PONTE,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 13880/11
Motion Seq. No.: 01
Motion Date: 04/12/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Statement of Material Facts, Affidavit, Affirmation and Exhibits and Memorandum of Law	1
Affidavit in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation	3

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

In an action for monies due and owing under a Business Revolving Credit Account Agreement ("Contract 1") and the absolute, personal, unconditional and continuing guaranty ("Guaranty 1") thereunder, and for monies due and owing under Business Credit Application and Business Checking Credit Line Agreement ("Contract 2") and the absolute, personal, unconditional and continuing guaranty ("Guaranty 2") thereunder, plaintiff moves, pursuant to CPLR § 3212, for summary judgment against the named corporate defendant, George Ponte, Inc. d/b/a GPI Equipment Co. ("GPI"), and the named individual defendant, George Ponte ("Ponte"); and moves for an order striking defendants' Answer and affirmative defenses; and moves for an

order severing plaintiff's fourth cause of action for attorney's fees for Inquest upon the filing of a Note of Issue. Defendants oppose the motion.

The Complaint alleges and plaintiff's proof shows that, on or about December 8, 1997, defendant GPI executed Contract 1 with plaintiff in the amount of $250,000.00. *See* Plaintiff's Affirmation in Support Exhibit A. Contract 1 provides that defendant GPI promises to pay to the order of the loan holder the principal sum of Contract 1, with interest thereon on the unpaid principal balance computed at the rate of 1.00% per annum above plaintiff's prime rate, which is the rate of interest publically announced by plaintiff as its prime rate calculated on the basis of a three hundred sixty (360) day year for the actual number of days elapsed, but in no event higher than the maximum permitted under applicable law. Contract 1 also provides that any principal or interest herein, which is not paid when due, shall be subject to late payment charges/fees of 5% of the payment due. The Complaint further alleges that Contract 1 was personally guaranteed by defendant Ponte (Guaranty 1). *See* Plaintiff's Affirmation in Support Exhibit B. The Complaint also alleges that the defendants were in default of Contract 1 and Guaranty 1 by failing to pay each and every installment due under said Contract 1 and Guaranty 1 since March 5, 2011, and each and every month thereafter. *See* Plaintiff's Affirmation in Support Exhibit C. On or about August 9, 2011, a default notice was issued to defendants. *See* Plaintiff's Affirmation in Support Exhibit H. Since defendants' defaults, no payments upon the obligations of the defendants have been made in accordance with Contract 1 and Guaranty 1. Based upon the default of Contract 1 and Guaranty 1, defendants are liable to plaintiff in the principal sum of $207,968.51, together with interest in the amount of $5,685.39 and late fees and costs in the amount of $1,921.13.

Additionally, the Complaint alleges and plaintiff's proof shows that, on or about March 16, 1998, defendant GPI executed Contract 2 with plaintiff in the amount of $25,000.00. *See* Plaintiff's Affirmation in Support Exhibit E. Contract 2 provides that defendant GPI promises to pay to the order of the loan holder the principal sum of Contract 2, with interest thereon on the unpaid principal balance computed at the rate of 6.00% per annum above plaintiff's prime rate,

which is the rate of interest publically announced by plaintiff as its prime rate calculated on the basis of a three hundred sixty (360) day year for the actual number of days elapsed, but in no event higher than the maximum permitted under applicable law. Contract 2 also provides that any principal or interest herein, which is not paid when due, shall be subject to late payment charges/fees of 5% of the payment due. The Complaint further alleges that Contract 2 was personally guaranteed by defendant Ponte (Guaranty 2). *See* Plaintiff's Affirmation in Support Exhibit E. The Complaint also alleges that the defendants were in default of Contract 2 and Guaranty 2 by failing to pay each and every installment due under said Contract 2 and Guaranty 2 since November 28, 2011 and each and every month thereafter. *See* Plaintiff's Affirmation in Support Exhibit F. On or about August 9, 2011, a default notice was issued to defendants. *See* Plaintiff's Affirmation in Support Exhibit H. Since defendants' defaults, no payments upon the obligations of the defendants have been made in accordance with Contract 2 and Guaranty 2. Based upon the default of Contract 2 and Guaranty 2, defendants are liable to plaintiff in the principal sum of $15,615.86, together with interest in the amount of $738.13.

On or about September 27, 2011, plaintiff commenced the instant action with the filing and service of a Summons and Complaint. *See* Plaintiff's Affirmation in Support Exhibit I. Issue was joined on or about December 2, 2011. *See* Plaintiff's Affirmation in Support Exhibit J.

Plaintiff submits that defendants' Answer consists solely of general denials and denials of knowledge or information sufficient to form a belief as to the allegations in the Complaint. Plaintiff argues that defendants' Answer contains no evidence of payment or allegations of forgery and that said Answer contains seven (7) baseless affirmative defenses, which are insufficient to defeat the within motion for summary judgment.

Plaintiff submits that it would not have entered into the subject Contracts without the personal guaranties of defendant Ponte. Plaintiff contends that it is common business practice for it (and for other creditors of small corporations) to require that the officers of small corporations guaranty and personally obligate themselves on corporate notes. Plaintiff argues, "[e]ven if

PONTE claimed that he did not intend to execute Personal Guaranties, the case law has specifically and emphatically held that this would not be a valid defense to the within action."

Plaintiff further argues, "[i]t is respectfully submitted that the (*sic*) no valid defenses or evidence of payment have been submitted by Defendants for the simple reason that the default exists, and there is no viable defense to this action. The terms and conditions of the Loans and Guaranties speak for themselves and cannot be defeated by Defendants' unsupported and vague denials and baseless defenses....No receipts, canceled checks, bank slips, or statements have been supplied by Defendants which would in any way lead one to conclude that the within Loans are not in default. It is respectfully submitted that no evidence of payment has been submitted by Defendants, since none can exist in view of the factual default which occurred. No such defense has been presented by the Defendants, and Plaintiff has established its entitlement to summary judgement herein as a matter of law."

In opposition to plaintiff's motion, defendant Ponte submits an Affidavit in which he states, "I do not dispute that GPI has not made the payments which Plaintiff's motion alleges have not been paid. However, Plaintiff promised to modify the loans prior to GPI's default, but repeatedly made last minute changes to the requirements and instructions which it had previously given. GPI and I relied to our detriment upon Plaintiff's promises and assurances that the loan would be restructured by borrowing money from other sources from September 2010 through March 2011 at higher interest rates than were owed to Plaintiff in order to keep GPI's obligations to Plaintiff current so as not to jeopardize the promised restructuring. However, Plaintiff repeatedly changed the requirements for a restructuring. The constant changes by Plaintiff delayed and ultimately doomed the proposed restructuring and brought about the default upon which this action is based, which would have otherwise been avoided....Plaintiff's conduct raises issues of fact as to whether Plaintiff should be granted summary judgment since Plaintiff promised to take actions which would have avoided GPI's default, but failed to do what it promised....In or around April 2010, GPI and Plaintiff began discussions about restructuring GPI's obligations to Plaintiff as GPI's financial issues became pressing. The bank representative

to whom GPI was assigned was Scott Creaven of Chase Business Banking in New Hyde Park, New York...Plaintiff proclaimed its willingness to work with GPI and discussed various scenarios with GPI to restructure the loans. Under the restructuring scenarios presented by Plaintiff, the total monthly payments on GPI's obligations could have been reduced by as much as approximately $6,000 per month. However, instead of making a deal with GPI, Plaintiff repeatedly delayed in doing things which they said they would do, changed the requirements previously presented to me or added requirements for a restructuring and shifted me from one representative to another, all of which ultimately led to GPI's default."

Defendant Ponte details the attempts that he made with Mr. Creaven in an attempt to restructure GPI's obligations to plaintiff. Defendant Ponte adds that, "[a]lthough I repeatedly informed Mr. Creaven that GPI would not be able to make the payment due on December 6, 2010 and needed to have the restructuring in place by that date, nothing happened and GPI was faced with two choices. One was defaulting on the loans, which I believed would kill the restructuring. The other was trying to continue to scrape together funds to make the loan payment as GPI and I had done since September 2010 in order to keep the restructuring alive while working with Mr. Creaven or with the workout group referenced in the December 2nd e-mail to whom GPI's accounts were subsequently transferred....In reliance upon the continued promise and assurances of a restructuring, GPI and I borrowed money from credit cards in order to pay the payments owed to Plaintiff beginning with the September 2010 payment, including credit cards with Chase which had a 29.9 percent interest rate and a Bank of America credit card which had a 19 percent interest rate....Thus, from September 2010 through December 2010, GPI and I borrowed approximately $36,000 on credit card accounts at interest rates approximately ten to twenty percent higher than the interest rate owed to Plaintiff in order to keep the loans current to facilitate the restructuring....GPI and I continued to borrow from credit cards in order to make the payments through March 2011 at interest rates ten percent to twenty percent above the interest rates owed on the obligations which are the subject of this lawsuit....By the end of March 2011, I concluded that Plaintiff's actions made it unlikely that there would be a restructuring and that

GPI and I should not incur any further debt in order to facilitate a restructuring, so no further payments were made after March 2011....While GPI and I incurred additional debt in order to make payments through March 2011, those funds if they were to be tapped at all were intended to provide funds for GPI to acquire product for resale and thereby generate income, not to pay other loans. Thus, Plaintiff's actions not only caused GPI and me to incur additional debt, but deprived GPI of funds which could have been used to generate income, which was critical because Plaintiff had frozen GPI's line of credit in September 2010 without notifying GPI."

In sum, defendant Ponte argues that "summary judgment should be denied because GPI and I relied to our detriment upon Plaintiff's promises and assurances of a restructuring. We incurred additional debt and now owe more money than we would have owed had we not relied upon Plaintiff's promises and assurances and simply stopped making payments in September 2010 instead of beginning to borrow from other sources in order to make the payments."

In reply to defendants' opposition, plaintiff argues, "[d]efendants do not deny the execution and delivery of the Loans and Guaranty agreements thereby **admitting** the validity thereof. Defendants' opposition papers further **admit** the default on the Loans...and do not dispute the amounts due and owing to Plaintiff. Thus, Defendants are **admittedly** in default with respect to making required payments on the subject Loans and Guaranty agreements. The **sole** defense contained in Defendants' opposition papers is that the Plaintiff allegedly 'promised' to modify or restructure the Loans prior to the Defendants' admitted default thereon and prior to the commencement of this litigation. This is not a valid defense to the within action. Defendants attach a series of pre-litigation e-mails exchanged between Plaintiff and Defendants in an effort to demonstrate their contention that Plaintiff 'promised' the Defendants a modification of the subject Loans and failed to keep said promise. Nowhere do Defendants point to any legal authority that the Plaintiff was required to modify the Defendants' Loans....Moreover, throughout the e-mails, the Plaintiff's representative clearly indicates the documentation and information that the Defendants needed to supply in order to consider a possible modification of the Loans. Defendants fail to demonstrate that they supplied the required documentation and information in

order for the review process to continue, and the Defendants' failure to do so resulted in the matter being transferred to the Plaintiff's workout group....The e-mails attached to the Defendants' opposition papers wholly fail to demonstrate that Plaintiff 'promised' to modify or restructure the subject Loans. Nothing in said e-mails demonstrates an 'assurance' that the Loans would be modified or restructured....Plaintiff was clearly under no obligation to modify and/or restructure the subject Loans....Defendants allege that they incurred additional debt to keep the subject Loans current for a couple of months while a *potential* Loan modification was being discussed. It is noted that Defendants present **no proof** that they incurred this additional debt, but this is nonetheless irrelevant as there was no promise made by Plaintiff that the Loans would in fact be modified. Therefore the Defendants' contention that they 'relied to their detriment' on a non-existent 'promise' is axiomatically unfounded, untenable and insufficient to defeat the within motion for summary judgment. The fact that Defendants may have elected to incur additional debt in an attempt to keep the subject Loans current during the course of pre-litigation settlement discussions was a business decision on the part of Defendants and is not an issue of fact which would prevent the Court's granting of the instant motion for summary judgment."

The Court notes that, in support of their estoppel theory argument, defendants cited the case of *Carver v. Fed. Sav. and Loan Assn of N.Y. v. Glanzer*, 186 A.D.2d 706, 588 N.Y.S.2d 905 (2d Dept. 1992). The *Carver* matter deals with estoppel in the context of a mortgage foreclosure.

While the instant action is not one based upon a mortgage, as previously indicated, defendants have relied upon mortgage related case law upon which to make their estoppel claim. However, using the same mortgage estoppel theory, it has been held that, when a mortgagor is attempting to assert estoppel against a mortgagee, who has instituted a foreclosure action, the mortgagor must produce evidentiary proof in admissible form sufficient to require the trial of that defense; mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are not sufficient. *See Prudential Home Mortg. Co., Inc. v. Cermele*, 226 A.D.2d 357, 640 N.Y.S.2d 254 (2d Dept. 1996)(holding that the mortgagee was not estopped from foreclosing on the

mortgagor's long-overdue mortgage, without regard to the sufficiency of the mortgagor's bare and unsubstantiated assertions that the mortgagee's employee had orally agreed to reinstate the mortgage, given the complete lack of evidence that the mortgagors had made any prejudicial change in their position in reliance on the agent's alleged statements). In *Massachusetts Mut. Life Ins. Co. v. Gramercy Twins Associates*, 199 A.D.2d 214, 606 N.Y.S.2d 158 (1st Dept. 1993), the Court held that a mortgagee's promise to negotiate for the restructuring of the mortgage in default does not estop the mortgagee from foreclosing on the mortgaged property when the mortgagor failed to work out its financial difficulties even though the mortgagor incurred additional obligations in an attempt to avoid foreclosure and restructure the mortgage.

In the matter before the Court, defendants have failed to produce evidentiary proof in admissible form sufficient to require the trial based upon their theory of estoppel. The e-mails that defendants attached as exhibits fail to meet this requirement. Said e-mails fail to demonstrate that plaintiff promised to modify or restructure the subject loans - nothing in said e-mails demonstrate an assurance that the subject loans would be modified or restructured. Furthermore, there is no evidence that plaintiff was under any obligation to modify and/or restructure the subject loans. Additionally, defendants failed to provide any evidentiary proof of the alleged additional debt that they incurred to keep the subject loans current for a couple of months while the potential loan modification was being discussed. Therefore, defendants failed to show how they suffered an injustice based upon plaintiff's alleged promise that it would consider either restructuring or modifying the subject loans. Defendants failed to demonstrate how, in justifiable reliance upon plaintiff's representation, they had been misled to their detriment. As in *Massachusetts Mut. Life Ins. Co. v. Gramercy Twins Associates*, *supra*, even if plaintiff had promised to negotiate for a restructuring of the loan, that does not estop plaintiff from bring a default against defendants when defendants failed to work out its financial difficulties even though they incurred additional obligations in an attempt to avoid default and restructure the mortgage.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for summary judgment against

the named corporate defendant, George Ponte, Inc. d/b/a GPI Equipment Co., and the named individual defendant, George Ponte, and for an order striking defendants' Answer and affirmative defenses and for an order severing plaintiff's fourth cause of action for attorney's fees for Inquest upon the filing of a Note of Issue is hereby **GRANTED**. It is further

ORDERED, that plaintiff is directed to submit judgment to the clerk on the first and third causes of action of the Complaint, with respect to Contract 1, in the principal amount of $207,968.51, plus accrued interest in the amount of $5,685.39, plus late charges/fees in the amount of $1,921.13. And it is further

ORDERED, that plaintiff is directed to submit judgment to the clerk on the second and third causes of action of the Complaint, with respect to Contract 2, in the principal amount of $15,615.86, plus accrued interest in the amount of $738.13. And it is further

ORDERED, that, with respect to the fourth cause of action, the matter is hereby set down for an Inquest, for an assessment of attorney's fees, to be held before the Calendar Control Part (CCP) on the 3rd day of August, 2012, at 9:30 a.m.

Plaintiffs shall file a Note of Issue on or before July 19, 2012. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claim giving rise to the Inquest. A copy of this Order shall be served upon the defendant by July 19, 2012.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
June 4, 2012

ENTERED
JUN 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE