

Signature Bank v Todic
2020 NY Slip Op 31547(U)
April 22, 2020
Supreme Court, New York County
Docket Number: 655837/2019
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 655837/2019

SIGNATURE BANK,

Plaintiff,

MOTION SEQ. NO. 001

- v -

FIKRET TODIC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9
were read on this motion to/for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Signature Bank moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant Fikret Todic based on a Guaranty he executed. Defendant guaranteed payment of a Promissory Note he executed on behalf of nonparty Big Apple General Contracting Corp. (“BAGC”). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is granted.

In or about August 2017, BAGC executed a Promissory Note (“the Prior Note”) payable to the order plaintiff in the principal amount of \$350,000.00. Doc. 4 at 9-10.

On or about October 10, 2017, defendant executed a “Continuing Guaranty” (“the Guaranty”) pursuant to which he personally guaranteed payment of BAGC’s “indebtedness” to plaintiff. Doc. 5 at 1. The Guaranty defined “indebtedness” as, inter alia, “the principal of and interest on and all other sums payable with respect to any and all advances, debts, obligations

and liabilities of [BAGC to plaintiff] . . . heretofore, now or hereafter made, incurred, created, or arising . . .” Doc. 5 at par. 1. Additionally, the Guaranty was “continuing, unlimited, absolute, and unconditional.” Doc. 5 at par. 2.

On or about October 1, 2018, BAGC executed a Promissory Note (“the Note”) payable to the order of plaintiff in the original principal amount of \$200,000.00. Doc. 4 at 1. Pursuant to the terms of the Note, which specifically provided that it superseded the terms of the Prior Note (Doc. 4 at 9-10), BAGC promised to pay plaintiff the principal sum of \$200,000.00, or so much thereof as may be outstanding, plus all accrued and unpaid interest thereon, on December 1, 2019, the Maturity Date of the Note. Doc. 4 at 1. The Note further provided that plaintiff shall be paid monthly payments of principal and interest commencing January 1, 2019 and ending November 1, 2019, at a rate equal to plaintiff’s Prime Rate, as defined in the Note, plus 1.00% per annum, and a final payment on December 1, 2019, the Maturity Date, of all remaining amounts of principal and accrued interest. Doc. 4 at 1.

Plaintiff now moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint as against defendant. Doc. 9. In an affidavit in support of the motion, William Zatwarnicki, an officer of plaintiff bank, states, inter alia, that BAGC defaulted under the Note and defendant defaulted under the Guaranty by, inter alia, failing to pay the monthly installments of principal and interest which became due pursuant to the note. Doc. 3 at par. 8.

Zatwarnicki further states that:

after application by [plaintiff] of all payments that have been made in connection with the Note, which were applied by [plaintiff] to principal, accrued interest and any other fees and charges for the period from October 1, 2018 to date, as set forth in [plaintiff's] Loan Payment History for the Note [Doc. 6], there remains a principal balance due and owing of \$190,000.00, plus accrued and unpaid interest thereon from December 1, 2018 through June 26, 2019 in the amount of \$7,110.49. Interest is continuing to accrue thereafter at the per diem rate of \$34.31.¹

Doc. 3 at par. 9.

In addition, states Zatwarnicki, the Note provides that BAGC shall pay all costs and expenses, including reasonable attorneys' fees, incurred in pursuing collection of payments to be made pursuant to the Note. Doc. 3 at par. 11. The Guaranty also provides that defendant shall pay all costs and expenses, including reasonable attorneys' fees, incurred in connection with the enforcement of the Guaranty. Doc. 5 at par. 9.

CPLR 3213 provides: "When an action is based upon an instrument for the payment of money only . . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." "CPLR 3213 was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless." *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485, 491-92 (2015) (internal quotation marks and citation omitted).

A Guaranty "may be the proper subject of a motion for summary judgment in lieu of complaint whether or not it recites a sum certain." *Manufacturers Hanover Trust Co. v Green*, 95

¹ The interest calculated by Zatwarnicki is based on plaintiff's Prime Rate. Doc. 3 at par. 9, n. 1.

AD2d 737, 737 (1st Dept 1983). For a plaintiff to establish its prima facie entitlement to summary judgment in lieu of complaint based on a guaranty, it must prove “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 N.Y.3d at 492. Here, plaintiff established, through the affidavit of Zatwarnicki and the exhibits annexed thereto, that BAGC defaulted on the Note, that defendant guaranteed payment of the Note, and that defendant failed to pay plaintiff pursuant to its “continuing, unlimited, absolute, and unconditional” Guaranty. Doc. 5 at par. 2. Since defendant failed to oppose the instant motion, no issue of material fact has been raised which would preclude the granting of the application.

Thus, plaintiff is entitled to summary judgment in lieu of complaint against defendant in the principal sum of \$190,000.00, with interest thereon from December 1, 2018 through June 26, 2019 in the amount of \$7,110.49, and from June 27, 2019 through the date judgment is entered herein at the rate of \$34.31 per day, plus costs, disbursements, and attorneys’ fees to be calculated by a JHO/Special Referee.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Signature Bank’s unopposed motion for summary judgment in lieu of complaint is granted; it is further

ORDERED that the Clerk is directed to enter judgment against defendant Fikret Todici in the principal sum of \$190,000.00, with interest thereon from December 1, 2018 through June 26, 2019 in the amount of \$7,110.49, and from June 27, 2019 through the date judgment is entered herein at the rate of \$34.31 per day; and it is further

ORDERED that plaintiff Signature Bank's request for collection costs, disbursements, and attorneys' fees is granted and is referred to a JHO/Special Referee to hear and determine; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) 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 "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that plaintiff Signature Bank's counsel shall serve a copy of this order with notice of entry on defendant Fikret Todic within 20 days and that counsel for plaintiff Signature Bank shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/suptctmanh/refpart-infosheet-10-09.pdf>) 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 hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; it is further

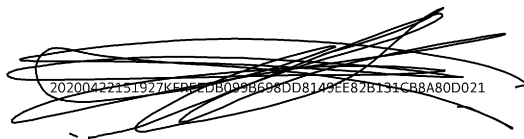
ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; and it is further

ORDERED that, within 20 days after entry of this order, counsel for plaintiff Signature Bank shall serve a copy of this order, with notice of entry, on the Trial Support Clerk located in the General Clerk's Office (Room 119), and on the County Clerk (Room 141B), by e filing protocol; and it is further

ORDERED that this constitutes the decision and order of the court.

4/22/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<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"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	
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