

ARS Investors II 2012-1 HVB, LLC v Galaxy Transp., Inc.
2015 NY Slip Op 30367(U)
February 24, 2015
Supreme Court, Bronx County
Docket Number: 24157/13E
Judge: John A. Barone
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-12

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ARS INVESTORS II 2012-1 HVB, LLC,

MEMORANDUM DECISION
Index No. 24157/13E

Plaintiff,

-against-

GALAXY TRANSPORTATION, INC., et al.,

Defendants.
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HON. JOHN BARONE:

Plaintiff's motion for summary judgment in lieu of complaint is decided as follows:

On December 30, 2005, defendant Galaxy Transportation, Inc., executed a note in favor of New York National Bank ("NYNB") in the principal amount of \$347,000. Additionally, defendant Galaxy executed a credit note in favor of NYNB in the principal amount of \$50,000. Defendant Galaxy executed a loan and security agreement ("the agreement") that memorialized the loan transaction underlying the note and the revolving credit arrangement underlying the credit note. Under the agreement, in exchange for a loan and revolving credit from NYNB, defendant Galaxy committed to repaying the loan and any extended credit on terms delineated in the agreement. The agreement also obligated defendant Galaxy to pay costs, charges, and expenses, including reasonable attorneys' fees, incurred by NYNB in exercising its remedies under the agreement for any default by defendants.

Defendants Grasso and Ingber executed the agreement as guarantors. Those defendants also executed an unlimited guaranty in favor of NYNB pursuant to which they

afforded the lender a security interest in all of their respective property, including any realty. In this connection, defendant Grasso provided a mortgage to NYNB, encumbering certain real property in the Bronx -- 1886-1888 Mulford Avenue -- owned by Grasso.

NYNB subsequently assigned to plaintiff the note, credit note, agreement, and unlimited guaranty.

Plaintiff commenced this proceeding under CPLR 3213 seeking summary judgment in lieu of complaint based on defendants' defaults under the note, credit note, agreement, and unlimited guaranty. Plaintiff demands judgment on the unpaid principal, interest at the varying rates prescribed by the agreement, and the costs, charges, and expenses plaintiff incurred in pursuing its remedies against defendants. The motion is supported by the detailed affidavit of plaintiff's asset manager, and copies of the relevant documents relating to the transactions among plaintiff, its assignor, and defendants. In his affidavit, the asset manager concludes, based on his review of plaintiff's business records, that defendants owe plaintiff \$151,369.98 as of October 31, 2013 as a result of their defaults under the note, and \$31,291.23 as of October 31, 2013 as a result of their defaults under the credit note. The motion is also supported by an affidavit from one of plaintiff's attorneys, along with a chart detailing the legal services provided by the attorneys, demonstrating that plaintiff incurred \$3,390 in attorneys' fees and \$530 in costs in pursuing its rights under the note, agreement, and unlimited guaranty.

Defendants Galaxy and Grasso oppose the motion,¹ arguing that plaintiff's action

¹Defendant Ingber has not submitted any opposition to the motion. Nevertheless, the court will scrutinize plaintiff's submissions to ensure that plaintiff established its entitlement to judgment as a matter of law against that defendant.

is, in fact, one seeking to foreclose a residential mortgage, and plaintiff was therefore required to bring a mortgage foreclosure action, which would afford Grasso certain protections, e.g., statutory notices (see RPAPL 1303), a settlement conference (see CPLR 3408). These defendants also argue that plaintiff has not demonstrated that it has standing to maintain an action to recover on the debts owed under the note and credit note, and that plaintiff was required to bring any action relating to the note and credit note in New York County. In support of their opposition, defendants Galaxy and Grasso submit the latter's affidavit, which states that he is the owner of the Mulford Avenue property that is encumbered by a mortgage that he gave to plaintiff's assignor as security for his guaranty, and that he resides in one of the units on that property. Defendant Grasso also states that if plaintiff's motion is granted, he will lose his residence.

In reply, plaintiff maintains that it is not required to prosecute a mortgage foreclosure action because it is not seeking to foreclose a mortgage. Rather, plaintiff has elected to seek damages for breach of the note, credit note, agreement, and unlimited guaranty. Plaintiff also maintains that, even assuming this is a proceeding to foreclose a mortgage, the protections afforded to owner-occupants of residential property encumbered by a mortgage are inapplicable here because, among other reasons, the debt secured by the mortgage was not incurred primarily for personal, family or household purposes. Plaintiff submits an additional affidavit from one its attorneys demonstrating that plaintiff incurred additional attorneys' fees in prosecuting this motion. Thus, plaintiff's attorneys' fees' on this matter now stand at \$3,949 (up from \$3,390 at the time plaintiff submitted its initial papers on this motion).

CPLR 3213 provides that, "[w]hen an action is based upon an instrument for the

payment of money only..., the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint” (see Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3213, C3213:1). “Cases within CPLR 3213 have dealt primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). “[A] document comes within CPLR 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms” (*id.*). A note and a guaranty often qualify for CPLR 3213 treatment (see *Cattaraugus County Bank v Brown*, 122 AD3d 1313 [4th Dept 2014]; *Digestive Disease and Nutrition Center of Westchester, LLP v Abrams*, 112 AD3d 778 [2d Dept 2013]; *German American Capital Corp. v. Oxley Development Co., LLC*, 102 AD3d 408 [1st Dept 2013]; *Chase Manhattan Bank, N.A. v Marcovitz*, 56 AD2d 763 [1st Dept 1977]).

Plaintiff’s evidence demonstrates that the note, credit note, agreement, and unlimited guaranty are “instruments for the payment of money only”; that defendants assumed certain obligations to plaintiff’s assignor as a result of the note, credit note, agreement, and unlimited guaranty; that defendants defaulted on those obligations; the amounts owed by defendants as a result of those defaults; that plaintiff demanded that defendants satisfy their obligations, but they refused; and that plaintiff, as NYNB’s assignee, has standing to maintain this proceeding. Therefore, plaintiff made a prima facie showing of entitlement to judgment as a matter of law on its claims (see *German American Capital Corp. v Oxley Development Co.*, *supra*; *Sandu v Sandu*, 94 AD3d 1545 [4th Dept

2012]; *Griffon V, LLC v 11 East 36th, LLC*, 90 AD3d 705 [2d Dept 2011]; *Simoni v Time-Line, Ltd.*, 272 AD2d 537 [2d Dept 2000]).

In opposition, defendants Galaxy and Grasso failed to raise a triable issue of fact. As to their principal purported defense -- that plaintiff should be required to prosecute its claims in a residential mortgage foreclosure action -- plaintiff is clearly suing on the note and credit note, seeking damages against the defendants for their defaults on their respective obligations under those notes, the agreement, and the unlimited guaranty. Nowhere in its papers does plaintiff suggest that it is seeking to foreclose a mortgage. Because plaintiff elected to sue on the note and credit note (*see Copp v Sands Point Marina, Inc.*, 17 NY2d 291 [1966]), defendants Galaxy and Grasso are mistaken that Grasso is entitled to a mortgage foreclosure settlement conference (*see* 248 Siegel's Practice Review 3, *More on Mortgage Foreclosure* [Aug. 2012]). Even assuming, *arguendo*, that this proceeding could be construed as foreclosing a mortgage, defendant Grasso would not be entitled to the benefits of CPLR 3408 or RPAPL 1304 (*see Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]).

In light of plaintiff's submissions, defendants Galaxy and Grasso's contention that plaintiff lacks standing to maintain this proceeding is without. Moreover, whether venue is proper in the Bronx or, as defendants Galaxy and Grasso contend, should have been laid in New York Court is not relevant on plaintiff's motion for summary judgment in lieu of complaint, as those defendants made no motion to change venue (*see* CPLR 510; *Iglesia v Iglesia*, 292 AD2d 424, 425 [2d Dept 2002] ["Pursuant to CPLR 509 and 510, the Supreme Court may not, *sua sponte*, change the venue of an action in the absence of a

motion or consent”).

With respect to plaintiff's claim for attorneys' fees and costs, plaintiff has demonstrated that it is entitled to recover those fees and costs. Although the amount of such fees and costs ordinarily must be determined at a hearing -- the amount of attorneys' fees and costs not being “sums certain” under CPLR 3213 (see *Premium Assignment Corp. v Utopia Home Care, Inc.*, 58 AD3d 709 [2009]; *Simoni v Time-Line, Ltd.*, *supra*) -- defendants Galaxy and Grasso have not challenged the work performed by plaintiff's attorneys or the amounts sought by plaintiff, and they do not request a hearing (see generally *Misicki v Caradonna*, 12 NY3d 511, 519 [2009] [“For [the court] to decide this [proceeding] on a distinct ground that [it] winkled out wholly on [its] own would pose an obvious problem of fair play. [The court is] not in the business of blindsiding litigants, who expect [it] to decide their [proceedings] on rationales advanced by the parties, not arguments their adversaries never made”). Therefore, the court determines this issue as a matter of law based on the papers, and concludes that plaintiff is entitled to an award of attorneys' fees in the amount of \$3,949 and costs in the amount of \$530.

Accordingly, it is hereby ordered that plaintiff's motion is granted; and it is further,

Ordered that plaintiff is directed to settle judgment on notice.

This constitutes the decision and order of the court.

Dated: 2/24/15



JOHN BARONE, J.S.C.