SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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SIGNATURE FINANCIAL, LLC

Plaintiff

Index No.152200/2017

v

DECISION AND ORDER

JEAN W. BIEN-AIME and JOSEPH A. JEAN

Defendants. MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, seeking recovery on two promissory notes and on an account stated, and to foreclose on collateral securing a loan, the plaintiff, Signature Financial, LLC (Signature), moves pursuant to CPLR 3215 for leave to enter a default judgment. The motion is granted, without opposition, to the extent that Signature may enter a default judgment against the defendants on the first, fourth, and fifth causes of action with respect to the note dated May 17, 2013, in the principal sum of $347,000.00, and the motion is otherwise denied.

II. BACKGROUND

Signature alleges that, on May 17, 2013, the defendants executed two separate promissory notes in favor of a nominal obligee, Marn Associates, LLC (Marn), one in the face value of

$347,000.00 (the $347,000 note) and the other in the face value of $367,000.00 (the $367,000 note). Signature further asserts that it, along with Marn and the defendants, entered into a security agreement referable to the notes, and a master joint participation agreement (MJPA) with respect to each note, pursuant to which Signature was assigned 100% of Marn's interest in the $347,000 note and 98.91% of Marn's interest in the $367,000 note.

In support of its motion, Signature submits the pleadings, an attorney's affirmation, and a copy of $347,000 note, which identifies Marn as the obligee and the defendants as the obligors, and obligated the defendants to repay Marn the sum of $347,000.00, with interest at the rate of 3.5% per annum, in monthly installments over a three-year period. The note further includes a written notice that a 100% interest in the note "has been assigned to Signature Financial, LLC," and is fully described on page six of the note. The note permits Marn and any assignee to accelerate the note if the defendants defaulted thereunder. Pursuant to the relevant MJPA, Signature, in consideration for furnishing an advance of the loan proceeds to Marn, obtained a senior participation interest in the $347,000 note, affording it, among other things, the right to enforce that note and foreclose on the collateral, consisting of a taxicab medallion and vehicle appurtenances such as meters and roof lights affiliated with the medallion. Signature also submits a

security agreement, the executed UCC-1 financing statement securing its interest in a taxicab medallion purchased by the defendants with the proceeds of the subject loan, and a demand letter to the defendants dated January 12, 2017. It further submits the affidavit of David McGowan, its vice-president and asset manager, who describes the terms of the $347,000.00 note, security agreement, and UCC-1 financing statement, the defendants' obligations under the $347,000 note and their failure to satisfy them, and the filing of the UCC-1 statement. McGowan asserts that Signature is now the holder of that note, and the defendant retained the medallion after default.

Although, in his affidavit, McGowan describes the terms of the $367,000 note as being virtually identical to those of the $347,000 note, and asserts that he annexed a copy of the $367,000 note to his affidavit as Exhibit C, no such copy of that note is annexed. Nor has he attached the security agreement, MJPA, or UCC-1 financing statement referable to the $367,000 note.

III. DISCUSSION

A. Standards for Leave to Enter Default Judgment

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering

or appearing (see CPLR 3215[f]; Allstate Ins. Co. v Austin, 48 AD3d 720, 720)." Atlantic Cas. Ins. Co. v RJNJ Services, Inc. 89 AD3d 649 (2nd Dept. 2011); see Rivera v Correction Officer L. Banks, 135 AD3d 621 (1st Dept. 2016). The proof submitted must establish a prima facie case. See Guzetti v City of New York, 32 AD3d 234 (1st Dept. 2006).

Signature meets this burden with respect to its breach of contract (first) cause of action, foreclosure (fourth) cause of action, and replevin (fifth) cause of action asserted in connection with the $347,000 note and the collateral secured thereby. It has not met its burden as to the account stated (second) cause of action or unjust enrichment (third) cause of action in connection with that note.

By failing to submit a copy of the $367,000 note, or the security agreement, MJPA, or UCC-1 financing statement referable thereto, Signature has failed to meet its burden in connection with any of the causes of action in connection with that note.

B. Breach of Contract (First Cause of Action)

As to the $347,000 note, Signature's proof establishes, prima facie, the facts supporting the first cause of action, which is for breach of contract, by showing that there was "formation of a contract between the parties, performance by the plaintiff['s] [assignor], the defendant's failure to perform, and

resulting damage." Flomenbaum v New York Univ., 71 AD3d 80, 91 (1st Dept. 2009). Where, as here, a contractual obligation is a promissory note, a plaintiff meets its burden by proving the existence of the subject note and nonpayment according to its terms. See Bonds Financial, Inc. v Kestrel Tech., LLC, 48 AD3d 230 (1st Dept. 2008).

The proof shows that the defendants, as obligors, executed the $347,000 note, along with a security agreement and UCC-1 financing statement, in consideration for a loan. Signature established that it is entitled to the principal sum of $321,645.40 on the first cause of action as to the $347,000 note, plus $51,692.73 in contractual interest at the rate of 3.5% per annum, along with late fees of $16,155.03, representing a sum equal to 5% of the principal amount due, as set forth in the note, less a credit of $1,500.00 to account for the defendants' post-default payment, for a total of $387,993.16. It is also entitled to statutory interest from January 12, 2017, when it notified the defendants of their default.

The court notes that, although the $347,000 note provides for Signature's recovery of attorneys' fees in the case of the defendants' default, and Signature requested such an award in its motion, it has not provided the court with an affidavit of legal services, invoices from its attorney, or a specification of the fees that it incurred. Hence, its request for an award of

attorneys' fees is denied without prejudice to renewal.

C. Account Stated (Second Cause of Action)

> "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other. . . [R]eceipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated."

Shea & Gould v Burr, 194 AD2d 369, 370 (1st Dept. 1993); see Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1st Dept. 2004). Signature submits no proof that it repeatedly invoiced the defendants, or that they accepted invoices without objection, and has thus not submitted proof supporting its right to judgment on the second cause of action, which seeks to recover on an account stated.

D. Unjust Enrichment (Third Cause of Action)

Since Signature may recover under an express agreement, no cause of action lies to recover for unjust enrichment, and Signature's proof is deficient to support judgment on the third cause of action. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). In any event, to establish unjust enrichment, "the plaintiff must show that the defendant was enriched, at the

plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." Castelotti v Free, 138 AD3d 198, 207 (1st Dept. 2016); see Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511 (2012); Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173 (2011). Crucially, a plaintiff cannot succeed on an unjust enrichment claim unless he or she has a "sufficiently close relationship" with the defendant. See Georgia Malone & Co., Inc. v Rieder, supra, at 516; Sperry v Crompton Corp., 8 NY3d 204 (2007). Since Signature has made no showing in this regard, there is no basis for the entry of judgment on the third cause of action.

E. Foreclosure of Security Interest (Fourth Cause of Action)

Signature also demonstrates, prima facie, that it is entitled to judgment as a matter of law on its fourth cause of action, which seeks to foreclose the security interest that it has pursuant to the UCC-1 statement. The security interest became enforceable by reason of the debtors' signed security agreement describing the collateral, their receipt of value in consideration of receipt of the collateral, their clearly identifiable rights in the collateral, consisting of their current possession of the taxi medallion and appurtenances, and the plaintiff's filing of a UCC-1 financing statement. See UCC 9-203(1), 9-310(a). When a debtor whose obligation is so secured

defaults, the secured party has the right to "reduce [its] claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure" UCC 9-501(1). Hence, Signature is entitled to a default judgment permitting it to foreclose on the collateral. See EMI Music Mktg. v Avatar Records, Inc., 317 F.Supp. 2d 412 (SD NY 2004); see generally Fleet Credit Corp. v Cabin Serv. Co., 192 AD2d 421 (1st Dept. 1993).

F. Replevin (Fifth Cause of Action)

To establish a right to replevin it must be shown that the defendant in is possession of certain property to which the plaintiff claims a superior right. See Nissan Motor Acceptance Corp. v Scialpi, 94 AD3d 1067 (2nd Dept. 2012). In connection with the fifth cause of action, which seeks replevin, Signature makes a prima facie showing of its entitlement to the replevin of the collateral secured by the security agreement and UCC-1 statement, consisting of New York City taxicab medallion #1T15, by demonstrating that it now lawfully holds the note, security agreement, and UCC-1 statement, the defendants defaulted thereunder by virtue of their nonpayment, the defendants are in possession of the medallion, and Signature has a right to possession and delivery of the vehicle under the terms of the security agreement and UCC-1 statement.

IV. CONCLUSION

Accordingly, it is

ORDERED that the branch of the plaintiff's motion which is for leave to enter a default judgment in connection with the $347,000 note is granted, without opposition, to the extent that it may enter judgment on the first, fourth, and fifth causes of action, and that branch of the motion is otherwise denied; and it is further,

ORDERED that those branches of the plaintiff's motion which are for leave to enter a default judgment in connection with the $367,000 note and for an award of attorneys' fees is denied, without prejudice to renewal upon proper papers; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff and against the defendants, jointly and severally, on the first cause of action in the principal sum of $387,993.16, plus statutory interest from January 12, 2017; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff permanently foreclosing the defendants' right or title to, or interest in, the collateral that is the subject of UCC-1 Financing Statement 201305178207098, dated May 17, 2013; and it is further,

ORDERED that the plaintiff shall serve a copy of this order and judgment upon the defendants at their last known addresses by regular and certified mail, return receipt requested, within 20 days of this order; and it is further,

ORDERED that within 20 days of service of a copy of this order with notice of its entry upon them, the defendants shall deliver to the plaintiff New York City Taxicab Medallion #1T15 and all other collateral, including but not limited to taxi meters and roof lights.

This constitutes the Decision and Order of the court.

Dated: 1/8/18

ENTER: _____

J.S.C.

HON. NANCY M. BANNON