

<b>New York Community Bank v Lee</b>
2012 NY Slip Op 31637(U)
June 6, 2012
Supreme Court, Nassau County
Docket Number: 13712-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**NEW YORK COMMUNITY BANK,**

**Plaintiff,**

**-against-**

**R. RANDY LEE and SISTERS, LLC,**

**Defendants.**  
-----x

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Index No: 13712-11  
Motion Seq. No: 1  
Submission Date: 4/17/12**

**The following papers have been read on this motion:**

- Notice of Motion, Attorney’s Statement in Support,**
- Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**

This matter is before the Court for decision on the motion filed by Plaintiff New York Community Bank (“Plaintiff” or “NYCB”) on March 8, 2012 and submitted on April 17, 2012. For the reasons set forth below, the Court grants the motion to the extent that the Court 1) grants Plaintiff summary judgment against Defendant R. Randy Lee on the first cause of action in the Complaint in the amount of \$947,203.44 in principal, plus unpaid interest at the Contract Rate and Default Rate, late charges, and costs and expenses, including reasonable attorney’s fees, associated with collection; and 2) grants Plaintiff summary judgment against Defendant Sisters, LLC on the fourth cause of action in the Complaint in the amount of \$947,203.44 in principal, plus unpaid interest at the Contract Rate and Default Rate, late charges, and costs and expenses, including reasonable attorney’s fees, associated with collection. The Court refers the determination of interest, late charges, and costs and expenses, including attorney’s fees, to an inquest.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order 1) awarding Plaintiff summary judgment against Defendants R. Randy Lee (“Lee”) and Sisters, LLC (“Sisters”) for the relief demanded in the complaint,; 2) dismissing Defendants’ affirmative defenses; and 3) severing NYCB’s request for attorney’s fees and directing that an inquest be held to determine the amount of attorney’s fees and costs to be awarded.

No opposition or other response has been submitted to the motion.<sup>1</sup>

### B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. 1 to Rand Stmt. in Supp.), alleges that this is an action by NYCB seeking payment on the following obligations:

1) a loan in the original principal amount of \$750,000.00 (“2006 Loan”) evidenced by a Note dated October 17, 2006 (“2006 Note”) (Ex. A to Compl.), made by Lee (“Borrower”) to the order of NYCB, which Loan is guaranteed by Sisters (“Guarantor”) pursuant to a guaranty by Guarantor to NYCB dated October 17, 2006 (“2006 Guaranty”) (*id.* at Ex. B) and secured by a collateral assignment of a leasehold mortgage (“2006 Leasehold Mortgage”) (*id.* at Ex. C) on premises (“Premises”) leased by Guarantor as defined in the Leasehold Mortgage,

2) a loan in the original principal amount of \$200,000.00 (“2009 Loan”) and, together with the 2006 Loan, the “Loans”) evidenced by a Note dated February 17, 2009 (“2009 Note”) (Ex. D to Compl.) (together with 2006 Note, the “Notes”) made by Borrower to the order of NYCB, which 2009 Loan is guaranteed by Guarantor pursuant to a guaranty (“2009 Guaranty”) (*id.* at Ex. E.) (together with 2006 Guaranty, the “Guarantees”) by Guarantor to NYCB dated February 17, 2009 and secured by a collateral assignment of a leasehold mortgage (“2009 Leasehold Mortgage”) (*id.* at Ex. F) (together with 2006 Leasehold Mortgage, the “Leasehold Mortgages”) on the Premises, and

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<sup>1</sup> Counsel for Plaintiff and counsel for Defendants executed a Stipulation Adjourning Motion dated March 12, 2012 which provided, *inter alia*, that “Defendants shall serve their opposition to the Motion, if any, so as to be received in hand by counsel for the Bank, no later than March 29, 2012[.]” Defendants did not serve any opposition to the motion.

3) interest calculated at the rate set forth in the Notes (“Contract Rate”) and the Default Rate (as defined in the Notes), late fees, and the costs and fees associated with collection and enforcement of the Notes including, but not limited to, attorney’s fees.

The Complaint contains detailed allegations regarding 1) the terms of the 2006 Loan, 2) the October 17, 2006 credit agreement (“2006 Agreement”) (Ex. G to Compl.) between Lee and NYCB which governed the terms of the 2006 Loan, 3) the terms of the 2006 Note, including Plaintiff’s rights in the event of a default, 4) the terms of the 2006 Guaranty, 5) Lee’s default under the 2006 Note by failing to make required payments, 6) the terms of the 2009 Loan, 7) the February 17, 2009 credit agreement (“2009 Agreement”) (*id.* at Ex. I) between Lee and NYCB which governed the terms of the 2009 Loan, 8) the terms of the 2009 Note, including Plaintiff’s rights in the event of a default, 9) Lee’s default under the 2009 Note by failing to make required payments, 10) the execution by Sisters of the Guarantees, and 11) Sisters’ default under the Guarantees by failing to make required payments following Lee’s default.

The Complaint contains four (4) causes of action. In the first cause of action, Plaintiff alleges that Lee breached his obligations under the Notes by failing to make required payments and seeks the sum of \$947,203.44 in principal, plus unpaid interest at the Contract Rate and Default Rate, late charges and costs and expenses, including reasonable attorney’s fees, associated with collection. In the second and third causes of action, alleging money lent and unjust enrichment respectively, Plaintiff seeks the same relief against Lee that it requests in the first cause of action. In the fourth cause of action, Plaintiff alleges that Sisters breached the Guarantees by failing to pay all obligations owed by Lee to NYCB, and seeks the same relief against Sisters that it requests against Lee in the first, second and third causes of action.

In support of Plaintiff’s motion, Henry W. Yabroudy (“Yabroudy”), a loan recovery officer of NYCB, affirms the truth of the allegations in the Complaint regarding 1) the sums advanced by NYCB to Borrower, 2) the parties’ execution of the Notes, Agreements and Guarantees and the terms of those instruments, 3) the Leasehold Mortgages, and 4) the parties’ defaults by virtue of their failure to make the required payments under the Notes and Guarantees. Yabroudy affirms that NYCB has elected not to seek enforcement of its rights under the collateral assignment of leasehold mortgage, but rather is seeking a monetary judgment against Borrower and Guarantor.

Yabroudy affirms that, as of February 28, 2012, there was due and owing to NYC under the 2006 Note and 2006 Agreement the principal sum of \$749,279.92, interest in the amount of \$69,884.76, late charges in the amount of \$6,329.93, and the costs of collection including reasonable attorney's fees. Yabroudy affirms, further, that as of February 28, 2012, there was due and owing to NYCB under the 2009 Note and 2009 Agreement the principal sum of \$197,923.52, interest in the amount of \$18,411.32, late charges in the amount of \$927.70, and the costs of collection including attorney's fees.

In further support of Plaintiff's motion, counsel for Plaintiff ("Plaintiff's Counsel") provides a copy of Defendants' Verified Answer and Affirmative Defenses ("Answer") which includes a Demand for Change of Venue in which Defendants ask that the place of trial be changed from the County of Nassau to the County of Richmond (Ex. 2 to Rand Stmt. in Supp.). Plaintiff served an affidavit in opposition to Defendants' demand for a change of venue (*id.* at Ex. 3). Plaintiff's Counsel submits that in light of Defendants' failure to make a formal motion to change venue, venue remains in Nassau County.

In the Answer, Defendants interpose general denials to certain allegations and interpose five (5) affirmative defenses. Those affirmative defenses are: 1) the Court lacks jurisdiction over this matter because the Premises securing the Notes is situated in Richmond County; 2) Defendants were not properly served; 3) the Complaint fails to state a claim or cause of action; 4) Plaintiffs have failed to act in a commercially reasonable manner; and 5) Defendants' offer of payment by way of tender of the deed to the subject property in lieu of foreclosure was refused by Plaintiff.

#### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by 1) producing the Loan documents which establish Borrower's unconditional obligation to pay principal, interest and late charges to NYCB, as well as collection costs including reasonable attorney's fees; 2) producing the Guarantees which reflect the Guarantor's unconditional obligation to pay to NYCB the full amount owed by Borrower to NYCB, as well as collection costs including reasonable attorney's fees; and 3) establishing the default by Borrower and Guarantor in failing to make the required payments.

Plaintiff further contends that Defendants' affirmative defenses do not raise any factual

or legal issues barring summary judgment and, therefore, should be dismissed. The first affirmative defense, related to the location of the Premises in Richmond County, lacks merit in light of the fact that Plaintiff is not seeking to foreclose its interests under the Leasehold Mortgages, but rather is seeking a money judgment against Defendants as a result of their defaults under the Loan Documents. Plaintiff contends, further, that the Court should dismiss Defendants' second affirmative defense in light of Defendants' failure to move for dismissal within 60 days of interposing their Answer. Plaintiff argues, further, that Defendants have failed to plead any facts in support of their third, fourth and fifth affirmative defenses.

Finally, Plaintiff argues that it is entitled to recover its attorney's fees and costs pursuant to the applicable provisions in the Loan Documents. Plaintiff asks the Court to schedule an inquest to permit NYCB to establish the amount of attorney's fees it has incurred in enforcing its rights under the Loan Documents.

### RULING OF THE COURT

#### A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

#### B. Promissory Note

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. *American Realty Corp. v. Sukhu*, 90 A.D.3d 792, 793 (2d Dept. 2011), quoting *Lugli v. Johnston*, 78 A.D.3d 1133, 1135 (2d Dept. 2010). Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense. *Id.*, citing *Jin Sheng He v. Sing Huei Chang*, 83 A.D.3d 788, 789 (2d Dept. 2011).

#### C. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); see also *Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept. 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept. 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept. 1994).

#### D. Counsel Fees

Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that is reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). Provisions or stipulations in contracts for payment of attorneys' fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977).

The amount of attorneys' fees awarded pursuant to a contractual provision is within the court's sound discretion, based upon such factors as time and labor required. *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006); *Matter of Ury*, 108 A.D.2d 816 (2d Dept. 1985). Legal fees are awarded on a *quantum meruit* basis and cannot be determined summarily. See *Simoni v. Time-Line, Ltd.*, 272 A.D. 2d 537 (2d Dept. 2000); *Borg v. Belair*

*Ridge Development Corp.*, 270 A.D. 2d 377 (2d Dept. 2000). When the court is not provided with sufficient information to make an informed assessment of the value of the legal services, a hearing must be held. *Bankers Fed. Sav. Bank v. Off W. Broadway Developers*, 224 A.D.2d 376 (1st Dept. 1996).

E. Defense of Lack of Personal Jurisdiction

A defendant who fails to move to dismiss on the ground of lack of personal jurisdiction within sixty (60) days after serving its answer waives that defense. *Dimond v. Verdon*, 5 A.D.3d 718, 719 (2d Dept. 2004); CPLR § 3211(e).

F. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its entitlement to judgment against Defendants by 1) producing the Notes, Guarantees and other Loan Documents; and 2) establishing the Defendants' default under those instruments. The Guarantees are in writing, executed by the person to be charged, and reflect Sisters' clear and explicit intent to guarantee the obligations of Lee. The Court also concludes that Defendants have failed to raise any issue defeating Plaintiff's right to summary judgment. As Plaintiff is pursuing a money judgment against Defendants, and is not seeking to foreclose upon the Premises, the current venue is appropriate. In addition, Defendants have waived their defense of lack of personal jurisdiction by failing to make a timely motion. Finally, Defendants have failed to allege facts in support of their remaining affirmative defenses. The Court declines to award Plaintiff judgment against Lee on the third and fourth causes of action in the Complaint, based on money lent and unjust enrichment, in part because there is a contract governing the parties' dispute.

In addition, Plaintiff is entitled to its costs of collection, including reasonable attorney's fees, pursuant to the applicable provisions in the Loan Documents. The Court, however, has an insufficient basis on which to determine the appropriate counsel fee award, and refers that matter to an inquest. The Court also refers the determination of interest, late charges, and other costs and expenses of collection, to an inquest. In light of the foregoing, it is hereby

**ORDERED**, that Plaintiff's motion is granted on the first and fourth causes of action in the Verified Complaint, and Plaintiff is awarded judgment, jointly and severally, against Defendants R. Randy Lee and Sisters, LLC in the sum of \$947,203.44 in principal, plus unpaid interest at the Contract Rate and Default Rate, late charges, and costs and expenses, including



reasonable attorney's fees, associated with collection, as determined at an inquest; and it is further

**ORDERED**, that the action is respectfully referred to Special Referee Frank N. Schellace on July 9, 2012 at 11:00 a.m. to hear and determine all issues regarding interest, late charges, and costs and expenses, including attorney's fees; and it is further

**ORDERED**, that Plaintiff's counsel shall serve upon counsel for Defendants, by regular mail, a copy of this Order with Notice of Entry, a Note of Issue or Notice of Inquest and shall pay the appropriate filing fees on or before June 22, 2012; and it is further

**ORDERED**, that the County Clerk is directed to enter a judgment in favor of Plaintiff and against Defendants R. Randy Lee and Sisters, LLC in accordance with the decision of the Special Referee.

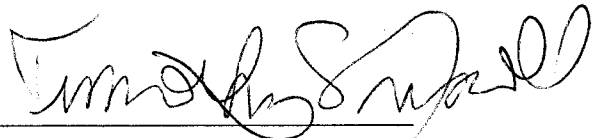
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

June 6, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.

XXX  
**ENTERED**  
JUN 13 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE