

Spring Bank v Menexas

2023 NY Slip Op 32564(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 655969/2020

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

-----X INDEX NO. 655969/2020

SPRING BANK, Plaintiff, MOTION SEQ. NO. 002

- v -

STEVEN MENEXAS, GEORGE MENEXAS, ESTATE OF ANTHONY KAMMAS, and SKYLINE RISK MANAGEMENT, INC.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for SUMMARY JUDGMENT

By decision and order resolving Mot. Seq. 001, this court denied plaintiff’s motion for a default judgment against defendant Steven Menexas and Skyline Risk Management, Inc., and directed said defendants to interpose an answer in this action (NYSCEF Doc. No. 43, *decision and order*). Plaintiff commenced this action to collect on promissory notes and personal guaranties in connection with loans made to defendants. Plaintiff alleges that it loaned the sum amount of \$250,000.00 (“First Loan”) to Skyline Risk Management Inc. (“Skyline”) on June 3, 2016, which was to mature on June 3, 2017; that Skyline executed a promissory note (the “Note”) in the amount of \$250,000.00 in plaintiff’s favor; that Skyline executed and delivered to plaintiff a Security Agreement, whereby Skyline granted plaintiff a lien and security interest in all of Skyline’s personal property, assets and other collateral (“First Security Agreement”); and that defendants GEORGE MENEXAS (“G. Menexas”), STEVEN MENEXAS (“S. Menexas”) and ANTHONY KAMMAS (“Kammas¹”), as “guarantors” (who are also officers of Skyline), each executed a written personal guaranty (collectively, the “2016 Guaranties”), whereby each guarantor unconditionally, jointly and severally guaranteed to plaintiff, the repayment of all amounts due and owing under the Note. Plaintiff asserts that it duly secured its interest in Skyline’s collateral by filing a UCC-1 financing statement with the State of New York.

The complaint sets forth that on March 10, 2017, plaintiff loaned Skyline an additional \$100,000.00 (“Second Loan”) and Skyline executed an amended and restated promissory note (“Amended and Restated Note”) in the amount of \$350,000.00 in favor of plaintiff, which included a provision that afforded Skyline the option to extend the maturity date of the Note for two additional one-year periods (NYSCEF Doc. No. 1, *summons and complaint*, ¶10). The maturity date of the Amended and Restated Note was March 10, 2018. It is alleged that on March 10, 2017, to provide additional security for the repayment of the Amended and Restated Note, the guarantors each executed a written unconditional guaranty (“2017 Guarantees”), whereby each guarantor unconditionally, jointly and severally, guaranteed to plaintiff, the repayment of all amounts due and

¹ Anthony Kammas died on or about June 29, 2020.

owing under the Amended and Restated Note. To further secure Skyline's obligations under the Amended and Restated Note, plaintiff claims that on March 10, 2017, Skyline executed and delivered to plaintiff an Amended and Restated Security Agreement ("Amended and Restated Security Agreement"), whereby Skyline granted plaintiff a lien and security interest in all of Skyline's personal property, assets and other collateral to secure the amount of the Amended and Restated Note. Plaintiff alleges that by a notice dated April 30, 2018, Skyline and the guarantors elected to extend the maturity date of the Amended and Restated Note to March 10, 2019 ("First Extension Notice"), and by another notice dated April 25, 2019, defendants again elected to extend the maturity date of the Amended and Restated note from March 10, 2019, to March 10, 2020 ("Second Extension Notice"). Plaintiff asserts that on May 29, 2020, Skyline executed a Second Amended and Restated promissory note ("Second Amended and Restated Note") in the amount of \$350,000.00 in favor of Spring Bank, which, in relevant part, further extended the maturity date of the Amended and Restated Note to September 10, 2020. Plaintiff claims that defendants defaulted by failing to repay the principal and interest due and owing as of the September 10, 2020, maturity date of the Second Amended and Restated Note, that they were notified of same, and that after receipt of the Notice of Default, defendants have failed to pay to plaintiff any of the amounts owed (*id.*, at ¶14-16).

Therefore, plaintiff seeks a money judgment against the guarantors, jointly and severally, in the sum of \$361,291.85, for breaching the 2016 and 2017 guarantees, together with any additional interest accrued from November 3, 2020, and all of plaintiff's costs, disbursements, expenses and attorneys' fees incurred in enforcing the Loan ("first cause of action"). In the second cause of action, plaintiff seeks an order directing the issuance of a writ of replevin for the collateral listed in Exhibit A to the Security Agreement. All of the above-referenced documents are collectively referred to here as the "Loan Documents."

Two separate answers were filed. Defendants S. Menexas, G. Menexas, and Skyline filed a joint answer wherein they denied plaintiff's allegations and asserted numerous affirmative defenses. They also assert two cross-claims against Kammas for indemnification (first cross-claim) and contribution (second cross-claim). These defendants further argue that they reserve the right to assert additional affirmative defenses, set-offs, offsets, and additional claims against plaintiff and Kammas. (NYSCEF Doc. No. 41, *answer with cross-claims to plaintiff's complaint*). Kammas also asserts in its answer two cross-claims against the other defendants for indemnification (first cross-claim) and contribution (second cross-claim) if it is found liable for any of the claims plaintiff alleges. It also sets forth that it reserves the right to amend its answer and assert such additional defenses, counterclaims and crossclaims. (NYSCEF Doc. No. 28, *Estate of A. Kammas' answer with cross-claims*).

Plaintiff now moves the court, pursuant to CPLR 3212, for an order granting it summary judgment against all defendants in the amount of \$418,440.70, plus per diem interest from December 27, 2021, in the amount of \$171.76, together with costs and attorneys' fees and, an order of replevin against Skyline allowing for the recovery of the collateral. (NYSCEF Doc. No. 62, *memo of law*, pg. 9). Plaintiff recites the facts above and further argues that defendants are jointly and severally liable for the amount owed pursuant to the Loan Documents. Plaintiff contends that it has performed its obligations under the Loan Documents as it has served the required notices. (*id.*, at pg. 5).

In opposition, defendant Kammas contends that by failing to attach a copy of the 2016 Guaranties; the 2017 Note; the 2020 extension request; and the personal guaranties of the 2020 Note to its motion or complaint, plaintiff cannot establish Skyline's alleged breach of the 2017 Note and,

hence, plaintiff can neither establish defendant Kammas' personal liability pursuant to the 2017 Guaranty. Defendant Kammas also maintains that neither plaintiff's complaint nor its motion alleges that the individual defendants executed personal guaranties guaranteeing Skyline's full and timely payment to plaintiff pursuant to the 2020 Note (NYSCEF Doc. No. 63, *attorney affirmation in opposition*, pgs. 3, 6). It further argues that plaintiff's motion is procedurally defective because it lacks a Statement of Material Facts as required under 22 NYCRR 202.8(g) and therefore, must be denied. Defendant Kammas asserts that it did not receive consideration for executing the 2017 Guaranty, and even if it did receive the \$10.00 consideration for executing same, Skyline gave the consideration, not plaintiff, and therefore the consideration is invalid. (*id.*, at pg. 8). Defendant Kammas further contends that plaintiff cannot recover attorneys' fees as it has failed to plead a cause of action for attorneys' fees in its complaint, and that plaintiff should not be allowed to remedy the deficiencies in its moving papers by supplementing or providing additional exhibits for the first time in the reply motion. In furtherance of defendant Kammas' arguments, it proffers the affidavit of Maria Papaderos-Kammas, the administrator of the Kammas, in which she avers that plaintiff's summary judgment motion is premature because the outstanding balance claimed as due and owing by defendants to plaintiff is inaccurate. (NYSCEF Doc. No. 70, *affirmation of Maria Papaderos-Kammas in opposition*).

Skyline, S. Menexas' and G. Menexas' also oppose the motion, arguing that neither G. Menexas nor S. Menexas received \$10.00 or any other consideration in exchange for both the 2016 and 2017 guarantees, and as a sophisticated party, plaintiff knew or should have known at the time of drafting that such additional consideration was required. They also maintain that the record is devoid of any proof that the April 25, 2019, request for the extension was signed. They further contend that both G. Menexas and S. Menexas did not sign any personal guaranty in connection with the 2020 Note, and Skyline likewise did not sign any security agreement in connection with the 2020 Note. (NYSCEF Doc. No. 93, *Skyline, S. Menexas' and G. Menexas' opposition*, pg. 5). They also argue that summary judgment should be denied on plaintiff's cause of action for replevin because the security agreements that plaintiff relies on are invalid for lack of consideration; issues of fact remain as to the amount owed under the 2020 Note as plaintiff disregards the \$126,254.57 payment made towards the amount owed; and also, the equitable remedy of replevin is unwarranted where a plaintiff has a remedy at law under its contracts with defendants. (*id.*, at pg. 11).

In reply, plaintiff attaches a copy of the 2016 Guaranties; the 2017 Note; the 2020 extension request; and personal guaranties of the 2020 Note to its papers and argues that it has established that Skyline entered into the Note which was fully and unconditionally guaranteed by the guarantors and same have breached the agreement by failing to pay the amounts owed under the Loan Documents on or before the maturity date of September 10, 2020. Plaintiff contends that the argument that the 2016 and 2017 guaranties are invalid because they lacked consideration are disproved by the guaranties themselves because Skyline paid the consideration to the guarantors and same was explicitly acknowledged. (NYSCEF Doc. No. 97, *reply*, ¶14-16). Plaintiff further asserts that all of the initial Loan Documents were executed simultaneously — on June 3, 2016 — and thus, were part of "single transaction" under New York law and must all be read together and likewise, the Amended and Restated Note and the 2017 Guaranties were both executed simultaneously on March 10, 2017, and guarantors waived their right to raise any defenses to borrower's obligations under the Loan Agreement, and expressly acknowledged their liability under the guaranty. (*id.*, at ¶17). On the claim that Skyline has paid \$126,254.57 towards the loan balance, plaintiff argues that defendants have failed to produce or identify any evidence that they have done so, or that the amount claimed owed by Spring Bank is somehow incorrect and therefore, contrary to defendants' contention,

plaintiff maintains discovery is not necessary. Lastly, plaintiff argues that should the court conclude that there is a genuine issue of material fact as to the amount that is owed to Spring Bank, at minimum, this court can and should grant summary judgment in favor of Spring Bank with respect to liability and hold a hearing to determine damages.

It is well-settled that the proponent of a summary judgment motion 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562).

In order to establish a *prima facie* case on a breach of contract claim, plaintiff must show proof of a contract, plaintiff’s performance under the contract, defendant’s breach thereof, and damages as a result (see *Belle Light. LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019].) Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (see *Bartfield v RMTS Assoc.*, 283 AD2d 240, 241 [1st Dept 2001].)

“To state a cause of action for replevin, a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff” (*Shusterman v. Shusterman*, 2022 NY Slip Op 34219[U] **5 [Sup Ct, NY County 2022], citing *Hofferman v Simmons*, 290 NY 449, 455-456, [1943]).

With respect to the breach of contract branch of the motion (first cause of action), this court finds that plaintiff has not established its *prima facie* entitlement to summary judgment. Plaintiff failed to attach a copy of the 2016 guarantees and a copy of the 2017 Note to its moving papers but were attached in reply to Kammas’ opposition. It has been ably held that “a party moving for summary judgment may not submit new evidence in reply papers to cure a deficiency in the initial moving papers” and not all the defendants had the opportunity to respond to the new evidence (*Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2022]; *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006].) Plaintiff does not proffer any reason in its reply as to why the documents it failed to attach to its moving papers should be considered. Therefore, plaintiff’s motion for summary judgment on its claims for breach of contract and breach of guaranty is denied, with leave to renew upon proper papers.

Concerning plaintiff’s second cause of action for a writ of replevin, this court finds that plaintiff has not established its *prima facie* entitlement to summary judgment. “The action of replevin is essentially possessory in its nature” (*Americredit Fin. Servs., Inc. v Decoteau*, 103 AD3d 761, 761 [2nd Dept 2013] citing *Roach v Curtis*, 191 NY 387, 390 [1908]), and the movant must establish “the probability of success on the merits” (*Itria Ventures LLC v Beaver St. Pizza LLC*, 194 AD3d 447, 447 [1st Dept 2021].) Plaintiff seeks an order of replevin pursuant to NY Uniform Commercial Code. The requested judicial relief may be granted in an order of seizure pursuant to CPLR 7102, only after a movant’s fulfilment of the enumerated statutory requirements (see *Taxi Medallion Loan Trust III v D. & G. Taxi Inc.*, 2020 NY Slip Op 30324[U]**11-12 [Sup Ct, NY County 2018]). Here, plaintiff has failed to submit an affidavit containing all of the statutory

elements required by CPLR 7102(c) in support of the relief sought. Aside from a brief reference to UCC 9-609 which states that “after a default the secured party may take possession of the collateral,” plaintiff has not identified any provision or condition in the security agreement that grants it a superior right or title to the collateral vis-a-vis Skyline (see *Americredit Fin. Servs., Inc. v Decoteau*, 103 AD3d at 762). Furthermore, plaintiff’s papers do not indicate if, how and when the collateral will be disposed of, after it is seized by a sheriff or marshal, including whether plaintiff intends to foreclose on the collateral and apply the proceeds to reduce the debt, or to retain the collateral in satisfaction of the debt (see *Taxi Medallion Loan Trust III v D. & G. Taxi Inc.*, 2020 NY Slip Op 30324[U] at **11-12 [2018]). Therefore, the cause of action for entry of an order of replevin cannot be granted as plaintiff has not established its *prima facie* entitlement to summary judgment on the claim.

In view of the foregoing, that portion of plaintiff’s motion seeking court costs, attorney’s fees, and disbursement is denied at this stage of the action, as plaintiff has not prevailed with respect to the central reliefs sought, that is, damages against defendants and a writ of replevin (see *Nestor v McDowell*, 81 NY2d 410, 416 [1993]). These shall be saved for trial. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff’s motion, pursuant to CPLR 3212, for summary judgment against defendant for breach of contract and guaranty (first cause of action) is denied, with leave to renew upon proper papers; and it is further

ORDERED that that branch of plaintiff’s motion seeking judgment on a writ of replevin (second cause of action) is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

This constitutes the decision and order of the Court.

July 14, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: