

**Santander Bank, N.A. v Lou G Siegel Inc.**

2022 NY Slip Op 33626(U)

October 21, 2022

Supreme Court, Kings County

Docket Number: Index No. 520356/2019

Judge: Delores J. Thomas

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This opinion is uncorrected and not selected for official publication.

At the Matrimonial Term, Part 5T, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, 360 Adams Street, Brooklyn, New York, on the 21st day of Oct., 2022.

PRESENT: Hon. DELORES J. THOMAS, J.S.C.

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Santander Bank, N.A.,

Index No.: 520356/2019

Plaintiff,

- against -

**DECISION/ORDER**

Mot. Seq. #1-2

Lou G Siegel Inc. and Henrick Weiss,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of Plaintiff's/Defendant's order to show cause/notice of motion are as follows:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Cross Motion and Affidavits (Affirmations) Annexed <u>NYSCEF Docs.</u>	<u>25-49</u>
Defendant's Cross Motion and Affidavits (Affirmations) <u>NYSCEF Docs.</u>	<u>51-57</u>
Plaintiff's Affidavits (Affirmations) <u>NYSCEF Docs.</u>	<u>62-69;73-76</u>

Plaintiff moves pursuant to Civil Practice Law Rule §3212 for (1) summary judgment in favor of Plaintiff and against Defendants, Lou G Siegel Inc. and Henrick Weiss (jointly, the Defendants); (2) summarily dismissing Defendants' Answer and six (6) affirmative defenses filed with the Court on November 20, 2019 and the four (4) counterclaims contained therein all with prejudice; and (3) granting such other and further relief as this Court deems just, proper, and equitable.

Defendants cross move (motion sequence #2) pursuant to Civil Practice Law Rule §3025 to amend their answer and for such other relief as this court may deem proper.

## PROCEDURAL HISTORY

This matter was administratively transferred to Part 11 from the Honorable Devin Cohen, Part 13 and the parties appeared before this Court on September 14, 2022. The court was advised that Justice Cohen had denied Defendant's cross motion to amend. The court heard oral argument on Plaintiff's motion for summary judgment and granted same in a written order dated September 14, 2022.

Upon finding no written order from Justice Cohen, and after inquiring of him regarding this matter, the court was advised that Justice Cohen had not issued a decision on the cross motion (sequence #2) and that the matter had erroneously been marked denied. Thereafter the court advised Plaintiff's and Defendant's counsel as to these facts and that the court would recall and vacate the order dated September 14, 2022 and issue a new decision and order addressing both motion sequences numbers 1 and 2. The court will address the motions in reverse order.

Now, upon consideration of the arguments advanced by counsels at oral argument and upon the arguments set forth in their moving and supporting papers, the court finds as follows:

**Motion to Amend (seq. #2)**

Permission to amend a pleading should be "freely given" (CPLR §3025[b]; see *Krakovsi v Stavros Associates, LLC*, 173 AD3d 1146, 1147 [2d Dept 2019]; see also *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]), where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment would prejudice or surprise the opposing party. No evidentiary showing of merit is required under CPLR 32025(b) and a court shall not examine the legal sufficiency or merits of a pleading unless [the] insufficiency or lack of merit is clear and free from doubt (*United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755 [2d Dept 2014]).

In the instant matter, the motion to amend was made in response to the motion for summary judgment and does not respond thereto other than seeking to at the ninth hour raise

claims that were known to Defendants when they initially answered the complaint, as such the claim is late and Defendants' allegation as to why it now seeks to assert the claims is not persuasive (*see Prince v O'Brien*, 256 AD2d 208,,211 [1<sup>st</sup> Dept 1998]). To allow such amendment would be prejudicial to Plaintiff. Furthermore, the merits of the proposed pleadings are barred by the parole evidence rule and other well settled case law that "a party is presumed to have read and understood the document which he signed" (*Marine Midland Bank, N.A. v Idar Gem Distributors, Inc.*, 133 AD2d 525, 526 [4<sup>th</sup> Dept 1987]).

### **Motion for Summary Judgment (seq. #1)**

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). "But where there is no genuine issue to be resolved at trial, the case should be summarily decided,..." (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR §3212[b]), and he must do so by tender of evidentiary proof in admissible form. When a party has made a prima facie showing to entitle it to summary judgment, it is incumbent upon the opposing party to show by evidentiary facts that the defense is real and can be established on a trial (*see Indig v Finkelstein*, 23 NY2d 728, 728 [1968]). Conclusory allegations are insufficient to defeat summary judgment (*Jones v Gameray*, 153 AD2d 550, 550 [2d Dept 1989]; *see also McGahee v Kennedy*, 48 NY2d 832, 834 [1979]).

In the instant matter, Plaintiff has established by admissible evidence its right to summary judgment and as indicated, Defendants have not rebutted that showing. They have failed to submit papers in opposition to the motion and even if the court deems Defendants' cross motion to amend their answer to be a response to Plaintiff's motion for summary judgment, Defendants have still failed to show by admissible evidence that there is a triable issue of fact.

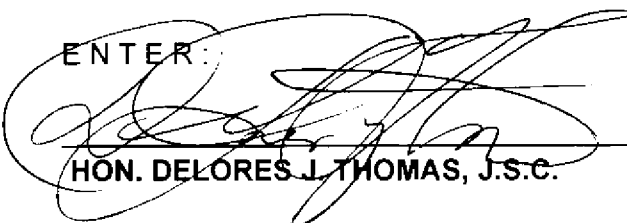
Accordingly, it is hereby ORDERED that the decision and order of the court dated September 14, 2022 is recalled and vacated for reasons set forth in the decision and order herein; and it is

ORDERED that Defendants' motion to amend their answer is denied; and it is further

ORDERED that Plaintiff's motion for summary judgment and to dismiss Defendants' affirmative defenses and counterclaims is granted in its entirety.

Any issues raised and not addressed herein are denied.

This constitutes the decision and order of the court.

ENTER:  
  
HON. DELORES J. THOMAS, J.S.C.