

<b>Melrose Credit Union v Stanitas</b>
2020 NY Slip Op 34612(U)
May 11, 2020
Supreme Court, Queens County
Docket Number: Index No. 711639 2017
Judge: Marguerite A. Grays
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Action for replevin<sup>1</sup> and a Fifth Cause of Action for attorneys' fees, costs and disbursements. In their answer to the complaint, Anastasia Stanitsas (Stanitsas) and Kalimera have alleged six (6) affirmative defenses. In their answer, Deidra Mellis (Mellis) and Kalimera have alleged twenty-four (24) affirmative defenses and seven (7) counterclaims.

Plaintiff has now moved for summary judgment on the complaint. With regard to the First Cause of Action for breach of contract, in order to make a prima facie showing of entitlement to judgment as a matter of law in an action to recover on a promissory note and on a guaranty thereof, such as in this case, plaintiff must establish "the existence of a promissory note executed by the defendant and the failure of the defendant to pay in accordance with the note's terms" (*Commonwealth Land Tit. Ins. Co. v Prado*, 176 AD3d 1164, 1165 [2019], quoting *Griffon V, LLC v. 11 E. 36th, LLC*, 90 AD3d 705, 706 [2011]; see *Empire Natl. Bank v Genard Group, Inc.*, 170 AD3d 959, 960 [2019]; *Ahmad v Luce*, 147 AD3d 888 [2017]). In general, "[t]o grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

Initially, in opposition to plaintiff's motion, although defendants have argued that the instant motion is premature since relevant disclosure, including depositions, have yet to take place, defendants have "failed to demonstrate that additional discovery may have led to relevant evidence or that the facts essential to oppose the motion were exclusively within the knowledge and control" of plaintiff (*Savage v Quinn*, 91 AD3d 748, 750 [2012]; CPLR §3212[f]; see *R.L. v New York City Dept. of Educ.*, 175 AD3d 477, 479 [2019]). Therefore, the court will continue on to consider the merits of plaintiff's motion for summary judgment.

The record in this matter includes copies of the pleadings, copies of the Balloon Note and the Security Agreement, both dated October 3, 2013, the UCC-1 Financing Statement, the notice of default dated August 1, 2017 that was sent to defendants, the affidavit of non-party Frank Horvat (Horvat), plaintiff's Chief Operating Officer and General Counsel, Stanitsas' affidavit, and Mellis' affidavit. In his affidavit, Horvat attested that he was an agent of non-party the National Credit Union Administration Board, which was appointed as conservator for plaintiff on February 10, 2017, which then succeeded all the rights, titles, power, and privileges of plaintiff regarding the Balloon Note at issue. Horvat further attested that he was familiar with plaintiff's practices and procedures, that he reviewed plaintiff's business records regarding defendants' loan, and that defendants defaulted in making the required payments on the Balloon Note.

Upon a careful review of the evidence in the record, in support of its motion, plaintiff has made a prima facie showing of entitlement to summary relief on its cause of action for breach of contract based upon the copies of the pleadings, the Balloon Note, the Security Agreement, the UCC-1 Financing Statement and the notice of default sent to defendants (see *Commonwealth Land*

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<sup>1</sup> In an Order dated June 29, 2018, this court dismissed the Fourth Cause of Action in the Complaint for replevin.

*Tit. Ins. Co. v Prado*, 176 AD3d at 1165). In opposition, defendants have failed to make a sufficient showing to raise a genuine issue of material fact.


The Court will now turn to plaintiff's contentions regarding the dismissal of defendants' affirmative defenses and counterclaims. In order to summarily dismiss and strike defendants' various affirmative defenses and counterclaims, plaintiff must demonstrate that they are either inapplicable to this breach of contract cause of action or without merit as a matter of law (*see Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 654 [2011]; *see generally Mazzei v Kyriacou*, 98 AD3d 1088, 1089 [2012]; *Greco v Christoffersen*, 70 AD3d 769, 771 [2010]).

After a careful reading of the allegations in their answers, the Court finds that that plaintiff is entitled to the dismissal of defendants' affirmative defenses and Mellis' and Kalimera's counterclaims since they, as a whole, are bare and conclusory and devoid of any factual support in the record, are without merit as a matter of law, and are thus, insufficient to defeat plaintiff's motion for summary judgment (CPLR §3013 and CPLR §3018 [b]; *see Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 654 [2011]; *see generally Mazzei v Kyriacou*, 98 AD3d 1088, 1089 [2012]; *Greco v Christoffersen*, 70 AD3d 769, 771 [2010]; *Bruno v Sant'elia*, 52 AD3d 556, 557 [2008]). No defendant has raised a triable issue of fact in opposition. Therefore, plaintiff is entitled to the dismissal of defendants' affirmative defense and Mellis' and Kalimera's counterclaims. As a consequence, Mellis' and Kalimera's request to sever their counterclaims from the main action, has been rendered moot.

In light of the above, plaintiff has made a prima facie showing of entitlement to summary judgment as a matter of law only on the issue of liability on its cause of action sounding in breach of contract. Although plaintiff has also alleged causes of action sounding in account stated and unjust enrichment in the complaint, and has sought attorneys' fees, costs and disbursements, it has failed to adequately address these causes of action and issues in its motion papers and is not entitled to the relief sought as to these claims.

Accordingly, plaintiff's motion is granted only to the limited extent that plaintiff is granted summary judgment on the issue of liability on its cause of action for breach of contract and the matter is set down for an inquest on the issue of damages as to this claim following a trial on the remaining causes of action. The motion is denied in all other respects.

Dated: 5/11/20

  
MARGUERITE A. GRAYS  
J.S.C.

FILED

5/14/2020  
10:06 AM

COUNTY CLERK  
QUEENS COUNTY