

Newbank v Parcare Servs. Inc.

2013 NY Slip Op 30200(U)

January 30, 2013

Sup Ct, Queens County

Docket Number: 30639/2010

Judge: Robert J. McDonald

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- - - - - x

NEWBANK,	Index No.: 30639/2010
Plaintiff,	Motion Date: 11/15/12
- against -	Motion No.: 9
	Motion Seq.: 2
PARCARE SERVICES INC., SARA STERN, CHAYA D. MILLER, CHAIM STERN and 445 PARK AVE, LLC,	

Defendants.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by the plaintiff for an order pursuant to CPLR 3212 striking affirmative defenses contained in the answer of defendants and granting summary judgment in favor of the plaintiff and against the defendants in the amount of \$358,215.65 based upon the defendants' default on a promissory note; and the cross-motion of the defendants for an order pursuant to CPLR 3211(a)(8) dismissing the action for failure to obtain personal jurisdiction over the defendants:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 6
Notice of Cross-Motion-Affidavits-Exhibits.....	7 - 11
Affirmation in Opposition to Cross-Motion-Memo of Law....	12 - 15
Reply Affirmation.....	16 - 19

On March 5, 2009, the plaintiff, NewBank, a New York banking corporation located in Flushing, New York, made a loan pursuant to the Small Business Administration to the defendant Parcure Services, Inc. in the original principal amount of \$400,000. At that time, Parcure executed and delivered to

plaintiff a promissory note in the amount of \$400,000 plus interest. The note provided that interest on the principal amount shall be 2.75% above the prime rate as set forth in the Wall Street Journal. The loan was to be re-paid in monthly principal installments of \$4,440,82.00 beginning in May 2009. Under the terms of the note, upon the default of borrower, the Bank had the right to accelerate payment of the entire amount due under the loan agreement. The note was signed by Sara Stern as President of Parcare Services, Inc. and by Brian Kim on behalf of NewBank. As security, Parcare also delivered to NewBank a security Agreement granting NewBank a security interest in the business equipment, fixtures, inventory, accounts and investment property. The Security Agreement was signed by Sara Stern as President of Parcare. In addition, on the same date, the principals of Parcare, Sara Stern and Chaya D. Miller signed unconditional guarantees for the \$400,000 loan in their individual capacities guarantying the obligations of the corporate defendant under the terms of the promissory note. Chaim Stern signed an Unconditional Limited Guaranty in favor of the plaintiff, NewBank. The limited guarantee provided that the guarantee would be limited to the amount NewBank obtains from specified mortgages on residential real estate in which Chaim Stern has an interest. Defendant 445 Park Avenue, LLC executed and delivered to plaintiff a Landlord's Subordination with respect to the inventory and equipment located at the premises.

On October 5, 2010, Parcare defaulted and in December 2010 the plaintiff commenced an action against the defendants to recover a judgment in the amount of \$363,615.07 plus interest and late charges due and owing since October 5, 2010. The complaint also requests that pursuant to the security agreement, the plaintiff be permitted to seize the assets, inventory and goods of the defendant Parcare located at 445 Park Avenue, Brooklyn, New York.

The defendants failed to serve a timely answer and plaintiff moved in May 2011 for a default judgment. However, pursuant to a stipulation entered into on April 18, 2012 the parties withdrew their respective motions and the plaintiff accepted service of defendant's verified answer containing several affirmative defenses including lack of personal jurisdiction, fraud in the inducement, unconscionability and violations of the UCC. The answer also contains a counterclaim stating that defendants were fraudulently induced to sign the unconditional guarantees for the loan to Parcare. Defendants contend that the plaintiff misrepresented to them they that would not be individually liable for the loan. The answer was deemed served and accepted by plaintiffs' as of April 18, 2012.

Plaintiff now moves for summary judgment against defendants for the amounts set forth in the complaint on the ground that the affirmative defenses and counterclaim set forth in the defendants' answer are without merit and that Newbank has presented sufficient documentary evidence demonstrating that Parcare executed the promissory note, that Parcare is in default on the promissory note, that demand was made for the amounts owed, and that the balance remains due and unpaid.

In support of the motion for summary judgment, plaintiff submits the affirmation of Hack Chull Kim, the loan officer employed by NewBank. Mr. Kim states that on October 5, 2010, Parcare defaulted in paying the Note and that despite due demand the defendants have failed and refused to make payments. Mr. Kim also denies that NewBank represented to the defendants that they would not be personally liable for the loan and only Parcare would be liable for repayment. Mr. Kim states that it was explained to the defendants that as the loan was an SBA insured transaction, the principals were required to execute a personal guarantee. Further, he asserts that the defendants all executed the personal guarantees at the closing of the loan. Kim states that the amount now due and owing is \$358,215.65 which consists of unpaid principal, accrued interest and late charges.

Plaintiff's counsel claims that based upon the above submitted documentary evidence that plaintiff has demonstrated, prima facie, that plaintiff is entitled to the relief sought in the complaint.

Defendants cross-move for an order pursuant to CPLR 3211(a)(8) dismissing the plaintiff's action for failure to obtain personal jurisdiction or in the alternative denying the plaintiff's motion for summary judgment pursuant to CPLR 3212(f) on the ground that further discovery is required to oppose the motion for summary judgment.

In support of the cross-motion counsel asserts that plaintiff failed to effectuate proper service of process on any of the defendants. The affidavits of service filed by the plaintiff indicate that process server Christopher W. Daniels served Parcare Services at 445 Park Avenue Brooklyn, New York on December 20, 2010 by personally serving "Sally Smith" who is stated by the process server to be a General Agent of the Corporation. The process server also served defendant Sara Stern and Chaim Stern on December 20, 2010 by serving "Sally Smith" at Parcare stating that Sally Smith identified herself as a co-worker of the defendant. The affidavit of service for defendant Chaye D. Miller indicates that she was served at her residence

located at 224 Keap Street Brooklyn, New York on December 20, 2010 by serving "Mrs. Miller" who identified herself as the defendant's wife. The affidavit of service for defendant 445 Park Ave, LLC indicates that service was made upon "Sally Smith" on December 20, 2010. The affidavit states that the process server knew that Ms. Smith was authorized to accept service for the Corporation.

In support of the cross-motion, the defendants submit an affirmation from Gary Schlesinger, a member of 445 Park Ave, LLC and an officer of Parcare Services, Inc. Mr Schlesinger states that there was no person appointed to accept service for the defendants nor was "Sally Smith" a member, manager, authorized agent or designated to accept service of process for either defendant entity or the individual defendants. Mr. Schlesinger states that Ms. Smith is a part-time receptionist and was not asked by the process server whether she was authorized to accept service. Mr. Schlesinger also states that service upon Sara Stern, Chaya Miller and Chaim Stern at the Offices of Parcare is improper as said individuals are not employees of Parcare and do not work in Parcare's Office.

Sara Stern states in her affirmation that neither she nor her husband are Parcare employees. Chaya Miller states in her affirmation that service upon her was improper because the affidavit states that service was made upon her wife and in fact she is married to a man. Chaim Stern submits in his affirmation that service upon him at the offices of Parcare is improper as he does not work there.

This Court finds that the defendants' cross-motion to dismiss the complaint for lack of personal jurisdiction is denied. It is clear that the defendants' answer containing the affirmative defense of lack of personal jurisdiction was deemed to be served and accepted by plaintiff on April 18, 2012. The defendants' cross-motion to dismiss the complaint for failure to obtain personal jurisdiction was served on September 28, 2012, five months later. Pursuant to CPLR 3211(e), the defendants were required to move to dismiss the complaint for lack of proper service within 60 days following the service of the answer, unless an extension of time was warranted on the ground of undue hardship. Here, the cross-motion to dismiss the complaint, made five months after service of the answer was untimely and was not supported by any showing of undue hardship which prevented the making of the motion within the requisite statutory period (see Reyes v Albertson, 62 AD3d 855 [2d Dept. 2009]; Dimond v Verdon, 5 AD3d 718 [2d Dept. 2004]; DeSena v HIP Hosp., Inc., 258 A.D.2d 555 [2d Dept. 1999]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (see Sheppard-Mobley v King, 10 AD3d 70[2d Dept. 2004]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v New York, 49 N.Y.2d 557[1980]).

This Court finds that the plaintiff established its prima facie entitlement to judgment as a matter of law by setting forth "the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms" (see New York Community Bank v Fessler, 88 AD3d 667 [2d Dept. 2011] citing Luqli v Johnston, 78 AD3d 1133, 1135 [2d Dept. 2010]; Pennsylvania Higher Educ. Assistance Agency v Musheyev, 68 AD3d 736 [2d Dept. 2009]). Plaintiff submitted the promissory note signed by the defendant and an affidavit asserting that the corporate defendant failed to make any payment on the note (see Larry Lawrence IRA v Exeter Holding Ltd., 84 AD3d at 1176; Jin Sheng He v Sing Huei Chang, 83 AD3d at 789). Therefore, this court finds based upon the fact that the plaintiff has demonstrated, prima facie, that the corporate defendant defaulted under the terms of the lease that the individual guarantors, Sara Stern, Chaya D. Miller and Chaim Stern are also liable pursuant to their respective personal unconditional guarantees.

In opposition, the defendants failed to raise a triable issue of fact with respect to a bona fide defense (see Larry Lawrence IRA v Exeter Holding Ltd., 84 AD3d at 1176; Gullery v Imburgio, 74 AD3d 1022, 905 NYS2d 221 [2d Dept. 2010]; Pennsylvania Higher Educ. Assistance Agency v Musheyev, 68 AD3d 736 [2d Dept. 2009]; Quest Commercial, LLC v Rovner, 35 AD3d 576 [2d Dept. 2006]). The defendants raised defenses of fraud in the inducement, unconscionability and misrepresentation. Specifically, defendants contend that they were fraudulently induced to sign unconditional guarantees for the loan provided to Parcare and that the plaintiff promised that the individual defendants would not be assuming personal liability for the loan. However, said defenses were supported only by the defendant's conclusory allegations which are insufficient to defeat the plaintiff's motion (see Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]; JPMorgan Chase Bank v Gamut-Mitchell, Inc., 27 AD3d 622[2d Dept. 2006]; Jae

Heung Yoo v Se Kwang Kim, 289 AD2d 451 [2d Dept. 2001]). The respective personal guarantees signed by each defendant clearly state that the guarantor unconditionally guarantees payment to the lender of all amounts due under the note and contains a clear notice that the guarantor may have to pay up to the full amount of the debt if the borrower does not pay.

Further, while determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (see CPLR 3212 [f]), "a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (see Chester v Alsol Enters., Ltd., 95 AD3d 922 [2d Dept. 2012]; Williams v. D & J School Bus, Inc., 69 A.D.3d 617 [2d Dept. 2010]). What must be offered is "an evidentiary basis to show that discovery may lead to relevant evidence and that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the moving party (see Gasis v City of New York, 35 AD3d 533 [2d Dept. 2006]). Here, the defendants failed to provide an evidentiary basis for their assertion that further discovery would lead to additional relevant evidence (see Lambert v Bracco, 18 AD3d 619 [2d Dept. 2005]).

Accordingly, for all the above stated reasons, the defendants' affirmative defenses and counterclaim are stricken and plaintiff's motion for summary judgment against Parcure Services, Inc, Sara Stern and Chaya D. Miller directing a judgment in the amount of \$358,215.65 plus interest from June 6, 2012 is granted. NewBank is also entitled to a judgment against Chaim Stern as provided in the unconditional limited guarantee.

In addition, that branch of the plaintiff's motion requesting an order of seizure with respect to the assets of Parcure Services, Inc., located at 445 Park Avenue Brooklyn New York pursuant to the Security Agreement is granted

Settle judgment on notice.

Dated: January 30, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.