

<b>Bethpage Fed. Credit Union v Sepyashvily</b>
2019 NY Slip Op 30618(U)
March 14, 2019
Supreme Court, New York County
Docket Number: 153095/18
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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BETHPAGE FEDERAL CREDIT UNION, Successor  
by Merger to Montauk Credit Union

Plaintiff

Index No. 153095/18

v

DECISION, ORDER, AND  
JUDGMENT

TENGIZ SEPYASHVILY, SAVVAS CAB CORP.,  
ZAHAL TAXI CORP., TANGIZ HACK CORP., and  
DECIDE CAB CORP.

Defendant.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking recovery on four separate promissory notes and an account stated, unjust enrichment, and to foreclose on collateral securing a loan, the plaintiff, Bethpage Federal Credit Union (BFCU), moves pursuant to CPLR 3025(b) and 3215 for leave to amend the caption and for leave to enter a default judgment against the defendants. The motion is granted, without opposition, to the extent that the caption is amended, the plaintiff may enter a default judgment against the defendants on the first, second, fourth and fifth causes of action, and the motion is otherwise denied.

## II. DISCUSSION

The branch of the plaintiff's motion pursuant to 3025(b) seeks to amend the caption to reflect errors in the naming of two of the defendants. Specifically, the plaintiff avers that upon further information, it learned that the proper name of the defendant "Tangiz Hack Corp." is "Tangiz Hacking Corp.," and that the proper name of "Savvas Cab Corp." is "Savvas Cab Corp., Inc." The affidavits of service submitted by the plaintiff demonstrate that even though the foregoing defendants were misnamed in the caption, the proper parties were, in fact, served and received notice of this action.

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting directly from the delay and where the evidence submitted in support of the motion indicates that the amendment may have merit. See McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11<sup>th</sup> LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1<sup>st</sup> Dept. 2011); Ingrami v Rovner, 45 AD3d 806 (2<sup>nd</sup> Dept. 2007). The plaintiff has shown that the amendment has merit and, having failed to oppose the motion, the defendants have failed to show any prejudice or surprise. Furthermore, it is well-settled that where pleadings have been served under a misnomer upon the party which the plaintiff intended as the defendant, and the misnomer could not possibly have misled the defendant as to who it was

that the plaintiff was in fact seeking to sue, the court should allow an amendment to correct the error rather than dismiss the action. See CPLR 305(c); Board of Managers of Oyster Point Condominium v Nyce, 79 AD3d 1034 (2<sup>nd</sup> Dept. 2010); Holster v Ross, 45 AD3d 640 (2<sup>nd</sup> Dept. 2007); Kingalarm Distributors v Video Insights Corp., 274 AD2d 416 (2<sup>nd</sup> Dept. 2000); Glover v Weiler Hosp. of Albert Einstein Coll. of Med., 256 AD2d 137 (1<sup>st</sup> Dept. 1998).

Turning to the branch of the plaintiff's motion seeking leave to enter a default judgment, it is well-settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2<sup>nd</sup> Dept. 2011). The proof submitted must establish a prima facie case. See Guzetti v City of New York, *supra*; Silberstein v Presbyterian Hosp., 95 AD2d 773 (2<sup>nd</sup> Dept. 1983).

BFCU submits the summons and complaint, proof of service thereof upon the defendants, an attorney's affirmation, and copies of the subject promissory notes and loan modification agreements. BFCU also submits security agreements and executed UCC-1 financing statements securing its predecessor's interest in

series of taxi medallions with rate cards and vehicles owned by the corporate defendants. It further submits the affidavit of Keith Weinkauf, its vice-president, who authenticates and describes the terms of the notes, security agreements, and UCC-1 financing statements, the manner in which the defendants were obligated under the note, the filing of the UCC-1 statements, and the defendants' failure to pay their obligations under the note. Weinkauf explains that Montauk Credit Union (Montauk)--the obligee under the notes--merged into BFCU on March 31, 2016, and avers that the defendants retained the taxi medallions with rate cards and vehicles after default.

BFCU's proof establishes, prima facie, the facts underpinning its breach of contract claim by showing that there was "formation of a contract between the parties, performance by the plaintiff['s] [assignor], the defendant's failure to perform, and resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1<sup>st</sup> Dept. 2009). Where, as here, a contractual obligation is a promissory note, a plaintiff meets its burden by proving the existence of the subject note and nonpayment according to its terms. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1<sup>st</sup> Dept. 2008).

The proof shows that the defendant Tengiz Sepyashvily, as obligor, executed four promissory notes with identical terms in favor of Montauk on November 14, 2014, along with security

agreements and UCC-1 financing statements, in consideration of four loans, each in the principal sum of \$1,000,000.00, to be repaid at the rate of 3.75% per annum in equal monthly installments of \$5,142.47 through November 14, 2017. Sepyashvily executed identical loan modification agreements with respect to each of the notes on November 29, 2016, which adjusted the interest rates of the notes to 3.5% per annum, lowered the monthly payments to \$3,030.01, and extended the maturity date until December 1, 2019. Pursuant to the modification agreements, in the event of default, interest was to be charged at 8.5% per annum on the unpaid principal, and there was to be a late fee of 5.0% of the delinquent amount for each payment not made within 10 days of its becoming due. BFCU establishes that Sepyashvily failed to repay his monthly installments beginning on September 1, 2017, and made no payments thereafter.

Each of the four promissory notes, respectively, has been signed by one of the four corporate defendants as guarantors. The terms of the subject guaranty agreements are clear, unambiguous, absolute and unconditional and, having defaulted in this action, the defendants have not shown, or even alleged, any fraud, duress or any other wrongful conduct by the plaintiff in regard to the agreements. Moreover, having failed to answer, the defendants are "deemed to have admitted all factual allegations in the complaint and all reasonable inferences that flow from

them." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003). The corporate defendants have also signed the security agreements as owners of the collateral pledged therein, and are bound by the terms of those agreements.

As to the plaintiff's second cause of action, "[a]n account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other. . . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated." Shea & Gould v Burr, 194 AD2d 369, 370 (1<sup>st</sup> Dept. 1993); see Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51, 52 (1<sup>st</sup> Dept 2004). BFCU's proof establishes that it billed Sepyashvily for the payments due under the promissory notes and modification agreements, and that Sepyashvily paid a portion of the indebtedness without objection, but ceased paying as of September 1, 2017. It thus established its entitlement to recover on an account stated.

In connection with the first and second causes of action, which are to recover for breach of contract and on an account stated, respectively, BFCU is thus entitled to recover the principal sums of (1) from Sepyashvily and the defendant Savvas

Cab Corp., a/k/a Savvas Cab Corp., Inc., jointly and severally, \$993,472.23, plus \$24,575.05 in contractual interest until September 11, 2018, and \$2,575.50 in late fees; (2) from Sepyashvily and the defendant Tangiz Hack Corp., a/k/a Tangiz Hacking Corp., jointly and severally, \$997,764.80, plus \$24,575.05 in contractual interest until September 11, 2018, and \$2,575.50 in late fees; (3) from Sepyashvily and the defendant Decide Cab Corp, jointly and severally, \$995,645.88, plus \$24,562.51 in contractual interest until September 11, 2018, and \$2,424.00 in late fees; and (4) from Sepyashvily and the defendant Zahal Taxi Corp., jointly and severally, \$995,724.62, plus \$24,573.07 in contractual interest until September 11, 2018, and \$2,424.00 in late fees. The plaintiff is also entitled to costs and interest at the contractual rate of 8.5% per annum on each principal amount remaining due under the promissory notes from September 11, 2018.

As a general rule, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1<sup>st</sup> Dept. 2012). Accordingly, the plaintiff is not entitled to leave to enter a default judgment as to its third cause of action.

The plaintiff's fourth and fifth causes of action seek to foreclose on the collateral securing the loans issued under the promissory notes. A plaintiff asserting a cause of action sounding in replevin must establish that the defendant in is possession of certain property to which the plaintiff claims a superior right. See Nissan Motor Acceptance Corp. v Scialpi, 94 AD3d 1067 (2<sup>nd</sup> Dept. 2012). BFCU makes a prima facie showing of its entitlement to the replevin of the collateral secured by the security agreements and UCC-1 statements, consisting of: (1) New York City Taxi Medallions, numbers 6K21, 6K22, 1Y37, 9P81, 7L47, 7N18, 8N47, and 8N48, with corresponding rate cards; (2) a 2014 Toyota with VIN 4T1BD1FK0EU111557; (3) a 2014 Toyota with VIN 4TBD1FK8EU111516; (4) a 2011 Ford with VIN NM0KS9CN9BT072439; (5) a 2014 Toyota with VIN 4T1BD1FK5EU112929; (6) a 2014 Toyota with VIN 4T1BD1FK2EU099959; (7) a 2014 Toyota with VIN 4T1BD1FK4DU092364; (8) a 2014 Toyota with VIN 4T1BD1FKEU113287; and (9) a 2014 Toyota with VIN 4T1BD1FK8EU104971. BFCU established its right to a default judgment on its fourth and fifth causes of action by demonstrating that it now lawfully holds the notes, security agreements, and UCC-1 statements, the defendants defaulted thereunder by virtue of their nonpayment, the defendants are in possession of the collateral, and BFCU has a right to possession and delivery of the collateral under the terms of the security agreements and UCC-1 statements.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is ORDERED that the branch of the plaintiff's motion pursuant to CPLR 3025(b) to amend the caption is granted, without opposition; and it is further,

ORDERED that the caption is hereby amended and shall read as follows:

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BETHPAGE FEDERAL CREDIT UNION, Successor by Merger  
to Montauk Credit Union

Plaintiff,

-v-

TENGIZ SEPYASHVILY, SAVVAS CAB CORP., a/k/a  
SAVVAS CAB CORP., INC., ZAHAL TAXI CORP., TANGIZ  
HACK CORP., a/k/a TANGIZ HACKING CORP., and DECIDE  
CAB CORP.

Defendants.

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and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the County Clerk, who is directed to mark the court's records to reflect the amendment; and it is further,

ORDERED that the branch of the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment is granted, without opposition, to the extent that it is awarded judgment on the first, second, fourth, and fifth causes of action, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff and against:

(1) the defendant Tengiz Sepyashvily and the defendant Savvas Cab Corp., a/k/a Savvas Cab Corp., Inc., jointly and severally, in the principal sum of \$993,472.23, with interest at the rate of 8.5% per annum from September 11, 2018 through the date of judgment, plus \$24,575.05 in contractual interest through September 11, 2018, \$2,575.50 in late fees, and costs and disbursements;

(2) the defendant Tengiz Sepyashvily and the defendant Tangiz Hack Corp., a/k/a Tangiz Hacking Corp., jointly and severally, in the principal sum of \$997,764.80, with interest at the rate of 8.5% per annum from September 11, 2018 through the date of judgment, plus \$24,575.05 in

contractual interest through September 11, 2018, \$2,575.50 in late fees, and costs and disbursements;

(3) from Sepyashvily and the defendant Decide Cab Corp, jointly and severally, in the principal sum of \$995,645.88, with interest at the rate of 8.5% per annum from September 11, 2018 through the date of judgment, plus \$24,562.51 in contractual interest through September 11, 2018, \$2,424.00 in late fees, and costs and disbursements; and

(4) from Sepyashvily and the defendant Zahal Taxi Corp., jointly and severally, in the principal sum of \$995,724.62, with interest at the rate of 8.5% per annum from September 11, 2018 through the date of judgment, plus \$24,573.07 in contractual interest through September 11, 2018, \$2,424.00 in late fees, and costs and disbursements; and it is further,

ORDERED that the plaintiff shall serve a copy of this order and judgment upon the defendant at his last known address by regular and certified mail, return receipt requested, within 20 days of this order and judgment; and it is further,

ADJUDGED that the plaintiff has a right to possession of 1) New York City Taxi Medallions, numbers 6K21, 6K22, 1Y37, 9P81, 7L47, 7N18, 8N47, and 8N48, with corresponding rate cards; (2) a 2014 Toyota with VIN 4T1BD1FK0EU111557; (3) a 2014 Toyota with VIN 4TBD1FK8EU111516; (4) a 2011 Ford with VIN NM0KS9CN9BT072439;

(5) a 2014 Toyota with VIN 4T1BD1FK5EU112929; (6) a 2014 Toyota with VIN 4T1BD1FK2EU099959; (7) a 2014 Toyota with VIN 4T1BD1FK4DU092364; (8) a 2014 Toyota with VIN 4T1BD1FKEU113287; and (9) a 2014 Toyota with VIN 4T1BD1FK8EU104971, superior to that of the defendants; and it is further,

ORDERED that within 20 days of service of a copy of this order and judgment with notice of its entry upon them, the defendants shall deliver to the plaintiff 1) New York City Taxi Medallions, numbers 6K21, 6K22, 1Y37, 9P81, 7L47, 7N18, 8N47, and 8N48, with corresponding rate cards; (2) a 2014 Toyota with VIN 4T1BD1FK0EU111557; (3) a 2014 Toyota with VIN 4T1BD1FK8EU111516; (4) a 2011 Ford with VIN NM0KS9CN9BT072439; (5) a 2014 Toyota with VIN 4T1BD1FK5EU112929; (6) a 2014 Toyota with VIN 4T1BD1FK2EU099959; (7) a 2014 Toyota with VIN 4T1BD1FK4DU092364; (8) a 2014 Toyota with VIN 4T1BD1FK7EU113287; and (9) a 2014 Toyota with VIN 4T1BD1FK8EU104971, currently in their possession.

This constitutes the Decision, Order, and Judgment of the court.

Dated: March 14, 2019

ENTER:

  
J.S.C.

**HON. NANCY M. BANNON**