

Bank of Am. v Aki Renovations Group Inc.
2020 NY Slip Op 32496(U)
June 8, 2020
Supreme Court, Queens County
Docket Number: 718977/17
Judge: Leonard Livote
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SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Acting Supreme Court Justice

IAS TERM, PART 33

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Bank of America,
Plaintiff,

Index No:718977/17

-- against --

Motion Date: 3/3/20

Aki Renovations Group Inc. and
Halil Todic,

Seq. No: 1

Defendants.

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FILED

**6/9/2020
11:12 AM**

**COUNTY CLERK
QUEENS COUNTY**

This is a motion by plaintiff for an Order and/or judgment:

- (1) pursuant to C.P.L.R. § 3212 authorizing and directing the clerk's entry of judgment for FILED: QUEENS COUNTY CLERK 02/04/2020 09:58 AM INDEX NO. Plaintiff Bank of America N.A., and against defendants Aki Renovations Group, Inc. and Halil Todic, jointly and severally, for the principal amount of \$3,491,495.08 due on the subject line of credit and guaranty, plus interest, late charges, attorneys' fees, costs and expenses;
- (2) against defendant Aki Renovations Group, Inc.: (a) restraining and enjoining Aki Renovations Group, Inc., and its agents from selling, moving, liquidating, disposing or permitting the removal of the Collateral; (b) compelling Aki Renovations Group, Inc., and its agents to segregate in an account controlled by BofA all proceeds of accounts receivable; © compelling Aki Renovations Group, Inc., and its agents to turn over to BofA, in their original form, all payments of accounts receivable now and hereafter received; (d) compelling Aki Renovations Group, Inc., and its agents to turn over to BofA a statement setting forth the names and addresses of Aki Renovations Group, Inc.'s account debtors and the amount owed by each of them; (e) compelling Aki Renovations Group, Inc. and its agents to assemble and make the Collateral available or deliver the Collateral to BofA for inspection, appraisal and sale or other disposition pursuant to the Uniform Commercial Code in order to satisfy the amounts due to BofA; (f) authorizing BofA to sell, liquidate, dispose of or retain the Collateral in a commercially reasonable manner, with the proceeds from same being applied first the costs of such sale or other disposition, including reasonable attorneys' fees, and then

in reduction of the amounts due BofA from Aki Renovations Group, Inc.; (g) appointing a receiver, or other agent of this Court, to manage the affairs of Aki Renovations Group, Inc. and, as an alternative to the relief requested in (e) and (f) above, to take possession of the Collateral on behalf of BofA and any other creditors of Aki Renovations Group, Inc., and to hold the Collateral pending further order of this Court; (h) ordering that the sheriff of any county of the State of New York wherein the Collateral is found, be directed to seize the Collateral at issue, and for the purpose, if the Collateral is not delivered to him or her, to break open, enter, and search for the Collateral in the place specified, and to hold the Collateral pursuant to C.P.L.R. § 7101, et al.; (i) issuing a Writ of Replevin directed to the Sheriff or other lawfully authorized officers of Queens County or where the Collateral may be found and directing that such Sheriff or other officers take immediate possession of the Collateral and deliver same to BofA, the court appointed receiver or other court appointed agent, as this Court may direct; (j) barring and foreclosing Aki Renovations Group, Inc. from all equity of redemption in and to the Collateral; and (k) directing that to the extent any of such Collateral has already been sold or otherwise liquidated, Aki Renovations Group, Inc. account for the proceeds derived from such sale or liquidation and remit such proceeds to BofA.

This action arises from a Line of Credit ("LOC") extended by plaintiff. The LOC is evidenced by a loan agreement, executed by BofA and Borrower on January 12, 2018 (the "LOC Agreement"). The Loan Agreement required monthly payments of interest only beginning on February 12, 2018, and then on the same day of each month thereafter, with full payment of all principal and interest on the expiration date of January 12, 2019 (the "Expiration Date").

To secure payment of the LOC, Guarantor executed and delivered to BofA his unconditional guaranty of payment, which was evidenced by a guaranty dated January 12, 2018 (the "Guaranty"). To further secure payment of the LOC, Borrower executed and delivered to BofA, a security agreement dated January 12, 2018 (the "Security Agreement"), which granted to BofA a security interest in and to all of Borrower's business assets (the "Collateral"). By way of extension letters dated January 7, 2019, February 14, 2019, and August 22, 2019, the Expiration Date was ultimately extended to September 15, 2019.

Borrower defaulted on the LOC by failing to make payment of

all principal and interest due and owing on the Expiration Date of September 15, 2019. On October 30, 2019, BofA declared Obligors in default under the LOC, and demanded immediate payment in full of all amounts due. Despite the demand, Obligors failed to make payment of the amounts due and owing to BofA under the LOC.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York*, *supra*).

Plaintiff has met its initial burden against the Borrower based upon Borrower's default for failure to make payments at maturity in accordance with the terms of the Loan Agreement. Plaintiff has met its initial burden against the Guarantor based upon Guarantor's failure to make payment, upon demand, of the amounts due under the LOC. There is no dispute that the Obligors are in default of their obligations under the LOC.

Defendants oppose the motion on the grounds that the plaintiff assured the defendants that, should they have issues with payment or the term of the line, that the Bank would renegotiate the terms. However, General Obligations Law § 15-301(1) provides that "[a] written agreement ... which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom

enforcement of the change is sought." Thus, the alleged oral modification does not establish an issue of fact.

Defendant also objects to the to the requested equitable relief because any such relief would constitute "post judgment collection tactics." However, the equitable relief is expressly provided for in the contract and permitted under the UCC.

Accordingly, the motion is granted.

Settle Order/Judgment.

Dated: June 8, 2020


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Leonard Livote, A.J.S.C.

FILED

6/9/2020

11:12 AM

**COUNTY CLERK
QUEENS COUNTY**