

**Cadlerock Joint Venture II, L.P. v Singh**

2014 NY Slip Op 31047(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 107314/2009

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

LUCY BILLINGS  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 46

Index Number : 107314/2009  
CADLEROCK JOINT VENTURE II

INDEX NO. \_\_\_\_\_

vs  
SINGH, SARITA

MOTION DATE \_\_\_\_\_

Sequence Number : 004  
SUMMARY JUDGMENT

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 4, were read on this motion ~~to~~ for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1-2

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 3

Replying Affidavits \_\_\_\_\_ No(s). 4

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

*The court denies plaintiff's motion for summary judgment, C.P.L.R. § 3212(b), and defendant's cross-motion to dismiss the complaint, C.P.L.R. § 3211(a)(1) and (3), pursuant to the accompanying decision.*

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

**FILED**  
APR 25 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/10/14

Lucy Billings, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED **LUCY BILLINGS**  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 46

-----x

CADLEROCK JOINT VENTURE II, L.P.,

Index No. 107314/2009

Plaintiff

- against -

SARITA SINGH,

Defendant

**FILED**

APR 25 2014

-----x

NEW YORK

COUNTY CLERK'S OFFICE

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiff moves for summary judgment based on a promissory note for a student loan of \$14,500.00, with interest at the rate set forth in the note, executed by defendant in favor of plaintiff's predecessor in interest, Wells Fargo Bank. C.P.L.R. § 3212(b). Defendant cross-moves to dismiss the complaint, claiming that, given plaintiff's inadmissible documents, plaintiff has failed to establish its standing to sue, C.P.L.R. § 3211(a)(3), and that her own documentary evidence establishes she has not defaulted in her repayment of the \$14,500.00 student loan. C.P.L.R. § 3211(a)(1). For the reasons explained below, the court denies both plaintiff's motion and defendant's cross-motion.

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's only witness supporting its motion demonstrates no personal knowledge of most of the essential transactions supporting plaintiff's claim. The witness, plaintiff's account

officer Medallis, does not indicate he ever has been an employee of Wells Fargo Bank or Cadleway Properties, Inc., which he claims was assigned defendant's promissory note by the bank and in turn assigned her note to plaintiff. Nor does he indicate any familiarity with the bank's business or its business recordkeeping or with Cadleway Properties' business, including its assignment to plaintiff, or its business recordkeeping.

Rodriguez v. Board of Educ. of City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 254 (1st Dep't 2011); Dorsey v. Les Sans Culottes, 43 A.D.3d 261 (1st Dep't 2007).

Consequently, while plaintiff claims defendant executed her promissory note April 28, 2003, Medallis demonstrates no personal knowledge of that fact or familiarity with her signature and thus is incompetent to authenticate the contract. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992). See Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); People v. Bryant, 12 A.D.3d 1077, 1079 (4th Dep't 2004); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003). Plaintiff nonetheless points to the absence of an unequivocal denial of defendant's signature in her answer, relying on U.C.C. § 3-307(1), which provides:

Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

- (a) the burden of establishing it is on the party claiming under the signature, but
- (b) the signature is presumed to be genuine or authorized . . . .

The Verified Complaint ¶ 3 alleges that:

On or about April 28, 2003, Defendant, for valuable and substantial consideration, executed and delivered to Plaintiff's predecessor-in-interest, a promissory note ("Note") for a student loan to Defendant in the principal sum of \$14,500.00 to be repaid with interest at the rate set forth therein. A copy of the said Note is annexed . . . and incorporated herein . . . .

Aff. of Stephen Vlock Ex. B ¶ 3. The Verified Answer ¶ 3 denies "information sufficient to form a belief as to each and every allegation contained in paragraph '3'" of the Complaint, id. Ex. E ¶ 3, a response that "shall have the effect of a denial" that defendant executed and delivered to plaintiff's predecessor the annexed note. C.P.L.R. § 3018(a). See Lorenzo v. City of New York, 71 A.D.3d 458 (1st Dep't 2010); Naber Elec. Corp. v. George A. Fuller Co., Inc., 62 A.D.3d 971, 973 (1st Dep't 2009).

Moreover, the Verified Answer ¶ 3 adds: "and holds plaintiff to strict proof thereof." Vlock Aff. Ex. E ¶ 3. Although it is difficult to conceive how defendant would not know these facts first hand, even if these phrases amount to a specific denial that places the effectiveness of her signature in issue, U.C.C. § 3-307(1)(b) presumes that her signature is genuine until she rebuts that presumption by challenging the authenticity of her signature with more than "a simple denial." Van Valen v.

Ferraro, 114 A.D.2d 621, 622 (3d Dep't 1985). See Carlin v. Jemal, 68 A.D.3d 655, 656 (1st Dep't 2009).

Nevertheless, even assuming plaintiff meets its initial burden to establish the authenticity of defendant's signature, plaintiff's prima facie claim encounters further impediments. Fundamentally, Medallis demonstrates no competence to establish that plaintiff owns defendant's promissory note. The contract assigning defendant's note from Wells Fargo to plaintiff's assignor, Cadleway Properties, moreover, sells "Seller's right, title and interest in and to each of the Accounts identified in the Account attached schedule hereto as Exhibit 'A,'" but no documents identified as Exhibit A, an Account, or an Account schedule are attached. Although the assignment contract is notarized, an Allonge by Cadleway Properties "to the order of" plaintiff dated November 7, 2007, contains only a typed signature and no authentication. E.g., Yonkers Ave. Dodge, Inc. v. BZ Results, LLC, 95 A.D.3d 774, 775 (1st Dep't 2012). Medallis does not indicate that he even was employed by plaintiff in 2007, let alone by Cadleway Properties; knows its Vice President Daniel Hutsepiller, the title and name typed after the date; or observed him actually sign or type in his name on the Allonge.

Finally, Medallis possesses no personal knowledge that defendant's last installment payment was on April 19, 2005, before her promissory note was assigned from Wells Fargo Bank to Cadleway Properties or from it to plaintiff, or any of the payments defendant made or failed to make before the note,

according to plaintiff, was assigned to it over 30 months later. In fact he claims the principal due is \$15,048.23, without any explanation why the balance would be more than \$14,500.00.

Although unlike the note and assignment contracts the account of defendant's payments might be established by Wells Fargo Bank's business records, no witness with knowledge of its business recordkeeping lays the foundation for the admissibility of its account records. C.P.L.R. § 4518(a); People v. Ramos, 13 N.Y.3d 914, 915 (2010); People v. Vargas, 99 A.D.3d 481 (1st Dep't 2012); Taylor v. One Bryant Park, LLC, 94 A.D.3d 415 (1st Dep't 2012). Such a witness need not be a Wells Fargo Bank employee, but he must be familiar with the bank's recordkeeping through his own use of the records or otherwise. People v. Brown, 13 N.Y.3d 332, 341 (2009); People v. Cratsley, 86 N.Y.2d 81, 89-90 (1995); One Step Up, Ltd. v. Webster Bus. Credit Corp., 87 A.D.3d 1, 10 (1st Dep't 2011); People v. DiSalvo, 284 A.D.2d 547, 548 (2d Dep't 2001).

Medallis demonstrates no such familiarity, Babikian v. Nikki Midtown, LLC, 60 A.D.3d at 471-72 (1st Dep't 2009); Zuluaga v. P.P.C. Constr., LLC, 45 A.D.3d 479, 480 (1st Dep't 2007); JP Morgan Chase Bank, N.A. v. RADS Group, Inc., 88 A.D.3d 766, 767 (2d Dep't 2011); Kane v. Triborough Bridge & Tunnel Auth., 8 A.D.3d 239, 241 (2d Dep't 2004), and lays no such foundation. He does not even present any discernible account records in support of plaintiff's motion. E.g., Lapin v. Atlantic Realty Apts. Co., LLC, 48 A.D.3d 337, 338 (1st Dep't 2008); Giordano v. Berisha, 45

A.D.3d 416, 417 (1st Dep't 2007); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Washington v. Montefiore Medical Ctr., 9 A.D.3d 271, 272 (1st Dep't 2004). See People v. Joseph, 86 N.Y.2d 565, 570 (1995); National State Elec. Corp. v. Marina Towers Assocs., 203 A.D.2d 49, 50 (1st Dep't 1994); Wagman v. Bradshaw, 292 A.D.2d 84, 87-88 (2d Dep't 2002).

Only in reply does Medallis present a document he identifies as Wells Fargo Bank's payment history to support defendant's default in repayment of her promissory note: evidence that was to have been presented originally in support of plaintiff's motion. Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012). Even were the court to accept this belated document, however, the absence of a foundation for the admissibility of this history as a business record by a witness with knowledge of the bank's business recordkeeping still precludes reliance on the document and is an omission fatal to plaintiff's claim.

## II. DEFENDANT'S CROSS-MOTION TO DISMISS THE COMPLAINT

The loan documents defendant presents are missing pages; are dated March 6, 2006; make no reference to plaintiff, its assignor, or Wells Fargo Bank; and are for a principal sum of \$14,535.00, a discrepancy she merely speculates is due to a fee

assessed. Beloff v. Gerges, 80 A.D.3d 460, 461 (1st Dep't 2011); Figueroa v. Luna, 281 A.D.2d 204, 206 (1st Dep't 2001). The account she presents refers to four loans, each first disbursed between December 16, 2003, and December 3, 2004. Therefore her documentary evidence fails to establish conclusively that she is not in default in her payments toward the same loan that plaintiff seeks to recover. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152-53 (2002); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009). See Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571 (2005).

Insofar as defendant relies on her affidavit to establish that the loan plaintiff seeks to recover is one of the four loans consolidated in 2006 and that she has made timely payments since then, her affidavit is not a document the court may rely on to dismiss the complaint under either C.P.L.R. § 3211(a)(1) or § 3211(a)(7). Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Ragini v. Board of Mgrs. of Loft Space Condominium, 107 A.D.3d 496, 497 (1st Dep't 2013); Flowers v. 73rd Townhouse LLC, 99 A.D.3d 431 (1st Dep't 2012); Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011). See Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 271 (1st Dep't 2004). Insofar as she relies on plaintiff's failure to present admissible evidence of her promissory note, its ownership of the note, or her default in repayment of the

note, neither the deficiencies in plaintiff's evidence, nor her own documentary evidence, establishes conclusively that plaintiff, with the requisite admissible evidence, will never support those facts. See Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d at 152-53; Wadiak v. Pond Mgt., LLC, 101 A.D.3d 474, 475 (1st Dep't 2012).

III. CONCLUSION

For all the reasons explained above, the court denies plaintiff's motion for summary judgment, C.P.L.R. § 3212(b), and defendant's cross-motion to dismiss the complaint. C.P.L.R. § 3211(a)(1) and (3). This decision constitutes the court's order.

DATED: April 10, 2014

*Lucy Billings*  
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 LUCY BILLINGS, J.S.C.

**LUCY BILLINGS  
 J.S.C.**

**FILED**  
 APR 25 2014  
 NEW YORK  
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