

Flushing AV Laundromat, Inc. v Dekao Qu
2019 NY Slip Op 33819(U)
November 15, 2019
Supreme Court, Kings County
Docket Number: 504585-14
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 504585-14
Motion Date: 9-16-19

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FLUSHING AV LAUNDROMAT, INC. and YING LIN,

Plaintiffs,

DECISION/ORDER

-against-

DEKAO QU and GOOD LUCK LAUNDROMAT, INC.,

Defendants.
-----X

The following papers numbered 1 to 4 were read on this motion:

<u>Papers:</u>	<u>Numbered:</u>
Notice of Motion	
Affirmations/Affidavits/Exhibits/Memo of Law.....1-2....
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....3.....
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....4.....
Other.....

Upon the foregoing papers, the motion is decided as follows:

In this action to enforce a promissory note, plaintiffs, FLUSHING AV LAUNDROMAT, INC. and YING LIN, seek summary judgment against defendants, DEKAO QU and GOOD LUCK LAUNDROMAT, INC., for defaulting under the terms of the note. Defendants oppose summary judgment on the grounds of fraud, breach of contract, unjust enrichment, unconscionability, and on the basis that facts essential to justify opposition may exist but cannot be stated until appropriate discovery has been conducted (CPLR 3212(f)).

A plaintiff establishes its prima facie entitlement to judgment as a matter of law with respect to a promissory note if it “show[s] the existence of a promissory note, executed by the

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defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms" (*Porat v. Rybina*, --- N.Y.S.3d ----2019, WL 5777793, 2019 N.Y. Slip Op. 07900 [2d Dept 2019]; see CPLR 3213; *Lugli v. Johnston*, 78 AD3d 1133, 1135). Here, plaintiff established prima facie entitlement to judgment as a matter of law by submitting the promissory note executed by Dekao Qu personally and as President of Good Luck Laundromat, Inc. on October 1, 2013, evidencing an unconditional obligation to repay the plaintiff by a certain date, and plaintiff's sworn affidavit attesting that the defendant had defaulted (see *Lugli v. Johnston*, 78 AD3d at 1135). At the bottom of the note is an endorsement signed by Ying Ling [sic] as President of Flushing Av Laundromat, Inc. making the note payable to Lin. The Court finds the plaintiff has established entitlement to summary judgment as a matter of law.

Once a plaintiff has established its prima facie entitlement to judgment, "the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" (*Jin Sheng He v. Sing Huei Chang*, 83 AD3d 788, 789). The defendant has failed to raise a triable issue of fact in opposing summary judgment. Defendant submits an affidavit in English signed by DeKao Qu. However, it is apparent from the submissions that this defendant requires a Chinese translator or interpreter (see defendant's exhibits C, E). Affidavits by persons not fluent in English will not be admissible unless the requirements of CPLR 2101(b) are met. If the affiant is not a fluent English speaker, an affidavit in English is inadmissible. Instead, the proper procedure is to draft the document in the language of the witness, together with an English translation and an affidavit by a translator stating his or her qualifications, and stating that the translation is accurate (see CPLR 2101(b); see also Thomas F. Gleason, 2019

Supplementary Practice Commentaries (McKinney's Cons Laws of NY, CPLR C2101)). DeKao Qu's "verified answer with counterclaims" cannot be used in lieu of an affidavit since there too the requirements of CPLR 2101(b) have not been met. The affirmation submitted by defendant's counsel titled "counterstatement of facts" has absolutely no probative value or evidentiary significance and must be disregarded since counsel has no personal knowledge of the facts he argues therein. The document is insufficient as a matter of law (*see* CPLR 3212, 3212(b); *Onewest Bank, FSB v. Michel*, 143 AD3d 869 [2d Dept 2016]; *Cullen v Spiess*, 122 AD3d 792 [2d Dept 2014]). Defendant submitted no evidence in admissible form to raise a triable issue of fact as to any bonafide defense in opposition to plaintiff's prima facie proof of entitlement to judgment on the promissory note.

Defendants Dekao Qu and Good Luck Laundromat, Inc. e-filed a third party summons and complaint in an effort to implead third-party defendants 854-856 Flushing Realty LLC and Best Brite Laundry II, Inc. However, as Dekao Qu and Good Luck Laundromat failed to pay any filing fee for the third party summons and complaint, the third party action is hereby deemed to be a nullity (*see* CPLR §§ 304, 306-a, 1007; 2001). In addition to the filing fee issue, the copy of the third party summons and complaint that was submitted with the summary judgment motion was not properly verified in the first instance. For this reason, it was not considered. The document has attached to it an unsigned verification at the bottom of which is marked [page] "16 of 81". Also attached is a "verification" signed by DeKao Qu on March 1, 2016 at the bottom of which is marked [page] "35 of 36" and "41 of 81". This "verification" states in English (without a proper CPLR 2101(b) translator's attestation): "I have read the foregoing verified complaint and maintain that the allegations therein are true; except as to those matters stated upon information

and belief and as to those matters I believe same to be true." Multiple pages of documents were contained between the complaint itself and the "verification" including exhibit pages and documents titled "assignment of lease" and "assignment agreement with lease modification". Thus, it is unclear which statements defendant may have been attempting to verify.

The Court has considered the defendant's remaining contentions and finds them to be without merit.

For all of the above reasons, it is hereby

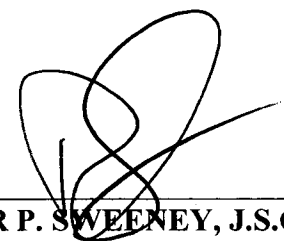
ORDERED, that plaintiff's motion for summary judgment is **GRANTED** to the extent that a hearing on damages and attorneys' fees shall be conducted by a Special Referee; and it is further

ORDERED, that plaintiff is directed to serve a copy of this order with notice of entry together with the referral to a Special Referee on all parties within thirty (30) days of the date hereof. The reference to the Special Referee will be "to hear and determine" unless within forty-five (45) days of the date hereof, a necessary party to the hearing contacts the court to contest the reference to hear and determine in which case the reference will be "to hear and report"; and it is further

ORDERED that defendant's third party summons and complaint attempting to implead third-party defendants 854-856 Flushing Realty LLC and Best Brite Laundry II, Inc. is deemed a nullity.

This constitutes the decision and order of the Court.

Dated: November 15, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C.

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