

<b>VNB N.Y., LLC v Paskesz</b>
2020 NY Slip Op 32343(U)
July 16, 2020
Supreme Court, New York County
Docket Number: 652149/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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<p>VNB NEW YORK, LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>CHARLES PASKESZ, CHAYA PASKESZ, JACOB        PASKES, INC.</p> <p style="text-align: center;">Defendant.</p>	<p><b>INDEX NO.</b>            <u>652149/2017</u></p> <p><b>MOTION DATE</b>        <u>N/A</u></p> <p><b>MOTION SEQ. NO.</b>    <u>005</u></p> <p style="text-align: center;"><b>DECISION + ORDER ON        MOTION</b></p>
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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 150, 151, 152, 153, 155, 156, 157, 159

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to enforce a promissory note, plaintiff VNB New York, LLC (“VNB”) originally moved for summary judgment on its first and second causes of action and for summary judgment dismissing the counterclaims. Defendants then originally cross moved for summary judgment dismissing the complaint. Subsequently, defendants Charles Paskesz and Chaya Paskesz filed for relief under Chapter 7 of the United States Bankruptcy Code. At the conclusion of the bankruptcy proceeding VNB and Charles Paskesz and Chaya Paskesz executed a stipulation discontinuing the action against Charles Paskesz and Chaya Paskesz and discontinuing their counterclaims against VNB. Thus, I only address the motion as to the first cause of action between VNB and defendant Jacob Paskes, Inc. (“Paskesz”). The second cause of action is discontinued pursuant to the parties’ stipulation, as are the counterclaims.

VNB commenced this action in or about April 2017. In its complaint VNB alleges that Paskesz borrowed \$2.5 million from VNB's predecessor in interest, Merchant's Bank of New York, pursuant to a security agreement dated November 7, 2002 and note dated November 18, 2002. On November 7, 2002, defendants Charles Paskesz and Chaya Paskesz guaranteed Paskesz's obligations. The note was further secured by a mortgage executed by certain non-parties.

VNB alleges that Paskesz defaulted on the note as of October 2011. By notice dated December 22, 2011, VNB demanded payment on the note but the note was never repaid. VNB then commenced a replevin action, and pursuant to a surrender agreement, Paskesz surrendered certain collateral that secured the amounts borrowed. That collateral was allegedly valued at \$9,964 and the replevin action was then discontinued without prejudice.<sup>1</sup>

VNB also commenced a foreclosure action to foreclose on the mortgage that secured the note. The foreclosure action was settled, and the mortgagors paid \$1 million to be released from any debt owed under the note. VNB received the settlement amount in March 2017.

In the current action VNB alleges that the amount of \$1.905 million plus interest is still due and owing on the note. The defendants answered the complaint and asserted various affirmative defenses. Guarantor defendants Charles Paskesz and Chaya Paskesz also asserted three counterclaims in their answer, which have now been discontinued.

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<sup>1</sup> VNB alleges that certain other collateral was stolen by a third party.

VNB moves for summary judgment on its first cause of action, and, in support of its motion, VNB explains that by letter dated July 14, 2010, VNB had demanded payment in full of amounts owed under the note. Instead of paying the amounts due under the note, the parties agreed to amend the terms of note. In September 2010, pursuant to a letter agreement, the 2002 note was amended to reflect the amount owed of \$2,115,000.00. Again, in March 2011, the note was amended to alter the repayment terms and maturity date.

With regard to Paskesz's affirmative defenses, VNB first argues that the action was commenced within the applicable statute of limitations, specifically, less than six years after defendants' breach in October 2011. It further maintains that it has standing to sue because the original note was executed in favor of The Merchants Bank of New York, which was a division of Valley National Bank. Valley National Bank later assigned the note to its subsidiary VNB New York Corp., which then merged with and into VNB New York LLC. Finally, it argues that defendants failed to allege sufficient facts to support the remaining affirmative defenses asserted.

### **Discussion**

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002); *see also 45 Broadway Owner LLC v. NYSA-ILA Pension Trust Fund*, 107 A.D.3d 629 (1<sup>st</sup> Dept. 2013).

Here, Paskesz and The Merchants Bank of New York, a division of Valley National Bank, executed a “grid note” in November 2002 for \$2.5 million. In September 2010, VNB and Paskesz executed a “term note” for \$2.115 million. Subsequently, in March 2011, VNB and Paskesz executed an amendment. The amendment stated,

“A. the borrower executed an original note in favor of the lender dated November 18, 2002 in the original principal sum of \$2,500,000.

B. In consideration of the Borrower executing and delivering to the Lender a mortgage in the amount of \$1,000,000 on property located at 1953 56th Street, Brooklyn, New York and subject to the terms of that certain letter agreement between the Borrower and the Lender dated September 15, 2010, the Lender modified the terms of the Original Note in accordance with the terms set forth in that certain replacement note dated as of September 15, 2010 evidencing an indebtedness in the principal amount of \$2,115,000 (the "Note").

C. As of the date hereof, the principal amount of \$1,945,000.00 remains due and owing under the Note.

D. The Lender and the Borrower desire to amend the Note to modify the repayment terms and the maturity date.”

The language of the 2011 amendment indicates that the original 2002 note was executed between VNB (its predecessor) and Paskesz. That original note was then “modified” in September 2010 to reflect a lesser amount owed, and memorialized in a replacement note. The 2011 amendment reflected new repayment terms and a new maturity date.

Based on the plain language of the three documents, I find that the 2010 note was not a new note, as argued by Paskesz, rather it merely modified the original 2002 note. The note was then amended in 2011. Further, Paskesz’s argument that the 2002 note was cancelled and replaced because it was between Paskesz and Merchants, and not VNB, is belied by the plain language of the amendment, which references the 2002 note between

Paskesz and “Lender,” therein defined as VNB. Finally, VNB has shown that Paskesz defaulted in payment despite due demand, and Paskesz does not submit any evidence showing full payment of the amounts due.

This action, commenced in 2017, is timely, and VNB has made out its *prima facie* case of entitlement to judgment on the issue of liability. However, I can’t determine from the evidence presented whether any of the collateral allegedly provided would satisfy the any or all of the outstanding amounts due and owing. Damages must therefore be calculated by a Special Referee.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff VNB New York, LLC’s motion for summary judgment is granted to the extent that judgment as to liability is entered in favor of the plaintiff and against defendant Jacob Paskes, Inc. on the first cause of action; and it is further

ORDERED that the cross motion of defendant Jacob Paskes, Inc. for dismissal of the complaint is denied; and it is further

ORDERED that, pursuant to a stipulation of the parties, the second cause of action against defendants Charles Paskesz and Chaya Paskesz and the counterclaims asserted by these defendants against VNB are discontinued without prejudice; and it is further

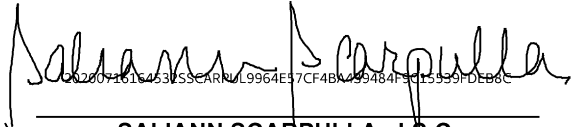
ORDERED that the third cause of action for attorneys’ fees and expenses in prosecuting this action and the issue of damages on the first cause of action are referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for plaintiff VNB New York, LLC shall, within 30 days from the date of this order, serve a copy of the order, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) on the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, this action shall be disposed of in accordance with the results of the Special Referee's report and this decision.

This constitutes the decision and order of this court.

7/16/2020  
DATE

  
SALIANN SCARPULLA, J.S.C.

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