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SHORT FORM ORDER

INDEX No. 11-11795

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-22-11 (#001)
MOTION DATE 12-15-11 (#002 & #003)
MOTION DATE 1-26-12 (#004)
ADJ. DATE: 4-12-12
Mot. Seq. # 001 - MotD # 003 - MD
002 - MD # 004 - MD

FH PARTNERS LLC, AS ASSIGNEE TO STATE BANK OF LONG ISLAND,

Plaintiff,

- against -

STS REFILL AMERICA, LLC, SHAHAR TURGEMAN, SCOTT ROTBLAT, URI HASON and MARK FREEDMAN,

Defendants.

LAMB & BARNOSKY, LLP
Attorney for Plaintiff
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Melville, New York 11747

JONATHAN FISHER, ESQ.
Attorney for Defendants STS Refill, Turgeman, and Hason
444 Madison Avenue, 18th Floor
New York, New York 10022

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Attorney for Defendant Mark Freedman
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Great Neck, New York 11021

Upon the following papers numbered 1 to 53 read on this motion for summary judgment and cross motions to dismiss and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 19 - 21, 22 - 24, 29 - 39 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 41 - 43, 44 - 47, 51, 52 ; Other memoranda of law 18, 28, 40, 50, 53 and working copy 25 - 27 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (# 001) by the plaintiff, which seeks an order 1) pursuant to CPLR 3212 granting summary judgment in its favor as to the liability of the defendants STS Refill America, LLC, Uri Hason and Mark Freedman under the promissory note and written guaranties which are the subject of this action and awarding damages thereunder, and 2) dismissing the counterclaim asserted by the defendants STS Refill America, LLC, and Uri Hason, is granted to the extent that said counterclaim is dismissed, and the plaintiff is awarded partial summary judgment on the issue of the three named defendants' liability to the plaintiff for their breach of their obligations under the subject promissory note and written guaranties including an award of reasonable counsel fees, and is otherwise denied; and it is further

ORDERED that this cross motion (# 002) by the defendants STS Refill America, LLC and Uri Hason for an order 1) pursuant to CPLR 3211 dismissing the complaint, 2) pursuant to CPLR 3025 granting leave to amend their answer, and 3) awarding them attorney's fees in defending this action is denied as academic; and it is further

ORDERED that this cross motion (# 003) by the defendant Mark Freedman for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint or, in the alternative, compelling the plaintiff to appear at a deposition and/or granting leave to amend his answer pursuant to CPLR 3025 is denied; and it is further

ORDERED that this amended cross motion (# 004) by the defendants STS Refill America, LLC, Uri Hason and Shahar Turgeman for an order 1) pursuant to CPLR 3211 dismissing the complaint, 2) pursuant to CPLR 3025 granting leave to amend their answer, and 3) for attorney's fees in defending this action is denied; and it is further

ORDERED that within sixty (60) days of receipt of a copy of this order, the plaintiff shall serve and file a note of issue, together with a copy of this order, so as to ready this action for an immediate trial on the issue of the defendant's damages pursuant to CPLR 3212 (c), which the Clerk of the Calendar Department shall schedule in accordance with the rules in effect in the Calendar Control Part.

This is an action to recover money due on a promissory note in the amount of $285,000.00 executed by the defendant STS Refill America, LLC (STS) in favor of the plaintiff's assignor, State Bank of Long Island (State Bank) on or about May 31, 2009 (Note). On or about February 27, 2007, the defendants Uri Hason (Hason), Mark Freedman (Freedman), Shahar Turgeman (Turgeman), and Scott Rotblat (Rotblat) executed commercial guaranties dated February 22, 2007, in favor of State Bank. On or about November 19, 2009, State Bank assigned the Note and guaranties to the plaintiff. In its complaint, the plaintiff alleges that STS is in default under the Note, and that the individual defendants have failed to comply with the terms of the guaranties, in that they have failed to pay the plaintiff the entire outstanding principal balance, plus all accrued interest, late charges, and penalties.

Now, issue having been joined as to STS, Hason and Freedman, the plaintiff moves for summary judgment in its action on the Note and guaranties.[1] The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic***

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[1] As of the making of the plaintiff's motion (# 001), Turgeman had not appeared in this action. In addition, Rotblat had defaulted and the plaintiff had obtained a default judgment in its favor.

Transmission Co., 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*).

In support of its motion, the plaintiff submits the relevant pleadings, the affidavit of the senior vice president for the plaintiff, copies of the Note and guaranties, copies of the allonge regarding the Note and the assignment of the guaranties, and copies of the demand letters mailed to the individual defendants. Initially, the Court notes that the affidavit in support of the plaintiff's motion is deficient on its face in that it was notarized in the State of Texas and was not accompanied by a certificate verifying that the manner in which it was taken conforms with Texas law (*see* CPLR 306 [d], 2309 [c]; Real Property Law § 299-a [1]). However, it has been held that the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice (*see* ***Betz v Daniel Conti, Inc.***, 69 AD3d 545, 892 NYS2d 477 [2d Dept 2010]; ***Matapos Tech. Ltd. v Compania Andina de Comercio Ltd.***, 68 AD3d 672, 891 NYS2d 394 [1st Dept 2009]; ***Smith v Allstate Ins. Co.***, 38 AD3d 522, 832 NYS2d 587 [2d Dept 2007]). Here, the Court finds that the plaintiff has shown the absence of actual prejudice to the defendants, and the entire record, including the defendants' opposition to the motion, supports that finding.

In his affidavit, Lonnie Abrahams (Abrahams) swears that he is the senior vice president for the plaintiff, FH Partners, LLC, that the exhibits attached to his affidavit are true copies of the relevant documents, and that the Note was assigned by State Bank to the plaintiff in exchange for good and valuable consideration. He states that the terms of the Note inure to the benefit of the plaintiff as assignee, that Hason and Freedman absolutely and unconditionally guaranteed full payment of the Note, and that State bank assigned the guaranties to the plaintiff. Abrahams further swears that STS has failed to comply with the terms of the Note, and that it is delinquent in its payments due thereunder. He states that the attorney for the plaintiff notified STS, Hason and Freedman of their default under the terms of the Note and guaranties, and of the amount then due and owing, in letters dated February 25, 2011. He indicates that the named parties have failed to pay the plaintiff the outstanding principal balance, plus accrued interest, late charges and penalties.

It is well established that a *prima facie* case to recover monies due under the terms of a promissory note and the obligations of the borrower named therein, is established by the submission of proof of the promissory note and of the failure to make payment in accordance with its terms (*see* ***Gullery v Imburgio***, 74 AD3d 1022, 905 NYS2d 221 [2d Dept 2010]; ***Quest Commercial, LLC v Rovner***, 35 AD3d 576, 825 NYS2d 766 [2d Dept 2006]). Here, the plaintiff's submissions, which included the promissory note and allegations regarding the default in payment by the defendant, were sufficient to establish the plaintiff's *prima facie* entitlement to an award of partial summary judgment on its claim against the defendant. In addition, a review of the absolute and unconditional guaranties executed herein indicate that the plaintiff is entitled to summary judgment declaring that Hason and Freedman are jointly and severally liable for the payment of any amount due under the Note, plus reasonable attorney's fees.

However, Abrahams affidavit does not establish his personal knowledge regarding the amount due to the plaintiff under the Note, or how it was calculated. In addition, the plaintiff's submission does not include any evidence regarding the amount of attorney's fees it might be due. The plaintiff's failure to offer due proof in admissible form regarding the amount of damages recoverable from the defendants under the Note and the amount of reasonable attorney's fees incurred in connection with this action, preclude the granting of an award of full summary judgment as demanded by the plaintiff (*see* CPLR 3212 [e]; ***Simoni v Time-Line, LTD.***, 272 AD2d 537, 708 NYS2d 537 [2d Dept 2002]). The plaintiff submits a "payoff" letter in its reply papers. However, it is well settled that a movant may not remedy basic deficiencies in its prima facie showing of entitlement to summary judgment by submitting evidence in reply (***Barrera v MTA Long Island Bus***, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]; ***Rengifo v City of New York***, 7 AD3d 773, 776 NYS2d 865 [2d Dept 2004]). As such the Court cannot consider such evidence in determining the movant's entitlement to summary judgment (***Rengifo v City of New York***, *supra*; ***Constantine v Premier Cab Corp.***, 295 AD2d 303, 743 NYS2d 516 [2d Dept 2002]). In addition, the payoff letter is from an entity which has not been identified or otherwise connected to the subject loan except by the loan number thereon.

Under these circumstances, it was incumbent upon the named defendants to demonstrate by sufficient proof in admissible form that genuine questions of fact exist on the issue of their non-liability to the plaintiff under the terms of the Note and/or guaranties. A review of the record adduced on the instant motion reveals, however, that no such questions of fact were raised by the defendants. The opposing papers submitted by defendants failed to demonstrate the existence of any genuine questions of fact requiring a trial. Initially, the Court notes that STS and Hason, as well as Freedman in his opposition discussed below, do not dispute the underlying debt herein, nor the signing of the Note and guaranties. Regardless, the defendants STS and Hason (hereinafter STS/Hason) served an answer that included six affirmative defenses, a counterclaim against the plaintiff, and a cross claim against Rotblat. The first, second, fourth and fifth affirmative defenses asserted by STS/Hason are unsupported by any facts and/or are otherwise without merit (*see* ***Town of Brookhaven v Mascia***, 38 AD3d 758, 833 NYS2d 519 [2d Dept 2007]). The third affirmative defense involves the question of venue, which is not a jurisdictional issue (CPLR Article 5; CPLR 1012).

The sixth affirmative defense asserted by STS/Hason contends that the plaintiff has failed "to properly set forth any claim as a 'holder in due course.'" A plaintiff suing to recover on a promissory note must establish, among other things, that it is the "holder" of a note for which the defendant is obligated to pay, the terms of repayment, and the defendant's default thereunder (*see* Uniform Commercial Code § 3-301; ***Anand v Wilson***, 32 AD3d 808, 821 NYS2d 130 [2d Dept 2006]). A "holder" is a person in possession of an instrument drawn, issued or endorsed to him or his order or to bearer or in blank (Uniform Commercial Code, §1-201 [20]). A promissory note, of course, may be transferred by negotiation or assignment, and the transfer of such an instrument "vests in the transferee such rights as the transferor had therein" (Uniform Commercial Code § 3-201 [1]). As with any other assignment, the assignee of a promissory note only acquires the title, rights and interests transferred by the assignor, and takes the property of the assignor subject to the claims and defenses that may have been asserted against the assignor (*see* ***Kaufman v Sbarro of Sunrise Mall***, 47 AD2d 734, 365 NYS2d 219 [1st Dept 1975]; *see generally* ***Matter of International Ribbon Mills (Arjan Ribbons)***, 36 NY2d 121, 365 NYS2d 808 [1975]).

Here, the plaintiff has established its entitlement to summary judgment as to its status as a "holder" of the Note and guaranties, and STS/Hason has failed to raise a triable issue of fact regarding the plaintiff's status or any claim or defense that might have been asserted against State Bank. In addition, STS/Hason's counterclaim simply alleges that the plaintiff "wrongfully collected funds pursuant to an alleged Note given to State Bank of Long Island." It has been held that "A [claim] is subject to dismissal when it is comprised of little more than bare legal conclusions and factual claims which are either inherently incredible or flatly contradicted by documentary evidence" (***Lovisa Const. Co. v Metropolitan Transp. Auth.***, 198 AD2d 333, 603 NYS2d 886 [2d Dept 1993]). Again, the plaintiff has established its entitlement to recover under the Note, and STS/Hason has failed to submit any evidence regarding the allegations in its counterclaim, has failed to otherwise rebut the plaintiff's entitlement to dismissal of its counterclaim, or to raise an issue of fact requiring a trial on the issues therein.

Freedman served an answer that included nine affirmative defenses, a cross claim against STS, Hason and Turgeman, and a cross claim against Rotblat. The first, second, third, fourth, fifth and seventh affirmative defenses asserted by Freedman are unsupported by any facts and/or are otherwise without merit (*see* ***Town of Brookhaven v Mascia***, *supra*). The sixth affirmative defense contends that this action is barred by the statute of limitations. The adduced evidence reveals that this action was commenced well within the applicable six-year statute of limitations (CPLR 213). The eighth and ninth affirmative defenses respectively contend that the plaintiff cannot maintain its claim against Freedman because the guaranty was signed before the Note was made, and that there is a failure of consideration for the guaranty. A review of the subject guaranty reveals that it is a "continuing" guaranty in which Freedman agrees to be responsible for "payment, performance and satisfaction of the indebtedness of [STS] to lender[2], now existing or hereafter arising or acquired, on an open and continuing basis," and that the guaranty signed by Freedman recites that it is for good and valuable consideration.

Accordingly, the plaintiff's motion for summary judgment in its favor as to the liability of STS, Hason and Freedman under the promissory note and written guaranties and for dismissal of their counterclaim, is granted to the extent to that said counterclaim is dismissed, and the plaintiff is awarded partial summary judgment on the issue of the named defendants' liability to the plaintiff for their breach of their obligations under the subject promissory note and written guaranties and an award of reasonable counsel fees.

STS, Hason and Turgeman cross move (# 004)[3] to dismiss the complaint on the grounds that the plaintiff is "not authorized to do business within the State of New York." Limited Liability Company Law § 808, entitled "Doing business without certificate of authority," provides in pertinent part:

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[2] The signed guaranties provide, in pertinent part: "The word "Lender" means STATE BANK OF LONG ISLAND, its successors and assigns."

[3] Cross motions # 002 and # 004 are identical except that the defendant Shahar Turgeman is added, and the return date of the latter cross motion is changed. The Court deems cross motion # 002 academic, and will consider cross motion # 004 only in the determination of the motion and cross motions. The Court has chosen to discuss cross motion # 004 at this point as it better suits the manner in which the parties discussed the issues in their submissions.

> (a) A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state.
>
> (b) The failure of a foreign limited liability company that is doing business in this state to comply with the provisions of this chapter does not impair the validity of any contract or act of the foreign limited liability company or prevent the foreign limited liability company from defending any action or special proceeding in any court of this state.

It is undisputed that the plaintiff is a corporation organized and existing under the laws of the State of Texas, and that it did not have a certificate of authority at the time that it commenced the instant action. These defendants contend that the failure to obtain said certificate requires a dismissal of the complaint. However, the failure of an LLC to obtain a certificate of authority to do business in New York before initiating an action is not a fatal jurisdictional defect, and the action may be maintained after the certificate has been obtained (*see* ***Basile v Mulholland***, 73 AD3d 597, 899 NYS2d 851 [1st Dept 2010]; ***RDLF Fin. Servs., LLC v Esquire Capital Corp.***, 34 Misc 3d 1235 [A], ___ NYS2d ___, [Sup Ct, Kings County 2012]; ***Access Point Med., LLC v Mandell***, 2011 NY Slip Op 32107 [U], 2011 WL 3439155 [Sup Ct, New York County 2011]; *cf.* ***Tri-Terminal Corp. v CITC Indus., Inc.***, 78 AD2d 609, 432 NYS2d 184 [1st Dept 1980]). Here, the record reveals that the plaintiff obtained a certificate of authority from the New York Department of State on December 16, 2011. In addition, the statute provides that the actions taken by the plaintiff regarding the taking of the assignment of the Note and guaranties, as well as any collection efforts or other contractual rights thereunder, were not impaired. As this is the sole substantive ground for this cross motion, and in light of the Court's findings above, the cross-movants' requests for leave to amend their answer and for attorney's fees are deemed academic.

Accordingly, the cross motion (# 004) by STS, Hason and Turgeman to dismiss the complaint, amend their answer, and for attorney's fees is denied.

Freedman cross moves for summary judgment dismissing the complaint on the grounds that the plaintiff was not authorized to do business in New York when the action was commenced, and that the plaintiff failed to provide discovery or appear at a deposition in this action. In the alternative, Freedman requests an order compelling the plaintiff to produce certain documents and to appear at a deposition and/or for leave to amend its answer to assert the affirmative defense that the plaintiff lacked standing to bring this action without a certificate of authority under LLCL 808 (a). For the reasons cited above, the Court denies those branches of Freedman's cross motion that raise the issue of the plaintiff's failure to obtain a certificate of authority prior to commencing this action. In addition, Freedman's request for a dismissal of the complaint based on the plaintiff's alleged failure to provide disclosure is denied. The drastic remedy of striking a pleading should not be employed absent a clear showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith (*see* ***Mendez v City of New York***, 7 AD3d 766, 778

NYS2d 501 [2d Dept 2004]; ***Traina v Taglienti***, 6 AD3d 524, 774 NYS2d 391 [2d Dept 2004]; ***Bach v City of New York***, 304 AD2d 686, 757 NYS2d 759 [2d Dept 2003]; ***Byrne v City of New York***, 301 AD2d 489, 490, 753 NYS2d 132 [2d Dept 2003]). Here, the Court finds that the requested disclosure is not necessary to resolve the issues raised by this action.

In light of the Court's findings herein, Freedman's request for discovery and for leave to amend his answer are deemed academic. As a general rule, motions for leave to amend pleadings are to be liberally granted absent prejudice or surprise resulting from the delay (*see* ***Glaser v County of Orange***, 20 AD3d 506, 799 NYS2d 120 [2d Dept 2005]). However, in this instance the Court has considered the issue raised in the proposed amended answer and it has resolved the issue in favor of the plaintiff. In addition, the Court has determined that the movant's contention that discovery is needed to enable him to defend this action is without merit.

Accordingly, Freedman's cross motion (# 003) for an order granting summary judgment dismissing the complaint or, in the alternative, compelling the plaintiff to appear at a deposition and/or granting leave to amend his answer is denied.

The Court notes that the plaintiff contends that, despite its inability to move against Turgeman until issue was joined, it should be awarded summary judgment against him pursuant to CPLR 3212 (b). However, the cross motion in which Turgeman appears is made pursuant to CPLR 3211, and the Court finds that the parties to that cross motion did not chart a summary judgment course which would permit the Court to grant summary judgment against Turgeman. The Court denies the request to convert the cross motion to one for summary judgment on notice to the parties, and it denies the requested relief against Turgeman. In summary, the Court grants summary judgment as to STS, Hason and Freedman as to their liability on the promissory note. However, a review of the record reveals questions of fact regarding the proper crediting of payments by the defendants and the amount of the outstanding principal balance, plus accrued interest, late charges and penalties. In addition, the plaintiff has not submitted any evidence regarding the amount due under the Note for its reasonable attorney's fees in collection of this debt. The plaintiff is thus entitled to an immediate trial on the issue of its damages pursuant to CPLR 3212.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: June 28, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION