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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: (HON. EILEEN A. RAKOWER _____ PART 15

Justice

Index Number : 114222/2010
VNB NEW YORK
vs.
CHATHAM PARTNERS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits _____ | No(s). 5, 6, 7, 8

Replying Affidavits _____ | No(s). 9, 10

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 11/20/13

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

VNB NEW YORK CORP.,
Plaintiff,

-v-

CHATHAM PARTNERS, LLC; BARRY AKRONGROLD; AND HANANYA COHEN a/k/a NINO COHEN

Index No. 114222/10

Decision and Order

Mot Seq. #2

Plaintiff VNB New York Corp. ("Plaintiff") seeks money damages arising from a breach of a promissory note executed on behalf of defendant Chatham Partners, LLC ("Chatham") in connection with a certain loan made by Park Avenue Bank and a Guaranty executed by defendants Barry Akrongold ("Akrongold") and Hanaya Cohen a/k/a Nino Cohen ("Cohen") relating to the subject Loan. The first cause of action is based on Chatham's alleged default on a Note. The second cause of action seeks reformation of the Guaranty executed by Akrongold and Cohen to correct an alleged scrivener's error in misidentifying the Borrower as "Fortune and Stone Corp.," instead of Chatham. The third cause of action seeks to recover damages as against defendants Akrongold and Cohen based on the Guaranty. The fourth cause of action seeks attorneys' fees from defendants.

Plaintiff moves for an Order, pursuant to CPLR §3212, granting summary judgment in favor of Plaintiff on all four causes of action in Plaintiff's verified complaint based upon Defendants' default on the subject Note and Guaranty and dismissing the verified answer of defendants Chatham, Akrongold, and Cohen.

In support of its motion for summary judgment, Plaintiff submits the affidavit of Paraskevoula Petridis and the affidavit of Erin M. Trengarthen. Annexed to the supporting affidavits, among other documents, is a copy of the subject Note, Guaranty, Commitment Letter, Amended Commitment Letter, the deposition transcript of Brian Gallagher, the scrivener of the Guaranty, and the affidavit from Brian Gallagher.

Defendants Akrongold and Cohen oppose Plaintiffs' motion for summary

judgment and cross move for an order granting summary judgment in their favor. In support, the following is submitted: affidavit of Akrongold, affidavit of Cohen, and the affirmation of Joanne M. Bonacci.

As set forth in the supporting affirmation of Paraskevoula Petridis, Vice President of Plaintiff, on or about November 2, 2006, Park Avenue Bank made a loan to Chatham in the principal amount of $1,000,000. On the same date, Chatham executed and delivered to Park Avenue Bank a certain Mortgage Note in the original principal amount of $1,000,000 secured by an Open-End Mortgage and Security Agreement. Pursuant to the terms of the Mortgage, Chatham granted Park Avenue a mortgage lien and security interest on real property located at 197 Chatham Street, New Haven, CT 06513, and 539 Ferry Street, New Haven, CT 06513.

As further set forth in Petridis' affirmation, on or about November 2, 2006, defendants Akrongold and Cohen executed and delivered to Park Avenue a Guaranty of Payment of the Note. The subject Guaranty executed by Akrongold and Cohen defines the "Borrower" as Fortune and Stone Corp., not as Chatham. The Guaranty executed by Akrongold and Cohen on November 2, 2006 provides in relevant part:

> PRELIMINARY STATEMENT. The Bank has agreed to make a loan to FORTUNE FINANCIAL & INVESTMENTS CORPORATION and NEW YORK STONE CORPORATION (collectively, the "Borrower") in the principal amount of $1,000,000 of even date herewith covering premises known as 197 Chatham Street and 529-539 Ferry Street, New Haven, Connecticut. It is a condition precedent to the making of the loan to the Borrower that the Guarantor shall have executed and delivered this Guaranty.

Brian Gallagher, the purported scrivener of the loan documents, including the Guaranty, avers in his affidavit, "Although the Guaranty provides that Akrongold and Cohen guarantee, *inter alia*, the obligations of the Borrower, and although my office mistakenly and erroneously defined 'Borrower' therein as Fortune Financial & Investment Corporation and New York Stone Corporation, the parties to the transaction actually intended that Guaranty to define the Borrower as Chatham Partners, LLC." Gallagher further avers, "The Loan was initially intended to be made to Fortune Financial & Investment Corporation and New York Stone Corporation as per Park Avenue's Loan Presentation dated October 23, 2006. Defendants decided prior to the closing to take title in a Special Purpose Entity called

Chatham Partners, LLC and all closing documents reflected that except for the single reference in the Guaranty which Defendants are attempting to use to escape liability."

As set forth in Erin Tregarthen's affirmation, on March 12, 2010, the Office of Thrift Supervision seized Park Avenue and placed it into receivership of the FDIC. On the same day, the FDIC entered into a Purchase and Assumption Agreement with Valley National Bank wherein Valley National Bank acquired certain assets and liabilities of Park Avenue including all of its loans an commitments. As a result of the Agreement, the Note, Modification an Extension Agreement, and Guaranty were assigned by FDIC as Receiver for Park Avenue to Valley National Bank by assignment dated as of March 12, 2010, and thereafter further assigned by Valley National Bank to VNB by assignment dated as of June 1, 2010.

As set forth in Petridis' affidavit, Chatham failed to comply with the terms and provisions of the Note, as modified by the Modification, by failing to pay monthly payments commencing with the payment on January 1, 2010 and thereafter. Petridis further avers that at there was due and owing, at the time of commencement of this action and there continues to remain due and owing, the principal balance of $977,322.13, plus interest, and that Akrongold and Cohen are also liable under the Guaranty.

In their affidavits, contrary to Plaintiff, Akrongold and Cohen aver that there was no mistake in the Guaranty and that they agreed only to guarantee the attorneys' fees and costs of Fortune Financial & Investment Corporation and New York Stone Corporation in the event that the loan to Chatham did not close.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Here, Plaintiff has made a prima facie showing of entitlement to summary judgment as against Chatham based on the terms of the Note and proof of nonpayment. Chatham does not oppose, and therefore has failed to raise any triable issues of fact.

However, Plaintiff has failed to make a prima facie showing of entitlement to summary judgment on its claim for reformation of the Guaranty and enforcement of the Guaranty as against defendants Akrongold and Cohen. Defendants Akrongold and Cohen have also failed to make a prima facie showing of entitlement to summary judgment as to these claims asserted against them.

"There is a presumption that a written instrument expresses the intention of the parties." *Eastern Air Lines, Inc. v. Trans Caribbean Airways, Inc.*, 29 A.D.2d 379, 382 [1st Dep't 1968]. "In order that there may be a reformation of an instrument the plaintiff is bound to establish either that it was executed under a mutual mistake of fact or that it was executed under a mistake upon the one side induced by fraudulent representations upon the other." (*Id.*)(citations omitted). Furthermore, "[b]efore plaintiff can be granted reformation, [it] must establish [its] right to such relief by clear, positive and convincing evidence. Reformation may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error." (*Id.*)(citations omitted).

"A scrivener's error constitutes a mistake in the reduction of an agreement to writing." *CRP/Extell Parcell I, LP v. Cuomo*, 34 Misc. 3d 1214(a), at *14 (Sup. Ct. N.Y. City 2012), *aff'd*,101 A.D. 3d 473 [1st Dept 2012] (citations omitted). "A written agreement may be reformed for mutual parties have reached an oral agreement, and unknown to either, the signed writing does not express that agreement." (*Id.*) (citations omitted).

Here, Plaintiff submits evidence in the form of Gallagher's affidavit to establish that the Guaranty executed by Akrongold and Cohen contained a scrivener's error and the "Borrower" was misidentified as "Fortune Financial & Investments Corporation and New York Stone Corporation," rather than Chatham, the entity which obtained the subject loan, and the loan to Chatham was conditional on the execution of the Guaranty by Akrongold and Cohen. In opposition, Arkongold and Cohen provide affidavits averring that there was no mistake contained within the

Guaranty and there was no prior agreement between the parties with respect to a guaranty as to Chatham LLC's loan. Therefore, in light of the conflicting testimony, there is an issue of fact raised as to whether there was a scrivener's error in the reduction of the Guaranty to writing which precludes both Plaintiffs' motion and defendants Akrongold and Cohen's cross motion for summary judgment.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted only as against defendant Chatham Partners, LLC; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff VNB New York Corp. and against defendant Chatham Partners, LLC, in the amount of $$977,322.13, together with interest as prayed for allowable by law (at the rate of 9% per annum) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants Barry Akrongold and Hananya Cohen a/k/a Nino Cohen's cross motion for summary judgment is denied.

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

DATED: NOVEMBER 20, 2013

EILEEN A. RAKOWER, J.S.C.