

Santander Bank, N.A. v Nolita Drug Corp.

2023 NY Slip Op 33401(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 152821/2020

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

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INDEX NO. 152821/2020

SANTANDER BANK, N.A.,

Plaintiff,

- v -

MOTION SEQ. NO. 001NOLITA DRUG CORPORATION
and NICKY LEGAKIS,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this commercial contract case against defendants NOLITA DRUG CORPORATION (“Borrower” or “Nolita”) and NICKY LEGAKIS (“Legakis”) seeking damages based on breach of contract, unjust enrichment, and account stated, stemming from the alleged non-payment under two business loan agreements, two promissory notes, and two guaranties (NYSCEF Doc. No. 1, *summons and complaint*). Legakis interposed an answer in this action, asserting several affirmative defenses. He also asserts a counterclaim compelling plaintiff to account for the funds in dispute, including the principal and interest allegedly owed by defendants under the loan documents (NYSCEF Doc. No. 14, *answer*). Borrower has not appeared in this action.

Plaintiff now moves, pursuant to CPLR 3215, for an order entering judgment against defendant NOLITA DRUG CORPORATION (“Borrower” or “Nolita”) on default based on its failure to answer or otherwise appear in this action. It also seeks an order, pursuant to CPLR 3212 and 3211(a), (b), granting summary judgment against defendant NICKY LEGAKIS and dismissing his counterclaim and affirmative defenses.

In support of its application, plaintiff submits, *inter alia*, the affidavit of Priscilla Soares (“Soares”), senior analyst for plaintiff, who affirms that plaintiff is entitled to the total sum of \$134,692.94 from defendants pursuant to two business loan agreements, two promissory notes and two guaranty agreements, which she attaches as exhibits to her affidavit. Additionally, Soares maintains that plaintiff is entitled to reasonable attorney’s fees, other charges, and the costs and expenses of this action. Specifically, she claims that, on or about October 12, 2018, Borrower and plaintiff entered into a business loan agreement in connection with a commercial loan to be made from plaintiff to defendants (“first BLA”) (NYSCEF Doc. No. 22, *first business loan agreement*). On or about October 12, 2018, Borrower executed a promissory note in favor of the plaintiff in the principal sum of \$110,000.00 (“first promissory note”) whereby plaintiff agreed to make a term loan to Borrower in said amount. Additionally, Borrower entered into a business loan agreement in connection with a certain commercial revolving line of credit facility (NYSCEF Doc. No. 24, *second business loan agreement*). In connection with the second

business loan agreement, Borrower executed a second promissory note in favor of plaintiff in the principal amount of \$40,000.00 whereby plaintiff agreed to extend the Borrower a certain commercial revolving line of credit facility up to said amount (NYSCEF Doc. No. 25, *second promissory note*). In consideration for and to induce plaintiff to extend the term loan to Borrower, Legakis executed a commercial guaranty (NYSCEF Doc. No. 26, *first guaranty*). Additionally, in consideration for and to induce plaintiff to extend the line of credit to Borrower, Legakis executed a second commercial guaranty (NYSCEF Doc. No. 27, *second guaranty*).

By memorandum of law, plaintiff argues that it is entitled to a default judgment against Borrower for its failure to answer in this action or otherwise appear in this matter, despite being duly served with process. Thus, it contends that a judgment in favor of plaintiff and against Borrower is warranted pursuant to CPLR 3215.

Plaintiff also contends that summary judgment should be granted in its favor against Legakis, as guarantor, because it is undisputed that defendants entered into the loan documents with plaintiff and breached the terms of same by failing to remit payment when due thereunder. Although Legakis attempts to raise affirmative defenses in his answer, plaintiff maintains that Legakis waived his rights to assert any defense or claim pursuant to the express language of the guaranty. The express waiver of the defenses aside, plaintiff contends that Legakis' affirmative defenses and counterclaim are without merit and should be stricken. Plaintiff claims that, to the extent Legakis attempts to assert a defense based on civil usury, said defense is unavailable to individual guarantors of corporate loans (NYSCEF Doc. No. 36, *memorandum of law*).

In opposition to the motion, defendant argues that the business loan and the guaranties contain discrepancies as to whom the payments were made, whether it was made to Borrower or Legakis. If, in fact, the payments were made to defendant, then he may assert violation of the state usury rate and seek that the interest and loan be void. To this point, defendant argues that the interest rate of the business loan and line of credit are 19.15% and 16.25%, respectively.

Legakis concedes that the first, third, fourth and seventh affirmative defenses should be dismissed. However, he claims that, insofar as the fifth, eighth and ninth affirmative defenses and counterclaim relate to plaintiff's violation of New York Obligation Law § 5-501 and § 14(a)(1) of the Banking Law, premised on the claim that the interest plaintiff seeks exceeds 16%, they should not be dismissed. According to defendant, the sixth affirmative defense is also viable because there is no account stated claim against him since plaintiff did not direct its fees and charges to the guarantor. As to the second cause affirmative defense, Legakis concedes that any defense related to statute of limitations does not lie. Additionally, Legakis argues that the motion warrants denial pursuant to CPLR 3212(f), on the ground that discovery is needed to clarify whether the loan was made to Nolita or Legakis (NYSCEF Doc. No. 41, *memorandum of law in opposition*).

In reply, plaintiff argues that, although Legakis attempts to raise an issue of fact based on usury, this argument is refuted by the clear and unambiguous terms of the underlying loan documents, which all reflect that Borrower was to receive the funds and the guarantor guaranteed payment. Furthermore, plaintiff maintains that Legakis' usury argument lacks merit because the defense of usury does not apply to default rates of interest as a matter of law. Plaintiff also

argues that defendant has failed to establish that outstanding discovery mandates denial of the motion because any records evidencing payments made by Borrower would not be in plaintiff's exclusive control. (NYSCEF Doc. No. 43, *reply memorandum of law*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

CPLR 3215 (a) provides, in pertinent part, that when "a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him [or her]." To establish his or her entitlement to a default judgment, the movant must demonstrate proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the default. (See *PV Holding Corp. v AB Quality Health Supply Corp.*, 189 AD3d 645, 646 [1st Dept 2020]; *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418, 418 [1st Dept 2016].) "[T]he 'quantum of proof necessary to support an application for a default judgment is not exacting . . . [but] some firsthand confirmation of the facts forming the basis of the claim must be proffered.'" (*Am. Tr. Ins. Co. v Braithwaite*, 2020 NY Slip Op 32213[U], *2 [Sup Ct, NY County 2020], quoting *GuzConetti v City of New York*, 32 AD3d 234, 236 [1st Dept 2006].)

Here, upon this court's review of the Soares affidavit, which includes the loan agreements, promissory notes, and guaranties, together with the payment history for both the term note and the line of credit note, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment against Legakis' for the outstanding amount \$134,692.94. Although the burden shifts to Legakis to raise a triable issue of fact, he fails to do so. This court rejects Legakis' argument premised on civil usury because "[a] civil usury defense may not be invoked by a corporation (General Obligations Law § 5-521 [1]), or the individual guarantor of a corporation's debt" (*72nd Ninth LLC v 753 Ninth Ave Realty LLC*, 168 AD3d 597, 597-599 [1st Dept 2019] [emphasis added]; *Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992], *lv denied* 81 NY2d 702 [1993]). Moreover, this court rejects Legakis' argument that an issue of fact remains as to whom the loan was made. The loan documents clearly set forth the loan was made to Borrower and Legakis does not affirm otherwise. Rather, he argues, quite unpersuasively, that alleged discrepancies in the guaranties, indicating that the loans were made to him personally, raise an issue of fact as to whether he may assert a defense for usury. The argument is unavailing. Assuming, *arguendo*, that Legakis' would be entitled to a defense of usury, any such defense was waived in the guaranties. Therefore, that branch of the motion seeking summary judgment as against Legakis in the amount of \$134,692.94, is granted.

Plaintiff submits proof that Borrower was served with the summons and verified complaint on June 25, 2020, pursuant to Business Corporation Law § 306, by delivering a copy of the same to the Secretary of State. (NYSCEF Doc. No. 9, *affidavit of service for Borrower*). Plaintiff also complied with the additional requirement set forth in CPLR 3215(g)(4) (NYSCEF

Doc. No. 31, *additional service*). The affirmation of Michael A. Giannini, Esq. establishes Borrower’s default, and the affidavit of Soares sets forth the facts constituting the claim. Despite service of the motion papers (NYSCEF Doc. No. 38, *affidavit of service*), Borrower fails to oppose the motion. Accordingly, that branch of the motion seeking a default judgment as against Borrower is granted. |

That branch of the motion seeking attorney’s fees shall be referred to a special referee. All other arguments have been considered by the court and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff’s motion seeking a default judgment in favor of plaintiff and against defendant NICKY LEGAKIS is granted; and it is further

ORDERED that plaintiff’s motion seeking summary judgment in favor of plaintiff and against defendant NOLITA DRUG CORPORATION is granted; and it is further

ORDERED that the affirmative defenses and counterclaim of defendant NICKY LEGAKIS are dismissed; and it is further

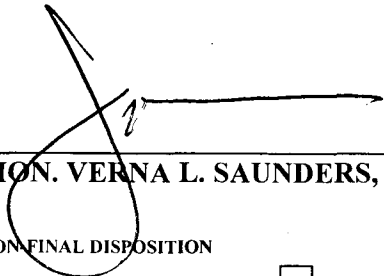
ORDERED and **ADJUDGED** that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants NOLITA DRUG CORPORATION and NICKY LEGAKIS, jointly and severally, in the amount of \$134,692.94, plus interest, together with costs and disbursements; and it further

ORDERED that that branch of the motion seeking attorney’s fees shall be referred to a special referee to hear and determine; 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.

This constitutes the decision and order of this court.

September 28, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: