SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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SOVEREIGN BANK, N.A.
f/k/a SOVEREIGN BANK,

Plaintiff,

- against -

B-TEX INC. and ROBERT HOROWITZ,

Defendants.

- X

Index No.:704157/2013

Motion Date: 09/23/14

Motion No.: 154

Motion Seq.: 1

The following papers numbered 1 to 15 were read on this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment against the defendants on its causes of action for a money judgment for default in the payment of a promissory note, account stated, and breach of personal guaranty:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law	1 - 6
Affirmation in Opposition-Affidavits-Exhibits	7 - 11
Reply Affirmation	12 - 15

This is an action commenced by the plaintiff, Sovereign Bank, for an order granting a money judgment and counsel fees for breach of a promissory note against defendant B- Tex Inc. and for breach of a personal guaranty against defendant, Robert Horowitz.

The plaintiff's complaint, filed with the court on September 30, 2013, alleges that on June 3, 2011, the defendant executed a written promissory note in the principal amount of $48,000 with the plaintiff, Sovereign Bank. The note was signed by Richard Horowitz as President of the Corporation. The complaint asserts that the defendants are in default for failing to make specified payments on the note beginning on April 10, 2013 and thereafter although duly demanded by the plaintiff. As a result of the

default, the plaintiff seeks judgment for breach of the promissory note in the amount of the remaining balance of $40,756.14 plus interest as defined in the Note from April 10, 2013, and counsel fees. Plaintiff also asserts a cause of action based upon an account stated with the defendant in the amount of $40,756.14. Further the complaint asserts that on June 3, 2011, Richard Horowitz executed an unconditional personal guarantee of payment under which Mr. Horowitz unconditionally guaranteed payment of any indebtedness due under the note executed by B-Tex.

Defendants joined issue by service of its answer dated March 27, 2014 containing affirmative defenses and two counterclaims. The plaintiff served a reply to the counterclaims on April 10. 2014.

Plaintiff now moves, prior to discovery, for summary judgment pursuant to CPLR 3212 against the defendants on its complaint seeking to recover judgment for the remaining sums due under the note. Plaintiff also seeks an order striking the defendants' answer with affirmative defenses and counterclaims and an order authorizing the plaintiff to amend the caption to reflect a recent change in the plaintiff's name to SANTANDER BANK N.A.

In support of the motion, plaintiff submits the affirmation of counsel, Mitchell L. Kaplan, Esq; the affidavit of Karen Tennant, Vice President of Sovereign Bank; a copy of the pleadings; and a copy of the Promissory and Note and Personal Guaranty.

In her affidavit, dated May 7, 2014, Karen Tennant, Vice President of Santander Bank, states that she has personally reviewed the business records pertaining to the defendants' account. She states that on June 3, 2011, the defendants executed a written promissory Note in the principal amount of $48,000. She states that the borrower defaulted under the terms of the of the loan by failing to remit its agreed monthly principal and interest beginning March 2013 through May 2013. On May 15, 2013 the plaintiff notified the borrower of the default and gave the defendants an opportunity to cure the default. She states that although the borrower has remitted certain partial payments to the plaintiff subsequent to the initial date of default, the plaintiff accepted same without prejudice to its rights and remedies under the Note and its right to accelerate the total amount due. She states that as of May 5, 2014, after giving the borrower credit for partial payments made after its default, the borrower is indebted to the plaintiff in the principal amount of $39,022.71 plus interest and late charges. Further, Ms. Tennant

states that to date, the Guarantor, Richard Horowitz, has not cured the default of B-Tex Inc. and is therefore liable to the plaintiff in the same amount as the corporation.

Counsel for the plaintiff, Mitchell Kaplan, Esq. states that plaintiff is entitled to summary judgment based upon the default of the defendants on the promissory note and guarantee. Counsel asserts that the nine affirmative defenses and counterclaims of the defendants are frivolous, stated only in conclusory terms without factual support, are without merit and do not rase a material issue of fact with regard to the defendants' default.

Plaintiff contends that the evidence submitted is sufficient to prove, prima facie, that defendants, signed an agreement in which defendant was obligated to make payments towards the loan extended by the plaintiff, that plaintiff performed all of its obligations under the agreement and the defendants defaulted on their obligation to make payment. Plaintiff contends that despite statements of account and notices of default being sent to the defendants, the defendants failed to pay the accelerated amounts due for principal, interest, late charges, and counsel fees. Plaintiff contends, therefore, that as the defendant has failed to raise a meritorious defense in their verified answer and as there are no triable issues of fact, plaintiff is entitled to summary judgment in the amounts set forth in the Tenant affidavit.

In opposition to the motion for summary judgment, defendant Robert Horowitz, submits an affidavit and attaches copies of checks to demonstrate that he made payments on the note to the plaintiff from April 15, 2013 through April 2014, the period of time for which plaintiff alleges non-payment in its complaint and in its affidavit from Ms. Tennant. He states he has been making payments since April 2014, as well. He attaches copies of checks showing payments in varying amounts from February 26, 2013 through May 3, 2014. Mr. Horowitz contends that because he has made timely payments which have been accepted by the plaintiff during the time period for which plaintiff alleges that he is in default, there is a question of fact with regard to whether he is in default on the promissory note and has breached the terms of the Note and the Guarantee.

In reply, plaintiff asserts that the belated payments made and accepted by the plaintiff and the discrepancy regarding the actual outstanding amounts due under the note do not raise a material question of fact which would warrant a denial of the motion for summary judgment. Counsel asserts that under the terms

of the note, the plaintiff is entitled to accept partial payments without waiving its rights and remedies against them. Further, counsel asserts that even if there is a question of the amount of damages, the plaintiff is still entitled to a finding on the issue of breach of contract that the defendant is in default under the terms of the loan. Plaintiff also submits an affidavit from Alan Fern, a Vice President of Santander Bank, N.A. stating that based upon his review of the defendants' account, the payments alleged to have been made by the defendant toward the promissory note were not timely made. Mr. Fern sates that under the terms of the note, payments are due on the 3rd day of the month, however, the payments made by defendant were made on the 20th, 15th, or 13th of the month from March 20, 2013 through May 13, 2013. Further, it is alleged that the acceptance of partial payments is not a waiver of the bank's rights under the terms of the Note.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Here, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law by establishing the existence of a promissory note executed by the defendant, that the defendant had guaranteed the note, and that the defendant defaulted in making payments pursuant to the note (see Gullery v Imburgio, 74 AD3d 1022 [2d Dept. 2010]; Pennsylvania Higher Educ. Assistance Agency v Musheyev, 68 AD3d 736 [2d Dept. 2009]). The burden then shifted to the defendant to come forward with sufficient evidence to raise a triable issue of fact. Further, acceptance of partial payment of the debt after acceleration does not constitute a waiver for acceleration (see UMLIC VP, LLC v. Mellace, 19 AD3d 684 [2nd Dept. 2005]). Therefore, if plaintiff properly accelerated the note, then its acceptance of payments thereafter would not constitute a waiver of its acceleration.

However, in opposition the defendant raised a question of fact as to whether the note was properly accelerated. According to the terms of the note, the plaintiff was required to pay the accrued unpaid interest due on the note on a monthly basis. The defendant submitted proof that payments were made by him during the months that in which it is alleged in the complaint that he was in default. This court finds based upon the defendants' submissions that there are questions of fact raised by the

defendant as to whether the amounts he paid on a monthly basis were timely paid; what amounts were required to be paid pursuant to the monthly statements of account, whether the amounts paid met his obligation with respect to what he owed to plaintiff on a monthly basis; whether the payments made by the defendant cured the purported default; what was the correct amount that was billed and which was due for each month; and whether defendant paid or failed to pay the proper amount in accordance with the terms of the note.

Accordingly, the plaintiff's motion for summary judgment and for an order striking the defendants's answer is denied. However, the branch of plaintiff's motion for an order permitting leave to amend the caption to reflect the present name of the plaintiff is granted without opposition. There is no prejudice or surprise to defendant by allowing such amendment (see Post v County of Suffolk, 80 AD3d 682 [2d Dept 2011]).

Dated: January 5, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.