

<b>National Credit Union Admin. Bd. v Basin</b>
2016 NY Slip Op 32456(U)
December 13, 2016
Supreme Court, New York County
Docket Number: 651546/16
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

NATIONAL CREDIT UNION ADMINISTRATION  
BOARD, ACTING IN ITS CAPACITY AS  
CONSERVATOR OF MONTAUK CREDIT UNION,

Plaintiff,

-against-

BORIS BASIN, CAPITAL TAXI LLC, KING OF  
RUSSIA TAXI, LLC, SUNNY TAXI LLC,  
BROTHER TAXI LLC, and HOLIDAY TAXI LLC,

Defendants.

Index No.: 651546/16  
**DECISION/ORDER**  
Mot. Seq. No. 1

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to amend the caption and for summary judgment.

<b>Papers</b>	<b>Numbered</b>
Plaintiff's Notice of Motion.....	1
Plaintiff's Memorandum of Law in Support.....	2
Defendants' Memorandum of Law in Opposition.....	3
Affidavit of Boris Basin in Opposition to Plaintiff's Motion.....	4
Plaintiff's Memorandum in Reply.....	5

*Jaspan Schlesinger LLP*, New York (Kevin J. Etzel of counsel), for plaintiff.  
*Fox Rothschild LLP*, New York (Brett A. Berman & Jordan B. Kaplan of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff commenced this action for breach of contract, accounts stated, and unjust enrichment against each defendant. Plaintiff moves for leave to amend the caption and for summary judgment. Plaintiff argues that the caption should be amended because Montauk Credit Union merged into Bethpage Federal Credit Union. Plaintiff asserts it has met its prima facie case because it has proven that plaintiff lent defendants money and that defendants defaulted on their loans. Defendants oppose plaintiff's motion only as to summary judgment. Defendants argue that plaintiff has (1) failed to demonstrate its prima facie case for breach of contract; (2) not demonstrated that defendants' affirmative defense should be dismissed; and (3) that summary judgment is premature because the parties have not yet engaged in disclosure.

## I. Amend Caption

Plaintiff moves to amend the caption to read “Bethpage Federal Credit Union as successor by merger to Montauk Credit Union.” Vice president of Bethpage Federal Credit Union, Lawrence S. Jones, asserts that Montauk Credit Union merged into Bethpage Federal Credit Union. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶ 40.) Defendants have not opposed this aspect of plaintiff’s motion. Plaintiff’s motion to amend the caption is granted.

## II. Summary Judgment

Plaintiff has met its burden to show that it executed promissory notes with each defendant, that it loaned defendants the money, and that defendants defaulted on the respective loans.

On its first cause of action for breach of contract, plaintiff proved that it lent Boris Basin and Capital Taxi LLC’s (Capital) \$704,000 on December 17, 2013. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶¶ 3-9; Exhibit 1.) Basin and Capital were required to make 59 payments, with the final balloon payment due on December 17, 2018. (*Id.*) Basin and Capital agreed to pay interest at the rate of 4.5% a year. (*Id.*) Basin signed the agreement as the borrower. Basin — as Capital’s president and secretary — signed the agreement as the guarantor. Basin and Capital defaulted by failing to pay the amount due on the loan on September 17, 2015. The full amount of the outstanding loan became due immediately. The current unpaid principle balance of the note is \$687,125.90. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶ 9.) Basin and Capital are jointly and severally liable.

On its fourth cause of action for breach of contract, plaintiff proved that it lent Basin and King of Russia Taxi LLC (King of Russia) \$704,000 on December 17, 2013. (*Id.* at ¶¶ 10-16; Exhibit 2.) Basin and King of Russia were required to make 59 payments, with the final balloon payment due on December 17, 2018. (*Id.*) Basin and King of Russia agreed to pay interest at the rate of 4.5% a year. (*Id.*) Basin signed the agreement as the borrower. Basin — as King of Russia’s president and secretary — signed the agreement as the guarantor. Basin and King of Russia defaulted by failing to pay the amount due on September 17, 2015. The full amount of the outstanding loan immediately became due. The current unpaid principle balance of the note is \$687,118.10. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶ 16.) Basin and King of Russia are jointly and severally liable.

On its seventh cause of action for breach of contract, plaintiff proved that it lent Basin and Holiday Taxi LLC (Holiday) \$704,000 on December 21, 2014. (*Id.* at ¶¶ 17-23; Exhibit 3.) Basin and Holiday were required to make 59 payments, with the final balloon payment due on January 21, 2019. (*Id.*) Basin and Holiday agreed to pay interest at the rate of 4.5% a year. (*Id.*) Basin signed the agreement as the borrower. Basin — as Holiday’s president and secretary — signed the agreement as the guarantor. Basin and Holiday defaulted by failing to pay the amount due on September 21, 2015. The full amount of the outstanding loan became due immediately. The current unpaid principle balance of the note is \$688,346.97. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶ 23.) Basin and Holiday are jointly and severally liable.

On its tenth cause of action for breach of contract, plaintiff proved that it lent Basin and Sunny Taxi LLC (Sunny) \$704,000 on December 17, 2013. (*Id.* at ¶¶ 24-30; Exhibit 4.) Basin and Sunny were required to make 59 payments, with the final balloon payment due on December 17, 2018. (*Id.*) Basin and Sunny agreed to pay interest at the rate of 4.5% a year. (*Id.*) Basin signed the agreement as the borrower. Basin — as Sunny’s president and secretary — signed the agreement as the guarantor. Basin and Sunny defaulted by failing to pay the amount due on September 17, 2015. The full amount of the outstanding loan became due immediately. The current principle balance of the note is \$687,130.98. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶ 30.) Basin and Sunny are jointly and severally liable.

On its thirteenth cause of action for breach of contract, plaintiff proved that it lent Basin and Brother Taxi LLC (Brother) \$704,000 on December 17, 2013. (*Id.* at ¶¶ 31-37; Exhibit 5.) Basin and Brother were required to make 59 payments, with the final balloon payment due on December 17, 2018. (*Id.*) Basin and Brother agreed to pay interest at the rate of 4.5% a year. (*Id.*) Basin signed the agreement as the borrower. Basin — as Brother’s president and secretary — signed the agreement as the guarantor. Basin and Brother defaulted by failing to pay the amount due on September 17, 2015. The full amount of the outstanding loan became due immediately. The current principle balance of the note is \$683,715.77. (Plaintiff’s Notice of Motion, Plaintiff’s Affidavit of Merit, at ¶ 37.) Basin and Brother are jointly and severally liable.

Plaintiff provided defendants with a written notice of default and acceleration dated February 11, 2016, for each of the loans. (Plaintiff’s Notice of Motion, Exhibit D.)

Although defendants oppose the motion, defendants do not assert any material issue of fact to warrant a trial. Defendants argue that the motion is premature and that defendants have not had enough time to conduct disclosure. But defendants would be in the best position to know whether they obtained these loans, how much they paid on them, and whether they defaulted. Defendants do not state what additional disclosure is needed and why it is necessary; therefore, plaintiff’s motion is not premature.

Defendants do not dispute plaintiff’s evidence with facts. Defendants’ conclusory assertions are insufficient to create issues of fact for trial: Basin states only that the borrowers’ obligations to pay back the money was conditioned on plaintiff’s performance as the lender. (Affidavit of Boris Basin in Opposition to Plaintiff’s Motion, at ¶ 9.) Basin does not state how plaintiff failed to perform as a lender. Defendants have not contested that they executed the promissory notes or that they are in default on the loans. Because defendants signed the respective contracts and have not complied with the terms, plaintiff’s motion for summary judgment on its breach-of-contract cause of actions is granted, namely cause of action one, four, seven, ten, and thirteen. Given the court’s decision, plaintiff withdraws its remaining cause of actions and its request for attorney fees. (Plaintiff’s Notice of Motion, Affirmation in Support, at ¶ 2, n 1.)

Plaintiff is entitled to interest at 4.5% from September 23, 2015.<sup>1</sup>

### III. Affirmative Defenses

Defendants' eight affirmative defenses are dismissed.

Defendants' counsel addresses only the first, second, and third affirmative defenses in its memorandum of law in opposition to plaintiff's motion.

Defendants' first affirmative defense is that plaintiff failed to state a claim. Defendants argue that because plaintiff has not shown that it performed its obligations, plaintiff has failed to make a prima facie case. But this defense fails for two reasons. Because the contract was not a bilateral agreement, it did not require plaintiff to perform aside from lending defendants the money. Also, because the contract was a promissory note, plaintiff must show on its prima facie case that defendants executed the note and that the defendants are in default. (*See Quest Commercial, LLC v Rovner*, 35 AD3d 576, 576 [2d Dept 2006].) Plaintiff has established its prima facie case. Therefore, defendants' first affirmative defense is dismissed.

Defendants' second affirmative defense is laches. The doctrine of laches is an equitable doctrine inapplicable in an action at law. (*Reeps v BMW of N. Am., LLC*, 94 AD3d 475, 476 [1st Dept 2012].) This is an action at law in which no equitable relief is sought. Therefore, defendants' second affirmative defense is dismissed.

Defendants' third affirmative defense is that plaintiff's claims are barred based on plaintiff's bad faith, misconduct, and breach of contract. Defendants assert that plaintiff caused defendants' default, but defendants offer no factual support for this argument. Defendants' third affirmative defense is dismissed.

Defendants' fourth affirmative defense alleges that plaintiff's claims are barred because of estoppel and equitable estoppel. Defendants offer no facts to support their defense of estoppel; conclusory statements are insufficient to defeat summary judgment. (*State Bank of Albany v Fioravanti*, 51 NY2d 638, 648 [1980].) Defendants' fourth affirmative defense is dismissed.

Defendants' fifth affirmative defense is that plaintiff's claims are barred because the damages suffered by plaintiff were proximately caused by plaintiff, and no damages were proximately caused by defendants. But defendants have not offered any facts to support this defense. Defendants' fifth affirmative defense is dismissed.

Defendants' sixth affirmative defense is that the doctrine of mitigation bars plaintiff's claims. Defendants do not offer any facts to support this defense. Defendants' sixth affirmative defense is dismissed.

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<sup>1</sup> This date is derived from plaintiff's complaint. Plaintiff's affidavit of merit, however, provides different dates in which interest accrues for the respective loans, namely October 11, 2015, October 28, 2015, and September 10, 2015. Also, plaintiff sent defendants letters of default on February 11, 2016. Given the different dates, the court relies on the date in the complaint.

Defendants' seventh affirmative defense is that the doctrine of accord and satisfaction bars plaintiff's claims. A party who asserts the affirmative defense of accord and satisfaction must establish that there was between the parties a disputed or unliquidated claim that they mutually resolved through a new contract discharging all or part of their obligations under the original contract. (*Profex, Inc. v Town of Fishkill*, 65 AD3d 678, 678 [2d Dept 2009].) Defendants have provided no facts. Defendants' seventh affirmative defense is dismissed.

Defendants' eighth affirmative defense is that plaintiff committed fraud. CPLR 3016 (b) provides that for a defense based on fraud, "the circumstances constituting the wrong shall be stated in detail." (*Accord Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010].) Defendants fail to allege any specific fact regarding any element of fraud. Defendants' eighth affirmative defense is dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted, and plaintiff shall settle order; and it is further

ORDERED that plaintiff serve a copy of this decision and order on all parties.

Dated: December 13, 2016



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.