

Gold Coast Bank v AMS Natl. Servs. Corp.

2016 NY Slip Op 32527(U)

September 29, 2016

Supreme Court, Suffolk County

Docket Number: 611938/2015

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

GOLD COAST BANK,

Plaintiff,

-against-

AMS NATIONAL SERVICES CORP., AMS
SERVICES INC. and FRANK CATALANO,

Defendants.

ORIG. RETURN DATE: FEBRUARY 2, 2016
FINAL SUBMISSION DATE: FEBRUARY 18, 2016
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: FEBRUARY 18, 2016
FINAL SUBMISSION DATE: FEBRUARY 18, 2016
MTN. SEQ. #: 002
CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 10 read on this motion _____
FOR SUMMARY JUDGMENT AND CROSS-MOTION TO AMEND PLEADINGS
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Amended Notice of
Cross-motion and supporting papers 5-7; Memorandum of Law 8; Affirmation in Reply
and supporting papers 9, 10; it is,

ORDERED that this motion (seq. #001) by plaintiff GOLD COAST BANK for an Order, pursuant to CPLR 3212, striking out the defendants' Verified Answer and directing the entry of summary judgment in favor of plaintiff and against defendants for the relief demanded in the complaint upon the grounds that there is no defense to the causes of action alleged in the complaint, and that the defenses that have been set forth have no merit, is hereby **GRANTED** in accordance with the following; and it is further

ORDERED that this amended cross-motion (seq. #002) by defendants AMS NATIONAL SERVICES CORP., AMS SERVICES INC. and FRANK CATALANO (collectively "defendants") for an Order, pursuant to CPLR 3025, granting defendants leave to amend their Verified Answer to add counterclaims against plaintiff, is hereby **GRANTED** in accordance with the following.

This action was brought to recover sums due on a promissory note and guaranties of payment thereof. The action was commenced by the filing of a Summons and Verified Complaint on or about November 10, 2015. Issue was joined by the service of a Verified Answer dated December 28, 2015. Plaintiff alleges the factual history of this matter as follows:

(1) On October 14, 2014, plaintiff loaned defendants AMS NATIONAL SERVICES CORP. and AMS SERVICES INC. (collectively "AMS") \$90,000, at which time AMS executed a promissory note dated October 14, 2014, in the principal amount of \$90,000 to be repaid with interest at 5.250% in 35 equal monthly payments of \$2,710.64, and one final payment of \$2,110.80, the first payment of which was due on November 14, 2014, and each subsequent payment of which was due on the 14th day of each month, thereafter, final payment being due on October 14, 2017.

(2) The promissory note provided the following, among other things:

- (a) Borrowers would pay a late charge of 5% on each late payment or \$25, whichever was greater;
- (b) Upon default, the interest rate would be increased by 7 percentage points (12.250%);
- (c) Failure to make payment when due was an event of default;
- (d) Upon default, the lender had the right to declare the entire unpaid principal balance due and all accrued unpaid interest;
- (e) AMS would pay plaintiff reasonable attorneys' fees in the event of a default;

Plaintiff alleges that AMS defaulted under the promissory note by failing to make the monthly payment due in August of 2015, and each and every month thereafter.

On a motion for summary judgment, the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (see *Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard-Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (see *Zuckerman*, 49 NY2d 557; *Blake v Guardino*, 35 AD2d 1022 [1970]).

As to defendants AMS SERVICES INC. and FRANK CATALANO, plaintiff is entitled to judgment as a matter of law on the guaranty given by each as a joint and several liability. Given the provisions of the guaranties as executed, there are no available defenses or other legal impediment to the granting of summary judgment.

In the matter of *Hyman v Golio*, 134 AD3d 992 (2015), the Second Department has made it very clear that there is:

prima facie entitlement to judgment as a matter of law by proving the existence of a guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (see *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492, 15 NYS3d 277, 36 NE3d

80; *Davimos v Halle*, 35 AD3d 270, 272, 826 NYS2d 61). In opposition, the defendant failed to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense (see *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. "Rabobank Intl."*, *N.Y. Branch v Navarro*, 25 NY3d at 492; *Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 710, 870 NYS2d 395)

(*Hyman v Golio*, 134 AD3d 992, 992).

Moreover, the guaranties executed by these defendants are separate undertakings and self-standing documents (see *Hyman*, 134 AD3d 992; *Acadia Woods Partners, LLC v Signal Lake Fund LP*, 102 AD3d 522 [2013]), and serve as a predicate for plaintiff's motion for summary judgment (see CPLR 3212; *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. "Rabobank Intl."*, *N.Y. Branch*, 25 NY3d 485). By their plain terms and unequivocal language, the defendants' guaranties foreclose any challenge to the enforceability and validity of the promissory note, and precludes defendants from raising any defenses or counterclaims relating to the underlying debt (see *Gannett Co. v Tesler*, 177 AD2d 353 [1991], citing *Citibank v Plapinger*, 66 NY2d 90 [1985]). "[T]he liability of [a] guarantor may be broader than and exceed the scope of that of the principal where the guarantee . . . is, by its unqualified language, enforceable against the guarantor" (*Raven El. Corp. v Finkelstein*, 223 AD2d 378, 378 [1996], citing *European Am. Bank v Lofrese*, 182 AD2d 67, 74 [1992]; see *Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737 [1983]).

Here, the subject guaranties effectively provide that, even if the principal is able to escape liability, the guaranties are still enforceable (see *Manufacturers Hanover Trust Co.*, 95 AD2d 737; *Bank of Amer. v Shapiro*, 31 AD2d 465 [1969]; *Franklin Nat. Bank v Eurez Constr. Corp.*, 60 Misc 2d 499 [Sup Ct. Nassau County 1969]; see also *Gard Entertainment Inc. v Country in N.Y., LLC*, 96 AD3d 683 [2012]; *Harrison Ct. Assoc. v 220 Westchester Ave. Assoc.*, 203 AD2d 244 [1994]).

Consequently, plaintiff's motion for summary judgment is **GRANTED** as to defendants AMS SERVICES INC. and FRANK CATALANO on the guaranties, and as to defendant AMS NATIONAL SERVICES CORP. on the promissory note. AMS NATIONAL SERVICES CORP.'s proffer of additional

causes of action in response or opposition to plaintiff's summary judgment motion does not relieve this defendant from responding with appropriate affidavits and exhibits in admissible form for the purpose of defeating the summary judgment motion in the first instance. Defendant failed to do so.

The cross-motion to amend the Verified Answer is **GRANTED** to the extent that the Verified Amended Answer with Affirmative Defenses and Counterclaims, annexed to defendants' cross-moving papers as Exhibit "C," shall be deemed served upon plaintiff as of the date of service of the instant Order upon plaintiff with notice of entry. Plaintiff may then serve a reply to the counterclaims, pursuant to CPLR 3025 (d), if so advised. Defendants' counterclaims are hereby severed and continued.

A Preliminary Conference on the counterclaims shall be held on **October 27, 2016, at 9:30 a.m.**, in Part 37, 1 Court Street, Riverhead, New York.

The foregoing constitutes the decision and Order of the Court.

Dated: September 29, 2016



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION