TD Bank, N.A. v Red Sun Mgt. Corp.
2024 NY Slip Op 35440(U)
May 23, 2024
Supreme Court, Queens County
Docket Number: Index No.708446/2022
Judge: Karina E. Alomar
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Short form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE **KARINA E. ALOMAR** IAS PART 23
JUSTICE

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TD BANK, N.A.,

Plaintiff,

Index No.: 708446/2022
Motion Date: 12/07/2023
Motion Seq. No.: 1

-against-

RED SUN MANAGEMENT CORP., and
HENG CHEN (a/k/a Heng Ju Chen),

Defendants.

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The following numbered papers 6 to 33 read on this motion by plaintiff for an order pursuant to CPLR §3212 granting summary judgment for money damages, including an award of interest, attorney's fees and costs as against Red Sun Management Corp ("Red Sun") and Heng Chen ("Chen")

PAPERS	NUMBERED
Notice of Motion, Affidavit, Exhibits…	EF Nos: 6 – 29
Affirmation of Opposition, Exhibits…	EF No: 32
Affirmation in Reply…	EF No: 33

On the Court's own motion, the Orders dated February 8, 2024 and April 10, 2024 are hereby recalled, and the following is substituted in its stead.

Upon the foregoing cited papers, it is ordered that plaintiff's motion for an order pursuant to CPLR §3212 granting plaintiff summary judgment for money damages, including an award of interest, attorney's fees and costs is decided as follows:

Plaintiff commenced the instant action on April 19, 2022, to recover monies due in connection with the note executed by defendants. It is alleged that defendants defaulted under the Note on October 19, 2021, and each month thereafter. By correspondence dated March 15, 2022, plaintiff declared the default, accelerated the balance due under Note, and demanded immediate payment in full of all amounts due and owing from defendants. It is further alleged that as of and including June 5, 2023, the total amount of $80,186.78 was due under the Note and Guaranty, consisting of $69,994.85 in principle, plus accrued interest in the amount of $9,446.32, late fees of $595.61, and site inspection fees of $150.00. Per diem interest at the rate of $24.07 is due for June 6, 2023, and for each day thereafter. Plaintiff further seeks legal fees and costs, against defendants, jointly and severally, for the default under the loan.

Additionally, on April 19, 2019, as security for the payment of Red Sun's obligations owed under the Note, Heng Chen (Guarantor and president of Red Sun) executed and delivered a certain "Commercial Guaranty" hereby the Guarantor "absolutely and unconditionally" guaranteed the payment of Borrower's obligations under the Note, and any other indebtedness owed by Borrower to Plaintiff. Moreover, on April 19, 2019, Red Sun executed and delivered a certain Commercial Security Agreement whereby among other things, Red Sun granted to plaintiff, a blanket security interest in, a lien on, and pledge and assignment of, all of Red Sun's assets including but not limited to its, accounts, general intangibles, products, instruments, tools, supplies, records, and all other property now existing or hereafter acquired and wherever located.

The security agreement provides, inter alia, that in the event of a default: (1) plaintiff shall have full power to enter upon the property of Red Sun to take possession of and remove the collateral; (2) plaintiff shall have full power to sell, lease, transfer, or otherwise deal with the collateral or proceeds thereof in plaintiff's own name or that of Red Sun;(3) plaintiff may sell the collateral at public action or private sale; (4) plaintiff shall have the right to have a receiver appointed to take possession of all or any part of the collateral, with the power to protect and preserve the collateral; and (5) Red Sun agrees to pay upon demand all of plaintiff's costs and expenses, including plaintiff's reasonable attorney's fees and legal expenses incurred in connection with the enforcement of the agreement. Plaintiff's continuing security interest in the collateral was perfected by a UCC-1 Financing Statement filed against Red Sun in the New York State Department of State on April 29, 2019.

Plaintiff's complaint asserts the following three causes of action for: 1) alleged breach of the Note and 2) Guaranty; and 3) enforcing the Security Agreement and for an order of replevin against the Borrower's collateral assets.

In this motion, plaintiff represents that it is the holder and owner of the commercial loan which is in default and has been accelerated pursuant to the subject loan documents. Plaintiff is seeking a judgment in the aggregate of $80,186.78 as of June 5, 2023, plus per diem interest at the rate of $24.07 for June 6, 2023, and each and every day thereafter, and legal fees and costs, against Obligors, jointly and severally, for the Default under the Loan Documents. Plaintiff is also seeking judgment enforcing its rights and remedies as to the Collateral, as provided for by the Security Agreement, based upon Borrower's default under the loan documents.

Defendants herein take the position that on May 13, 2022, defendants filed an Answer and denied generally all the allegations contained in plaintiff's complaint. Moreover, defendants' opposition papers characterize this as a credit card related matter and not a commercial loan issue. Additionally, defendants state that there is a discrepancy between plaintiff's affidavit where its states that the amount due was $80,186.78 as of June 5, 2023, and the TD Bank LOC payment history stating that the total balance due was $83,141.28.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see*, *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; see also *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*see*, *Alvarez*, 68 NY2d at 324; *see* also, *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]). However, failure to make prima facie showing of entitlement to judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v Goodson*, 8 NY2d 8 [1960]; *Rebecchi v Whitmore*, 172 AD2d 600 [1991]).

"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." (*Lugli v Johnston*, 78 AD3d 1133 [2d Dept 2010]; *N. Fork Bank v ABC Merch. Servs., Inc.*, 49 AD3d 701 [2d Dept 2008]); *Famolaro v Crest Offset, Inc.*, 24 AD3d 604 [2d Dept 2005]).

"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]). To state a replevin cause of action, "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 (*Khoury v Khoury*, 78 AD3d 903, 904 [2d Dept 2016]). Further, it has been held that, on a motion for an order of seizure pursuant to Article 71 of the CPLR, "a plaintiff must demonstrate a likelihood of success on its cause of action for replevin and the absence of a valid defense to its claim" (*Great Am. Ins. Co. v Auto Mkt. of Jamaica, N.Y.*, 133 AD3d 631, 632 [2d Dept 2015][internal citations omitted]).

In opposition, defendants take the position that: (1) plaintiff failed to mail the loan documents to the "card holder" as required to establish a prima facie case seeking a balance due from a credit card holder; and (2) Kymberli J. Hall-Mitchell's, assistant vice president of TD Bank N.A. (plaintiff), affidavit and the loan payment history documents (NYSCEF Doc #26) contain different amounts due and owing.

In reply, plaintiffs state that defendants in opposition do not dispute that it defaulted under the loan documents by failing to make timely monthly payments due on the loan. Moreover, defendants mischaracterize this case as one involving a credit card debt, as opposed to a U.S. Small Business Administration loan. Plaintiff addresses the difference between the payment history and the total amounts being sought by plaintiff in the instant motion is that the payment history does not reflect plaintiff's attorney's fees and costs through present. Lastly, the defendants failed to contradict the allegations set forth in the plaintiff's moving papers in that they do not dispute that they executed the loan documents, nor do they contend that it has been satisfied, nor do they challenge receipt of the loan proceeds, and as such there are no material issue of fact in dispute and as such, the court should grant plaintiff's motion.

With respect to Hall-Mitchell's affidavit dated August 15, 2023. Ms. Hall-Mitchell deposed that as of and including June 5, 2023, the total amount of $80,186.78 was due under the Note and Guaranty, consisting of $69,994.85 in principal, plus accrued interest in the amount of $9,446.32, late fees of $595.61, and site inspection fees of $150.00. Ms. Hall-Mitchell's affidavit further states that "[a]lso due and owing are legal fees and costs." Defendants contend that the amount due as per Ms. Hall-Mitchell's affidavit is different than that of the amount due on the loan payment history provided by plaintiff, and as such summary judgment should be denied as there are material issues of fact. Plaintiff's loan payment history (NYSCEF Doc #26) provides that the total amount of $83,141.28 was due under the Note and Guaranty, consisting of consisting of $69,994.85 in principal, plus accrued interest in the amount of $9,446.32, late fees of $595.61, and miscellaneous fees in the amount of $3,104.50. However, the miscellaneous fees consist of the $150 site inspection fee and legal fees which Ms. Hall-Mitchell did not include in her numeric calculation.

Here, TD Bank established its prima facie entitlement to judgment as a matter of law on its first and third causes of action for breach of the Loan Agreement and the Note and Guaranty by submitting the Note, the Loan Agreement, Notice of Default, counsel's affirmation, the affidavit of Kymberly J. Hall-Mitchell and TD Bank's Loan Payment History. Defendants in opposition, failed to raise a triable issue of fact to preclude summary judgment on TD Bank's first and third causes of action.

Accordingly, it is hereby

ORDERED, that plaintiff's motion pursuant to CPLR §3212 for summary judgment as against Red Sun Management Corp and Heng Chen, is only granted to the extent that: 1) TD Bank is granted summary judgment on its first cause of action asserted against the defendants for breach of the Loan Agreement and the Note, 2) TD Bank is granted summary judgment on its second cause of action against the defendants 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 the other cause of action asserted in the complaint is otherwise denied, and it is further

ORDERED, that an assessment of damages will be held at the time of trial of this action.

This constitutes the decision and Order of the Court.

Dated: May 23, 2024

KARINA E. ALOMAR, J.S.C.

FILED
5/24/2024 TA
COUNTY CLERK
QUEENS COUNTY