

**Suffolk County Natl Bank v ARC Mechanical, Corp**

2013 NY Slip Op 31951(U)

August 12, 2013

Sup Ct, Suffolk County

Docket Number: 4781/12

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 8/24/12  
ADJ. DATES 7/12/13  
Mot. Seq. # 001 - Mot D  
Mot. Seq. # 002 - MD  
Trial on Damages: 10/11/13  
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-----X  
SUFFOLK COUNTY NATIONAL BANK :  
 :  
 : Plaintiff, :  
 :  
 : -against- :  
 :  
 : ARC MECHANICAL, CORP, TNN REALTY :  
 : LLC., ANTHONY TAORMINA and NINA :  
 : TAORMINA, :  
 : Defendants. :  
 :  
 : -----X

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Upon the following papers numbered 1 to 19 read on this motion by the plaintiff for summary judgment and cross motion by the defendants for the same relief in their favor; Notice of Motion/Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 5-7; Answering Affidavits and supporting papers 8-9; 10-11; Reply papers 12-13; Other 14-15 (plaintiff's memorandum); 16 (defendants' memorandum); 17 (plaintiff's reply memorandum); 19 (defendants' memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (#001) by the plaintiff for summary judgment on its complaint in this action to recover sums due from the defendants under the terms of a corporate Revolving Line of Credit Note and Agreement, a second promissory note and personal guarantees is considered under CPLR 3212 and is granted to the extent that the plaintiff is awarded partial summary judgment on the issue of liability, the amount of which, shall be determined at a trial on damages; and it is further

**ORDERED** that a trial on the issue of the plaintiff's damages of the type contemplated by CPLR 3212(c) shall be held on **October 11, 2013** at 9:30 a.m. in Part 45 at the courthouse located at 1 Court Street - Annex, Riverhead, New York, subject to the filing of a note of issue with the clerk, upon a copy of this order on or before *September 14, 2012*; and it is further

*OK*

**ORDERED** that the cross motion (#002) by the defendants for an order granting them summary judgment is denied.

The plaintiff commenced this action to recover damages, including attorney's fees, incurred by the plaintiff by reason of breaches on the part of the corporate borrower, Arc Mechanical, Corp., under the terms of two promissory notes executed by it in favor of the plaintiff on February 2, 2009. The first of such notes evidenced a \$750,000.00 Revolving Line of Credit agreement while the second evidenced a loan in the amount of \$183,000.00. The plaintiff also seeks recovery of such damages from the remaining defendants by reason of their breaches of written guarantees of the obligations of the corporate borrower defendant under the terms of the notes. The plaintiff claims that defaults in payments occurred in September of 2011 and that such defaults continue to date.

In the First cause of action advanced in the complaint, the plaintiff demands recovery under the terms of the first note and guarantees in the sum of \$73,1952.53. This amount includes interest at the per diem rate of \$108.32 from September 9, 2011 through February 8, 2012. In its Second cause of action, the plaintiff demands recovery under the terms of the second note and guarantees in the amount of \$84,656.77, together with interest at a per diem rate of \$16.35 from the date of February 8, 2012. Finally, the plaintiff demands an award of reasonable counsel fees incurred by reason of the defaults in payment in an amount unspecified as well as costs and disbursements.

Although each of the defendants are represented by the same counsel, each responded to the plaintiff's service of the summons and complaint by service of separate answers in which each contained the same three affirmative defenses. Those defenses are: 1) failure to state claims upon which relief may be granted; 2) a lack of personal jurisdiction over the defendants; and 3) defects in the summons.

Although the answers were executed in March of 2012, the action was not initialized until the filing of a Request for Judicial Intervention in August of 2012 upon the service and filing of the instant motion by the plaintiff for summary judgment on its complaint. According to correspondence dated June 20, 2013, the submission of the plaintiff's motion was repeatedly adjourned by stipulations of counsel due to their engagement in settlement negotiations. On June 21, 2013, counsel stipulated to one further adjournment to July 12, 2013. That stipulation, which was so-ordered by the court, provided for the service of opposing papers by the defendants on or before July 5, 2013. The stipulation further provided that any cross motion by the defendants had to be separately served upon the plaintiff.

By the instant motion (#001), the plaintiff seeks summary judgment on the two causes of action set forth in its complaint which sound in breach of contract against the defendants. The opposing papers submitted by the defendants raise the following unpleaded defenses: 1) misdeeds and duplicitous acts on the part of the defendants' counsel in negotiating the loans and failures to advise the guarantor defendants of the jural nature and consequences of their execution of the written guarantees and challenges to the accuracy and completeness of the loan documents produced by the

plaintiff, including the guarantees. The defendants further question the validity of the plaintiff's post-commencement assignment of the subject notes and other loan documents and by nuance, suggest that the plaintiff may not rightfully pursue its pleaded claims against the defendants as a result of such transfers.

In addition to their opposing papers, the defendants served cross moving papers (#002) upon the plaintiff in which they seek summary judgment dismissing the plaintiff's complaint. The grounds advanced are the very same as those set forth in the affidavit in opposition of defendant, Anthony Taormina, who is a principal of both corporate defendants and the husband of defendant, Nina Taormina. For the reasons stated below, the plaintiff's motion is granted only on the issue of the defendant's liability, while the cross motion by the defendants is denied in its entirety.

It is well established that in an action to recover damages for breach of a promissory note or other credit or loan agreement and any written guarantee of the obligation of the obligor thereunder, a prima facie case is made by the plaintiff upon due proof of the existence of the underlying note and guarantee and a failure on the part of the defendants to make payment in accordance with the terms of such note and guarantee (*see Urstadt Biddle Prop., Inc. v Excelsior Realty*, 65 AD3d 1135, 885 NYS2d 510 [2d Dept 2009]; *Provident Bank v Giannasca*, 55 AD3d 812, 866 NYS2d 289 [2d Dept 2008]; *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 862 NYS2d 96 [2d Dept 2008]; *North Fork Bank v ABC Merchant Servs., Inc.*, 49 AD3d 701, 701, 853 NYS2d 633 [2d Dept 2008]; *Suffolk County Natl. Bank v Columbia Telecom. Group, Inc.*, 38 AD3d 644, 645, 832 NYS2d 80 [2d Dept 2007]; *North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676, 828 NYS2d 194 [2d Dept 2007]). Where such a showing is made, the defendant must demonstrate, by due proof in admissible form, the existence of at least one genuine question of fact to avoid the granting of the plaintiff's motion (*see Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, *supra*; *Quest Commercial LLC v Rouner*, 35 AD3d 576, 825 NYS2d 766 [2d Dept 2006]).

Here, the plaintiff satisfied its initial burden by establishing that the it loaned monies to the corporate borrower defendant, Arc Mechanical, Corp., under the terms of the subject notes and that the remaining defendants each executed a written, continuing guarantee of payment and performance of the obligations of such corporate borrower as to all amounts loaned to it by the plaintiff. The moving papers further established the defendants' defaults in payment under the terms of said documents. The plaintiff thus established a prima facie entitlement to partial summary judgment on the issue of the defendants' liability for damages incurred by reason of the defendants' breaches of the credit agreement and guarantees. The plaintiff also established its entitlement to an award of reasonable counsel fees in view of the defendants' agreement to pay same under the terms of the loan documents (*see Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc.*, 57 AD3d 708, 870 NYS2d 395 [2d Dept 2008]). However, due proof of the amounts due, including those demanded for counsel fees, was lacking. The plaintiff thus established a prima facie entitlement to summary judgment only on the issue of the defendants' liability (*see CPLR 3212[c]*).

It was thus incumbent upon the answering defendants to demonstrate, by due proof in admissible form, the existence of genuine questions of fact with respect to bona fide defenses to avoid

the granting of the plaintiff's motion in whole or in part (*see Imperial Capital Bank v 11-13-15 Old Fulton D*, 88 AD3d 652, 930 NYS2d 267 [2d Dept 2011]; *JPMorgan Chase Bank, N.A. v Galt Group, Inc.*, 84 AD3d 1028, 923 NYS2d 643 [2d Dept 2011]; *Gullery v Imburgio*, 74 AD3d 1022, 905 NYS2d 221 [2d Dept 2010]; *Quest Commercial LLC v Rovner*, 35 AD3d 576, *supra*). Notably, neither the opposing papers nor the cross moving papers submitted by the defendants addressed, let alone established, that any of the three affirmative defenses asserted in the answer of the defendants have merit. Those defense are thus dismissed. Left only for consideration are the newly asserted defenses raised by the defendants in their opposing and cross moving papers as outlined above.

Rejected as unmeritorious are the defendants' claims that the instant motion is premature due to the absence of discovery. The defendants, who personally participated in the loan transaction, failed to demonstrate that additional discovery may lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the plaintiff (*see CPLR 3212[f]*; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *McFadyen Consulting Group, Inc. v Puritan's Pride*, 87 AD3d 620, 928 NYS2d 87 [2d Dept 2011]; *Urstadt Biddle Prop., Inc. v Excelsior Realty*, 65 AD3d 1135, *supra*).

Also rejected are the defendants' claims that issues of fact exist due to the incomplete nature of the loan documents produced by the plaintiff, as such claims are predicated merely upon speculation, innuendo and surmise and were unsubstantiated by any proof. The defendants' participation in the execution of the loan documents, coupled with their failure to adduce any evidence of errors, discrepancies or lack of authenticity in the documents produced, warrant the rejection of these claims.

The defendants' challenges to the validity of the plaintiff's post-commencement assignment of the subject notes are similarly without merit. There are no proscriptions against assignments set forth in the loan documents. The defendants' submissions contain no proof tending to implicate the validity of the assignments or that the defendants are otherwise relieved of their obligations to pay amounts due under the loan documents. Nor is there any statute, law or rule cited which precludes the plaintiff's continued prosecution of this action due to its post-commencement transfer of its interests in the subject notes. Indeed, the only statute governing post-commencement transfers is CPLR 1018 and its provisions are permissive, rather than mandatory in nature, leaving it to the court to decide whether a substitution of the transferee should be directed in any given case (*see IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012]).

As for the defendants' claim that they possess a valid defense that is premised upon the duplicitous conduct and other misdeeds allegedly committed by their transactional counsel, all of which are allegedly imputable to the plaintiff, said claim is unsupported by any proof in admissible form and lacking in substantive merit (*see Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443, 922 NYS2d 66 [1st Dept 2011]; *Delta Funding Corp. v Yaede*, 268 AD2d 55, 702 NYS2d 854 [2d Dept 2000]; *Prudential Ins. Co. of Am. v Kelly*, 174 AD2d 717, 571 NYS2d 761 [2d Dept 1991]). Moreover, this unpleaded defensive claim of fraud in the inducement by the defendants' counsel lacks the specificity required for pleaded claims and defenses for fraud (*see CPLR 3016[b]*; *3018[b]*). In

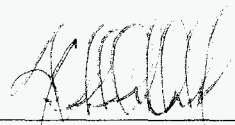
any event, discrepancies between defendant Anthony Taormina's unsubstantiated recollection of certain factual representations allegedly made by his counsel, all of which conflict with the plain language of the promises, covenants, representations and waivers set forth in the defendants' guarantees, are wholly insufficient to rebut the plaintiff's prima facie showing of its entitlement to an award of partial summary judgment (*see HSBC Bank USA, Natl. Ass'n v Laniado*, 72 AD3d 645, 897 NYS2d 514 [2d Dept 2010]; *see also Urstadt Biddle Prop., Inc. v Excelsior Realty*, 65 AD3d 1135, *supra*; *HSBC Bank USA, Natl. Ass'n v Goldberger*, 105 AD3d 906, 963 NYS2d 324 [2d Dept 2013]; *Key Equip. Fin. v South Shore Imaging, Inc.*, 69 AD3d 805, 893 NYS2d 574 [2d Dept 2010]; *North Fork Bank v ABC Merchant Serv., Inc.*, 49 AD3d 701, 853 NYS2d 633 [2d Dept 2008]).

The defendants' thus failed to rebut the plaintiff's prima facie showing of its entitlement to summary judgment on the issue of the defendants' liability. The defendants also failed to demonstrate any grounds for the granting of their cross motion (#002) for dismissal of the complaint, as it is premised upon the very same claims advanced in their opposing papers. The cross motion is thus denied.

The plaintiff's motion for summary judgment is thus granted to the extent that partial summary judgment is awarded to the plaintiff on the issue of the defendants' liability. Left for determination is the amount of damages recoverable from the defendants, including the calculation of principal and interest, as well as the amount of counsel fees to which the plaintiff is entitled, as the plaintiff's submissions were insufficient to establish these sums as a matter of law. The amount of these damages shall thus be the subject of an immediate trial on the issue of damages as contemplated by CPLR 3212(c).

Pursuant to CPLR 3212(c), an immediate trial on the amount recoverable by the plaintiff from the defendants under the notes and guarantees, including reasonable counsel fees, shall be held on **October 11, 2013**, as indicated above. To ready this matter for such trial, the plaintiff must file, upon a copy of this order, a note of issue with the clerk, with due proof of service thereof upon defendants' counsel, on or before **September 14, 2013**. Proof of such filing shall be handed up at the start of the proceedings to be conducted on October 11, 2013.

DATED:

8/12/13

THOMAS F. WHELAN, J.S.C.