

State Bank of Long Island v Botticelli Builders, LLC
2012 NY Slip Op 30945(U)
March 28, 2012
Sup Ct, Nassau County
Docket Number: 1918/11
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

STATE BANK OF LONG ISLAND,

Plaintiff(s),

-against-

**BOTTICELLI BUILDERS, LLC, ASSUNTINA
BOTTICELLI, JERICHO PLAZA, L.L.C.
BOTTICELLI JERICHO ASSOCIATES, LLC,
GIULIANO BOTTICELLI, BOTTICELLI
PLAINFIELD ASSOCIATES LLC,**

Defendant(s).

_____ x

Index No. 1918/11

Motion Submitted: 12/22/11

Motion Sequence: 001, 002, 003

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....XX
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....

The instant action was commenced to collect monies allegedly due and owing to plaintiff bank by defendants, based on a Promissory Note ("the Note") and a Commercial Security Agreement ("the Agreement") executed by defendant Botticelli Builders, LLC, and Commercial Guarantees ("the Guaranty/Guarantees") executed by the remaining defendants.

In Motion Sequence 1, plaintiff moves this Court for an order granting summary judgment against defendants Botticelli Builders, LLC ("Builders"), Assuntina Botticelli ("Assuntina"), Botticelli Jericho Associates, LLC ("BJA"), Giuliano Botticelli ("Giuliano"),

and Botticelli Plainfield Associates, LLC (“Plainfield”) in the amount of the principal, \$900,137.46, together interest, late charges (\$237,427.52), costs, and attorneys’ fees.

Plaintiff also moves this Court pursuant to CPLR §3215 for an order directing the entry of default judgments against defendant Jericho Plaza, LLC (“Jericho”) in the amount of \$900,137.46, plus interest, late charges (\$234,427.52), costs, and attorneys’ fees.

None of the defendants have submitted opposition to the relief requested by plaintiff in Motion Sequence 1, except as discussed below.

By Motion Sequence 2, Silvia Cerrone seeks to intervene in the above-captioned action, and requests that this Court issue an Order adding her as a party defendant, directing that the summons and complaint be amended to reflect same, permitting her to serve an answer, dismissing the complaint against Jericho Plaza, LLC (“Jericho”), or in the alternative, consolidating this action with Index No. 2842/2011 pending in this Court (Mahon, J.). Proposed intervener Cerrone seeks the foregoing relief on the ground that she is or may be inadequately represented, and that her interest in Jericho Plaza, LLC is or may be bound by the judgment to be entered herein.

According to her affidavit, Cerrone alleges that she is a 50% owner of Jericho, and that Giuliano Botticelli is only a 25% owner of the company, as is his father Antonio Botticelli. Further according to her affidavit, Cerrone states that, without her vote, Giuliano Botticelli did not have majority approval of a guaranty given by Jericho to plaintiff. Cerrone asserts that she would never have approved making the guaranty to plaintiff, and that Giuliano Botticelli has submitted fraudulent documents in the pending action identified by Index No. 2842/2011.¹

Silvia Cerrone has also submitted a proposed answer on behalf of herself and Jericho Plaza, LLC.

Plaintiff cross-moves to amend the complaint to add Silvia Cerrone and Carlo Cerrone, her husband, as party defendants, and for severance of this action as against Jericho, Silvia Cerrone and Carlo Cerrone. Plaintiff opposes Silvia Cerrone’s motion to intervene and to dismiss the complaint as to Jericho, or to consolidate this action with the action identified by Index No. 2842/2011.

¹Giuliano Botticelli is an attorney licensed to practice law in New York, who appears to be delinquent in his attorney registration for the last three registration periods.

In connection with its cross-motion, plaintiff has submitted copies of two continuing, unlimited, commercial guarantees, one purportedly signed by Silvia Cerrone, and the other purportedly signed by Carlo Cerrone. Each guarantee is signed on behalf of Botticelli Builders, LLC., not Jericho. Plaintiff avers that the Cerrones were not originally made parties to this action because their respective guarantees were located in a “different part of SBLI’s file” related to this matter.

In reply to plaintiff’s cross-motion, the Cerrones each submitted an affidavit stating that they did not sign the commercial guarantees for Botticelli Builders, LLC attached to plaintiff’s vice president’s affidavit, and that they did not guarantee any financial obligation of Botticelli Builders, LLC. Yet, the Cerrones assert that the guarantees submitted by plaintiff “appear to be taken from an unrelated line of credit or home equity loan” from past years, that were repaid. The Cerrones further assert that these old guarantees were likely presented to plaintiff in relation to the present loan giving rise to this action by their son-in-law, defendant Giuliano Botticelli. The Cerrones aver that Giuliano Botticelli has engaged in various forms of fraudulent activity, including the foregoing.

With regard to plaintiff’s motion to amend the complaint to include Silvia and Carlo Cerrone, the Court recognizes that leave to amend pleadings “shall be freely given” absent prejudice or surprise resulting from the delay (*CPLR § 3025, Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 A.D.2d 310, 711 N.Y.S.2d 510 (2d Dept., 2000); *Sewkarran v. DeBellis*, 11 A.D.3d 44, 782 N.Y.S.2d 758 [2d Dept., 2004]), and unless the proposed amendment is “palpably insufficient” to state a cause of action or is patently devoid of merit (*Smith-Hoy v. AMC Property Evaluations, Inc.*, 52 A.D.3d 809, 811, 862 N.Y.S.2d 513 (2d Dept., 2008) *citing Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238 [2d Dept., 2008]).

Inasmuch as plaintiff has produced documentation purporting to be continuing unlimited guarantees executed by each of the Cerrones on behalf of Botticelli Builders, LLC, already a defendant in this action, the Court finds that the amendment is appropriate. Also, Silvia Cerrone’s affidavit in support of the intervener’s motion requests that she be added as a party defendant. The fact that Silvia and Carlo Cerrone claim that a fraud was perpetrated with respect to the guarantees is not the proper subject of a motion to amend the complaint, but such a claim is properly addressed by motions made and/or proceedings held after they are added as defendants in this action, including a trial to determine issues of credibility that are apparent, even at this relatively early juncture. Furthermore, this Court finds that all necessary parties have been served with the instant motion.

Accordingly, plaintiff's application to amend the complaint is granted as set forth in the proposed amendment (Plaintiff's Exhibit G). Plaintiff shall serve the proposed amended summons and complaint upon defendants' respective counsel on or before May 10, 2012.

In light of the foregoing, Silvia Cerrone's application to intervene in this action is denied, as she, and Carlo Cerrone, will have the opportunity to interpose an answer to the amended summons and complaint as drafted.

Silvia Cerrone's further requests for an Order dismissing the complaint against Jericho Plaza, LLC ("Jericho"), or in the alternative, consolidating this action with Index No. 2842/2011 pending in this Court (Mahon, J.) are denied. By Decision and Order dated February 21, 2012, the Court (Mahon, J.) denied Silvia Cerrone's motion requesting consolidation of the two actions.

Inasmuch as Silvia Cerrone has been added as a defendant in this action, and has submitted a proposed answer in her intervener's motion (Exhibit B), dismissal of the complaint against Jericho is not appropriate at this juncture. Moreover, the grounds for dismissal asserted by Silvia Cerrone, which are that defendant Giuliano Botticelli had no authority to enter into the transaction with plaintiff on Jericho's behalf and submitted fraudulent documents, have not been sufficiently developed at this juncture to warrant dismissal of the complaint against Jericho. Leave to renew the motion to dismiss the complaint against Jericho is granted.

Plaintiff's motion for a default judgment against Jericho Plaza, LLC ("Jericho") is denied as the result of the amendment of the summons and complaint, and Silvia Cerrone's obvious intention to interpose an answer on behalf of herself and Jericho, as evidenced by her proposed answer included in her intervener's motion.

The Court now turns its attention to Motion Sequence 1, in which plaintiff moves this Court for an order granting summary judgment against defendants Botticelli Builders, LLC ("Builders"), Assuntina Botticelli ("Assuntina"), Botticelli Jericho Associates, LLC ("BJA"), Giuliano Botticelli ("Giuliano"), and Botticelli Plainfield Associates, LLC ("Plainfield") in the amount of the principal, \$900,137.46, together with interest, late charges (\$237,427.52), costs, and attorneys' fees.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment

should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein defendants Builders, Assuntina, BJA, Giuliano, and Plainfield (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

To satisfy its burden, plaintiff must submit proof of the existence of the underlying Note and the Guarantees, the unconditional terms of repayment and defendants' failure to make payment in accordance with those documents. (*Gera v. All-Pro Athletics, Inc.*, 57 A.D.3d 726, 870 N.Y.S.2d 87 (2d Dept., 2008); *Famolaro v. Crest Offset, Inc.*, 24 A.D.3d 604, 807 N.Y.S.2d 387 [2d Dept., 2005]). This Court is satisfied that the affidavit of Stephen B. Mischo, vice president of plaintiff bank, together with the Note, Guarantees and Agreement incorporated therein, establish plaintiff's entitlement to summary judgment as a matter of law.

The Note was executed by defendant Giuliano on behalf of defendant Builders, and the "absolute and unconditional" Guarantees were executed by defendants Assuntina and Giuliano, and by defendant Giuliano on behalf of defendants BJA and Plainfield.

The Commercial Security Agreement giving plaintiff a security interest in the collateral of defendant Builders was executed by defendant Giuliano on behalf of Builders.

The joint answer interposed by Builders, Assuntina, BJA, Giuliano, and Plainfield, which is not verified, contains general denials and conclusory defenses to this action; thus, it is insufficient to establish the existence of genuine, triable issues of fact with respect to this matter (*Orange County-Poughkeepsie Limited Partnership v. Bonte*, 37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept., 2007); *Mlcoch v. Smith*, 173 A.D.2d 443, 570 N.Y.S.2d 70 [2d Dept., 1991]).

Furthermore, "facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 544, 330 N.E.2d 624, 369 N.Y.S.2d 667 (1975)); *see also* *McNamee Construction Corp. v. City of New Rochelle*, 29 A.D.3d 544, 817 N.Y.S.2d 295 [2d Dept., 2006]).

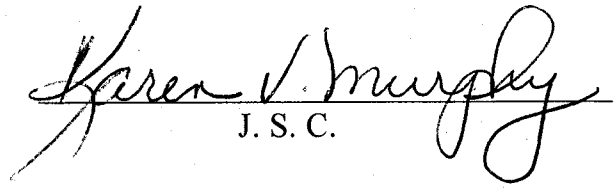
Plaintiff's motion for summary judgment against defendants Builders, Assuntina, BJA, Giuliano, and Plainfield is granted in the amount of \$900,137.46, together with an award of interest as set forth in the affidavit of Stephen B. Mischo through and including the

date of entry of judgment. Plaintiff's request for late charges is also granted. Based on the fact that plaintiff's attorney has claimed attorney's fees in the amount of \$4,623 this Court awards plaintiff reasonable attorney's fees in the amount of \$4,623.

Submit a judgment on notice, with a bill of costs.

The foregoing constitutes the Order of this Court.

Dated: March 28, 2012
Mineola, N.Y.


J. S. C.

ENTERED
APR 05 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE