

<b>VNB N.Y. Corp. v White</b>
2013 NY Slip Op 32284(U)
September 23, 2013
Sup Ct, NY County
Docket Number: 653856/2012
Judge: Eileen A. Rakower
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 15**

*Justice*

VNB NEW YORK CORP.,

Plaintiff,

- v -

**TIMOTHY J. WHITE d/b/a TIMOTHY WHITE  
PHOTOGRAPHY,**

Defendant.

INDEX NO. 653856/2012  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

<u>PAPERS NUMBERED</u>	
1, 2	_____
3, 4	_____
5, 6, 7	_____

**Cross-Motion: Yes X No**

Plaintiff VNB New York Corp. (“VNB New York”) moves for an Order, pursuant to CPLR §3213, directing the entry of judgment for VNB New York and against defendant Timothy J. White d/b/a Timothy White Photography (“White”), jointly and severally, in the amount of \$482,640.55, with attorneys fees and interest until payment in full is received and after the entry of Judgment on the grounds that there is an instrument for the payment of money between the parties, and proof of nonpayment.

In support of its motion, Plaintiff submits a supporting affidavit of John Stine, Vice-President of the Special Assets Department of Valley National Bank (“Valley”), the servicer of VNB New York. White opposes.

As set forth in Stine’s affidavit, on or about March 8, 2006, White executed a Promissory Note and Loan Agreement in the principal sum of \$400,000.00 in favor of The Park Avenue Bank (“the Unsecured Note”). Pursuant to the terms of the

Unsecured Note, White, as borrower, agreed to repay such sums together with interest thereon computed from the date hereof until maturity, at the rate equal to one percent in excess of the "Prime Rate" per annum, and thereafter at the Default Rate, together with any costs, expenses and attorney's fees incurred pursuant to the provisions hereof. The Maturity Date, which was originally April 1, 2009, was extended to August 1, 2009. White defaulted under the Unsecured Note by failing to make the scheduled payment due on August 1, 2009 and all subsequent payments. VNB New York seeks to enforce a loan pursuant to assignment.

On March 10, 2006, Timothy White, LLC also executed a note in favor of The Park Avenue Bank for \$5 million secured by the property located at 451 West 54<sup>th</sup> Street, New York, New York (the "Secured Note"). Timothy J. White a/k/a Timothy White (and Elicia White f/k/a Elicia Ho) guaranteed the secured note. In January 2010, Park Avenue Bank commenced an action to foreclose on the Secured Note before this Court ("Action No. 1.").

On or about March 10, 2010, The Park Avenue Bank was closed by the NYS Department of Banking and the Federal Deposit Insurance Corporation ("FDIC") was appointed as the Receiver over Park Avenue Bank's assets. On March 12, 2010, the Plaintiff and the FDIC, as receiver, entered into a purchase and assumption agreement ("Purchase Agreement") pursuant to which the Plaintiff Valley National Bank assumed all of Park Avenue's assets and liabilities.

On March 12, 2010, the FDIC, as receiver for Park Avenue Bank, signed an Allonge, relating to the *Unsecured Note*, directing Defendant to pay Valley National Bank.

In Action No. 1, counsel for Valley National Bank, as successor to Park Avenue moved for summary judgment on the complaint and to amend the caption to replace Valley National Bank as plaintiff instead of Park Avenue Bank.

While the motion was pending in Action No. 1, on June 1, 2010, Valley National Bank signed an Allonge pertaining to the *Unsecured Note*, directing Defendant to pay VNB New York Corp. The Allonge lists the Lender's name as Park Avenue Bank.

Thereafter, the summary judgment motion in Action No. 1 was "resolved"

pursuant to a Forbearance Stipulation, which contained whereas clauses expressing: (1) the secured note and default thereon; (2) the unsecured note (which was reduced to \$300,000), and default thereon; (3) that Valley National Bank was the holder of the “aforementioned obligations;” (4) defendant’s agreement to the above clauses as “correct;” (5) defendant’s consent to substitute Valley National Bank as plaintiff and to a Judgment of Foreclosure and Sale in Action 1; (6) defendant’s agreement to appoint a referee; and (7) plaintiff’s agreement to forebear from moving for a judgment of foreclosure until April 1, 2011, so long as defendant made payments required thereunder.

On June 3, 2011, Valley National Bank, as successor in interest to Park Avenue Bank, moved on Action No. 1 to confirm a Referee’s Report and for a Judgment of Foreclosure and Sale which was granted on August 22, 2011.

Thereafter, on January 10, 2012, Defendant moved by Order to Show Cause in Action No. 1 to stay the sale, vacate the Judgement of Foreclosure, and to dismiss the action for lack of standing. On oral argument, the Court declined to dismiss the action for lack of standing, but vacated the summary judgment settlement order and Judgment of Foreclosure because at the time Valley National Bank moved for Judgment of Foreclosure, the underlying loan had been already assigned to VNB New York, and VNB New York should have previously moved to be substituted. Plaintiff’s cross motion to amend the caption to have VNB New York substituted as Plaintiff was denied without prejudice upon a proper substitution.

Thereafter, VNB New York commenced the instant action (Action No. 2) on November 8, 2012 to recover on the Unsecured Note based on the various assignment and allonges, which was then followed by another motion in Action No. 1 commenced by LCP 54 St, LLC, as successor in interest to VNB New York Corp., as successor in interest to Valley National Bank, as successor in interest to The Park Avenue Bank.

Action No. 2 was transferred to this Part pursuant to Order dated June 6, 2013 by Hon. Carol Edmead. Action No. 1 has now been settled.

CPLR §3213 states, in relevant portion:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a

notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion . . .

“A plaintiff makes out a prima facie case for summary judgment in lieu of complaint by proof of an instrument and the defendant's failure to make payment according to its terms.” *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D. 2d 136 [1<sup>st</sup> Dept 1968].

Here, VNB New York provides the affidavit of Stine, which annexes the Note and Loan Agreement executed by White in the principal sum of \$400,000 in favor of The Park Avenue Bank, a press release from the FDIC website memorializing the closure of The Park Avenue and FDIC's appointment as the receiver over The Park Avenue Bank's assets, a copy of the Allonge reflecting FDIC's assignment of the Note to Valley National Bank on March 12, 2010, and a copy of the Allonge reflecting further assignment of the Note from Valley National Bank to VNB New York on June 1, 2010.

The Note, in the section captioned “Interest,” states that “In addition, upon an Event of Default, borrower will pay interest on any amount overdue, on demand at a rate equal to sixteen percent (16%) per annum.” The Note further provides in the section captioned “Interest” that “in the event that any payment of principal or interest shall become overdue for a period of 10 days, a late charge of 6% of such overdue payment may be charged...”

As set forth in Swine's supporting affidavit, White, as the Borrower, defaulted under the Note by failing to make the scheduled payment due on August 1, 2009 and all subsequent payments. Defendants failed to cure the default. As a result, VNB NY Corp is owed the principal sum of \$299,778.88 plus interest thereon at a rate of 5.25% per annum from July 9, 2009 through August 1, 2009 in the amount of \$1,005.56; interest from August 2, 2009 through and including October 25, 2012 at the rate of 16% per annum in the amount of \$181,606.12, and late charges in the amount of \$249.99 for a total amount of \$482,640.55.

In opposition, White submits an affidavit, along with the attorney affirmation of Jon B. Felice. White contends that there remain issues with respect to the

assignments of the debt, the allonge, the power of attorney, and improper notarization, which had been raised in connection with Action No. 1. White also contends that Plaintiff fails to give a breakdown of the interest and that Plaintiff's claim for 16% default interest is not proper as the default interest is 10.75% pursuant to the parties' prior settlement.

In reply, Plaintiff reiterates that it has proper standing, states that its calculation was correct, but states that "should Defendant prefer that the 'settlement amount' be binding, Plaintiff would not object to a determination that Defendant is liable for \$358,408.42 as of August 23, 2010 with interest thereafter accrued at the Note's Default rate."

Here, as there is an issue as to what if, any, effect the Forbearance Stipulation had with respect to the Unsecured Note which Plaintiff seeks to enforce in this matter, Plaintiff has not made out a prima facie case for summary judgment in lieu of Complaint.

Wherefore it is hereby,

ORDERED that the plaintiff's motion for summary judgment in lieu of the complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service of the complaint.

This constitutes the decision and order of the court. All other relief requested is denied.

**Dated:** 9/23/13

  
HON. EILEEN A. RAKOWER, U.S.C.

**Check one:** FINAL DISPOSITION X NON-FINAL DISPOSITION

**Check if appropriate:**  DO NOT POST  REFERENCE