

<b>TD Bank, N.A. v Cianculli</b>
2024 NY Slip Op 35144(U)
August 6, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 200962/2022
Judge: Maureen T. Liccione
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Short Form Order

Index No. 200962/2022

SUPREME COURT – STATE OF NEW YORK  
PART 78 – SUFFOLK COUNTY

**P R E S E N T:**

**Hon. Maureen T. Liccione**

Justice Supreme Court

-----x  
TD BANK, N.A.,

Plaintiff,

-against-

CHRISTOPHER CIANCULLI d.b.a.  
CCC ENTERPRISES,

Defendant.  
-----x

Mot. Seq. No. 001 – MotD/CaseDisp  
Orig. Return Date: 03/20/2024  
Mot. Submit Date: 05/01/2024

**PLAINTIFF’S ATTORNEY**

MEYNER & LANDIS, LLP  
One Gateway Center, Suite 2500  
Newark, NJ 07102

**DEFENDANT’S ATTORNEY**

MEGAN C. RYAN, ESQ.  
11 Dustin Avenue  
N. Merrick, NY 11566

Upon the e-filed documents numbered 5 through 25, it is determined as follows:

**ORDERED** that plaintiff’s motion for summary judgment pursuant to CPLR 3212 is granted as to the first cause of action alleging that defendant defaulted under the promissory note, and is granted in part as to the second cause of action to the extent described below and is otherwise denied without prejudice; and it is further

**ORDERED** and **ADJUDGED** that a money judgment in favor of the plaintiff, TD Bank, N.A., and against the defendant Christopher Cianciulli d.b.a. CCC Enterprises is awarded on the first cause of action in the sum of \$83,948.07, plus interest accrued from December 13, 2021 to be calculated in accordance with the terms of the promissory note dated February 13, 2018, plus late charges of 5% of the unpaid portion of any regularly scheduled payment that became 15 days or more late, and plus attorney fees in the amount of \$6,415.00 and costs in the amount of \$705.93; and it is further

**ORDERED** that, within 30 days of the date of this Order, plaintiff shall file, on notice, a proposed judgment in accordance with the previous paragraph; and it is further

**ORDERED** and **ADJUDGED** that judgment is hereby entered in favor of the plaintiff on the second cause of action directing the defendant to assemble the collateral subject to the

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commercial security agreement dated February 13, 2018 and make it available to the plaintiff for sale or other disposition pursuant to the Uniform Commercial Code; and it is further

**ORDERED** and **ADJUDGED** that judgment is hereby entered in favor of the plaintiff on the second cause of action authorizing plaintiff to sell, lease, license, or otherwise dispose of the collateral in its present condition or following any commercially reasonable preparation or processing pursuant to the Uniform Commercial Code to satisfy the amounts due by defendant to the plaintiff.

In this action to recover for breach of a promissory note and injunctive relief related to the collateral secured by a commercial security agreement, the plaintiff, TD Bank, N.A. (TD Bank or plaintiff), moves pursuant to CPLR 3212 for summary judgment on the complaint against defendant Christopher Cianciulli d.b.a. CCC Enterprises (Borrower).

On February 13, 2018, TD Bank entered into a Small Business Administration loan agreement (Loan Agreement) with the Borrower for the aggregate principal sum of \$87,000 (Loan). The line of credit was evidenced by a promissory note (Note), also executed on February 13, 2018, which contains an unequivocal and unconditional obligation for the Borrower to repay the Loan plus variable interest, with the interest to be calculated based upon changes in the Wall Street Journal Prime Index. The Note and the Loan Agreement had a maturity date of February 13, 2028. The Note required Borrower to pay the Loan in full immediately upon TD Bank's demand and defined default as Borrower's failure to make any payment when due.

The Borrower also executed a commercial security agreement dated February 13, 2018 (Security Agreement), which granted to TD Bank a security interest in and to all of Borrower's business assets (Collateral). TD Bank's security interest in the Collateral was perfected by a UCC-1 Financing Statement filed against Borrower with the New York State Department of State on February 27, 2018.

In September 2020, Borrower failed to make payment. On January 5, 2021, TD Bank declared the default, accelerated the balance due under Note, and demanded immediate payment in full of all amounts due and owing from the Borrower. Borrower then made some partial payments towards the Loan which were accepted by TD Bank under a reservation of rights. Following application of the partial payments, TD Bank claims that the Borrower remains due for the October 13, 2021 monthly payment and all payment thereafter. On July 21, 2022, TD Bank sent a second notice of default demanding payment of the full amount remaining under the Note

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and access to the business premises for an inspection and evaluation of the Collateral under the Security Agreement. The Borrower failed to cure its default.

On September 19, 2022, TD Bank filed a Summons and Verified Complaint alleging that Borrower defaulted under the terms of Note and the Loan Agreement (first cause of action) and defaulted also under the terms of the Security Agreement and failed to provide TD Bank with possession of the Collateral (second cause of action). Borrower filed its Answer on November 27, 2022.

TD Bank now moves for an Order (1) pursuant to CPLR 3212, authorizing and directing the clerk's entry of judgment for TD Bank, and against the Borrower in the principal amount of \$83,948.07, due on the Loan, plus interest, late charges, attorneys' fees, costs and expenses; (2) compelling Borrower to make the Collateral available to TD Bank for sale or other disposition pursuant to the Uniform Commercial Code; (3) authorizing TD Bank to sell, liquidate, dispose of or retain the aforesaid Collateral in a commercially reasonable manner, with the proceeds from the same being applied first to the costs of such sale or other disposition and then in reduction of the amounts due from Borrower; (4) restraining Borrower from any use of the Collateral; (5) requiring the Borrower to hold all Collateral, and all proceeds from the Collateral, in trust for TD Bank; (6) ordering that the Sheriff seize the Collateral, and for the purpose, if the Collateral is not delivered to him, to break open, enter, and search for the Collateral in the place specified, and to hold the Collateral pursuant to CPLR 7101, et al.; (7) issuing a Writ of Replevin directing the Sheriff to take immediate possession of the Collateral and deliver same to TD Bank.

In support of its summary judgment motion, TD Bank submits the Note, the Loan Agreement, and the Security Agreement (collectively Loan Documents), and the UCC-1 Financing Statement bearing Filing Number 201802275244632 filed against Borrower. The plaintiff further submits the affidavit of Kymberli Hall-Mitchell, the Vice President of TD Bank affirming that Borrower failed to pay in accordance with the terms of the Loan Documents, the Borrower's payment history, and the two demand letters sent by TD Bank to the Borrower. Borrower is opposing the motion.

### **Summary Judgment on the First Cause of Action**

TD Bank seeks summary judgment on its first cause of action alleging that Borrower defaulted under the Note. "To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a promissory note, a plaintiff must show the existence of a

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promissory note executed by the defendant and the failure of the defendant to pay in accordance with the notes terms” (*Hansraj v Sukhu*, 145 AD3d 755, 755 [2d Dept 2016], quoting *Nunez v Channel Grocery & Deli Corp.*, 124 AD3d 734, 734 [2d Dept 2015]; *Griffon V, LLC v 11 E. 36th, LLC*, 90 AD3d 705, 706 [2d Dept 2011]). Once the plaintiff submits evidence establishing a prima facie case, the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue of fact with respect to a bona fide defense (*Hansraj*, 145 AD3d at 755; *Sun Convenient, Inc. v Sarasamir Corp.*, 123 AD3d 906, 907 [2d Dept 2014]).

Here, the plaintiff established, prima facie, its entitlement to judgment as a matter of law on the issue of liability with respect to the Note by submitting proof of the Note signed by the Borrower, which contains an unequivocal and unconditional obligation for the Borrower to repay the Loan plus variable interest, the Loan Agreement, and the Borrower’s default under their terms. TD Bank provided admissible evidence in the form of the payment history of the Loan and the affidavit of Ms. Hall-Mitchell.

In opposition, the Borrower failed to establish the existence of a triable issue of fact with respect to a bona fide defense (*N. Am. Sav. Bank, FSB v Esposito-Como*, 141 AD3d 706, 708 [2d Dept 2016]). Borrower argued that TD Bank failed to establish its prima facie entitlement as it failed to prove that it mailed the billing statements or the Loan Agreement to the Borrower. However, proof of mailing the billing statements or the Loan Agreement is not an element of establishing prima facie entitlement to judgment as a matter of law with respect to a promissory note (*see Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789 [2d Dept 2011]). Instead, it is an element for establishing a prima facie case to recover on an account stated (*Bank of Am., N.A. v Ball*, 188 AD3d 974, 974 [2d Dept 2020]). “An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due” (*Bank of Am., N.A. v Ball*, 188 AD3d 974, 974 [2d Dept 2020] [internal quotation omitted]). Such is not the case here – here TD Bank extended a commercial credit loan to Borrower evidenced by the Note, not a credit card. TD Bank’s complaint contained no cause of action to recover on an account stated.

There is also no merit to the Borrower’s additional argument that the affidavit of Ms. Hall-Mitchell is insufficient to establish the plaintiff’s entitlement to summary judgment. The affidavit sufficiently establishes the business records relied upon and satisfies the admissibility requirements for those documents and the statements therein pursuant to CPLR 4518 (a).

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A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*Cadlerock Joint Venture, L.P. v Trombley*, 150 AD3d 957, 959 [2d Dept 2017]). To establish a foundation for the admission of a business record, the proponent of the record must satisfy the requirements identified in the statute CPLR 4518 (a) (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 205 [2d Dept 2019]). First, the proponent must establish "that the record be made in the regular course of business—essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business" (*id.*; quoting *People v Kennedy*, 68 NY2d 569, 579 [1986]). Second, the proponent must also demonstrate that it be the regular course of such business to make the record (*Bank of New York Mellon v Gordon*, 171 AD3d at 205). Third, the proponent must establish that the record be made at or about the time of the event being recorded (*id.*).

In this case, the Ms. Hall-Mitchell's affidavit states that she was personally familiar with the facts and circumstances of this action and has "personal knowledge regarding the business practices and procedures with respect to the contemporaneous creation, maintenance and storage of Plaintiff's business records," and that all the documents enclosed with the affidavit "were retrieved from Plaintiff's electronic business records retention system, were scanned and stored shortly after execution and maintained in the regular course of Plaintiff's business operations" (NYSCEF Doc No. 7). Thus, the Court finds that TD Bank demonstrated the admissibility of the business records upon which Ms. Hall-Mitchell relied under the business records exception to the hearsay rule (*see* CPLR 4518 [a]; *Bank of New York Mellon v Lopes*, 158 AD3d 662, 664 [2d Dept 2018]).

Additionally, the Borrower failed to raise the pleaded affirmative defenses in opposition to the motion for summary judgment thus waiving those defenses (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 756 [2d Dept 2013]).

Consequently, TD Bank is granted summary judgment on its first cause of action. Pursuant to the terms of the Note, in addition to the principal amount due on the Loan, TD Bank is entitled to interest on the unpaid balance of the Note at a variable interest rate, a late charge of 5% on the unpaid portion of the regularly scheduled payments, and reasonable attorneys' fees and costs and legal expenses (*see Kassab v Kasab*, 195 AD3d 832, 832 [2d Dept 2021]). The Loan Agreement

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also expressly provides that the Borrower shall pay the plaintiff's reasonable attorneys' fees and collection costs in enforcing its rights against the Borrower.

As to the prejudgment interest, New York courts have long held that when an agreement involving an indebtedness "provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment" (*NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). The prejudgment interest (including interest after default) shall be calculated in accordance with the terms of the Note at the variable interest rate based on changes in an independent index which is the Wall Street Journal Prime, as described in detail in the Note. While the affidavit of Ms. Hall-Mitchell and TD Bank's Statement of Undisputed Material Facts state that the Borrower failed to make the October 13, 2021 monthly payment and all payments thereafter, the payment history of the Loan provided by TD Bank reveals that a last payment of \$2,404.69 was made on December 13, 2021 covering the November 2021 billing date. The Court finds that interest on the principal amount of \$83,948.07 accrues as of December 13, 2021, and not October 13, 2021.

As for the legal fees and costs, TD Bank submitted an Affirmation of Legal Fees, Costs, and Expenses, as well as a detailed fee transaction file list, stating that it has incurred legal fees in the amount of \$6,415.00 and costs in the amount of \$705.93. The Court determines that these attorneys' fees are reasonable and warranted for the services rendered (*Citicorp Tr. Bank, FSB v Vidaurre*, 155 AD3d 934, 935 [2d Dept 2017]) and that the costs are recoverable.

Therefore, TD Bank is entitled for a judgment against the Borrower in the principal amount of \$83,948.07 due on the Loan, plus interest accrued from December 13, 2021 to be calculated in accordance with the terms of the Note, plus late charges, plus \$6,415.00 in attorneys' fees and \$705.93 in legal costs.

### **Summary Judgment on the Second Cause of Action**

TD Bank also seeks summary judgment on its second cause of action regarding its right to enforce the terms of the Security Agreement and the Borrower's default under the terms of the Security Agreement. The injunctive relief requested under the second cause of action is making the Collateral available to TD Bank for sale or other disposition; authorizing TD Bank to sell, liquidate, dispose of or retain the aforesaid Collateral in a commercially reasonable manner; restraining Borrower from any use of the Collateral; requiring the Borrower to hold all Collateral, and all proceeds from the Collateral, in trust for TD Bank; ordering the Sheriff to seize the

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Collateral; and issuing a Writ of Replevin directing the Sheriff to take immediate possession of the Collateral and deliver same to TD Bank.

Per the New York Uniform Commercial Code, a creditor obtains an enforceable security interest in a debtor's collateral where (a) the debtor has signed a security agreement which contains a description of the collateral, (b) value is given, and (c) the debtor retains rights in the collateral (NYUCC § 9-203). Thus, when a debtor whose obligation is so secured defaults, the secured party has the right to "reduce [its] claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure" (NYUCC § 9-501 [1]). In enforcing such rights "a secured party: (1) may take possession of the collateral; and (2) without removal, render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610" (NYUCC § 9-609 [a]). In any event after default, a secured party may require the debtor to assemble the collateral and make it available to the secured party (NYUCC § 9-609 [b]). Thereafter, a secured party may "sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing" (NYUCC Law § 9-610 [a]).

Here, TD Bank's security interest in the Collateral is enforceable by reason of the Borrower's signed Security Agreement describing the Collateral as "all inventory, equipment, accounts (...), chattel paper, instruments..." (NYSCEF Doc No. 10), the Borrower's receipt of value (a \$87,000 loan), and the Borrower's clearly identifiable rights in the Collateral (keeping and maintaining the Collateral in good order, paying taxes upon the Collateral, and holding and insuring the Collateral). Since TD Bank has established that it has an enforceable security interest in the Collateral, Borrower's aforesaid default under the Loan Documents entitles TD Bank to the rights and remedies set forth in the Security Agreement, which specifically include assembly and sale of the Collateral, and all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code. In its opposition, Borrower failed to raise any issues of fact regarding the enforcement of the Security Agreement. In fact, Borrower did not include any arguments as to why TD Bank should not be granted summary judgment on its second cause of action.

Thus, TD Bank is entitled to summary judgment requiring the Borrower to make the Collateral available to TD Bank and providing for the disposition of the Collateral by the Borrower pursuant to NYUCC Law § 9-610. However, plaintiff's request for further injunctive relief including, a restraining order against the removal of Collateral, requiring the Borrower to hold the

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Collateral in trust for TD Bank, a seizure order to the Sheriff, and a Writ of Replevin is denied, as plaintiff does not provide any basis for its entitlement to this relief and does not point to any sections of the Security Agreement or the Uniform Commercial Code allowing it this relief. Additionally, TD Bank did not submit the affidavit required by CPLR 7102 (c) for an application for an order of seizure.

As a result, summary judgment on the second cause of action is granted to the extent only that the Borrower shall assemble the Collateral and make it available to the plaintiff for sale or other disposition pursuant to the Uniform Commercial Code and TD Bank is authorized to sell, lease, license, or otherwise dispose of the Collateral in its present condition or following any commercially reasonable preparation or processing pursuant to the Uniform Commercial Code in order to satisfy the amounts due by defendant to the plaintiff. The portion of the motion denied is denied without prejudice.

The foregoing constitutes the decision and Order of the Court:

ENTER

DATE: August 6, 2024  
Riverhead, NY

  
HON. MAUREEN T. LICCIONE, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION