

SG Equip. Fin. USA Corp. v Moore

2013 NY Slip Op 31049(U)

March 27, 2013

Sup Ct, New York County

Docket Number: 653941/2012

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

SG EQUIPMENT FINANCE USA CORP,

Plaintiff,

-against-

DAN MOORE a/k/a/ DANIEL RAY MOORE,

Defendant.

INDEX NO. 653941/2012

MOTION DATE Jan. 31, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion for summary judgment in lieu of complaint.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, it is ordered that this motion for summary judgment in lieu of complaint is decided in accordance with the accompanying decision and order.

Dated: March 27, 2013

Signature of O. Peter Sherwood, J.S.C.

Check one: [] FINAL DISPOSITION [x] NON-FINAL DISPOSITION

Check if appropriate: [] DO NOT POST [] REFERENCE

[] SUBMIT ORDER/ JUDG. [] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X

SG EQUIPMENT FINANCE USA CORP.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 653941/2012

Mot. Seq. No.: 001

DAN MOORE a/k/a/ DANIEL RAY MOORE,

Defendants.

-----X

O. PETER SHERWOOD, J.:

On this motion for summary judgment in lieu of complaint pursuant to CPLR 3213, plaintiff SG Equipment Finance USA Corp. (“SGEF”) alleges that the defendant Dan Moore a/k/a Daniel Ray Moore (“Moore”) defaulted under the terms of a personal guaranty (the “Guaranty”), which guaranteed the payment and performance obligations of non-party Moore Freight Service, Inc. (“Moore Freight”) to SGEF under a Master Loan and Security Agreement (“MLSA”) and two Term Notes. The motion is unopposed.

On November 15, 2012, plaintiff commenced this action by filing the summons and notice of motion for summary judgment in lieu of complaint to recover \$636,588.58, plus interest from September 4, 2012 at the default rate of 18% per annum, together with late charges, attorneys’ fees, costs and disbursements.

On January 28, 2011, SGEF and Moore Freight executed the MLSA, which set forth the terms and conditions by which SGEF would extend credit to finance Moore Freight’s purchase of commercial equipment. The MLSA is signed by defendant, in his capacity as President of Moore Freight, and by Patricia Hensley, plaintiff’s Vice President (Santagato Affidavit Ex. A). That same day, SGEF provided initial financing to Moore Freight in the principal amount of \$301,995.00, as evidenced by a Term Note dated January 28, 2011 (“Note One”) (Santagato Aff. Ex. B). Under the terms and conditions of Note One, Moore Freight agreed to repay the principal balance by remitting sixty consecutive monthly installments of \$5,908.88 commencing on March 4, 2011 and each month thereafter.

On February 2, 2011, SGEF provided additional financing to Moore Freight in the principal

amount of \$498,027.37, as evidenced by a Term Note dated February 2, 2011 (“Note Two”) (Santagato Aff. Ex. C). Under the terms and conditions of Note Two, Moore Freight agreed to repay the principal balance by remitting sixty consecutive monthly installments of \$9,744.48 commencing on March 7, 2011 and each month thereafter.

Moore and SGEF also executed the Guaranty on January 28, 2011, whereby Moore personally guaranteed the prompt payment of all indebtedness and obligations owed by Moore Freight to SGEF. Specifically, Moore guaranteed to SGEF:

“the prompt payment and/or performance of all indebtedness, obligations and liabilities of [Moore Freight] at any time owing to SGEF, whether now existing or hereafter arising, direct or indirect, matured or unmatured, primary or secondary, certain or contingent, or acquired by or otherwise created in favor of SGEF, including without limitation any and all rent, loan, purchase or other installment payments, principal balances, taxes, indemnities, liquidated damages, accelerated amounts, return deficiency charges, casualty value payments, all interest, late charges and fees, attorneys’ fees or enforcement and other costs, which may at any time be payable to SGEF, together with all claims for damages arising from or in connection with the failure to punctually and completely pay or perform such obligations, whether or not such obligations are from time to time reduced or extinguished and thereafter increased or incurred”

(Santagato Aff. Ex. D). The Guaranty renders Moore primarily liable for each of Moore Freight’s obligations, “and not merely as a surety” of such obligations (*id.*)

Section 5(a) of the MLSA defines an “Event of Default” as the failure by Moore Freight to make any payment as it becomes due under a Term Note, where such failure to pay is not cured within ten days. If an Event of Default occurs, under section 6 of the MLSA, SGEF is permitted to declare each Term Note immediately due and payable, and to recover expenses and attorneys’ fees.

Beginning in September 2012 and each month thereafter, plaintiff alleges that Moore Freight failed to pay the amounts due under the Term Notes (Santagato Aff. at 14). Plaintiff then sought payment from Moore under the Guaranty. On October 9, 2012, SGEF served a letter notice upon Moore demanding the immediate payment of all amounts due under the Guaranty by October 17, 2012 (Santagato Aff. Ex. E). Plaintiff alleges that Moore has failed to pay the amount demanded under the Guaranty (Santagato Aff. at 21).

CPLR 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the

document without regard to extrinsic evidence (*see Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]). CPLR 3213 is not available if the instrument requires resort to proof “other than simple proof of nonpayment or a similar de minimis deviation from the face of the document” (*Weissman*, 88 NY2d at 444). However, the application of CPLR 3213 “is not affected by the circumstance that the instrument in question was part of a larger transaction . . . as long as the instrument requires the defendant to make certain payments and nothing else” (*Torres & Leonard v Select Professional Realities*, 118 AD2d 467, 468 [1st Dept 1986]; *see Nordea Bank Finland PLC v Holten*, 84 AD3d 589 [1st Dept 2011]; *Bank of America, N.A. v Solow*, 59 AD3d 304 [1st Dept 2009]). Thus, the fact that the obligation is referenced in underlying documents or reference to underlying documents is necessary to establish the amount of the liability does not affect the availability of CPLR 3213 (*see Bank of America, N.A.*, 59 AD3d at 304; *Boland v Indah Kiat Fin. (IV) Mauritius*, 291 AD2d 342, 342-343 [1st Dept 2002]).

The usual standards for summary judgment apply to CPLR 3213 motions. The proponent of a CPLR 3213 motion establishes a prima facie entitlement to judgment by offering proof, in evidentiary form, of the instrument for payment of the money in question and of failure to make payments in accordance with its terms (*Weissman*, 88 NY2d at 444; *Wachovia Bank, N.A. v Silverman*, 84 AD3d 611, 612 [1st Dept 2011]; *Matas v Alparagas S.A.I.C.*, 274 AD2d 327 [1st Dept 2000]). In the case of a guaranty, which may also be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain, plaintiff, as the proponent of the motion must present the note, an unconditional guaranty to pay and proof of nonpayment by the guarantor to establish a prima facie case (*see European Am. Bank v Cohen*, 183 AD2d 453 [1st Dept 1992]; *Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541 [1st Dept 1992]).

Here, the MLSA and two Term Notes, signed by defendant on behalf of Moore Freight, contain an unconditional promise to repay plaintiff for all credit extended to Moore Freight, together with interest, costs and attorneys’ fees. The Guaranty contains a straightforward unconditional promise to pay the monies owed to plaintiff by Moore Freight, whether at maturity or earlier by reason of acceleration. Considered together with plaintiff’s supporting affidavit as to defendant’s

default, the MLSA, Term Notes and Guaranty sufficiently establish plaintiff's prima facie entitlement to summary judgment. Once a prima facie case is established, the defendant can defeat the motion by offering proof sufficient to raise a triable issue of fact (*see Banco Popular North Amer. v Victory Taxi Mgmt., Inc.*, 1 NY3d 381, 383 [2004]). Defendant, who has neither appeared nor submitted any opposition to this motion despite having been served with the papers on December 14, 2012 pursuant to CPLR 308 (2) and 313, has failed to rebut that prima facie showing by proffering evidentiary proof sufficient to raise a triable issue. The motion is, therefore, granted as to liability.

Turning then to the question of the amount owed by defendant, plaintiff submits an affidavit of Steven Santagato, plaintiff's Collection Manager, in which he indicates an amount due as of November 14, 2012 of \$636,588.58 (Santagato Aff. at 22-23). Broken down as to Note One, such amount consists of the past due amount as of September 2012 of \$5,908.88, the present value of the remaining 41 payments calculated at a 3% discount rate in the amount of \$230,450.04, and late fees in the amount of \$295.44, for a total of \$236,654.36. As to Note Two, such amount consists of the past due amount as of September 2012 of \$9,744.48, the present value of the remaining 41 payments calculated at a 3% discount rate in the amount of \$379,947.22, and late fees in the amount of \$487.92, for a total of \$390,178.92. The total amount due also includes attorneys' fees and costs in the amount of \$9,755.30. It is unclear from the record why the present value of the remaining payments was calculated at a 3% discount rate, and how late fees were calculated. Accordingly, the issue of damages shall be referred to a special referee to hear and determine.

Turning then to the question of attorneys' fees, plaintiff's attorney in his affirmation in support of the motion states that an award of attorneys' fees in the sum of \$9,755.30 is warranted. Plaintiff's counsel provides a contemporaneous time record in the form of an invoice indicating the legal services rendered and the associated fee, but the amount totals only \$8,225.30. Plaintiff's attorney notes that additional legal fees in the amount of \$1,530.00 have been incurred since the date of the invoice, but does not provide a contemporaneous time record indicating the specific legal services rendered and the associated fee.

“An award of attorneys' fees pursuant to [a] contractual provision may only be enforced to the extent the amount is reasonable and warranted for the services actually rendered” (*SO/Bluestar*,

LLC v Canarsie Hotel Corp., 33 AD3d 986, 987 [2d Dept 2006], quoting *Kamco Supply Corp. v Annex Contr.*, 261 AD2d 363, 365 [2d Dept 1999]). The evaluation of what constitutes reasonable attorneys' fees to be awarded pursuant to a contractual provision is a matter within the sound discretion of the court (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *SO/Bluestar, LLC*, 33 AD3d at 988). In making a determination of what is reasonable, New York courts generally consider such factors as the time, effort and skill required; the difficulty of the questions presented; the attorneys' experience, ability and reputation; the fee customarily charged in the locality for similar services; and the contingency or certainty of compensation (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]; *see also Green v Silver*, 79 AD3d 1097, 1098 [2d Dept 2010]; *Bankers Fed. Sav. Bank FSB v Off West Broadway Developers*, 224 AD2d 376, 378 [1st Dept 1996]). Here, the record before the Court is not sufficient to determine an award of reasonable attorneys' fees. The Court will thus refer the issue of attorneys' fees to a special referee to hear and determine.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is GRANTED on default as to liability; and it is further

ORDERED that the issue of damages, including calculation of the amount due and owing as of the date of entry of this Order, including interest, late fees, and reasonable attorneys' fees, is hereby referred to a Special Referee to hear and determine the amount due to plaintiff in accordance herewith provided that not later than May 3, 2013, plaintiff serves a copy of this order with Notice of Entry and a Note of Issue on defendant, and upon payment of the appropriate fees and filing of the Note of Issue and service of a copy of this order upon the Clerk of the Special Referee Part, Room 119M, at 60 Centre Street, not later than April 26, 2013; and it is further

ORDERED that upon determination by the Special Referee of the amount due to plaintiff, plaintiff shall have leave to enter a Clerk's judgment in such sum together with interest as determined by the Special Referee and costs and disbursements as taxed by the Clerk.

This constitutes the decision and order of the Court.

DATED: March 27, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.