

**VNB New York Corp. v Kates**

2014 NY Slip Op 31670(U)

June 27, 2014

Sup Ct, New York County

Docket Number: 652976/2013

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 -  
  
STEVEN KATES,  
  
Defendant.

INDEX NO. 652976/2013  
  
MOTION DATE \_\_\_\_\_  
  
MOTION SEQ. NO. 001  
  
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>
<u>1, 2</u>
_____
_____

**Cross-Motion:**     Yes     No

Plaintiff VNB New York Corp. (“VNB”) previously moved, pursuant to CPLR §3213, for an Order granting summary judgment in lieu of Complaint against defendant Steven Kates (“Defendant”) in the sum of \$1,300,000.00, with interest, on the grounds that there is an instrument for payment of money between the parties, together with reasonable attorneys’ fees.

VNB’s motion was denied on the grounds that VNB had already obtained the identical relief by way of Order entered on June 10, 2013, under Index No. 850006/2013 (“the Prior Action”). VNB now moves to renew its motion, stating that after this Court denied its motion, Judge Edmead “so ordered” the Notice of Discontinuance on February 10, 2014, which both served to vacate the Court’s June 10, 2013 Order and discontinue the Prior Action.

Plaintiff submits the affidavit of Voula Petridis, Vice President of Special Assets Department of VNB.

As set forth in Petridis’ affidavit, on or about January 28, 2008, 15-35 Elk (“Elk”) executed a Consolidated Secured Promissory Note in the principal sum of \$1,300,000.00 in favor of The Park Avenue Bank (the “PAB”) (the “Note”). Pursuant to the terms of the Note, Elk, as borrower, agreed to repay such sums together with interest thereon computed from the date hereof until maturity, at the

rate equal of 7.75% per annum, and therefore at the default rate, with any costs, expenses and attorneys' fees incurred by Elk. For purpose of securing the payment, Elk executed and delivered to PAB, a Mortgage Consolidation and Extension Agreement, Assignment of Leases and Rents and Security Agreement ("Mortgage"), on property located at 309 East 8<sup>th</sup> Street, New York, NY 10009 ("the Property").

Kates "unconditionally and irrevocably" personally guaranteed the sums due under the Note ("the Obligations") as evidenced by a Guarantee signed by Kates on January 28, 2008.

On or about March 12, 2010, PAB 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 Valley National Bank ("Valley") acquired the Note and the Mortgage from PAB.

Subsequently, on June 1, 2010, Valley further assigned its interest in the Note and Mortgage to VNB New York Corp. ("VNB") by Assignment of Mortgage dated June 1, 2010.

On December 7, 2012, the FDIC assigned the Guarantee and all other documents evidencing the loan ("the Loan Documents") to Valley by an Assignment of Guarantee and Other Loan Documents.

On December 7, 2012, Valley further assigned its interest in the Guarantee and other loan documents to VNB by an Assignment of Guarantee and Other Loan Documents.

VNB is now the owner and holder of the Note, Mortgage, and all other Loan Documents.

As further set forth in Petridis' affidavit, the Borrower defaulted under the Note by failing to pay the entire Principal Sum on the Maturity Date of February 1, 2010. The Note provides, "From the occurrence of Default, regardless of whether there has been a notice of default issued by Holder, interest shall accrue on the outstanding Principal Sum at a rate equal to twenty four percent (24%) per annum." To date, Defendant has failed to cure the Default. No payments have been received by VNB, subsequent to the Default, except a partial payment in the amount of \$37,500 received on November 11, 2012 in connection with the Borrower's bankruptcy proceeding.

Petridis avers that the outstanding balance as of July 24, 2013 is \$2,565,126.50, which is comprised of the following: \$1,300,000.00 (principal balance), \$8,675.69 (note rate interest at the rate of 7.75% per annum from June 1, 2009 to July 1, 2009); \$1,285,271.61 (default rate interest at the rate of 24.00% per annum from July 2, 2009 to July 24, 2009); late charges (\$8,679.20) less partial payment of \$37,500.00.

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 has made a prima facie case for summary judgment in lieu of Complaint against Kates by proof of the Note, Guarantee, and assignments thereto, and Petridis' affidavit which avers to the default. Kates does not oppose and therefore has failed to raise any material issue of fact.

Wherefore it is hereby,

ORDERED that the plaintiff's motion for summary judgment in lieu of the complaint is granted without opposition; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff, VNB New York Corp., against defendant, Steven Kates, in the amount of \$2,565,126.50, 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 an assessment of damages against defendant, Steven Kates, is directed on the issue of reasonable attorney's fees, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

Dated: JUNE 27, 2014

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION      X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE