

Signature Bank v Alliance Mech. Group, Inc.

2020 NY Slip Op 31430(U)

April 30, 2020

Supreme Court, New York County

Docket Number: 654006/2019

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

-----X

SIGNATURE BANK,

Plaintiff,

- v -

ALLIANCE MECHANICAL GROUP, INC., VITO VIRGILIO

Defendants.

-----X

INDEX NO. 654006/2019

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5-29 were read on this motion to/for JUDGMENT – SUMMARY.

Plaintiff Signature Bank moves, pursuant to CPLR 3212, for an order granting summary judgment against defendants Alliance Mechanical Group, Inc. (Borrower) and Vito Virgilio (Guarantor). Defendants oppose. Plaintiff’s motion is granted.

I. Background¹

This case arises from a commercial line of credit extended to Borrower beginning in 2016 in the amount of \$1 million, reaching \$2 million at its zenith (Line of Credit). By continuing guaranty dated September 8, 2016, Guarantor guaranteed payment of the amount due on the Line of Credit (Dkt. 11 [Guaranty]). The parties also entered a security agreement (Dkt. 12 [Security Agreement]), and plaintiff filed a UCC-1 financing statement in connection therewith (Dkt. 13). Borrower executed a series of promissory notes evidencing the Line of Credit, dated September 8,

¹ Unless otherwise indicated, the facts are undisputed. References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

2016 (Dkt. 7); July 20, 2017 (Dkt. 8); and July 9, 2018 (Dkt. 9). On December 21, 2018, Borrower executed another note (Dkt. 10 [Note]) that reduced the Line of Credit from \$2 million to \$1.88 million and extended the maturity date to February 28, 2019. Guarantor signed the Note on behalf of Borrower.

Per the Note, interest accrues on the Line of Credit at plaintiff's prime rate plus 0.75 percentage points per annum (minimum 4% per annum) with a default interest rate of 18%. During its term, the Note required monthly payments of interest only, with full payment of all principal and interest due on the February 28, 2019 maturity date. Borrower failed to make payment of all principal and interest due and owing at that time. By letter dated May 9, 2019 (Dkt. 14), plaintiff notified Borrower of the default. On June 4, 2019, plaintiff demanded immediate payment in full of all amounts outstanding under the Line of Credit. Borrower did not make the demanded payment.

The Note and Guaranty further require defendants to pay plaintiff's attorneys' fees and expenses in connection with collection. Specifically, under the Note, Borrower agreed "to pay on demand all of the Bank's costs and expenses, including reasonable counsel fees, in connection with collection of any sums due to [plaintiff] and enforcement of its rights under this Note or any other Loan Document" (Dkt. 10 at 8). Pursuant to the Guaranty, Guarantor likewise agreed "to pay reasonable attorneys fees ... and all other costs and expenses which may be incurred by [plaintiff] in the enforcement of this Continuing Guaranty or any claim hereunder or under any other instrument or guaranty" (Dkt. 11 at 5).

On July 12, 2019, plaintiff commenced this action. The complaint alleges: (1) breach of the Note; (2) breach of the Guaranty; and (3) breach of the Security Agreement. On August 29, 2019, defendants answered, asserting numerous affirmative defenses.

Plaintiff moves for summary judgment on its first two causes of action, seeking (1) \$1,880,000 in principal; (2) \$49,767.79 in accrued interest as of September 20, 2019; and (3) per diem interest of \$300.27 (5.75%) from September 21, 2019.

In support of its motion, plaintiff submits an affidavit from L. Edward Newsome, senior lender and vice president and an 11-year employee of plaintiff (Dkt. 6 [Newsome Affidavit]). The Line of Credit was assigned to Newsome's supervision on July 5, 2017. Newsome attests to the authenticity of the Note and Guaranty, and as to the amounts remaining due under the Note.

In opposition, defendants submit a single affidavit from their attorney, who bases his testimony on his review of his law firm's case file and "conversations with the various parties and their representatives." Counsel asserts that "payments were being made regularly up to the time of purported default" but does not controvert any facts asserted by Newsome or deny that payment was not made in full following the maturity date.

II. Discussion

A. Legal Standard

Movant bears the burden of making a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). Plaintiff may establish prima facie entitlement to summary judgment on a promissory note by showing that the instrument unequivocally and unconditionally obligated defendant to pay and that defendant failed to do so (*see Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]). Plaintiff may do the same on a guaranty by proving "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (*Cooperatieve Centrale Raiffeisen-*

Boerenleenbank, B.A. v Navarro, 25 NY3d 485, 492 [2015], quoting *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). It is sufficient, moreover, to “submit the instrument sued upon along with [an] affidavit of nonpayment” (*European Am. Bank & Tr. Co. v Schirripa*, 108 AD2d 684, 684 [1st Dept 1985]; *see generally* CPLR 3212[b] [“A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions”]).

Once the movant has laid bare its proof, the opposing party is compelled to do the same (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 [1st Dept 2011]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the claim rests or demonstrate an acceptable excuse for failure to offer admissible evidence (*Zuckerman*, 49 NY2d at 562). Failure to contradict facts is an admission (*Costello Assocs., Inc. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). The evidence on the motion must be examined in the light most favorable to the opponent of summary judgment (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment must be denied if there is any doubt as to the existence of a triable issue following examination of the documents submitted in connection with the motion (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). Indeed, summary judgment cannot be defeated by the “shadowy semblance of an issue” (*Jeffcoat v Andrade*, 205 AD2d 374, 375 [1st Dept 1994]).

B. Liability and Damages Under the Note and Guaranty

By submitting authenticated copies of the Note and Guaranty, along with affidavit testimony establishing defendants’ failure to fully repay the Note upon maturity and the amounts

due thereunder, plaintiff established its prima facie entitlement to recover on the Note and Guaranty under its first two causes of action. Defendants object, arguing that Newsome failed to examine the relevant books and records. The court disagrees with defendants' interpretation of the Newsome Affidavit. Newsome attests to his ongoing familiarity with plaintiff's records in connection with the Line of Credit and to his responsibility to administer the Line of Credit beginning in 2017. Defendants also object to a lack of "any computation in admissible form" and "proof of Defendant falling behind in payments," but offer no competing calculation or evidence of payment. To the contrary, the Newsome affidavit prima facie established defendants' default and the amounts owed as a result of the default. Defendants failed to raise a triable issue of fact as to their liability under the Note and Guaranty or the amounts due thereunder, or as to any of the defenses raised in their answer to the complaint. Summary judgment on the first two causes of action is therefore granted to plaintiff.

C. Recovery of Attorneys' Fees

The Note and Guaranty clearly and unmistakably allow plaintiff to recover its costs in connection with their enforcement, including plaintiff's reasonable attorneys' fees (see *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]). Plaintiff submits an affirmation of counsel of plaintiff's legal fees, costs and expenses (Dkt. 21), accompanied by itemized billing records of work performed by a senior partner and two associate attorneys (Dkt. 22). Having examined the records of the fees, the amounts of which the court finds to be reasonable, and no objection having been made by defendants, the court grants plaintiff its legal fees and costs incurred in connection with its efforts to enforce the Note and Guaranties in the amount of \$6,059.15. Accordingly, it is


ORDERED that plaintiff's motion for summary judgment on the first and second causes of action is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff and against defendants in the amount of \$1,929,767.79, together with interest on the \$1,880,000.00 principal balance at the rate of 5.75% per annum from the date of September 21, 2019, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, plus plaintiff's attorneys fees, costs and expenses in the amount of \$6,059.15; and it is further

ORDERED that the third cause of action is severed and shall continue; and it is further

ORDERED that within 30 days, plaintiff shall submit a letter to the court by emailing ekimmel@nycourts.gov (cc-ing adverse counsel) requesting either (1) a preliminary conference or (2) leave to voluntarily discontinue the severed action, and defendants may stipulate to or oppose plaintiff's request within 14 days of plaintiff's letter by submitting a stipulation by email or their own letter by the same method, and all submissions, once emailed, shall be promptly e-filed upon the resumption of e-filing in non-essential matters; and it is further

ORDERED that within 10 days of resumption of e-filing in non-essential matters on NYSCEF, plaintiff shall serve a copy of this order with notice of entry on defendants by overnight mail.

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JENNIFER G. SCHECTER, J.S.C.

4/30/2020
DATE

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: