[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 106484/2010
NEW YORK COMMERCIAL BANK
vs
SATO CONSTRUCTION
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
JUN 04 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 25 2012

HON. JUDITH J. GISCHE J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER / JUDG ☐ SETTLE ORDER / JUDG

Supreme Court of the State of New York
County of New York: Part 10

---x

NEW YORK COMMERCIAL BANK, successor in interest to ATLANTIC BANK OF NEW YORK,

Plaintiff,

-against-

SATO CONSTRUCTION CO., INC. d/b/a FLAG WATERPROOFING & RESTORATION, ANTHONY E. COLAO and JOSE MILLAN,

Defendants.

---x

Decision/Order
Index No.: 106484/10
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):



| **Papers** | **Numbered** |
|---|---|
| Pltf's n/m [3212] w/ AJW affirm, EC affid, exhs. | 1 |
| Def's opp. w/ AC affid, exhs. | 2 |
| Pltf's reply w/ AJW affirm. | 3 |

Hon. Judith J. Gische, J.S.C.:

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff New York Commercial Bank, successor in interest to Atlantic Bank of New York ("NYCB" or "plaintiff" or "Bank") to recover from the defendants Sato Construction Co., Inc. d/b/a Flag Waterproofing & Restoration ("Sato"), Anthony E. Calao ("Colao") and Jose Millan ("Millan") (collectively "defendants"), outstanding sums due under a line of credit and term note. Plaintiff makes this summary judgment motion to dismiss the defendants counterclaim, claiming that there is no justiciable issue of fact to be tried, and because the counterclaim is without legal merit. Issue has been joined on the counterclaim, the note of issue has been filed and the motion is timely. Summary judgment relief is, therefore, available. CPLR § 3212; Myung Chun v. North American

Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001].

**Summary of the Facts**

*Initial Action*

Plaintiff's first cause of action arises from a September 30, 2008, Revolving Line of Credit Promissory Note ("2008 LOC Note") in the principal amount of $600,000.00. (Pltf's Exh. G). In the 2008 LOC Note, Sato covenanted, inter alia: (a) to repay the note by July 3,2009; (b) that NYCB had no obligation to extend the 2008 LOC Note, even if no default or breach occurs (Pltf's Exh. G ¶ 5); (c) that no failure or delay of the bank in exercising any right, power or remedy shall operate as a waiver (Pltf's Exh. G ¶ 16); and (d) to a merger clause, in which the parties agreed that the note set forth the entire agreement between the borrower and the bank, and no amendment, modification, or waiver of any provision of the 2008 LOC Note, nor consent to any departure of the borrower therefrom would be effective, unless it was in writing and signed by the bank (Pltf's Exh. G ¶ 17). Even then the amendment, modification, or waiver would be effective only in the specific instance and the specific purpose for which it was given. (Id.). Plaintiff alleges that Sato defaulted on the terms of the 2008 LOC Note. Plaintiff claims that Sato owes $600,000.00, with interest at the rate of 5.25% from November 6, 2009 to March 5, 2010 and interest at the default rate of 8.25% from March 6, 2010.

Plaintiff's second cause of action arises from a Business Installment Loan Promissory Note ("2008 Term Note") in the principal amount of $400,000.00. In the 2008 Term Note, Sato covenanted, inter alia: (a) that the failure to make any payment when due on the 2008 LOC Note would result in a default under the 2008 Term Note; (b) that in the

case of default, interest would accrue at a per annum rate of interest equal to the sum of the rate of interest then in effect plus 5%; (c) to pay a late charge in the amount of 5% of any payment made more than 5 days after the due date; (d) to a merger clause (Pltf's Exh. H ¶ D.4.); and (e) to a non-waiver clause. (Pltf's Exh. H ¶ D.2.). Plaintiff alleges that Sato defaulted in its obligations under the 2008 Term Note as a result of the default under the 2008 LOC Note on July 3, 2009. Plaintiff claims that the principal sum of $324,553.51, with interest at the rate of 6.75% from February 1, 2010 to March 5, 2010 and at the default rate of 11.75% from March 6, 2010, together with late charges is due on the 2008 Term Note.

*Defendants' Counterclaim*

Sato alleges that it had a banking relationship with NYCB from 1988 through 2009 during which Sato borrowed various sums of money on term notes and credit lines from NYCB (and its predecessor). After 2006, Sato claims that each liability was either paid, modified or extended on the basis of oral approval from plaintiff's loan officer, which was then followed by a formal written approval a couple of months later. Sato claims that during the periods between the oral approval and the written confirmation of the extension or modification, no new written loan documents existed, even though Sato continued to make all payments due, as orally agreed.

Sato, a construction business, claims that it requires lines of credit and loans to be in place in order to qualify for performance bonds necessary to bid on jobs and that this requirement was known by plaintiffs employees who dealt with the Sato loan and credit line accounts. Defendants claim that the 2008 LOC Note and the 2008 Term Note were orally extended by the plaintiff, and that Sato, in reliance on their past practices, continued to

make payments. However, after being assured that new loan documents were being prepared, Sato claims that, subsequently, in November 2009, plaintiff orally notified Sato that the 2008 Term Note and 2008 LOC Note were being called due and were not being extended. Sato received the same information in writing, on December 10, 2009, over four months after the due dates of the credit line and promissory note.

In its counterclaim, Sato argues that Plaintiff's failure to act in a timely manner resulted in Sato being denied bonding on any job it sought after December of 2009, through the time of filing of the counterclaim. Sato further claims that due to plaintiff's inaction from July 2009 to November 2009, Sato was unable to obtain any credit necessary to continue bidding on new jobs, which resulted in a 40% drop in gross revenue. Due to the foregoing, defendants claim that the plaintiffs act of "reneging" on it's oral promise to renew the 2008 Term Note and 2008 LOC Note caused lost profits in excess of $1,000,000.00.

**Discussion**

When deciding whether the plaintiff is entitled to the grant of summary judgment in its favor against a defendants counterclaim, the court considers whether the plaintiff has tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Zuckerman v. City of New York, 49 N.Y. 2d 557, 562 [1980]. If met, the burden then shifts to defendants who must then demonstrate the existence of a triable issue of fact in order to defeat these motions. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary

judgment, the court may and should resolve it without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 [2d Dept. 2003].

The public policy of the State of New York mandates that a person signing an instrument for the accommodation of a bank which, in its form, is a binding obligation, is estopped from enforcing an alleged oral agreement to forebear from enforcing the instrument according to its terms. First Nat. City Bank v Cooper, 50 A.D.2d 518 [1st Dept. 1975]; Manufacturers Hanover Trust Co. v Trans Nat. Communications, Inc., 36 A.D.2d 709, 710 [1st Dept. 1971]; see also, General Obligations Law, § 15-301. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Greenwich Capital Fin. Products, Inc. v Negrin, 74 A.D.3d 413, 415 [1st Dept 2010]; W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 [1990]. A line of credit is governed by the same general principles of law applying to all other written contracts. See, General Obligations Law, § 15-301.

Plaintiff claims that over the course of many years of the banking relationship, it extended many revolving lines of credit ("revolving LOC") to Sato. These revolving LOCs set out clear maturity dates, at which time plaintiff had reserved the contractual right to extend the notes, in its sole discretion, regardless of whether or not Sato had defaulted. Pltf's Exh. G ¶ 5. These prior dealings between the parties had resulted gaps in coverage that were previously resolved into executed written extensions. These gaps included two months from June and July of 2007, three months from July to September of 2008, two months from November to December 2008, and, finally, five months from July to December 2008.

Although defendants claim that these gaps created a prior course of dealing and

expectations between the parties, it is clear that once new notes were executed, the prior course of conduct was not intended to create any future expectation or obligation. The notes, in this case, executed after the last so called gap, explicitly contain a non-waiver clause (Pltf's Exh. G ¶ 16 and Exh. H ¶ D.2.), a merger clause (Pltf's Exh. G ¶ 17 and Exh. H ¶ D.4.) and they specifically state that the plaintiff is not under any obligation to renew or extend the note (Pltf's Exh. G ¶ 5).

The notes are fully integrated unambiguous contracts which by their terms could not be modified or varied by parol modification or by an alleged course of conduct. See Julien J. Studley, Inc. v. New York News, Inc., 70 N.Y. 628, 629 [1987]; American Bank & Trust Co. v. Intermodulex NDH Corp., 74 A.D.2d 218 [1st Dept. 1980]; Carlin v. Jemal, 68 A.D.3d 655 [1st Dept. 2009]). Neither the alleged prior course of conduct by the parties, nor the alleged oral promises by the bank's loan officer that the notes would be extended could modify the terms of the underlying note. See e.g. Chem. Bank v PIC Motors Corp., 87 A.D.2d 447, 450 [1st Dept. 1982] aff'd, 58 N.Y.2d 1023 [1983]; American Bank & Trust Co. v. Intermodulex NDH Corp., *supra*.

Accordingly the court finds that defendants counterclaim is insufficient as a matter of law. The court rejects defendants claim that there was an oral extension of the notes, as such alleged extensions are in contravention of the explicit terms of the notes. Nor could there have been any course of dealing that operated to modify the terms of the notes. Here, the notes that plaintiff entered into with defendant specifically stated that all modifications of the original agreement contracted to had to be in writing, signed by the Bank, to be effective. The court finds that the defendants counterclaim is not supported by

the long-established law of this state, particularly where the comprehensive written agreement between the parties contains a merger clause and specific contract terms that contradict the very representations that defendant alleges were made. W.W.W. Associates, Inc. v. Giancontieri, *supra*; Glenfed Financial Corporation v. Aeronautics and Astronautics Services, Inc., 181 A.D.2d 575 [1st Dept. 1992].

In view of the fact that there could be no oral modification of the 2008 LOC Note and 2008 Term Note, the court does not reach the further issue of lost profits raised on this motion.

**Conclusion**

In accordance with the foregoing, it is hereby,

**ORDERED** that plaintiffs motion for summary judgment dismissing the defendants counterclaim is granted in its entirety; and it is further

**ORDERED** that this case is ready for trial, plaintiff shall serve a copy of this decision/order on the office of Trial Support so that the case can be scheduled; and it is further

**ORDERED** that any relief not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York

May 25, 2012

So Ordered:

FILED

JUN 04 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. JUDITH J. GISCHE, J.S.C.