

**TD Bank, N.A. v Ye Consulting Inc.**

2023 NY Slip Op 34022(U)

October 16, 2023

Supreme Court, Kings County

Docket Number: Index No. 501136/21

Judge: Katherine A. Levine

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 92 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16<sup>th</sup> day of October, 2023.

P R E S E N T:

HON. KATHERINE LEVINE,

Justice.

-----X  
TD BANK, N.A.,

Plaintiff,

- against -

Index No. 501136/21

YE CONSULTING INC. and JOEL EPSTEIN,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

21-35  
40-41  
43

Upon the foregoing papers in this action for breach of a business loan agreement, plaintiff TD Bank, N.A. (TD Bank or plaintiff) moves for an order: (1) granting it summary judgment as against defendants Ye Consulting Inc. (“Ye Consulting” or “Borrower”) and Joel Epstein (Epstein or Guarantor) (collectively, Defendants), and (2) dismissing Defendants’ answer, their 42 affirmative defenses and their counterclaim e-filed on February 4, 2021, at NYSCEF Doc No. 11.<sup>1</sup>

<sup>1</sup> Defendants’ February 4, 2021 answer does not assert counterclaims (NYSCEF Doc No. 11).

### Background

On January 15, 2021, TD Bank commenced this action by filing a summons and a complaint verified by Denyse Castagna (Castagna), an Assistant Vice-President and Workout Loan Officer of TD Bank. The complaint alleges that “[p]ursuant to a certain Business Loan Agreement dated as of August 27, 2018, between Borrower [Ye Consulting] and Plaintiff (the ‘Loan Agreement’), Borrower executed and delivered to Plaintiff a certain Promissory Note dated as of August 27, 2018 (the ‘Note’) in the principal amount of . . . \$100,000.00) (the ‘Loan’), which was secured by a Commercial Security Agreement granting TD Bank a security interest in, and a lien upon, Ye Consulting’s assets.<sup>2</sup> The Loan Agreement, the Note and the Commercial Security Agreement are annexed to the complaint as Exhibits A, B and D, respectively.

The Note allegedly provides for interest “at a rate of 2.490 percentage points over the Index (as defined in the Note) per annum . . .” and states that borrower shall pay lender’s attorneys’ fees and litigation costs. The Note provides for a default rate of interest of 18% and a late charge of 6% of the unpaid portion of the scheduled payment (*id.* at ¶¶ 7-8). The complaint alleges that to induce TD Bank to execute the Loan Agreement, Epstein executed a personal guaranty of the Loan (*id.* at ¶ 9), a copy of which is annexed to the complaint as Exhibit C.

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<sup>2</sup> The complaint alleges that “Plaintiff perfected its security interest in the Collateral by duly filing a UCC-1 Financing Statement with the Office of the Secretary of State of the State of New York on September 14, 2018, bearing Filing No. ‘201809146145414’” (*id.* at ¶ 11).

The complaint alleges that “Defendants have defaulted under the terms of Loan Documents as a result of, *inter alia*, a payment default pursuant to the Loan Documents on August 15, 2019 and continuing thereafter” (*id.* at ¶ 13). By a December 22, 2020, letter (Default Letter) TD Bank’s counsel allegedly notified defendants of the “Event of Default” (*id.* at ¶ 14). The complaint alleges that “[d]espite Plaintiff’s demand, the Defendants have failed to pay the outstanding amounts due and owing pursuant to the Loan Documents” (*id.* at ¶ 15). As of December 21, 2020, \$101,554.49 is allegedly due under the Loan Documents (*id.* at ¶ 16).

The complaint asserts the following six causes of action for: (1) breach of contract (the Note) asserted against the Borrower, Ye Consulting; (2) an account stated asserted against the Borrower; (3) unjust enrichment asserted against the Borrower; (4) foreclosure of the Borrower’s collateral assets under the Commercial Security Agreement; (5) an order of replevin against the Borrower’s collateral assets; and (6) breach of the guaranty asserted against Epstein, the Guarantor.

### ***Defendants’ Successive Answers***

On February 4, 2021, Defendants e-filed their answer to the complaint, which was entitled “Defendants’ Verified Answer & Counterclaims,” although there were no counterclaims asserted therein (*see* NYSCEF Doc No. 11). Rather, the February 4, 2021 answer denied the allegations in the complaint and asserted 42 affirmative defenses, including: (1) Statute of Frauds; (2) the Statute of Limitations; (3) failure to send a default

notice; (4) usury; (5) waiver and estoppel; (6) laches; (7) violation of the Truth in Lending Act (TILA); (8) Defendants are entitled to a set off for payments made; (9) the Loan Agreement requires arbitration; (10) Plaintiff's claims are unconscionable; (11) lack of mutual consideration; (12) violation of General Business Law (GBL) §349; (13) "Defendant Joel Epstein does not recall personally signing any guaranty, note, and/or agreements . . ."; and (14) contracts of adhesion are unenforceable.

On February 15, 2021, new defense counsel e-filed a notice of appearance and an unverified "Answer with Affirmative Defenses" which reiterates many of the same affirmative defenses asserted in Defendants' original answer, and was seemingly filed to correct the erroneous reference to "counterclaims" in the title to the February 4, 2021 answer (*compare* NYSCEF Doc Nos. 11 and 17).

***TD Bank's Instant Summary Judgment Motion***

On July 26, 2021, TD Bank, prior to any discovery, moved for summary judgment granting it the relief demanded in the complaint and specifically dismissing "Defendants' Verified Answer, and affirmative defenses and counterclaim.

TD Bank submits an affidavit from Castagna, based upon his review of TD Bank's business records and his own personal knowledge of how they are kept and maintained. He reiterates the allegations in the verified complaint regarding the August 27, 2018 Loan Agreement and the \$100,000.00 Note executed by Epstein on behalf of Ye Consulting, the Borrower, and asserts that "[t]he Loan is NOT guaranteed by the United States Small

Business Administration . . .” (*id.* at ¶ 8). Castagna reiterates the interest rate under the Loan, the provision in the Note for the payment of TD Bank’s attorneys’ fees and litigation costs,<sup>3</sup> default interest and late charges (*id.* at ¶¶ 9-12). Castagna describes the guaranty of the Loan executed by Epstein and the Commercial Security Agreement, pursuant to which Borrower granted TD Bank a security interest in its assets as collateral security for the Loan (*id.* at ¶¶ 13-14). Castagna attests that TD Bank perfected its security interest in the Loan by recording a UCC-1 Financing Statement with the New York Secretary of State, along with the Loan documents (*id.* at ¶ 15). Castagna attests that TD Bank rendered periodic statements of account regarding the Loan to the Borrower who “never objected or protested any such statements or any item contained therein, as was its duty and obligation if any error existed” (*id.* at ¶¶ 17-18). Notably, the account statements are not annexed to TD Bank’s motion.

Castagna attests that “Defendants have defaulted under the terms of Loan Documents as a result of, *inter alia*, a payment default pursuant to the Loan Documents on October 27, 2020 and continuing thereafter” (*id.* at ¶ 19), and references the December 22, 2020 Default Letter in the record, which was sent by defense counsel (*id.* at ¶ 20). He

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<sup>3</sup> Castagna asserts that “[s]olely for the purposes of entering summary judgment herein and expressly provided that [t]here is no inquest or hearing on damages, the Plaintiff will agree to waive its right to recover its reasonable attorneys’ fees” (*id.* at ¶ 26). However, since TD Bank only calculated accrued interest and late fees as of June 15, 2021 (*id.* at ¶ 25), a framed-issue hearing is required to determine the total amount Defendants owe under the Note and/or Guaranty.

states that “[d]espite Plaintiff’s demand, the Defendants have failed to pay the outstanding amounts due and owing pursuant to the Loan Documents” (*id.* at ¶ 21). Castagna attests that the Guarantor, who is personally liable for the Loan, “never revoked, denied, nor disputed the existence of the Loan Document” (*id.* at ¶¶ 22-24).

Castagna further attests that:

“By virtue of all of the foregoing, the Defendants are jointly and severally liable to the Plaintiff under the Loan Documents, as of June 15, 2021, in the outstanding principal sum of \$99,931.58, plus accrued and unpaid interest in the sum of \$4,349.85 through said date, plus accrued and unpaid late charges through said date in the sum of \$231.36, plus interest on the outstanding principal sum continuing to accrue at the Default Rate from June 16, 2021 through the date of entry of judgment, plus legal fees in the sum of \$815.00 through said date, plus a UCC-Fee in the sum of \$20.00 through said date, plus the costs and disbursements of this Action” (*id.* at ¶ 25).

Importantly, to substantiate Ye Consulting’s October 27, 2020 payment default and the amounts of interest and late charges owed to TD Bank, Castagna references TD Bank’s Loan Payment History, a copy of which is annexed to Castagna’s moving affidavit (*id.* and NYSCEF Doc No. 28, Loan Payment History).

TD Bank submits an attorney affirmation in which counsel affirms that she personally mailed the Default Letter to Defendants. Counsel argues that TD Bank has presented a prima facie case by producing the Note, Loan Agreement, Default Letter, the Guaranty and business records evidencing Defendants’ October 27, 2020 payment default (i.e., the Loan Payment History). Finally, counsel contends that “Defendants’ Affirmative

Defenses entirely consist of unsubstantiated ‘boiler-plate’ legal conclusions that are entirely lacking in factual support and are otherwise devoid of any legal merit” and should, therefore, be dismissed (*see* NYSCEF Doc No. 29 at ¶¶ 10 and 22-26).

Notably, TD Bank’s summary judgment motion only addresses the first and sixth causes of action for Defendants’ alleged breach of the Note and Guaranty, and does not mention the second causes of action for an account stated, the third cause of action for unjust enrichment, the fourth cause of action to enforce the Commercial Security Agreement and the fifth cause of action for an order of replevin against the Borrower’s collateral assets.

### ***Defendants’ Opposition***

Defendants’ attorney affirmation asserts that “Plaintiff’s motion must be denied because the affidavit of the Plaintiff is defective.” Specifically, Castagna failed to adequately explain the payments, interest and advances and “the alleged transactional breakdown . . .” reflected in TD Bank’s Loan Payment History and accounting of the Loan (*id.* at ¶¶ 4-6). Defense counsel further argues that Castagna was not the bank officer who interacted with Epstein, was not involved with the Loan and was not present when the Loan documents were allegedly executed by Epstein (*id.* at ¶¶ 7-8). Defense counsel further argues:

“the Plaintiff [s] affidavit does not set forth the allegation that there was a default on the commercial loan. There is no proper proof that the default notice annexed to the Plaintiff’s attorney’s affirmation . . . was mailed to the Defendant[ ]s;

[t]here are no statements of account nor invoices annexed to the Plaintiff's motion; and the Plaintiff's affidavit lacks personal knowledge and is not an admissible business record" (*id.* at 9).

Defense counsel also asserts that an essential element of an account stated is proof that the account statement was mailed, and TD Bank failed to submit such proof in support of its second cause of action asserted against the Borrower for an account stated (*id.* at ¶ 11). Defense counsel also asserts that TD Bank provided no proof of mailing of the Default Letter, which is an essential element of its breach of contract claim (*id.* at ¶ 12), without referencing counsel's own testimony that she personally mailed the Default Letter. Because Castagna's knowledge is based on her review of business records, defense counsel asserts that her affidavit "must describe a policy or procedure of Plaintiff's reasonably calculated to achieve delivery in the ordinary course of business and show that she is personally familiar with that policy or procedure and thus competent to authenticate its existence" (*id.* at ¶ 13). Defense counsel also contends that "Plaintiff's motion for summary judgment lacks probative value as it fails to annex any proof of mailing of any notices to cure the alleged default" (*id.* at ¶ 14).

Finally, defense counsel argues that "[d]iscovery is especially necessary in this case because the Plaintiff has failed to account for the Defendant's payments pursuant to the Defendant's annexed [Castagna] affidavit, and the Plaintiff has failed to offer any invoices whatsoever" (*id.* at ¶ 15).

Defendants submit a two-page affidavit from Epstein, the President of Ye Consulting, who attests that “[t]he loan documents which allegedly imposed contractual obligations upon me were typed in fine print, and contained complex legal terms and Defendant[ ]s were not represented by an attorney” and “[d]ue to the complexity of the loan documents and alleged commercial guaranty, I did not fully understand the terms set forth within it” (NYSCEF Doc No. 41 at ¶¶ 4 and 8). Epstein makes the conclusory claims that “I do not believe I owed the amount the Plaintiff is suing for in its Summons and Complaint”; “I do not recall ever receiving the notice of default; Acceleration and demand for payment letter . . .”; and “I need my attorney to conduct discovery to see the actual invoices and statements that were allegedly sent to me” (*id.* at ¶¶ 5-7).

***TD Bank’s Reply***

TD Bank, in reply, contends that “[t]here is absolutely no merit to Defendants’ contention that the Castagna Affidavit is ‘defective’ simply because the affiant did not personally administer the Loan at issue.” Counsel asserts that “[t]he Castagna Affidavit more than ably sets forth that she reviewed the Plaintiff’s business records concerning its claims against Defendants, that she has personal knowledge of how such records are kept and maintained, and that said records were maintained by Plaintiff in the ordinary course of its business” (*id.* at ¶ 9).

Counsel asserts that “Defendants cannot escape from the undisputed fact that they breached the terms of the Loan Documents evidencing the Loan by failing to make the

required payments due under those documents . . .” (*id.* at ¶ 11). Counsel argues that “the allegations contained in the Castagna Affidavit properly laid the foundation for the admission of the Note, Loan Agreement, Security Agreement, UCC-1, Guaranty, and Payment History which were annexed to her affidavit as Exhibits ‘A’ – ‘F’” (*id.* at ¶ 17). Counsel asserts that “it is well settled that a defendant disputing amounts owed or the defense of payment has the burden of proof and must provide evidence of the alleged payments in question to avoid summary judgment” (*id.* at ¶ 23). Counsel contends that “Defendants have failed to offer any evidence contradicting these documented payment details [in the Loan Payment History] or otherwise identified any payments unaccounted for by Plaintiff” (*id.* at ¶ 24).

Contrary to Epstein’s recollection, TD Bank’s counsel affirms that “[t]he Default Letter was executed *by me* and mailed via overnight mail and U.S. mail to the Defendants as reflected in the Default Letter” and was “not returned as ‘undeliverable’” (*id.* at ¶ 25 [emphasis added]). Counsel also notes that the Note, according to its terms, was payable on demand (*id.* at ¶ 26). Counsel submits that Epstein’s “bare and conclusory allegation” that he does not believe that he owes the amount sought by TD Bank fails to raise an issue of fact to preclude summary judgment (*id.* at ¶ 30).

### Discussion

Summary judgment is a drastic remedy that deprives litigants of their day in court and should, thus, only be granted when there is no doubt as to the absence of triable issues

of material fact. *Owens v City of New York*, 183 A.D.3d 903, 906 (2d Dept. 2020); *10 Bethpage Rd., LLC v 114 Woodbury Realty, LLC*, 178 A.D.3d 751, 754 (2d Dept. 2019). “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.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Morejon v. New York City Tr. Auth.*, 216 A.D.3d 134, 136 (2d Dept. 2023). Once the movant has made a prima facie showing of entitlement to summary judgment, the “burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016), citing *Alvarez, supra*, 68 NY2d at 324.

“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.” *Roopchand v Mohammed*, 154 A.D.3d 986, 987 (2d Dept. 2017); *Rodrigues v. Samaras*, 117 A.D.3d 1022, 1023 (2d Dept. 2014).

Here, TD Bank established its prima facie entitlement to judgment as a matter of law on its first and sixth causes of action for breach of the Loan Agreement and the Note and Guaranty by submitting the Note, the Loan Agreement executed by Epstein on behalf

of Ye Consulting, the Guaranty executed by Epstein, together with the Notice of Default, Castagna's affidavit, counsel's affirmation and TD Bank's Loan Payment History evidencing Defendants' October 27, 2020 payment default. Defendants, in opposition, failed to raise a triable issue of fact to preclude summary judgment on TD Bank's first and sixth causes of action. Epstein's brief opposing affidavit, in which he asserts that "I do not believe I owed the amount the Plaintiff is suing for . . ."; "I do not recall" receipt of the Default Letter and "I did not fully understand the terms [of the Loan]" is conclusory, and insufficient to raise a triable issue of fact and lacks credibility (NYSCEF Doc No. 41 at ¶¶ 5, 6 and 8).

While TD Bank is correct that the majority of the affirmative defenses asserted in Defendants' February 4, 2021 answer are boilerplate, conclusory and fail to preclude the relief TD Bank seeks, Defendants subsequently amended their answer as of a right on February 15, 2021. Because TD Bank's notice of motion and moving papers specifically seek dismissal of Defendants' February 4, 2021 answer e-filed at NYSCEF Doc No. 11 (*see* NYSCEF Doc No. 21), that branch of TD Bank's motion it is denied because the only operative responsive pleading was e-filed on February 15, 2021 (*see* NYSCEF Doc No. 17), more than five months before TD Bank's motion was filed on July 26, 2021. Curiously, neither of the parties' motion papers mention or even address Defendants' February 15, 2021 answer to the complaint (*see* NYSCEF Doc No. 29 at ¶¶ 7-10 and NYSCEF Doc Nos. 40-41). Accordingly, it is hereby

**ORDERED** that TD Bank's motion (mot. seq. 1) is only granted to the extent that:

(1) TD Bank is granted summary judgment on its first cause of action asserted against Ye Consulting for breach of the Loan Agreement and the Note; (2) TD Bank is granted summary judgment on its sixth cause of action asserted against Epstein for breach of the Guaranty; and (3) TD Bank is entitled to an award of reasonable attorneys' fees and the costs of this litigation, pursuant to the express terms of the Loan Agreement and the Note; TD Bank's motion regarding Defendants' February 4, 2021 answer and the other causes of action asserted in the complaint is otherwise denied; and it is further

**ORDERED** that the parties shall appear before a Referee on a date to be selected by the Clerk for a framed-issue hearing to determine: (1) the total amount of principal, default interest and late fees that accrued from June 15, 2021 through the present under the terms of the Loan Agreement and the Note, and (2) the amount of reasonable attorneys' fees and litigation costs incurred by TD Bank in the prosecution of this action.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.  
HON. KATHERINE A. L.  
JUSTICE SUPREME CO.

HON. KATHERINE A. LEVINE  
JUSTICE SUPREME COURT