TD Bank, N.A. v P&G Imports, LLC
2024 NY Slip Op 35304(U)
March 6, 2024
Supreme Court, Queens County
Docket Number: Index No. 702800/23
Judge: Timothy J. Dufficy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

file:///LRB-ALB-FS1/Vol1/ecourts/Process/covers/NYSUP.07028002023.QUEENS.001.LBLX000_TO.html[06/16/2026 3:46:42 PM]

MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

---x

TD BANK, N.A., **Plaintiff,** **-against-** **P & G IMPORTS, LLC; and PETER DADDEO,** **Defendants.**	**Index No.: 702800/23** **Mot. Date: 1/9/24** **Mot. Seq. 1** **Dated: March 6, 2024**

FILED
3/6/2024
COUNTY CLERK
QUEENS COUNTY

---x

In this action involving an alleged default on a commercial loan, the plaintiff moves for an order, *inter alia*: awarding plaintiff a default judgment as against P & G Imports, LLC (P&G), summary judgment in its favor as against Peter DAddeo (DAddeo); and recovery of certain collateral; and, *pro-se* defendant DAddeo cross-moves for an order dismissing the instant action.

Plaintiff's motion is granted, to the following extent, as discussed below; and DAddeo's cross-motion is denied.

Plaintiff alleges that P & G Imports, LLC (P &G) executed a promissory note and business loan agreement on October 3, 2017. DAddeo executed and delivered an unconditional guaranty of payment with a commercial guaranty to the plaintiff, dated October 3, 2017. P&G further executed a security agreement dated October 3, 2017, which granted TD Bank a security interest in and to all of P&G's business assets. Pursuant to a Change in Terms Agreement executed by P&G, on December 7, 2017, the principal balance of the loan was increased to $72,000.

Plaintiff then commenced the instant action via Summons and Verified Complaint, filed on February 7, 2023, alleging *inter alia*, that the defendants defaulted on the commercial loan.

On February 28, 2023, *pro se* defendant Peter DAddeo filed an Answer alleging various affirmative defenses stating, *inter alia*, that: he "was not a signatory to the loan agreement, and any liability of dDefendant, Peter DAddeo, arises solely from the Commercial Guaranty executed by defendant, Peter DAddeo, on October 3, 2017"; the commercial guaranty contains no provision regarding interest, late fees, or attorney's fees in the event of default; the Commercial Guaranty contains no provision regarding a payment plan; the plaintiff's complaint should be dismissed against defendant DAddeo; or in the alternative, the Court should enter a judgment in plaintiff's favor, in the amount of $7,121.30, representing ten percent of the principal amount due on the loan.

Plaintiff now moves for an order, *inter alia*: awarding the plaintiff a default judgment as against P&G; awarding the plaintiff summary judgment as against DAddeo; compelling P & G to make certain collateral available to the plaintiff; authorizing the plaintiff to sell, liquidate, dispose of or retain said collateral; restraining P & G from using said collateral; requiring P & G to hold said collateral in trust for the plaintiff; ordering the sheriff of any county in New York State to seize said collateral; and issuing a Writ of Replevin directed to the Sheriff or other lawfully authorized offers of Queens County to take possession of said collateral and deliver to the plaintiff.

Defendant DAddeo opposes and cross-moves for an order dismissing the instant action; or in the alternative, limiting the amount to be awarded in any judgment to ten percent of the principal loan amount.

The Court will first address DAddeo's cross-motion to dismiss. In his Affidavit, DAddeo alleges that: he has been involved in ongoing "good faith negotiations to resolve the financial obligations"; he is challenging the service of the Summons and Complaint in that "the person served at the [Florida] Address and [Connecticut] Address [are] not [him]"; he did not waive any jurisdictional defenses as he "did not concede to proper service or jurisdiction"; and, he is currently facing significant financial challenges.

"An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him, and therefore confers personal jurisdiction over him, unless he asserts an objection to jurisdiction either by way of motion or in his answer" (*Ohio Sav. Bank v Munsey*, 34 AD3d 659 [2d Dept 2006]). Pursuant to CPLR 3211(e), "an objection that the summons and complaint...was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading."

The defense of lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), is waived where a defendant "fail[s] to raise it in a pre-answer motion to dismiss or in their answer" (*Bank of N.Y. Mellon v Selig*, 165 AD3d 872, 874 [2d Dept 2018] citing CPLR 320(a)).

While the Court is sympathetic to Mr. DAddeo's current situation, this Court cannot disregard the CPLR provisions, nor can it afford *pro se* litigants "any greater rights than those afforded to other litigants" (*Bank of Am., N.A. v Afflick*, 172 AD3d 1146, 1147 [2d Dept 2019]). As such, DAddeo failed to raise a defense, pursuant to CPLR 3211(a)(8), in his Answer. As such, the cross-motion by DAddeo to dismiss the instant action based on such grounds is denied, in its entirety.

The Court will next address the motion by the plaintiff.

The branch of plaintiff's motion seeking a default judgment against P & G, pursuant to CPLR 3215, such is granted. P & G was duly served the Summons and Verified Complaint pursuant to CPLR 311 and BCL §306(b)(1). P & G failed to submit an Answer, or move with respect to the plaintiff's Complaint herein (*see* CPLR 3215). Plaintiff demonstrated the merits of its claim by submitting a verified complaint as part of its motion (*see* CPLR 3215[f]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [NY 2003]); *Henriquez v Purins*, 245 AD2d 337 [2d Dept 1997]; *Rafiq v. Weston,* 171 AD2d 783 [2d Dept 1991]). Thus, the plaintiff shall be awarded a default judgment as against P & G.

The branch of plaintiff's motion seeking summary judgment as against defendant DAddeo and striking his affirmative defenses, pursuant to CPLR 3212, on its: first cause of action regarding the default on the loan and promissory note; second cause of action regarding the commercial guarantee; and its third cause of action regarding the commercial security agreement is determined, as follows.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v Klein*, 24 Ad2d 920 [3d Dept 1965]. The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*See Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"To establish *prima face* 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 notes terms" (*Lugli v Johnston*, 78 AD3d 1122, 1135 [2d Dept 2010]).

Regarding the commercial guaranty, "[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantors failure to perform under the guaranty" (*Encore Nursing Ctr. Partners Ltd. Partnership-85 v Schwartzberg*, 172 AD3d 1166, 1168 [2d Dept 2019]).

Regarding the breach of the security agreement and recovery of certain collateral, pursuant to NY UCC, "[a]n order of seizure is not a final disposition of a matter but is a *pendente lite* order made in the context of a pending action where the movant has established, *prima facie*, a superior right in the chattel" (*Southeast Fin., LLC v Broadway Towing, Inc.*, 117 AD3d 715 [2d Dept 2014])(internal citations omitted). "Pursuant to CPLR 7102, an application for an order of seizure must be supported by an affidavit that clearly identifies the chattel to be seized and states, among other things, facts demonstrating that the plaintiff is entitled to possession of the chattel..." (*Id.*)(internal citations omitted).

In support of the motion, plaintiff provides, *inter alia*: the promissory note; the business loan agreement; the change in terms agreement; the commercial guaranty; and, the commercial security agreement, all entered into by the plaintiff and defendants. Plaintiff further provides the payment history, notices of default sent to the defendants, and an Affidavit of Thomas Beeker, Vice President of TD Bank, N.A. In said Affidavit, Beeker avers that, based upon his knowledge from reviewing the file, the defendants defaulted on the loan by failing to make monthly payments due on August 3, 2022 and thereafter.

Plaintiff has established the existence of the loan and promissory note executed by the defendants, and demonstrated that the defendants defaulted by failing to make payments due on said loan. Additionally, the plaintiff has provided the commercial guaranty signed by defendant Peter DAddeo, the basis for the underlying debt in the defendants' default, and the guarantor's failure to perform under said guaranty.

Thus, plaintiff is awarded summary judgment in its favor on its first and second causes of action, in the amount of seventy-one thousand two hundred thirteen dollars and eight cents ($72,213.08), the principal amount due under the loan, plus statutory interest to be determined by the County Clerk. Pursuant to the terms of the loan, plaintiff is further awarded: site visit fees in the amount of one-hundred fifty dollars and zero cents ($150.00); late fees in the amount of three-hundred seventy-nine dollars and thirty-six cents ($379.36); plus a per diem interest rate of twenty-three dollars and seventy-two cents ($24.72) from August 17, 2023 until payment is made; plus costs and reasonable attorney's fees, in the amount of five thousand eight hundred fifty one dollars and fifty three cents ($5,851.53), as supported by the itemized fee transaction list (NYSCEF Doc. No. 26) and the Affirmation of Legal Fees, Costs and Expenses (NYSCEF Doc. No. 25).

Regarding the third cause of action, the plaintiff has met its *prima facie* burden that, under the terms of the security agreement, it is entitled to take immediate possession of the collateral at issue. Plaintiff has provided the commercial security agreement signed by defendant DAddeo "as Member of P & G Imports LLC," and the UCC 1 Financing Statement Form. As such, the defendants shall be compelled to make the collateral available to the plaintiff for sale or other disposition pursuant to the UCC; and, the plaintiff shall be authorized to sell, liquidate, dispose of or retain the 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 the defendants.

However, the plaintiff has failed to establish its entitlement to the injunctive relief or Writ of Replevin sought regarding the collateral, specifically in that the plaintiff has not alleged facts specific enough to establish an irreparable harm warranting the injunctive relief, pursuant to CPLR 6301, nor as to ascertain the value or location of said collateral. As such, said relief is denied, without prejudice.

In the opposition, the defendants fail to raise a triable issue of fact to rebut plaintiff's entitlement to summary judgment. P&G has not appeared or responded to plaintiff's complaint and DAddeo's opposition, as set forth in the Letter/Correspondence to the Court (NYSCEF Doc. No. 28) and, the cross-motion fails to rebut the validity of the note, the guarantee, or the security agreement. Further, the affirmative defenses stated in Daddeo's Answer are bare, conclusory, and unsupported. As such, the the affirmative defenses raised in the Answer shall dismissed (*see e.g. Diaz v 297 Schaefer St. Realty Corp.*, 195 AD3d 794 [2d Dept 2021]*; Wachovia Mtge. FSB v Macwhinnie*, 175 AD3d 1587 [2d Dept 2019]).

Thus, summary judgment is awarded to the plaintiff as against the defendants on its first, second and third causes of action, as set forth above; and the affirmative defenses alleged in defendant DAddeo's Answer are hereby dismissed.

Submit Judgment. Proposed Judgment must be filed to NYSCEF.

FILED
3/6/2024
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.