

Newbank v Seventh Ave. Fine Foods Corp.
2020 NY Slip Op 30084(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 651420/2017
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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NEWBANK,

Plaintiff,

- v -

SEVENTH AVENUE FINE FOODS CORP., 532 MADISON
AVENUE GOURMET FOODS, INC., MICHAEL PARK,
RYUNG CHO,

Defendants.

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INDEX NO. 651420/2017
MOTION DATE 04/27/2017
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 were read on this motion to/for JUDGMENT - SUMMARY.

In this action for breach of contract, plaintiff Newbank moves pursuant to CPLR 3212 for summary judgment on its complaint against defendants Seventh Avenue Fine Foods Corp., 532 Madison Avenue Gourmet Foods, Inc., Michael Park, and Ryung Cho. Defendants cross-move pursuant to CPLR 3211(a)(4) to stay this action pending the determination of a motion to consolidate in a now-disposed action pending in New York County entitled *Park et. al. v Newbank, et. al. (Park II)*, Index no. 651048/2017.

BACKGROUND

On February 22, 2013, Seventh Avenue Fine Foods Corp. (Seventh Avenue) executed a Note wherein it borrowed the principal amount of \$800,000 from Newbank and agreed to repay the principal sum, plus interest by way of monthly payments (NYCEF # 9, Note at ¶4). Seventh Avenue and Newbank also entered into the Business Loan Agreement (Agreement) wherein Newbank agreed to comply with the terms and conditions of the Note (NYSCEF # 10, Agreement at 3, 4). Further, defendants 532 Madison Avenue Gourmet Foods, Inc., Michael Park, and Ryung Hee Cho entered into the Unconditional Guarantee (Guarantee) wherein they each unconditionally guaranteed payment of all amounts owing under the Note upon demand (NYSCEF # 11, Guarantee at ¶¶1, 6).

Newbank claims that it performed all the terms as required under the Note and Agreement. Defendants contend that Seventh Avenue ceased making monthly payments of the principal and interest in accordance with the terms of the Note. By letter dated February 1, 2017, Newbank notified Seventh Avenue of its default under the Note and declared all amounts owing under the Note immediately due and payable by February 10, 2017. The balance of the unpaid loan as of January 25, 2017, was \$573,499.40, plus interest in the amount of \$11,087.65 and late fees in the amount of \$5,804.90, totaling \$590,391.95. Seventh Avenue failed to pay the outstanding balance by the due date.

By letters dated March 8, 2017, Newbank notified the guarantors of Seventh Avenue's default under the Note and demanded that the guarantors pay Newbank the outstanding obligations by March 16, 2017. The guarantors failed to pay the outstanding obligation.

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Breach of Contract

In support of their motion for summary judgment on its claims for breach of contract, Newbank argues it performed its obligations under the Note and Agreement, but Seventh Avenue did not as Seventh Avenue failed to pay the outstanding balance of the loan. Newbank further argues that co-defendants Michael Park and Ryung Cho breached the Guarantee by failing to pay the outstanding balance due.

In opposition, defendants contend that Newbank's motion should be dismissed since a motion to consolidate this action with *Park II* is pending in that case. Defendants further argue that in *Park II*, Newbank will owe defendants herein damages in excess of the damages in this matter. Further, defendants contend that Newbank fails to articulate the basis for the amount they seek as damages.

To prevail on a cause of action for breach of contract the plaintiff must prove “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Newbank establishes a prima facie entitlement to recovery of the sums due under the Note and Agreement based upon proof that the parties executed the Agreement, that Newbank performed under the Agreement and that Seventh Avenue subsequently failed to make payments thereon in accordance with its terms (see *Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 [2d Dept 1985], *affd* 61 NY2d 627 [1986]).

In opposition, defendants fail to raise an issue of fact. Defendants first argue that Newbank’s motion should be denied because at the time this motion was filed a motion to consolidate this action with the *Park II* action was pending.

In *Park II*, Michael Park and an entity he owned, 470 West 42 Street Gourmet, Inc., DBA Treehaus Mima sued Newbank and an employee of Newbank. In that action, Park claimed that he sought to sell one of his entities, 830 Third Avenue Gourmet, the sale of which was supposed to net money on-hand of \$900,000, after expenses and liabilities. Newbank held an antecedent note on 830 Third Avenue Gourmet.

Aside from the fact that the instant action and *Park II* are not related as they involve different parties and different loans issued to different entities, and therefore does not warrant consolidation, defendants’ argument is also moot. In separate orders dated September 20, 2017, another justice of this court denied Park’s motion to consolidate and granted Newbank’s motion for summary judgement dismissing the complaint. The Appellate Division, First Department affirmed, finding that Park failed to establish any damages based on the actions taken by Newbank (see *Park v Newbank*, 168 AD3d 625 [1st Dept 2019]).

Defendants’ second contention disputes the amount of the balance; their contention is without support. As part of its moving papers, Newbank submits a copy of Seventh Avenue’s loan history record, which lists payments from 2013 through 2017, including those attributable to interest and the principal and the late charges assessed (NYSCEF # 13). The loan history lists the principal of the loan and the loan balance after payments. Defendants fail to identify any specific charges they contend are incorrect (*First City Nat. Bank & Tr. Co. v Heaton*, 165 AD2d 665, 712 [1st Dept 1990]) [defendants’ failure to present evidentiary facts raising a triable issue of fact sufficient to rebut plaintiff’s showing the existence and breach of the promissory note]).

To the extent that defendants argue that Newbank's motion is premature for further discovery, defendants fail to demonstrate how further discovery will lead to relevant evidence (*see e.g. Hariri v Amper*, 51 AD3d 146, 152 [1st Dept 2008] ["It is settled that a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment"]).

Thus, in sum, Newbank has met its burden to warrant granting its motion for summary judgment.

Attorneys' Fees

The branch of Newbank's motion seeking costs, expenses, and disbursements, including reasonable attorneys' fees pursuant to the Note, Agreement and Guarantee is granted as unopposed. The Note, Agreement and Guarantee all provide for the reimbursement of costs, expenses, and disbursements, including reasonable fees, where Newbank seeks to enforce the terms of any of those documents (NYSCEF # 9, Note at ¶6[B]; NYSCEF # 10, Agreement at p.5; NYSCEF # 11, Guarantee at ¶9[A]). The determination of costs, expenses and disbursements, including attorneys' fees to which Newbank is entitled from defendants for the enforcement of the Note, Agreement and Guarantee is referred to a special referee to hear and determine.

Accordingly, it is hereby

ORDERED that plaintiff Newbank's motion for summary judgment on its complaint is granted; it is further

ORDERED that the Clerk of the Court is directed to enter judgment against defendants, Seventh Avenue Fine Foods Corp., 532 Madison Avenue Gourmet Foods, Inc., Michael Park, and Ryung Cho, jointly and severally, in the amount of \$590,391.95, plus statutory interest from January 25, 2017; it is further

ORDERED that the amount of costs, expenses and disbursements, including attorneys' fees plaintiff is entitled to is severed and referred to a Judicial Hearing Officer ("JHO") or Special Referee; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court

at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the plaintiff shall serve a proposed accounting within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from service of plaintiff's papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

1/06/2020
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE