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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

VICTORIA PLUMBING & HEATING SUPPLY CO.,	TRIAL / IAS PART 29 NASSAU COUNTY
Plaintiff,	Index No. 11614-11
- against -	Motion Sequence No. 001
RICHARD YOPP SR. AND RICHARD YOPP JR.,	
Defendants.	

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1
Answering Affidavits	2
Replying Affidavits	3
Briefs: Plaintiff's / Petitioner's	4
Defendant's / Respondent's	

The plaintiff corporation moves pursuant to CPLR 3215 for default judgment against the defendant Richard Yopp Jr. The plaintiff also moves pursuant to CPLR 32152 for summary judgment against the defendant Richard Yopp Sr., and to dismiss this defendant's answer with affirmative defenses and cross claims on the ground there are no triable issues of fact.

The plaintiff seeks to recover the liquidated sum of $37,142.33 plus interest from June 30, 2010 to the date of the entry judgment against these defendants pursuant to the defendants' breach of a February 25, 2008 written application for credit containing their written personal

guarantees for payment of any obligation of ACS Mechanical Inc. The plaintiff maintains it sold and delivered goods to ACS Mechanical Inc., at the request of ACS Mechanical Inc., for the agreed price and reasonable value of $37,142.33, but there was no payment after due demand. The plaintiff obtained judgment against ACS Mechanical Inc. on November 17, 2010 for $38,889.54, including interest from June 30, 2010 together with costs and disbursements of that Supreme Court, Nassau County action index number 17919/10.

> A plaintiff's right to recover upon a defendant's default in answering is governed by CPLR 3215 (***see Reynolds Securities v. Underwriters Bank & Trust Co.***, 44 N.Y.2d 568, 572, 406 N.Y.S.2d 743, 378 N.E.2d 106) which requires that the plaintiff state a viable cause of action (***see*** CPLR 3215[f]; ***Green v. Dolphy Constr. Co.***, 187 A.D.2d 635, 636, 590 N.Y.S.2d 238). In determining whether the plaintiff has a viable cause of action, the court may consider the pleadings in the action, affidavits, or affirmations submitted by the plaintiff (***see Woodson v. Mendon Leasing Corp.***, 100 N.Y.2d 62, 71, 760 N.Y.S.2d 727, 790 N.E.2d 1156), and prior determinations of the court (***see Haberman v. Wassberg***, 131 A.D.2d 331, 333, 516 N.Y.S.2d 925)

Fappiano v. City of New York, 5 A.D.3d 627, 628-629, 774 N.Y.S.2d 773 [2d Dept, 2004].

Richard Yopp Jr. never appeared in this matter. The damages sought here are for a sum certain. The plaintiff submits the February 17, 2012 affidavit of its president, who states the goods were sold and delivered to ACS Mechanical Inc. which defaulted on payment of the agreed price of $37,142.32 guaranteed by Richard Yopp Jr. This Court determines the plaintiff meets its CPLR 3215 burden for default judgment against the defendant Richard Yopp Jr.

> To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and "must make his showing by producing evidentiary proof in admissible form" (***Friends of Animals v Associated Fur Mfrs., supra***, pp 1067-1068). As the court in ***Di Sabato v Soffes*** (9 AD2d 297, 301) As the*553 court in ***Di Sabato v Soffes*** (9 AD2d 297, 301) stated: stated: "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Bare conclusory allegations are insufficient to defeat a motion for summary judgment (***Ehrlich v. American Moninger Greenhouse Mfg. Corp.***, 26 N.Y.2d 255, 259, 309 N.Y.S.2d 341, 257 N.E.2d 890; ***Shaw v. Time-Life Records, supra***, p. 207, 379 N.Y.S.2d 390, 341 N.E.2d 817; ***Aetna Cas. & Sur. Co. v. Schulman***, 70 A.D.2d 792, 794, 417 N.Y.S.2d 77)"

Spearmon v. Times Square Stores Corp., 96 A.D.2d 552, 552-553, 465 N.Y.S.2d 230 [2d Dept, 1983]).

> The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (***Lopez v. WS Distrib. Inc.***, 34 A.D.3d at 760, 825 N.Y.S.2d 516; ***see Conte v. Frelen Assoc.***, 51 A.D.3d at 621, 858 N.Y.S.2d 258; ***Min Whan Ock v. City of New York***, 34 A.D.3d 542, 824 N.Y.S.2d 651)
> ***Woodard v. Thomas***, 77 A.D.3d 738, 740, 913 N.Y.S.2d 103 [2d Dept, 2010].

Richard Yopp Sr. raises five affirmative defenses: failure to state a cause of action; lack of personal jurisdiction; someone else executed the documents without his knowledge or consent; damages were caused by the plaintiff or an unnamed party; and damages were contributed to in whole or in part by the culpable conduct of third parties. The plaintiff contends it was not paid as agreed and guaranteed after sale and delivery of the goods to ACS Mechanical Inc. The plaintiff asserts the guarantee by Richard Yopp Sr. was clear and unambiguous.

"In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Leon v. Martinez***, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; ***see First Keystone Consultants, Inc. v. DDR Constr. Servs.***, 74 A.D.3d 1135, 1136, 904 N.Y.S.2d 113)" (***Palm v. Tuckahoe Union Free School Dist.***, 95 A.D.3d 1087, 1089, 944 N.Y.S.2d 291 [2d Dept, 2012]). The plaintiff here raises allegations which demonstrate the existence of a *bona fide* justiciable controversy. In opposition, Richard Yopp Sr. fails to show the plaintiff cannot establish a cause of action (***see T.V. v New York State Dept. of Health***, 88 A.D.3d 290, 929 N.Y.S.2d 139 [2d Dept, 2011]; ***see also Sysco Corp. v Town of Hempstead***, 133 A.D.2d 751, 520 N.Y.S.2d 40 [2d Dept, 1987]).

> The process server's affidavit, which indicated that the appellant was served in accordance with CPLR 308 (2), constituted prima facie evidence of proper service and the appellant's conclusory denial of receipt of the summons and complaint was insufficient to raise any issue of fact (***see, Genway Corp. v Elgut***, 177 AD2d 467; ***Colon v Beekman Downtown Hosp.***, 111 AD2d 841). Since the appellant failed to specifically refute the contents of the affidavit of service or to substantiate his conclusory allegation, the Supreme Court properly denied his motion without conducting a hearing on the issue of service (***see, Genway Corp. v Elgut, supra; Colon v Beekman Downtown Hosp., supra***)
> ***Sando Realty Corp. v Aris***, 209 A.D.2d 682, 619 N.Y.S.2d 140 [2d Dept, 1994].

Here, the plaintiff's process server states, in a November 29, 2011 affidavit, he served the summons and verified complaint on Richard Yopp Sr. by delivering a copies of the papers to his spouse at their residence located at 1852 Relyea Drive, Merrick, New York. Richard Yopp Sr. admits that home is his residence. The process server also states he mailed copies of the summons and verified complaint addressed to Richard Yopp Sr. to that same address on November 29, 2011 and December 5, 2011. In opposition, Richard Yopp Sr. fails specifically to refute the contents of the affidavit of service or substantiate his own conclusory allegations. The Court determines the issue of service in favor of the plaintiff and finds a traverse is unnecessary under the circumstances (***see Remington Investments, Inc. v. Seiden***, 240 A.D.2d 647, 658 N.Y.S.2d 696 [2d Dept, 1997]). Moreover, Richard Yopp Sr. served an answer on or about December 19, 2011, thus he failed to comply with CPLR 3211(e), that is to object to the service of process on the ground of lack of personal jurisdiction within 60 days of the date of the pleading, to wit February 18, 2012. Hence, the Court determines it has personal jurisdiction.

> The plaintiff bank made a prima facie showing of entitlement to judgment as a matter of law against Bauer by submitting proof of the existence of the underlying credit agreement, Bauer's personal guaranty of the obligations of the dental practice under that agreement, and the failure of the dental practice to make payment in accordance with the terms of the credit agreement (***see HSBC Bank USA, N.A. v. Laniado***, 72 A.D.3d 645, 897 N.Y.S.2d 514; ***Wolf v. Citibank***, N.A., 34 A.D.3d 574, 575, 824 N.Y.S.2d 176; ***Kensington House Co. v. Oram***, 293 A.D.2d 304, 304–305, 739 N.Y.S.2d 572). Bauer failed to raise a triable issue of fact in opposition. "[S]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature," and Bauer's "affidavit was alone inadequate to raise an issue of fact necessitating a trial" (***Banco Popular N.A. v. Victory Taxi Mgt.***, 1 N.Y.3d 381, 384, 774 N.Y.S.2d 480, 806 N.E.2d 488; ***see Seaboard Sur. Co. v. Nigro Bros.***, 222 A.D.2d 574, 635 N.Y.S.2d 296)

JPMorgan Chase Bank, N.A. v. Bauer, 92 A.D.3d 641, 641-642, 938 N.Y.S.2d 190 [2d Dept, 2012].

This Court determines the plaintiff makes a *prima facie* showing of entitlement to judgment as a matter of law against Richard Yopp Sr. by submitting proof of the existence of the underlying agreement, and Richard Yopp Sr.'s personal guaranty of the obligations of that agreement. The plaintiff also shows the failure of ACS Mechanical Inc. to make payment in accordance with the

terms of the credit agreement, and Richard Yopp Sr. failure to pay as guaranteed. The Court determines the guaranty, by its terms, was absolute and unconditional regardless of the validity or enforceability of any other obligation (***see North Fork Bank v. ABC Merchant Services, Inc.***, 49 A.D.3d 701, 853 N.Y.S.2d 633 [2d Dept, 2008]). In opposition, Richard Yopp Sr. submits only a bare assertion of forgery, and fails to meet the legal requirement of showing a triable issue of fact. There is no showing of evidence in admissible form by Richard Yopp Sr. to require a handwriting expert to state with a reasonable degree of certainty that Richard Yopp Sr.'s signature of the guarantee is genuine. Moreover, the defense allegation of forgery is not plead with particularity.

> While we have on occasion denied a plaintiff the benefit of the expedited procedure set forth in CPLR 3213 on the ground that reference beyond the four corners of the instrument was necessary in order to comprehend fully the nature of the obligation to be enforced and thus raised a question as to whether the instrument was in fact one "for the payment of money only", where, as here, the referenced matter is merely repetitive of terms already contained within the instrument and does not alter the purely monetary nature of the obligation, there is no reason to delay judgment in the plaintiff's favor. We hold that the note and the guarantee constitute prima facie evidence of the obligation within the purview of ***Interman Indus. Prods. v R. S. M. Electron Power*** (37 NY2d 151, 155). This is particularly true in the matter at bar where the defendant has expressly agreed in his guarantee "not to assert any defenses, claims, counterclaims or set-offs to any asserted right of or effort by Shearson to seek recovery under the terms of such Note, this Guarantee or Settlement Agreement". The breadth of this waiver renders the prolongation of this action for the recovery of an undisputed debt utterly pointless (***see, Key Bank v Munkenbeck***, 162 AD2d 503)

Shearson Lehman Hutton v Myerson & Kuhn, 197 A.D.2d 410, 410-411, 602 N.Y.S.2d 396 [2d Dept, 1993].

The Court determines the plaintiff makes a *prima facie* showing of entitlement to judgment as a matter of law against Richard Yopp Sr. by showing Richard Yopp Sr. unconditionally guaranteed the payment of the obligations of ACS Mechanical Inc. (***see North Fork Bank v. ABC Merchant Services, Inc.***, 49 A.D.3d 701, 853 N.Y.S.2d 633 [2d Dept, 2008]). In opposition, Richard Yopp Sr. proffers no evidence in admissible form to support his allegations that the damages were caused by the plaintiff or an unnamed party; and damages were contributed to in whole or in part by the culpable conduct of third parties (***see National Westminster Bank, U.S.A. v. Barrier***

Technology Corp., 131 A.D.2d, ***supra***).

Accordingly, the motion is granted. The Clerk is directed to enter judgment pursuant to CPLR 5016 upon submission of a proposed judgment which complies with the mandates of CPLR 5018.

So ordered.

Dated: **July 5, 2012**

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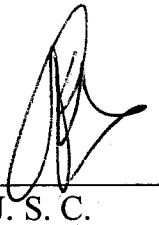

J. S. C.

FINAL DISPOSITION