

<b>New York Community Bank v Mithu</b>
2021 NY Slip Op 33174(U)
December 10, 2021
Supreme Court, Bronx County
Docket Number: Index No. 803993/2021E
Judge: Eddie J. McShan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 32

NEW YORK COMMUNITY BANK f/k/a NEW  
YORK COMMERCIAL BANK,

*Plaintiff,*

-against-

OBAIDUL ISLAM MITHU, and MOSAMMAT M.  
FATEMA,

*Defendants.*

**DECISION AND ORDER**

Index No.: 803993/2021E

**Present:**

**Hon. EDDIE J. MCSHAN**

The following e-filed documents, listed on NYSCEF as document numbers 2 - 16 (Motion Seq. #001) were read on this motion seeking summary judgment in lieu of complaint.

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiff moves for summary judgment in lieu of complaint pursuant to CPLR 3213 on the basis that the defendants failed to make payments pursuant to a loan New York Commercial Bank extended to non-party Mifate Cab Corp. (“Non-Party Borrower”) on June 13, 2017 pursuant to a promissory note. Plaintiff notes that New York Commercial Bank merged into New York Community Bank on December 1, 2018, and in support annexes a copy of the certificate of merger (NYSCEF # 7). Plaintiff also notes that the Non-Party Borrower has filed for bankruptcy.

Plaintiff asserts that defendants Obaidul Islam Mithu (“Mithu”) and Mosammat M. Fatema (“Fatema”) executed an unconditional guaranty on behalf of the Non-Party Borrower. In support, Plaintiff annexes the promissory note dated June 13, 2017 (“Note”) (NYSCEF # 5), and the Guaranty also dated June 13, 2017 (“Guaranty”) executed by defendants Mithu and Fatema in their representative and individual capacities (NYSCEF # 6). Plaintiff also indicates that the defendants entered into three loan modifications (NYSCEF # 8, 9, 10) but their guaranty obligations were always preserved. Plaintiff acknowledges receiving certain payments under the loan (NYSCEF # 13), but notes that there was a post-maturity default. Plaintiff emphasizes that the Non-Party

Borrower's bankruptcy filing constitutes a default event under the Note. Plaintiff annexes a copy of a default letter dated January 13, 2021 addressed to the aforementioned defendants (NYSCEF # 11). Plaintiff seeks \$828,753.92 from the defendants based upon their unconditional guaranty. Plaintiff annexes a spreadsheet maintained in its regular course of business demonstrating the outstanding amount of principal, interest and fees.

The Court notes that the Plaintiff submitted affidavits of service sworn to on April 13, 2021 by process server Frederick Pringle indicating that the summons, notice of motion for summary judgment in lieu of complaint, request for judicial intervention and notice of electronic filing were served pursuant to CPLR 308(2) on both defendants (NYSCEF # 15 and 16). The affidavits of service also indicate that the process server served another copy of the foregoing papers via first class mail in accordance with CPLR 308(2). The Court further notes that the defendants did not interpose an answer and failed to submit any opposition. Accordingly, the Court grants the instant application on default as follows.

CPLR 3213 provides, “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint” (*see for example Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485 [2015]). “The purpose of CPLR 3213 is ‘to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless’” (*SpringPrince, LLC v Elie Tahari, Ltd.*, 173 AD3d 544 [1<sup>st</sup> Dept 2019], *quoting Weissman v Sinorm Deli*, 88 NY2d 437 [1996]). “‘To establish a *prima facie* entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the

note's terms" (*see American Realty Corp. of NY v Sukhu*, 90 AD3d 792 [2d Dept 2011], quoting *Lugli v Johnston*, 78 AD3d 1133 [2d Dept 2010]).

In the instant matter, Plaintiff made a *prima facie* showing of its entitlement to summary judgment pursuant to CPLR 3213. Plaintiff established that the parties' Note is an instrument for the payment of a sum of money only, namely that the principal sum of the loan in the amount of \$762,745.31 to be paid in installments called by its terms and subsequent loan modification agreements (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 [1<sup>st</sup> Dept 1968]). The Note itself requires the Non-Party Borrower "to make certain payments and nothing else" (*see Seaman-Andwall Corp.*, 31 AD2d 136). There is nothing in the Note, Guaranty or subsequent loan modification agreements requiring this Court to "resort to extrinsic material to establish the amounts payable" which would be indicative that the Agreement is not an instrument for the payment of money only and therefore, an accelerated judgment pursuant to CPLR 3213 would be inappropriate (*see Tradition North America, Inc. v Sweeney*, 133 AD2d 53 [1<sup>st</sup> Dept 1987]).

It is undisputed based upon the record presented that the Non-Party Borrower has failed to tender the installment payments in accordance with the Note. Plaintiff established that defendants Mithu and Fatema unconditionally guaranteed the Note as evidenced by the Guaranty executed by defendants in their representative and individual capacities. Accordingly, defendants Mithu and Fatema are personally obligated for payment under the Note (*see for example Bankers Trust Co. v Javeri*, 105 AD2d 638 [1<sup>st</sup> Dept 1984]). As such, Plaintiff's motion for summary judgment in lieu of complaint is granted. Plaintiff shall be entitled to entry of a final judgment against the defendants in the sum of \$828,753.92 together with contract interest of 16% up until the date of this Order and statutory interest thereafter (*see IRB-Brasil Resseguros S.A. v Portobellow Intern. Ltd.*, 84 AD3d 637 [1<sup>st</sup> Dept 2011]). The Court finds that the parties' Note does not "clearly and unequivocally" specify a post-judgment rate" (*IRB-Brasil Resseguros S.A.*, 84 AD3d 637).

In addition, Plaintiff shall be entitled to an award of attorney fees, costs and disbursements in accordance with the parties' Note. The Court finds however, that Plaintiff failed to establish that the liquidated award of counsel fees in the amount of "twenty percent (20%) of the principal and interest then due hereunder" agreed to by the parties in the Note is a reasonable award of counsel fees based upon the facts and circumstances of this case (*see for example Community Nat. Bank & Trust Co. of New York v Intercoastal Trading Corp.*, 55 AD2d 525 [1<sup>st</sup> Dept 1976] *citing Franklin National Bank v Wall Street Commercial Corporation*, 21 AD2d 788 [2d Dept 1964]). Plaintiff merely requests an award of counsel fees. Accordingly, a hearing must be held to determine the reasonableness of Plaintiff's request for an award of attorneys' fees on March 3, 2022 at 2:15 p.m. to determine a reasonable award of counsel fees.

In light of the foregoing, it is hereby

**ORDERED AND ADJUDGED** that Plaintiff's application for summary judgment in lieu of complaint is granted in accordance with the Court's findings hereinabove; and it is further

**ORDERED AND ADJUDGED** that the parties shall appear for a hearing on March 3, 2022 at 2:15 p.m. for a hearing on Plaintiff's request for an award of counsel fees in accordance with the Court's findings hereinabove. All parties must contact the Court at either (718) 618-1326 or [eshkreli@nycourts.gov](mailto:eshkreli@nycourts.gov) to obtain the link to the scheduled virtual hearing; and it is further

**ORDERED AND ADJUDGED** that Plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants within ten (10) days from the date this Order is uploaded to NYSCEF by the Court. Plaintiff shall uploaded to NYSCEF the proof of service on the defendants in advance of the scheduled virtual hearing.

This shall constitute the decision and order of the Court.

Dated: December 10, 2021

  
Hon. Eddie J. McShan, J.S.C.