

Capital One v York St. Check Cashers, Inc.
2013 NY Slip Op 30480(U)
February 28, 2013
Supreme Court, Suffolk County
Docket Number: 8967-12
Judge: Thomas F. Whelan
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dropping her as a named party defendant to this action and an amendment of the caption to reflect same is considered under CPLR 1015 and 1003 and is granted; and it is further

ORDERED that pursuant to CPLR 3212(c), a trial on the amount of the damages recoverable by the plaintiff from the corporate defendant and defendant William Rodriguez, including the amount of reasonable counsel fees to which the plaintiff may be entitled, shall be held in accordance with the further order of the court issued after this matter has been certified as trial ready by counsel and incorporated into a certification order; and it is further

ORDERED that a preliminary conference limited solely to issues concerning the amount of the damages recoverable by the plaintiff from the corporate defendant and defendant William Rodriguez shall be held on Friday, **March 29, 2013**, in the courtroom of the undersigned located in the Supreme Court Annex Building of the courthouse at One Court Street, Riverhead, New York 11901.

On January 25, 2005, the plaintiff's predecessor-in-interest extended a revolving credit loan to defendant York Street Check Cashers, Inc. (hereinafter "York" or corporate defendant), under the terms of a promissory note in the principal amount of \$150,000.00 in favor of the plaintiff's predecessor-in-interest by merger. Also executed on that date were written guarantees of the obligations of the corporate defendant by defendant William Rodriguez and named defendant, Joy Rodriguez, who died prior to the commencement of this action. As additional security for the loan, defendant York executed a security agreement wherein it pledged its assets as security for the loan while defendant William Rodriguez executed a subordination agreement in favor of the plaintiff's predecessor-in-interest. In June of 2011, defendant York executed the last of eight re-stated promissory notes by which the loan's maturity date was extended until December 1, 2011. Under the terms of the June 1, 2011 note, defendant York was required to remit monthly payments in the amount of \$10,000.00 from July 1, 2011 through December 1, 2011, by automatic debit from accounts maintained by defendant York at the plaintiff's bank. The plaintiff commenced this action after York defaulted in its payment obligation under the terms of the note that was due on December 1, 2011. The plaintiff claims that the defendants owe a principal amount of \$50,000.00, together with some \$82,000.00 in overdrafts on three of defendant York's bank accounts.

In its complaint, the plaintiff advances six causes of action for recovery of amounts due against the corporate defendant York and one cause of action against the remaining individual defendant Rodriguez as guarantor. The **FIRST** cause of action targets defendant York and sounds in breach of the Re-stated Promissory Note of June 1, 2011 and other loan documents whereby such defendant was required to pay overdrafts in its accounts with the plaintiff. The **SECOND** and **THIRD** causes of action also target defendant York but sound in an account stated and unjust enrichment. The **FOURTH** cause of action seeks the remedy of replevin with respect to the collateral pledged as security by defendant York in the security agreement executed at the time of the loan's origination in 2005. The **FIFTH** and **SIXTH** causes of action also target York for the production of corporate books and records and financial statements which it purportedly agreed to produce under the 2005 loan documents. The **SEVENTH** cause of action targets the guarantors which now continues only against defendant, William Rodriguez.

Issue was joined by service of a joint answer on behalf of defendants, York and William Rodriguez. Therein, eight affirmative defenses are asserted by the answering defendants including their failures to state a claim, satisfy conditions precedent and mitigate damages. In addition the plaintiff is

charged with breaches of its obligations under the terms of the loan documents and with waiver, estoppel, and unclean hands.

By this motion, the plaintiff seeks “summary judgment” in its favor and an amendment of the caption to delete the pre-deceased defendant, Joy Rodriguez. The plaintiff’s substantive demands for relief are opposed by the answering defendants who claim that the motion must be denied as premature pursuant to CPLR 3212 because the plaintiff has not provided the defendants with discovery. None of the affirmative defenses asserted in their answer were raised or otherwise asserted in opposition to this motion. For the reasons stated, the motion is granted only to the extent that: 1) Joy Rodriguez is dropped as a party defendant and the caption is amended to reflect same; 2) partial summary judgment is granted to the plaintiff on its FIRST and SEVENTH causes of action, which causes of action are severed from all others pursuant to CPLR 3212(e); and 3) a trial on the issue of damages shall abide the trial ready certification of the severed causes of action and the scheduling of such trial by further order of the court.

It is well established that in an action to recover damages for breach of a promissory note, credit or loan agreement and any written guarantees of the obligation of the obligor thereunder, a prima facie case is made by the plaintiff upon due proof of the existence of the underlying note or credit or loan agreement and written guarantees and a failure on the part of the defendants to make payment in accordance with the terms of such note and guarantees (*see Clemente Bros. Contr. Corp. v Hafner-Milazzo*, 100 AD3d 677, 954 NYS2d 156 [2d Dept 2012]; *Valley Natl. Bank v INI Holding, LLC*, 95 AD3d 1108, 945 NYS2d 97 [2d Dept 2012]; *Signature Bank v Galit Props., Inc.*, 80 AD3d 689, 915 NYS2d 138 [2d Dept 2011]; *Provident Bank v Giannasca*, 55 AD3d 812, 866 NYS2d 289 [2d Dept 2008]; *New York Community Bank v Fessler*, 88 AD3d 667, 668, 930 NYS2d 601 [2d Dept 2011]; *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]). Where such a showing is made by the plaintiff on a motion for summary judgment, the answering defendants targeted by such motion must demonstrate, by due proof in admissible form, the existence of genuine questions of fact with respect to bona fide defenses to avoid the granting of the plaintiff’s motion (*see Imperial Capital Bank v 11-13-15 Old Fulton D*, 88 AD3d 652, 930 NYS2d 267 [2d Dept 2011]; *JPMorgan Chase Bank, N.A. v Galt Group, Inc.*, 84 AD3d 1028, 923 NYS2d 643 [2d Dept 2011]; *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 satisfied its burden on this motion by establishing the existence of the notes, the credit and security agreements, the guarantee and the defendants’ defaults in payment under the terms thereof. The plaintiff thus demonstrated a prima facie entitlement to partial summary judgment on its claims for recovery of damages by reason of the defendants’ breaches of their obligations to pay amounts due under the terms of the notes, the written guarantee and other loan documents. The moving papers also established the answering defendants’ liability for payment of the plaintiff’s reasonable counsel fees to the extent incurred in the collection of amounts owing under the terms of the note and written guarantees in view of the answering defendants’ agreement to pay same under the terms of the loan documents guarantees. There was, however, a lack of due proof as to the amounts due and owing to the plaintiff, including the amount of reasonable counsel fees to which it may be entitled to collect from the defendants. A prima facie entitlement to an award of partial summary judgment on the plaintiff’s FIRST

and SEVENTH causes of action only with respect to the issue of the defendant's liability for sums owing to the plaintiff under the terms of the loan documents and written guarantee.

The moving papers failed, however, to demonstrate the existence of the elements of an account stated against the corporate defendant that is the subject of the plaintiff's SECOND cause of action (*see Branch Services, Inc. v Cooper*, 102 AD3d 645, 2013 WL 85916 [2d Dept 2013]; *Raytone Plumbing Specialities, Inc. v Sano Constr.*, 92 AD3d 855, 939 NYS2d 116 [2d Dept 2012]; *Digital Ctr., S.L v Apple Indus., Inc.*, 94 AD3d 571, 942 NYS2d 488 [1st Dept 2012]). The moving papers also failed to establish the plaintiff's prima facie entitlement to summary judgment on the THIRD, FOURTH, FIFTH and SIXTH causes of action against the corporate defendant (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]).

It was thus incumbent upon the defendants to demonstrate their possession of some bona fide defense to the plaintiff's breach of contract claims that presents at least one genuine issue of fact, thereby precluding the granting of any type of accelerated judgment in favor of the plaintiff. A review of the opposing papers reveals, however, that no question of fact was raised with respect to the issue of the defendants' liability to the plaintiff under the loan documents.

As indicated above, the opposing papers submitted by the defendants are limited to the procedural challenge that the motion is premature due to the plaintiff's failure to provide documentation of amounts due, including the history of the accounts which are purportedly overdrawn from which payments of amounts due and owing under the loan documents were to be withdrawn and credited as paid by defendant York. To the extent that the defendants' opposition may be read as a request for a denial of this motion so as to afford the defendants the opportunity to engage in discovery as contemplated by CPLR 3212(f), it is denied. The rule at CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (*Woodard v Thomas*, 77 AD3d 738 at 740, 913 NYS2d 103 [2d Dept 2010], *quoting Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760, 825 NYS2d 516; *see Friedlander Org., LLC v Ayorinde*, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

Here, the defendants' claims that issues of fact exist that preclude an award of summary judgment in favor of the plaintiff, are rejected as unmeritorious. The defendants advanced not one challenge to plaintiff's claims that the defendants' defaulted in payment under the terms of their written contracts and none of the documentation to which the defendants claim they are entitled in order to amount a defense to the damages claimed by the plaintiff are limited to the issue of damages. However, the court finds that due to the absence of proof in admissible form sufficient to establish as a matter of law the amounts claimed

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as due and owing by the plaintiff, issues of fact exist with respect to the amounts due under the terms of the note and the accounts allegedly overdrawn by the corporate plaintiff. In addition, the calculation of interest and late fees and the amount of counsel fees to which the plaintiff is entitled were not established by the papers submitted by the plaintiff in support of its motion. The court has thus limited its award of summary judgment to the award of partial summary judgment on the issue of the defendants' liability under the FIRST and SEVENTH causes of action set forth in the complaint (*see* CPLR 3212[e]).

The court further finds that the defendants should be afforded the opportunity to engage in limited discovery with respect to the amounts claimed as due by the plaintiff, prior to the scheduling of a trial on the limited issue of the plaintiff's damages that is the subject of CPLR 3211(c). Accordingly, a preliminary conference limited to the issue of the plaintiff's damages shall be held herein on Friday, **March 29, 2012** in the courtroom of the undersigned in the Supreme Court Annex Building of the courthouse located at One Court Street, Riverhead, New York 11901.

DATED: 2/28/13



THOMAS F. WHELAN, J.S.C.