SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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TD BANK, N.A.,

Plaintiff,

DECISION AND ORDER

- v - Index No. 653203/2020

EBAD FABRICS INC., ABDULLAH EBAD MOT SEQ 001

Defendants.
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, *inter alia*, to recover for breach of a promissory note and personal guaranty and injunctive relief related to collateral secured by a commercial security agreement, the plaintiff, TD Bank, N.A., moves pursuant to CPLR 3212 for summary judgment on the complaint against the defendants Ebad Fabrics Inc. (Ebad Fabrics) and its principal Adbullah Ebad (Ebad). The defendants oppose the motion. The motion is granted in part.

II. BACKGROUND

On July 13, 2016 the plaintiff entered into a Small Business Administration loan agreement (the loan agreement) with Ebad Fabrics. Pursuant to the agreement, the plaintiff advanced a commercial line of credit to Ebad Fabrics in the sum of

$150,000. The line of credit was evidenced by a promissory note which contains an unequivocal and unconditional obligation for Ebad Fabrics to repay the loan plus variable interest, with the interest to be calculated based upon changes in the Wall Street Journal Prime Index. The note further provides that Ebad Fabrics was to make regular monthly payments of all accrued unpaid interest due under the note, with the full value of the loan and any outstanding unpaid interest due on July 13, 2023, and that upon default the plaintiff may accelerate the full value of the loan plus any unpaid interest.

To secure the payment of the promissory note, Ebad also personally signed a commercial guaranty, dated July 13, 2016, absolutely and unconditionally guaranteeing the full and punctual payment of the amounts due under the promissory note by Ebad Fabrics. The defendants further executed a commercial security agreement (the security agreement), dated July 13, 2016, granting the plaintiff a security interest in all of Ebad Fabric's assets. The security agreement was perfected by a UCC-1 Financing Statement bearing file number 201607255888626 and was filed against the defendant in the New York State Department of State on July 25, 2016.

In November 2018 the defendants stopped making timely regular payments under the promissory note and guaranty. On

February 27, 2019 the plaintiff sent a notice of default to the defendants demanding payment of the full amount remaining under the note and guaranty. The defendants made occasional payments thereafter, but then failed to make any payments after July 2019. On March 31, 2020, the plaintiff sent a second notice of default demanding payment of the full amount remaining under the note and access to the business premises for an inspection and evaluation of the plaintiff's collateral under the security agreement. The defendants again failed to cure their default.

On July 18, 2020 the plaintiff commenced the instant action seeking to recover under the promissory note, guaranty, and for injunctive relief pursuant to the security agreement. On October 12, 2020, the defendant interposed an answer offering general denials. On November 12, 2020, this motion ensued.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see

Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

B. Plaintiff's Motion for Summary Judgment

In support of its motion the plaintiff submits, *inter alia*, the promissory note, business loan agreement, guaranty, and security agreement entered into by the plaintiff and the defendants. The plaintiff further submits the affidavit of Thomas Beeker, a vice president for one of the plaintiff's branches with 14 years of experience with delinquent commercial loans, the defendants' payment history under the promissory note, and the demand letters from the plaintiff to the defendants. Beeker, in his affidavit, avers that based upon his personal knowledge arising from his review of the file, the defendants defaulted under the promissory note on November 19, 2018, made sporadic payments thereafter, and then defaulted again after July 2019 and made no further payments.

Beeker further avers that, upon this default, the plaintiff accelerated the amounts due pursuant to the note and that Ebad Fabrics owes principal in the sum of $129,488.65, accrued interest of $11,291.13, site visit fees of $150, plus late fees of $1,714.56, and per diem interest at the rate of $28.70 per day from October 16, 2020 through repayment of the loan.

1. Breach of Promissory Note

These submissions establish the plaintiff's entitlement to summary judgment on its first cause of action. "To establish *prima facie* entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms." See Lugli v Johnston, 78 AD3d 1133 (2nd Dept. 2010); see also Richmond Plaza Assocs. v Santucci, 192 AD2d 412 (1st Dept. 1993); Kornfeld v NRX Techs., Inc., 93 AD2d 772 (1st Dept. 1983). Here, the plaintiff's submissions demonstrate the existence of the promissory note, signed by Ebad on behalf of Ebad Fabrics, containing an unequivocal and unconditional obligation to repay, and the defendants' subsequent failure to make payments under the promissory note. The plaintiff's submissions further demonstrate that the defendants owe

principal, unpaid interest, and other related fees totaling $142,664.34.

2. Breach of Personal Guaranty

The plaintiff's submissions also establish its entitlement to summary judgment on its second cause of action as against Ebad for the amounts due under the personal guaranty. Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd., 97 AD3d 444, 446-447 (1st Dept. 2012), quoting National Westminster Bank USA v Sardi's Inc., 174 AD2d 470, 471 (1st Dept. 1991). Here, the terms of the subject guaranty agreement are clear, unambiguous, absolute and unconditional, obligating Ebad for Ebad Fabric's default.

3. Breach of Security Agreement

The plaintiff's submissions also establish, in part, its right to enforce the terms of the commercial security agreement. A creditor obtains an enforceable security interest in a debtor's collateral where (a) the debtor has signed a security agreement which contains a description of the collateral, (b) value is given, and (c) the debtor retains rights in the collateral. See NYUCC § 9-203. The security agreement satisfies

the first criterion of an enforceable security interest as it provides collateral in all of Ebad Fabric's assets. See NYUCC § 9-504. The plaintiff's advancing of the funds under the terms of the loan documents constitutes "value," thereby satisfying the second criterion for an enforceable security interest. See NYUCC § 1-201; Fundex Capital Corp. v Reichard, 172 AD2d 420 (1st Dept. 1991). Thus, when a debtor whose obligation is so secured defaults, the secured party has the right to "reduce [its] claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure." NYUCC § 9-501(1). In enforcing such rights "a secured party: (1) may take possession of the collateral; and (2) without removal, render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610." NYUCC § 9-609. Furthermore, after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties." Id.

Thereafter, the secured party is entitled to dispose of the collateral in satisfaction of the amount due to the secured party. See NYUCC § 9-610. Thus, the plaintiff is entitled to an order foreclosing the defendants' rights in the collateral, entitling the plaintiff to possession of the collateral, and providing for the disposition of Ebad Fabric's assets pursuant

to NYUCC § 9-610. However, to the extent that the plaintiff appears to seek further injunctive relief including, a restraining order against the removal of collateral, turnover of collateral, appointment of a receiver, seizure of collateral, etc., the plaintiff states only that the security agreement permits it to pursue such various remedies but does not provide a basis for its entitlement to each of them in any organized manner, it merely recites a list without further detail. Thus, the third cause of action is granted only to the extent that the plaintiff may take possession of the collateral and dispose of the collateral in satisfaction of the amount due pursuant to NYUCC § 9-609. The portion of the motion denied is denied without prejudice.

C. Defendants' Opposition

The defendants' opposition is untimely. Pursuant to CPLR 2214(b), if a motion is served 16 or more days before its return date, opposition to it must be served no less than seven days before the return date. The plaintiff's motion was served on the defendants on November 12, 2020. The motion, returnable on December 11, 2020, contained a notice pursuant to CPLR 2214(b) informing the defendants that any answering affidavits were to be served at least seven days before the return date which was December 4, 2020. However, the defendants failed to submit their response until the evening of December 10, 2020 and did not

provide any excuse for the delay. Thus, the court rejects the late opposition papers. See Mosheyva v Distefano, 288 AD2d 448 (2nd Dept. 2001); Senise v Mackasek, 174 AD2d 522 (1st Dept. 1991); Romeo v Ben-Soph Food Corp., 146 AD2d 688 (2nd Dept. 1989); see also Corchado v City of New York, 64 AD3d 429 (1st Dept. 2009).

Even if the filing is considered as timely, it fails to raise a triable issue of fact. The gravamen of the defendants' opposition is that the instant motion is premature since discovery is necessary. In that regard, the defendants submit an affidavit from Ebad in which he avers that the loan officer who underwrote the Loan Agreement, Ralph Pastel, knew that Ebad Fabrics was undercapitalized and convinced Ebad to enter into the Loan Agreement and guaranty by telling him "not to worry" about his ability to repay the loan. The affidavit further avers that Pastel had previously waived late fees and accepted late payments on the note. Therefore, according to Ebad, discovery regarding his discussion with and the alleged representations made by Pastel in the loan application process is necessary.

Under CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment exist but cannot be stated, summary judgment may be denied. See CPLR 3212(f); Glob. Minerals & Metals Corp. v Holme, 35 AD3d 93 (1st Dept. 2006).

This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. See Overseas Reliance Tours & Travel Serv. Inc. v Sarne Co. Inc., 17 AD2d 578 (1st Dept.1963); see also Baron v Inc. Vil. Of Freeport, 143 AD2d 792 (2nd Dept. 1988). However, to avail oneself of CPLR 3212(f) to defeat a motion for summary judgment, a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party (see Berkeley Fed. Bank & Trust v 229 E. 53rd St. Assoc., 242 AD2d 489 [1st Dept. 1997]), that the claims in opposition are supported by something other than mere hope or conjecture (see Neryaev v Solon, 6 AD3d 510 [2nd Dept. 2004]), and that the party has at least made some attempt to discover facts at variance with the moving party's proof (see Cruz v Otis El. Co., 238 AD2d 540 [2nd Dept. 1997]). See also Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP, 44 AD3d 557 (1st Dept. 2007).

Here, defendants do not satisfy their burden under CPLR 3212(f). With regard to Pastel's representations and the loan application he prepared, Ebad himself participated in the loan application process such that the plaintiff is not in exclusive possession of the facts he asserts. Moreover, Ebad makes only conclusory allegations that Pastel somehow convinced or persuaded him to enter into the agreement. Ebad's affidavit, and the affidavit submitted by his attorney in opposition to the

motion, offer nothing more than "mere hope or speculation" that discovery would reveal evidence sufficient to defeat the motion for summary judgment. The defendants' submissions also fail to demonstrate that they made any attempt to discover any facts before claiming the plaintiff's motion was premature. Finally, the defendants do not address the issue that, under the well-established rule regarding parol evidence, their claim that an oral representation made to Ebad outside of the four corners of the parties' written agreement would be inadmissible. See Schron v Troutman Sanders LLP, 20 NY3d 430 (2013).

There is no merit to the defendants' additional argument that the Beeker affidavit is insufficient to establish the plaintiff's entitlement to summary judgment, as it was Pastel, not Beeker, who had personal knowledge of the application for the loan agreement. Beeker's affidavit was sufficient for the purpose it was submitted. It was based on his personal knowledge of a business' practices and procedures with respect to the creation, maintenance, and storage of business records, and provided the foundation for introducing those documents. See CPLR 4518(a); Marine Midland Bank, N.A. v Embassy E., Inc., 160 AD2d 420 (1st Dept. 1990).

D. Attorneys' Fees

Attorneys' fees that are merely incidents of litigation are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Here, there is such a provision. The Loan Agreement and guaranty expressly provide that the defendants shall pay the plaintiff's reasonable attorneys' fees and collection costs in enforcing its rights against the defendants under those agreements.

The factors used to determine the reasonableness of attorney's fees "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained (citations omitted)." Matter of Barich, 91 AD3d 769, 770 (2nd Dept 2012); see Matter of Freeman, 34 NY2d 1, 9 (1974). An award of reasonable counsel fees is within the sound discretion of the court. See Diakrousis v Maganga, 61 AD3d 469 (1st Dept. 2009). The detailed time and billing records supplied and affirmed by the plaintiff's attorneys show that counsel expended 11.6 hours of legal work in this action and charged $2,360.00 in fees, and that incurred $540.00 in costs and disbursements. Applying the above factors, the court finds these amounts to be reasonable,

and that the plaintiff is entitled to an additional judgment in the sum of $2,900.00.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is,

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted as to the first and second causes of action alleging breach of promissory note and breach of personal guaranty, and is granted in part as to the third cause of action to the extent described below and is otherwise denied without prejudice; and it is further,

ORDERED that the Clerk shall enter a money judgment in favor of the plaintiff, TD Bank, N.A., and against the defendants, Ebad Fabrics Inc., and Abdullah Ebad, jointly and severally, on the first and second causes of action in the sum of $142,664.34, plus per diem interest at the rate of $28.70 per day from October 16, 2020 through repayment of the loan; and it is further,

ADJUDGED that the defendants' right or title to, or interest in, the collateral that is the subject of the security agreement dated July 13, 2016, is permanently foreclosed, and the plaintiff is entitled to possession of that collateral; and it is further,

ORDERED and ADJUDGED that judgment is hereby entered in favor of the plaintiff compelling the defendant, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of the defendant to assemble and make the collateral available or deliver the collateral to the plaintiff for inspection, appraisal and sale or other disposition pursuant to the Uniform Commercial Code in order to satisfy the amounts due to the plaintiff; and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiff and against the defendants in the sum of $2,900.00 as reimbursement for contractual attorney's fees and disbursements, and it is further

ORDERED that the plaintiff shall serve a copy of this order and judgment upon the defendants at their last known addresses by regular and certified mail, return receipt requested, within 20 days of this order.

This constitutes the Decision, Order, and Judgment of the court.

Dated: 2/22/2021

ENTER:

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON