

Sovereign Bank v Alvarez

2014 NY Slip Op 30889(U)

April 4, 2014

Sup Ct, New York County

Docket Number: 650116/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SOVEREIGN BANK,

Plaintiff,

Index No. 65116/2012

-against-

DECISION/ORDER

ANTHONY ALVAREZ, DELLA HERZOG,
ANDREW MEYERS, SAM CRUZ and
MT DROP SHIPMENT, INC.

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This action revolves around a dispute between a lender and borrower. Plaintiff now moves for an order entering judgment by default against defendants MT Drop Shipment, Inc., Anthony Alvarez, Della Herzog and Andrew Meyers (hereinafter collectively referred to as the "Settling Defendants") pursuant to a Stipulation of Settlement and Amended Stipulation of Settlement. Settling Defendants' cross-move for an order compelling plaintiff to: (a) accept the principal and interest payment tendered by the defendants on October 4, 2013; and (b) return the \$5,781.52 audit fee the defendants paid to plaintiff. For the reasons set forth below, both motions are granted in part and denied in part.

The relevant facts are as follows. On or about August 1, 2008, defendant MT Drop Shipment, Inc. ("MT"), entered into a business loan agreement and promissory note with plaintiff Sovereign Bank, N.A., now known as Santander Bank, N.A. ("Sovereign"). In order to induce plaintiff to enter into the loan agreement, defendants Anthony Alvarez, Della Herzog and Andrew Meyers executed Guarantees whereby they each guaranteed the payment and performance of all liabilities owing from MT to plaintiff under the loan agreement (the "Guarantees").

On or about January 13, 2012, following the defendants' default of their obligations under the business loan agreement and Guarantees, plaintiff commenced this action by filing a summons and complaint. In or about April 2012, plaintiff and the Settling Defendants entered into a Stipulation of Settlement (the "Stipulation") wherein said defendants agreed to make certain payments to plaintiff in full settlement of the claims in the complaint. Thereafter, in or about February 2013, the parties entered into an Amended Stipulation of Settlement (the "Amended Stipulation"). The Amended Stipulation provided that:

Contemporaneously with the full execution and delivery of this Amended Stipulation of Settlement, the Settling Defendants shall pay Sovereign the sum of One Hundred Thirty Thousand Dollars And Zero Cents (\$130,000) (the "initial payment"). The initial Payment shall be applied to the following Obligations in the following order: (i) interest at the default rate of Nine Percent (9%) per annum, which as of the date of this Amended Stipulation of Settlement is One Thousand Seven Hundred Dollars and Eighty-One Cents (\$1,700.81); (ii) fees for field audits rendered as of the date of this Amended Stipulation of Settlement in the amount of Five Thousand Seven Hundred Eighty One Dollars and Fifty Two Cents (\$5,781.52); (iii) Sovereign's legal fees through December 31, 2012, in the approximate amount of Fifteen Thousand Dollars (\$15,000); and (iv) in partial satisfaction of the outstanding principal balance for the Obligations, which as of the date of this Amended Stipulation of Settlement is in the amount of Two Hundred Eighteen Thousand Four Hundred Fifty-Eight Dollars and Ninety-Six Cents (\$218,458.96).

Additionally, pursuant to the Amended Stipulation, commencing March 1, 2013, and continuing on the first day of each month thereafter, the Settling Defendants were to

make monthly payments to Sovereign each in the amount of Twelve Thousand Dollars (\$12,000) inclusive of principal and interest thereon; and on or before August 1, 2013, the Settling Defendants, [were to pay] to Sovereign the entire principal balance of the Obligations, together with interest thereon and all costs and expenses (including, but not limited to, Sovereign's reasonable attorneys' fees and costs) (the "Balloon Payment").

If the Settling Defendants failed to pay the amounts when due, the Amended Stipulation provided that plaintiff could, among other things, enter "a judgment against the Settling Defendants and each of them, without any further notice . . . in the amount of the Obligations and less any amounts received pursuant to this Amended Stipulation of Settlement." As to the amount of reasonable attorneys' fees plaintiff was able to recoup, the Amended Stipulation provided that the amount "shall be conclusively determined by an affidavit provided by an officer of Sovereign or a member of the law firm(s) representing Sovereign in this matter together with copies of actual invoices presented to Sovereign by such law firm(s)."

From February 1, 2013 to July 1, 2013, the Settling Defendants made each of the \$12,000 monthly payments due under the Amended Stipulation. Thereafter, Settling Defendants requested a final payoff letter from plaintiff to ascertain the amount of the Balloon Payment that was due on or before August 1, 2013. On or about July 19, 2013, plaintiff provided a payoff letter, which stated that there was a remaining balance due of \$74,768.30, which included the outstanding principal in the amount of \$54,274.06, plus interest in the amount of \$434.24, plus legal fees in the amount of \$20,000, plus UCC termination fee of \$60.00. Thereafter, on or about August 14, 2013, Settling Defendants contacted plaintiff to dispute the amount of legal fees. Specifically, in an email to plaintiff, Settling Defendants requested copies of the legal invoices

that would support the alleged legal fees in the amount of \$20,000.

On or about October 4, 2013, Settling Defendants delivered a check in the amount of \$55,704.63, representing the remaining principal and interest due to plaintiff and the UCC termination fee. However, Settling Defendants continued to dispute the amount of attorneys' fees due. Plaintiff never cashed the check. Thereafter, by letter dated December 16, 2013, plaintiff sent Settling Defendants a new payoff letter that stated "SUPERSEDES PAYOFF LETTER OF 7/19/2013." Pursuant to the December letter, plaintiff's legal fees were reduced to \$12,500.00 and the final payoff amount through August 19, 2013, was stated as \$67,512.56. No legal invoices were included with the letter but were later provided to Settling Defendants, for the first time, on or about December 26, 2013.

Plaintiff now brings the instant motion pursuant to the Amended Stipulation for an entry of judgment against the Settling Defendants on the ground that they defaulted under the Amended Stipulation as they failed to pay the entire Balloon Payment on August 1, 2013. Specifically, plaintiff seeks a judgment against the Settling Defendants in the amount of \$57,917.41, plus interest at the default rate of fifteen percent per annum from December 31, 2013, plus costs and disbursements, including reasonable attorney's fees and expenses. Settling Defendants cross-move for an order compelling plaintiff to accept the principal and interest payment tendered to it on October 4, 2013 and to return the \$5,781.52 audit fee the defendants paid to Sovereign under the Amended Stipulation of Settlement.

As an initial matter, the portion of Settling Defendants' cross-motion seeking an order compelling plaintiff to accept the principal and interest payment tendered by the Settling Defendants on October 4, 2013, is granted. Settling Defendants have presented the court with

evidence that they tendered a check to plaintiff for the outstanding principal, applicable interest and UCC termination fee due under the Amended Settlement on or about October 4, 2013.

Plaintiff does not dispute this fact or set forth any argument in opposition to Settling Defendants' cross-motion as to why this court should not enter judgment compelling them to accept said tender made in good faith. Nor has plaintiff cited any authority as to why, despite the tender of the amount in October 2013, it would now be entitled to judgment for said amount with interest from December 30, 2013.

However, the portion of Settling Defendants' cross-motion seeking an order compelling plaintiff to return the \$5,781.52 audit fee they paid to Sovereign is denied. The only argument put forth by Settling Defendants in support of their contention that they are entitled to this reimbursement is that audits were never performed. However, this contention is without merit as plaintiff presents the court with invoices for the audits that were performed on November 14, 2011, January 21, 2012 and June 12, 2012. Moreover, Settling Defendants explicitly agreed in the Amended Stipulation to pay plaintiff an "initial payment," which included "fees for field audits rendered as of the date of this Amended Stipulation of Settlement in the amount of Five Thousand Seven Hundred Eighty One Dollars and Fifty Two Cents (\$5,781.52)." Thus, they cannot now seek reimbursement of an amount they already agreed to pay.

Based on the foregoing, the only issue that remains is the portion of plaintiff's motion seeking attorneys' fees. On this issue, the court finds that while plaintiff is entitled to attorneys' fees, a hearing is necessary to determine the amount of attorneys' fees plaintiff may recoup. The Amended Stipulation explicitly provided that Settling Defendants were to pay Sovereign all costs and expenses including its reasonable attorneys' fees and costs as part of their final Balloon

Payment. Moreover, the amount of the fees was to “be conclusively determined by an affidavit provided by an officer of Sovereign or a member of the law firm(s) representing Sovereign in this matter together with copies of actual invoices presented to Sovereign by such law firm(s).”

While plaintiff now, on this motion, provides the court with the Affidavit of Michael S. Amato and annexed invoices to establish the amount of its attorney’s fees, it is undisputed that it never provided such documents to Settling Defendants with the pay-off letters. Indeed, on the facts before this court it seems no affidavit was every provided but only, after several demands, did plaintiff finally provide invoices to the Settling Defendants on or about December 26, 2013.

Moreover, a review of the Amato affidavit reveals that a lot of the fees plaintiff is now seeking to recover were only incurred due to the fact that plaintiff refused the good faith tender made by Settling Defendants in October 2013. Thus, at this time, Mr. Amato’s affidavit is no longer sufficient to conclusively determine the amount of attorneys’ fees plaintiff is entitled to and a hearing must be held.

Accordingly, plaintiff’s motion is granted only to the extent that it is hereby ORDERED that it is entitled to attorneys’ fees. Additionally, Settling Defendants cross-motion is granted only to the extent that it is hereby ORDERED that plaintiff accept the principal and interest payment tended by Settling Defendants on October 4, 2013, in the sum of \$55,704.63, which was in full satisfaction of the principal and interest due under the Amended Stipulation.

The portion of plaintiff’s action that seeks the recovery of attorney’s fees is severed and the issue of the amount of reasonable attorney’s fees plaintiff may recover against the Settling Defendants is referred to a Special Referee to hear and report. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry,

