

Bank of Baroda v Pronto Beer Distrib. Inc.
2020 NY Slip Op 31812(U)
June 8, 2020
Supreme Court, New York County
Docket Number: 657011/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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BANK OF BARODA, NEW YORK BRANCH,

Plaintiff,

- v -

PRONTO BEER DISTRIBUTORS INC., DIVYANG VED

Defendant.

INDEX NO.	657011/2019
MOTION DATE	11/25/2019
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 38, 39, 40, 42, 43, 44, 45, 46 were read on this motion for SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

Plaintiff Bank of Baroda, New York Branch (the “Bank”) seeks Summary Judgment in Lieu of a Complaint based on Defendants’ breach of a Credit Agreement, Promissory Note, and associated Guaranty Agreement, pursuant to CPLR § 3213. Defendant Pronto Beer Distributors Inc. (“Pronto”) did not submit a timely opposition to the motion. Defendant Divyang Ved (“Ved”) submitted an affirmation of counsel in opposition.¹

For the following reasons, the Bank’s motion is granted as to both Pronto and Ved.

CPLR § 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” This provision “was enacted to provide quick relief on documentary claims so presumptively meritorious that a

¹ The Affirmation submitted by Ved’s counsel does not comply with the Part 3 Practice Rules, which require that legal argument be contained in a Memorandum of Law. Counsel is cautioned to follow the Court’s rules in the future.

formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless.” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 NY3d 485, 491-92 [2015] [internal quotation marks and citation omitted]). Under CPLR § 3213, a plaintiff makes out a prima facie case for summary judgment in lieu of a complaint by proof of an instrument and the defendant’s failure to make payment according to its terms. (*See Seaman-Andwall Corp. v. Wright Machine Corp.*, 31 AD2d 136, 137 [1st Dept 1968]). The burden then shifts to the defendant to establish, by admissible evidence, the existence of a triable issue of fact in order to avoid enforcement. (*Id.* at 137).

The Bank has submitted evidence sufficient to show: (1) a valid Credit Agreement, Promissory Note and Guaranty Agreement; (2) the obligations each party had thereunder; and (3) that the agreements were breached by Pronto and Ved. Pronto and the Bank entered into a Credit Agreement and Promissory Note on July 10, 2017. (*See* NYSCEF 5 [“Pronto Credit Agreement”] and 6 [“Pronto Note”]). The Credit Agreement and Promissory Note state that any failure by Pronto to timely pay any of its obligations to the Bank shall be an event of default, and the Bank may accelerate payment of all amounts due by Pronto immediately upon the occurrence of an event of default. (*See* Pronto Credit Agreement § 8.01; Pronto Note at p. 2).

The Bank submitted a Guaranty Agreement signed by Ved and others in favor of the Bank on July 10, 2017. (*See* NYSCEF 9 [“Guaranty Agreement”]). The Guaranty Agreement provides that Ved as Guarantor shall be liable to the Bank and pay the Bank immediately on demand as part of its liability under the Guaranty Agreement. (*See* Guaranty Agreement § 14). Each document contains unambiguous and unconditional promises by Defendants to pay the Bank specified sums upon Pronto’s default. Pronto subsequently defaulted on the Credit

Agreement and Promissory Note in August 2019. (See NYSCEF 4 [“Affidavit of Elango Balasubramaniam” at ¶ 12]).

Pronto’s opposition to the motion for summary judgment in lieu of complaint was due on January 21, 2020. Although Ved received an extension of time to respond to the motion, Pronto did not. Even if the Court were to accept Ved’s opposition to the motion as including Pronto, it would be insufficient to state a viable defense for the reasons discussed below.

Ved’s arguments in opposition to the Bank’s motion are unavailing. (See NYSCEF 39 [“Affidavit in Opposition to Motion”]). First, Ved’s conclusory suggestion that the Guaranty Agreement is not an instrument for the payment of money only is meritless. (See, e.g., *European American Bank & Trust Co. V. Schirripa*, 485 NYS2d 763 [1st Dept 1985]; see also *Bank of America, N.A. v. Solow*, 59 AD3d 304, 305 [1st Dept 2009]). Second, the only “evidence” to suggest that Ved “does not recall” signing the Guaranty Agreement² is an affirmation of counsel, which is not based on personal knowledge and is not sufficient to create an issue of fact in opposition to a motion for summary judgment. (*Marinelli v Shifrin*, 260 AD2d 227, 229 [1st Dept 1999] [affidavit of counsel, not based on personal knowledge, “is of no probative value in opposing a motion for summary judgment.”]; see also *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980] [holding that the submission of a hearsay affirmation by counsel alone does not establish the existence of a factual issue requiring a trial of the action in avoidance of summary judgment]). Finally, Ved’s speculation, without any evidence, that the Bank “might” have violated the Bank Holding Company Act is insufficient to raise a genuine issue of material fact.

² Ved does not dispute that he signed the notarized Mortgage Agreement, which the parties signed on July 10, 2017, the same day as the Guaranty Agreement. (See NYSCEF 10 [“Pronto Mortgage”]; see also NYSCEF 44 [“Affidavit of Judy Gray”]).

Therefore, the Bank’s Motion for Summary Judgment in Lieu of a Complaint is granted.

The matter will be referred to a Special Referee (to be appointed by the Court) for a determination as to the amount of collection costs and fees.

Accordingly, it is:

ORDERED that the Bank’s Motion for Summary Judgment in Lieu of Complaint against Pronto is **granted**; it is further

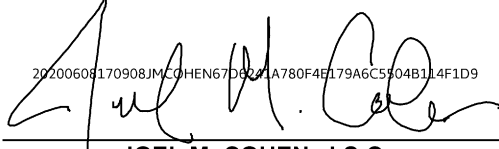
ORDERED that the Bank’s Motion for Summary Judgment in Lieu of Complaint against Ved is **granted**; it is further

ORDERED that the Court clerk is directed to enter judgment against Defendants Pronto and Ved, jointly and severally, in the amount of \$761,553.53 together with default interest; and it is further

ORDERED that the Bank’s request for collection costs and fees is **Granted** and will be referred to a Special Master to be appointed by the Court

This constitutes the Decision and Order of the Court.

6/8/2020
DATE


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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE