

**Atalaya Asset Income Fund II LP v HVS Tappan  
Beach Inc.**

2016 NY Slip Op 32430(U)

October 4, 2016

Supreme Court, Nassau County

Docket Number: 600517-16

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT:  
HON. JEROME C. MURPHY,  
Justice.

ATLAYA ASSET INCOME FUND II LP,  
  
Plaintiff,  
  
- against -

TRIAL/IAS PART 19  
Index No.: 600517-16  
Motion Date: 8/15; 8/22/16  
Sequence Nos.: 001, 002, 003  
MG, MD, MD  
DECISION AND ORDER

HVS TAPPAN BEACH INC., SUN PROPERTY  
CONSULTANTS, INC., HVS ENTERPRISES INC.,  
SINGH HOSPITALITY GROUP, INC., HARENDRA  
SINGH, RUBY SINGH and TOWN OF OYSTER  
BAY,  
  
Defendants.

The following papers were read on this motion:

Sequence No. 001:  
Notice of Motion, Affirmation, Affidavit of Facts and Exhibits.....1

Sequence No. 002:  
Notice of Cross Motion, Affidavit of Ruby Singh, Affirmation of Martin Silver  
and Exhibit.....2  
Affirmation in Opposition to Cross-Motion, Affidavit in Opposition and  
Exhibits.....3

Sequence No. 003:  
Notice of Motion, Memorandum of Law, Affirmation and Exhibits.....4  
Plaintiff's Memorandum of Law in Opposition .....5  
Affidavit in Opposition of Lawrence I. Linksman.....6  
Affirmation in Opposition and Exhibits.....7  
Reply Memorandum of Law in Further Support..... 8

PRELIMINARY STATEMENT

In Sequence No. 001, plaintiff brings this application for order: (1) pursuant to CPLR § 3215 granting plaintiff a default judgment against defendant, HVS Tappan Beach Inc. ("Tappan Beach") on the complaint's first and second causes of action and against defendants, Sun

Property Consultants, Inc. (“Sun Property”), HVS Enterprises, Inc. (“Enterprises”), Singh Hospitality Group, Inc. (“Hospitality”), Harendra Singh (“Harendra”) and Ruby Singh (“Ruby”) on the complaint’s third and fourth causes of action; (2) directing the entry of a money judgment against Tappan Beach, Sun Property, Enterprises, Hospital, Harendra and Ruby in the amount of \$1,842,875, with interest thereon from October 1, 2015; (3) permitting an affirmation itemizing plaintiff’s collection costs (including attorneys’ fees) to be submitted with its proposed judgment; (4) severing and continuing unabated plaintiff’s claims against the remaining defendant, Town of Oyster Bay, and (5) granting plaintiff such other and further relief as may be just, proper and equitable. No opposition has been submitted by any parties herein.

In Sequence No. 002, defendant, Ruby Singh brings this application for an order pursuant to CPLR § 3012(d) to compel the plaintiff to accept the late answer of the defendant, Ruby Singh, and such further or different relief which this Court deems just and proper. Opposition by plaintiff has been submitted to this application.

In Sequence No. 003, defendant, Town of Oyster Bay, brings this application for an order pursuant to CPLR § 3211(a)(7), dismissing plaintiff’s complaint in its entirety with prejudice. Opposition has been submitted by plaintiff.

#### BACKGROUND

Plaintiff commenced this action for recovery on a promissory note of \$1,800,000.00 by filing a Summons and Complaint on January 26, 2016. The Complaint alleges that on or about July 11, 2014, Atalaya Asset Income Fund II LP (“Atalaya”) loaned HVS Tappan Beach (“Tappan Beach”) \$1,800,000.00, in consideration for a promissory note of that date, made by Harendra Singh (“Harendra”), as president. The note called for monthly payments of interest only by Tappan Beach commencing September 1, 2014, until August 1, 2016. Tappan Beach allegedly failed to make the monthly installment for October 2015, and, by virtue of the acceleration clause, the entire amount became due and payable. Plaintiff asserts as its First Cause of Action a claim for \$1,800,000.00, with interest of \$15,000.00, accrued late charges of \$775, and a liquidation preference of \$27,000.00, totaling \$1,842,875.00.

The Second Cause of Action against Tappan Beach claims entitlement to legal fees necessarily incurred as a result of plaintiff’s prosecution of this action. The Third Cause of Action, against Sun Property, Enterprise Hospitality, Harendra, and Ruby Singh (“Ruby”) is based upon an unconditional guarantee of payment of the July 11, 2014 Note. The Fourth Cause of Action asserts the claim for legal fees against the same defendants based upon their guarantee.

The Fifth, Sixth, and Seventh Causes of Action are directed at the Town of Oyster Bay (“TOB”). They allege that on July 11, 2014, TOB, Tappan Beach and Atalaya entered into an Agreement for the purpose of securing efficient and beneficial operation of the food and beverage concession at the Town Beach. The Agreement, at § 32(i), provided that upon receipt of written notice by TOB from Atalaya that Tappan Beach defaulted under the promissory note, constitutes an event of default by Tappan Beach. § 32 provides that in the event of default by Tappan Beach under subd. (I), the Agreement is terminated, and the Termination Payment to Tappan Beach, which was irrevocably assigned to plaintiff, is due and owing. The Termination Payment is equal to the sum of the unpaid principal balance of the Promissory Note, together with default interest, late fees, prepayment penalty, costs, expenses, and attorney’s fees from the date of the default by Tappan Beach. The Fifth Cause of Action seeks damages from TOB in the amount of \$1,842,875.00 plus attorney’s fees, costs and disbursements.

The Sixth Cause of Action alleges that § 43 of the Agreement provides that the parties acknowledge and agree that Atalaya is a third-party beneficiary of the contract between TOB and Tappan Beach. In the Seventh and Alternate Cause of Action, plaintiff anticipates that TOB will deny that the Agreement is a valid contract. Plaintiff therefor asserts that TOB induced Atalaya to make the loan to Tappan Beach by promising that TOB would fully repay it in the event of default by Tappan Beach. The asserted reason for TOB to make this commitment is that the funds were specifically targeted for improvements to concession service at the Town Beach, which improvements were sought and desired by TOB.

#### DISCUSSION

##### ***Motion Sequence No. 1***

The decision whether to grant a default judgment is left to sound judicial discretion (*Shah v. New York State Dep’t. Of Civil Service*, 168 F.3d 610, 615 [2d Cir.1999]; *Briarpatch Ltd. V. Geisler Roberdeau, Inc.*, 513 F.Supp.2d 1, 3 [S.D.N.Y. 2007]). In considering whether a default judgment is appropriate, the Court must first consider whether service of process has been properly effectuated upon the defaulting defendant; and second, whether the unchallenged facts alleged in the complaint state a legitimate cause of action (*Kee v. Hasty*, 2004 WL 807071 at 4 [S.D.N.Y.] *citing*, 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2688 [3d ed. 1998 ]).

The plaintiff must establish by affidavit of an individual with personal knowledge, or similarly verified complaint, facts sufficient to establish the claims alleged (*Dyno v. Rose*, 260

A.D.2d 694 [3d Dept. 1999]). Where the verified complaint is conclusory, and devoid of factual allegations, constituting the claim alleged, a motion for default judgment shall be denied (*Celnick v. Freitag*, 242 A.D.2d 436 [1<sup>st</sup> Dept. 1997]; *Luna v. Luna*, 263 A.D.2d 470 [2d Dept. 1999]).

The next consideration which the Court must consider is the appropriate level of damages to be awarded plaintiff. By defaulting, a defendant admits to all well-pleaded allegations, except those pertaining to damages (*Greyhound Exhibitgroup, Inc. V. E.L.U.L Realty Corp.*, 973 F.2d 155, 158 [2d Cir.1992]; *Traffic Sports USA, Inc. v. Segura*, 2008 WL 4890164 [E.D.N.Y.]). “(W)here the plaintiff has filed reasonably detailed affidavits and a memorandum of law pertaining to the damages requested . . . and the defendant has failed to make an appearance in the case, the Court can make an informed recommendation regarding damages without an evidentiary hearing.” *Id.* at 5.

By Order of this Court dated August 14, 2016, the Court granted plaintiff’s motion to sever the action against Sun Property Consultants, Inc., and permitting plaintiff to proceed against remaining defendants HVS Tappan Beach, Inc., HVS Enterprises, Inc., Singh Hospitality Group, Inc., Harendra Singh, Ruby Singh, and the Town of Oyster Bay. For this reason, the Court will not consider a default judgment against Sun Property Consultants, Inc., as the action against it has been severed due to a bankruptcy stay.

Plaintiff has provided affidavits of service upon HVS Tappan Beach, Inc. (Exh. “B”), with an affidavit of additional mailing (Exh. “C”), HVS Enterprises, Inc. (Exh. “F” [Doc. 5]), an affidavit of additional mailing to HVS Enterprises, Inc. (Exh. “G”), Singh Hospitality Group, Inc. (Exh. “H”), affidavit of additional mailing to Singh Hospitality Group, Inc. (Exh. “I”), Sheriff’s certificate of personal service upon Harendra Singh (Exh. “J” [Doc. 8]), affidavit of additional mailing to Harendra Singh (Exh. “K”), affidavit of service upon Ruby Singh (Exh. “L”), affidavit of additional mailing to Ruby Singh (Exh. “M”). The Complaint is annexed as Exh. “A”).

This is an action on a Note in the amount of \$1,800,000.00, which plaintiff claims that defendant HVS Tappan Beach, Inc. defaulted upon in October 2015. The additional defendants are personal guarantors of the obligation of HVS Tappan Beach, Inc. The Promissory Note is annexed as Exh. “N”. The Note provided for the payment of interest only at the rate of 6.75% over the prime rate of interest as published by the Wall Street Journal on the last business day prior to payment date. In no event was it to be less than 10.0%.

It provided for default and acceleration in the event of a monetary default, which is a

failure to make payment within 10 days after the date when due. In the event of a default, lender was entitled to interest at the rate of 2.00% per month, not to exceed the maximum interest permitted by law. Lender was also entitled to a late charge of 5.00% of the payment in the event payment was not made within 10 days of the due date. Art. 17 provided that in the event it became necessary to employ counsel to collect the debt, borrower agreed to pay all reasonable fees and out-of-pocket expenses of the lender, including reasonable attorney's fees and disbursements for the services of external or in-house counsel whether or not suit is brought. Art. 23 provided that upon the earlier of the maturity date, as may be extended, or the repayment of the Principal Indebtedness, the borrower was to pay the lender a Liquidation Preference of \$27,000.00.

Annexed as Exh. "O" is a Guaranty of Payment, signed by Harendra Singh on behalf of Sun Property Consultants, Inc., HVS Enterprises, Inc., Singh Hospitality Group, Inc., Harendra Singh, and Ruby Singh. The signatures of Harendra Singh and Ruby Singh are notarized.

Plaintiff has submitted an affidavit of Lawrence I. Linksman, the Chief Executive Officer of Bridge Funding, Inc., a loan originator and servicer for Atalaya Asset Income Fund II, LP, an individual who has personal knowledge based on his review of the relevant documents, records and instruments related to this matter maintained by Bridge Funding, Inc. and/or plaintiff. He asserts that there is presently due and owing to plaintiff from HVS Tappan Beach, Inc. the principal amount of \$1,800,000.00, interest of \$15,000.00, late charges of \$775, and the liquidation preference of \$27,000.00, all in the total sum of \$1,842,875.00, with interest from October 1, 2015.

In addition, Tappan Beach, Inc. agreed to pay to plaintiff all of its reasonable attorney's fees, costs, and expenses incurred in enforcing its rights under the terms of the Note. The Guarantors, in addition to guaranteeing the repayment of the principal, with interest, late charges, and liquidation fee, agreed to guaranty the payment of reasonable legal fees, costs and disbursements.

Plaintiff's motion for a Default Judgment against HVS Tappan Beach, Inc., HVS Enterprises, Inc., Singh Hospitality Group, Inc., Harendra Singh, and Ruby Singh is granted. Plaintiff is directed to Settle Judgment on Notice, and is authorized to submit an affirmation as to the basis for, and reasonableness of legal fees incurred in the course of obtaining judgment against the defendants, and a statement of disbursements and expenditures, which shall be considered by the Court in the granting of Judgment by Default.

### ***Motion Sequence No. 2***

Defendant Ruby Singh seeks to compel plaintiff to accept her late answer. She does not deny receipt of the Summons and Complaint, only that she did not understand it, and that she was unable to obtain the advice of attorneys who have previously represented her and her husband, because she has been unable to pay their legal bills since her husband's incarceration.

She has examined the Personal Guaranty, which contains what appears to be her signature, she has no recollection of signing the document, or doing so in the presence of a notary public.

Plaintiff having established that defendant Ruby Singh was in default, it became incumbent on Ms. Singh to come forward with a reasonable excuse for her default, and to demonstrate a meritorious defense to the action to avoid the entry of a default judgment (*Juseinoski v. Board of Educ. Of City of New York*, 15 A.D.3d 353, 356 [2d Dept. 2005]; *Kennedy v. City of New York*, 114 A.D.3d 831, [2d Dept. 2014]). A defendant seeking to compel a plaintiff to accept a late answer is required to make a similar showing (*Gershman v. Ahmad*, 131 A.D.3d 1104, 1105 [2d Dept. 2015]).

Defendant Ruby Singh has failed on both of her obligations to establish a reasonable excuse and a potentially meritorious defense. Lack of understanding of the legal process served upon her does not constitute a reasonable excuse (*Wells Fargo Bank v. Besemer*, 131 A.D.3d 1047, 1049 [2d Dept. 2015]). Neither is an unsupported allegation of inability to retain legal counsel (*Kanat v. Ochsner*, 301 A.D.2d 456, 457—458 [2d Dept. 2003]; *Buro Happold Consulting Engineers, PC v. RMJM*, 107 A.D.3d 602 [1<sup>st</sup> Dept. 2013]).

In addition to providing a reasonable excuse for her failure to interpose an Answer, Ms. Singh has failed to set forth. With respect to her inability to recall executing the Guaranty, implicitly, if not explicitly, raising the specter of forgery, the Opinion Letter of her counsel, Exh. "Q" to the Affirmation in Opposition, explicitly states explicitly states that ". . . Ruby Singh executed the Loan Documents applicable to her in my presence and under my supervision." (*Id.* at ¶ f.).

The unsubstantiated assertion of lack of recollection of signing the Guaranty is insufficient to overcome the presumption of validity of a notarized document (*Professional Offshore Opportunity Fund, Ltd. v. Braider*, 121 A.D.3d 766 [2d Dept. 2014]).

The motion by Ruby Singh to compel plaintiff to accept her late Answer is denied. Defendant has failed to establish either a reasonable excuse for her default, or a potentially

meritorious defense.

***Motion Sequence No. 3***

The Town of Oyster Bay moves to dismiss the Complaint pursuant to CPLR § 3211(a)(7). They claim that an Agreement dated July 2014 among The Town of Oyster Bay, HVS Tappen Beach, Inc., and Atalaya Asset Income Fund II, LP, although apparently signed by John Venditto, Supervisor, and Frank Nocerino, Commissioner of Parks, is not enforceable. Each of the foregoing individuals have submitted affidavits that they do not recall signing the Agreement. Mr. Venditto also asserts his understanding that the document was not authorized by a Town Board Resolution.

In its Memorandum of Law in Support of the Motion, counsel argues that the guarantee agreement sought to be enforced against the Town was never approved by the Town Board, and could not have been approved because it violates the New York State Constitution. Plaintiff disputes the claim that the Agreement constitutes an unlawful guarantee, and states that the tepid affidavits of Venditto and Nocerino that they have no recollection of signing are insufficient to overcome the presumption of validity of their notarized signatures on the document (Exh. "A" to Affirmation of Jonathan E. Pickhardt).

On a motion to dismiss pursuant to CPLR § 3211 (a)(7), the court must determine, "accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated" (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]); *See also Simmons v. Edelstein*, 32 A.D.3d 464, 465 [2d Dept.2006]); (*Manfro v. McGivney*, 11 A.D.3d 662, 663 [2d Dept.2004]).

A motion to dismiss under CPLR § 3211 (a)(7), as distinguished from a motion for summary judgment, limits the Court to an examination of the pleadings to determine whether they state a cause of action. Plaintiff may not be penalized for failing to make an evidentiary showing in support of a complaint which states a cause of action on its face (*Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 351 [2013]).

The issue presented, is whether or not the Complaint adequately states a claim under any cognizable legal theory. The issues of whether or not the document was signed by authorized representatives of the Town of Oyster Bay, or whether it was approved by a Town Board Resolution, do not undercut the claims set forth in the Complaint. The Complaint, which

movant has failed to attach to its moving papers, but which is attached as Exh. "A" to Motion Sequence No. 1, asserts three Causes of Action against the Town.

The Fifth Cause of Action asserts that the Town of Oyster Bay, HVS Tappan Beach, Inc., and Atalaya Asset Income Fund II, LP entered into an Agreement in July 2014 for the purpose of securing the efficient and beneficial operation of the food and beverage concession at the Town Beach. Pursuant to Sec. 32 of the Agreement, in the event of receipt of a written notice of default by HVS Tappan Beach, the Agreement is deemed terminated by Town of Oyster Bay, and HVS Tappan Beach irrevocably assigned to plaintiff the Termination Payment to be made by Town of Oyster Bay to HVS Tappan Beach. This Termination Payment consisted of the unpaid principal balance of the Promissory Note, default interest, late fees, prepayment penalty, costs, expenses and attorney's fees accruing from the default.

The Complaint alleges that on or about October 16, 2015, Town of Oyster Bay received from plaintiff a written notice of the breach by HVS Tappan Beach, and, pursuant to Sec. 32 of the Agreement, the Town became obligated to pay to plaintiff \$1,842,875, together with attorney's fees, costs and expenses.

The Sixth Cause of Action is a claim in the alternative, that in Sec. 43 of the Agreement, Town of Oyster Bay and HVS Tappan Beach acknowledged that plaintiff was a third-party beneficiary of the Agreement, and by failing to pay the Termination Payment, Town of Oyster Bay has breached the Agreement.

In the Seventh Cause of Action, plaintiff anticipated that Town of Oyster Bay would deny that the Agreement is a legally valid and binding contract. Town of Oyster Bay induced plaintiff to make the loan to HVS Tappan Beach by promising plaintiff that plaintiff would be fully repaid in the event HVS Tappan failed to repay the loan. The Town made these promises because the loan proceeds were specifically earmarked for improvements at the Town Beach, which were of importance to and desired by the Town. The Town allegedly knew at the time of the loan that plaintiff was relying on the Town's promise to fully repay the loan in the event of default, and that the improvements would not be made without plaintiff making the loan. Furthermore, the Town continues to retain the use and benefit of the improvements made with the loaned funds, and that it would be unfair, inequitable, and unreasonable for the Town to retain these benefits which they obtained by inducing plaintiff to enter into the loan agreement based upon a promise to repay the loan in the event of default by HVS Tappan Beach.

The foregoing allegations are sufficient to state causes of action against defendant Town

of Oyster Bay. Town of Oyster Bay's motion to dismiss the Complaint for failure to state a cause of action is denied.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
October 4, 2016

**ENTER :**

  
**JEROME C. MURPHY**  
**J.S.C.**

**ENTERED**

**OCT 12 2016**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**