

**21212 26th Ave. Debt Holder LLC v Chabad
Lubavitch Community Ctr. of Northeast Queens, Inc.**

2021 NY Slip Op 33104(U)

November 12, 2021

Supreme Court, Queens County

Docket Number: Index No 706974/20

Judge: Leonard Livote

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Supreme Court Justice

Commercial Part A/IAS Part 33

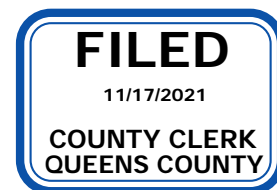
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21212 26th AVENUE DEBT HOLDER LLC,
Plaintiff,

Index No 706974/20

-- against --

Motion Date: 6/15/21

CHABAD LUBAVITCH COMMUNITY CENTER
OF NORTHEAST QUEENS, INC., CHABAD OF
NORTHEASTERN QUEENS, INC., BLANCHE
SUSAN BENENSON AS CO-EXECUTOR OF THE
ESTATE OF ESTHER SIEV BENENSON A/K/A
ESTHER S. BENENSON, SHARON GAIL BENENSON
AS CO-EXECUTOR OF THE ESTATE OF ESTHER
SIEV BENENSON A/K/A ESTHER S. BENENSON,
AMY LYNN BENENSON AS CO-EXECUTOR OF
THE ESTATE OF ESTHER SIEV BENENSON A/K/A
ESTHER S. BENENSON, MICHAEL JOEL BENENSON
AS CO-EXECUTOR OF THE ESTATE OF ESTHER
SIEV BENENSON A/K/A ESTHER S. BENENSON,
and PETER LYNFIELD AS CO-EXECUTOR OF THE
ESTATE OF ESTHER SIEV BENENSON
A/K/A/ ESTHER S. BENENSON,
Defendants



Seq 1

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The following papers numbered 1 - 10 below read on this motion by Plaintiff for an Order (i) pursuant to CPLR § 3212, granting summary judgment to Plaintiff on each and all of its claims; and (ii) awarding Plaintiff attorneys' fees and costs; and, the cross motion for an Order, (a) pursuant to CPLR §§ 3215 and 3011, for a default judgment against Plaintiff upon the Counterclaim of the Chabad Defendants, to which no Reply was served by Plaintiff, (b) pursuant to CPLR § 3212, denying Plaintiff's motion for summary judgment and granting summary judgment in favor of Defendants Chabad Lubavitch Community Center of Northeast Queens, Inc. and Chabad of Northeastern Queens Inc. against Plaintiff 21212 26th Avenue Debt Holder LLC, (c) pursuant to CPLR

§3211(a)(1), (3) and (7), dismissing this action and Plaintiff's Complaint in this action, which seeks recovery on a fully paid and satisfied Mortgage Note and a Guaranty thereof or recovery as a co-guarantor, which it is not, (d) on the Chabad Defendants' Counterclaim, declaring the Mortgage Note and Mortgage fully paid and satisfied and that Defendant Chabad Lubavitch Community Center of Northeast Queens, Inc. is entitled to a satisfaction of the Mortgage which secured the Mortgage Note, which has been fully paid and satisfied.

PAPERS
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits.....	1-4
Cross Motion, Affirmation, Affidavits and Exhibits.....	5-8
Answering Affirmations, Affidavits And Exhibits.....	
Reply Affirmations, Affidavits And Exhibits.....	9-10
Other	

Upon the foregoing papers, the motion and cross-motion are determined as follows:

In March 2009, Defendant Chabad Lubavitch Community Center of Northeast Queens, Inc. (the "Borrower") obtained a \$950,000 loan, evidenced by a Note and secured by a related Mortgage (the "Note"). The Note was further secured by two guarantees, one given by an affiliate of the Borrower, Defendant Chabad of Northeast Queens, Inc. (the "Chabad Guarantor," and its guarantee the "Chabad Guarantee") and one given by Esther Siev Benenson (the "Benenson Guarantee" and, collectively with the Chabad Guarantee, the "Guarantees"). Esther Siev Benenson passed away in 2019, and the Benenson Guarantee became an obligation of her estate (the "Estate"). The Estate is represented by five individual co-executors, who are named in that capacity as defendants in this lawsuit. In January 2020, the Borrower defaulted on the Note by failing to make the required monthly payments, and later by failing to pay off the Note, in full, when it matured by its own terms on April 1, 2020. Neither the Borrower nor the Chabad Guarantor, nor the Estate cured the default by paying the balance due. As a result, this lawsuit was filed on June 8, 2020 by the then-noteholder seeking recovery under the Note and both Guarantees.

Shortly after the lawsuit was commenced, in order to protect itself from mounting penalty interest, the Estate formed Plaintiff, a limited liability company, and caused it to purchase the Note from the then-noteholder (the original plaintiff in this lawsuit), using funds provided by the Estate. The Note was duly assigned to Plaintiff by the then-noteholder and Plaintiff was substituted as the plaintiff in this lawsuit against Defendants.

In order “[t]o establish a prima facie case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument.” (*Stewart Info. Services Corp. v Corporatair LLC*, 35 Misc 3d 1222(A) [Sup Ct 2012]). Furthermore “[o]nce a plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense.” (*Id.*)

A plaintiff establishes a prima facie cause of action on a guarantee by establishing the existence of the underlying obligation, the guarantee and the failure of the prime obligor to make the payments required by the prime obligor (*see USA Auto Funding, LLC. v Capital City Coach Lines, Inc.*, 8 Misc 3d 1009(A) [Sup Ct 2005]).

However, where the note is paid in full by a co-guarantor, the only cause of action available is one by the co-guarantor to recover for contribution against the other co-guarantors (*Mediclaim, Inc. v Groothuis*, 38 AD3d 730, 731 [2d Dept 2007]). “Only a co-guarantor who has paid more than his or her proportionate share of the common liability is entitled to contribution from the other co-guarantors” (*Panish v. Rudolph*, 298 A.D.2d 237, 748 N.Y.S.2d 726 [1st Dept.2002]).

In the instant case, plaintiff is not a bona-fide third-party assignee of the note; rather, plaintiff is an alter ego of the estate defendants. Plaintiff moves for summary judgment and defendant cross-moves to dismiss.

Plaintiff’s first cause of action alleges breach of the note; the second cause of action alleges breach of the guarantees; and the fifth cause of action seeks contractual attorney’s fees pursuant to the note. However, because plaintiff is not a good faith assignee, plaintiff cannot maintain actions for breach or attorney’s fees. Accordingly, the first, second, and fifth causes of action must be dismissed.

In the third cause of action, plaintiff seeks to pursue a contribution claim on a subrogation theory. The fourth cause of action alleges a claim for contribution. However, plaintiff cannot recover pursuant to a cause of action for contribution as it is not a co-guarantor of the note (*see, Mediclaim, Inc. v Groothuis, supra*, at 731 [2d Dept 2007]). Accordingly, the third and fourth causes of action must be

Defendants cross-move for a default judgment on its counter claim against plaintiff. However, plaintiff moves by separate motion (seq. no. 2) to extend its time to answer and/or compel acceptance of the late answer. Accordingly, the cross-motion for a default judgment is denied.

Accordingly, the plaintiff's motion for summary judgment is denied; the cross-motion to dismiss is granted because the note was fully paid and plaintiff lacks standing to maintain an action for contribution; the remainder of the relief sought in the cross-motion is denied and it is,

ORDERED, that the complaint is dismissed.

Any other or further relief requested and not specifically addressed is denied.

This constitutes the Order of the Court.

Dated: November 12, 2021



Leonard Livote, J.S.C.