

HSBC Bank USA, N.A. v BMG Import Exports, Inc.
2021 NY Slip Op 32354(U)
November 19, 2021
Supreme Court, New York County
Docket Number: Index No. 150353/2021
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE BLUTH PART 14

Justice

-----X

HSBC BANK USA, NATIONAL ASSOCIATION,

Plaintiff,

- v -

BMG IMPORT EXPORTS, INC., GAD BOUSKILA, ANNA BOUSKILA

Defendants.

-----X

INDEX NO. 150353/2021

MOTION DATE _____

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 29, 31, 33, 35, 36, 37, 38, 39

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 34, 40, 41, 42, 43, 44, 45, 46, 47, 48

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

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) by defendants to dismiss plaintiff’s second cause of action for unjust enrichment is denied as moot. The motion (MS002) by plaintiff for summary judgment is granted.

Background

Plaintiff contends that defendant BMG Import Exports, Inc. (“BMG”) executed a note in the principal amount of \$100,000 in July 2007. In connection with the note, BMG entered into a loan agreement and the individual defendants each signed a guaranty. Plaintiff points out that the guarantees signed by each individual defendant prohibited them from asserting counterclaims.

Plaintiff alleges that BMG defaulted under the terms of the loan when it failed to make the payment on March 2, 2020. Plaintiff then purportedly sent a demand letter to defendants on

September 25, 2020 and defendants failed to make the required payments. Plaintiff contends that defendants owe \$92,000 in principal plus interest.

Defendants (in support of their motion to dismiss and in opposition to plaintiff's motion) claim that the record is incomplete with respect to how much plaintiff is actually owed. They claim that plaintiff failed to adequately demonstrate a breach of the subject agreement and that plaintiff's requested damages is without merit. Defendants also claim that discovery is necessary. Defendant Bouskila (the COO of BMG) submits an affidavit in which she claims that plaintiff's records show that BMG paid \$250,763.80 but that BMG's records show it paid \$392,495.66.

In reply, plaintiff argues that the loan report produced by defendants in opposition is inadmissible because they failed to lay the proper foundation to introduce this purported evidence. Plaintiff also argues that this document makes no sense—it allegedly includes overpayment and, according to plaintiff, it seems to include payments made by defendants to plaintiff for another obligation (a credit card).

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Plaintiff met its prima facie burden on its motion through the affidavit of Mr. Gates (a VP for plaintiff) and the attached exhibits which establish that BMG defaulted under the terms of the loan agreement. Exhibit D to this affidavit clearly shows that defendants owe \$92,000 plus interest (NYSCEF Doc. No. 21).

Defendants failed to raise a material issue of fact in opposition. The affidavit of Ms. Bouskila claims that she has included a "Peachtree Report" reflecting payments to HSBC related to a line of credit, but she does not specifically address whether this exhibit (NYSCEF Doc. No. 41) is related to the note at issue here. As plaintiff points out, defendants have other business dealings with plaintiff (including a credit card). Moreover, this exhibit (assuming it is admissible) does not contain a column stating how much principal is owed. It only contains columns for payment and draw amounts. And the Court agrees with plaintiff that this exhibit is not admissible as Ms. Bouskila's affidavit does not meet the requirements of CPLR 4518(a) (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 205-06, 97 NYS3d 286 [2d Dept 2019]).

This defendant does not provide enough detail about how this record was generated or that it was made in the regular course of BMG's business.

And even if the Court could consider it, the Court is unsure exactly what this table is supposed to show. It definitely does not compel the Court to deny the motion particularly because defendants did not submit bank statements or other evidence supporting their claim that plaintiff's records are inaccurate. To raise an issue of fact, defendants needed to substantiate their assertion that they paid something different from what plaintiff claims on the specific debt.

Also, the Court observes that defendants do not explicitly deny that they defaulted under the terms of the loan by failing to make payments starting in March 2020. Instead, they suggest that there is a discrepancy between what plaintiff alleges is owed and what defendants claim is owed. In other words, there is no dispute that defendants owe something; therefore, plaintiff is entitled to summary judgment on liability.

And, as stated above, defendants do not adequately challenge the amount claimed by plaintiff so the Court awards plaintiff the amount it seeks.

Motion Sequence 001, which seeks to dismiss the unjust enrichment claim by plaintiff, is moot in light of this decision. Plaintiff admits it pursued this claim in the alternative.

Accordingly, it is hereby

ORDERED that the motion (MS002) by plaintiff for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$92,000 plus interest at the contractual rate from July 8, 2021 plus late fees in the amount of \$397.70 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the request for legal fees is denied at this time as plaintiff did not attach any invoices, and plaintiff may make a separate motion for reasonable legal fees on or before December 9, 2021; and it is further

ORDERED that the motion (MS001) by defendants to dismiss the unjust enrichment claim is moot and therefore denied.

11/19/2021
DATE


ARLENE BLUTH, J.S.C.

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