

TD Bank, N.A. v Magnificent Obsessions Ltd

2024 NY Slip Op 34415(U)

December 13, 2024

Supreme Court, New York County

Docket Number: Index No. 654088/2023

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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TD BANK, N.A., SUCCESSOR BY MERGER TO
COMMERCE BANK, N.A.,

Plaintiff,

- v -

MAGNIFICENT OBSESSIONS LTD, ALBERT ELKHARRAT

Defendant.

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INDEX NO. 654088/2023

MOTION DATE 09/26/2023,
07/26/2024

MOTION SEQ. NO. 001 002

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13,
14

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, it is ORDERED that defendant Albert Elkharrat's motion
to dismiss the complaint (Mot. Seq. No. 001) is denied, as stated on the record after oral
argument on January 11, 2024; and it is further

ORDERED that so much of plaintiff's motion (Mot. Seq. No. 002) as seeks a default
judgment against defendant Magnificent Obsessions Ltd. ("borrower") is denied. Where service
upon a corporate defendant is made via the Secretary of State, additional notice must be provided
to the corporation by first class mail to its last known address (CPLR 3215 [g] [4]). A plaintiff's
failure to comply with the statutory requirements and submit proof of such compliance with its
motion warrants denial of the motion (Schilling v Maren Enters, 302 AD2d 375, 376 [2d Dept
2003]). Here, plaintiff attempted to serve additional notice upon borrower care of the Secretary

of State (NYSCEF Doc. No. 43), which self-evidently is not borrower's last known address. At minimum, the 2018 Change in Terms Agreement between plaintiff and borrower lists borrower's address as 1425 6th Avenue, New York, New York (2018 agreement, NYSCEF Doc. No. 26 at 1). In the absence of proper additional notice, the motion must be denied (*Sterk-Kirch v Uptown Communications & Elec., Inc.*, 124 AD3d 413, 414 [1st Dept 2015]). Denial is without prejudice to renewal upon compliance with the statute; and it is further

ORDERED that so much of plaintiff's motion as seeks summary judgment against defendant Elkharrat is granted for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 20, 28, 30, 41-42) and the exhibits attached thereto, in which the court concurs, as summarized herein. Plaintiff commenced this action to recover for breach of an amended and restated promissory note and related agreements, including Elkharrat's personal guaranty of the note. Plaintiff has also established prima facie entitlement to summary judgment against Elkharrat by submission of the executed guaranty and proof of defendants' failure to pay sums owed thereunder (*Gard Entertainment, Inc. v Country in New York, LLC*, 96 AD3d 683, 683 [1st Dept 2012] ["Here, plaintiff established its entitlement to summary judgment as against Block by demonstrating proof of the guarantee he made in connection with a note executed by Country and his failure to make payments called for by its terms"]).

In opposition, Elkharrat fails to raise a triable issue of material fact (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). By failing to raise any of his affirmative defenses other than the twelfth and thirteenth in opposition to the motion, he has waived them (*Steffan v Wilensky*, 150 AD3d 419, 420 [1st Dept 2017]). The thirteenth defense concerns issues already addressed by the court's denial of the motion to dismiss, as stated on the oral argument record of January 11, 2024. The twelfth affirmative defense states that Elkharrat did not sign any

document other than the original note and security agreement in his individual capacity, and thus cannot be bound by any of the subsequent agreements. Plaintiff, however, seeks to hold Elkharrat liable based on his guaranty, which he did sign in his individual capacity (2007 note and security agreement, NYSCEF Doc. No. 21 at 6), and which unambiguously obligates Elkharrat to guarantee “all of Borrower's Obligations (as defined in the Note), as well as any other existing or future debts, liabilities, and obligations of the Borrower to [plaintiff], whether related or unrelated (collectively, “Guaranteed Obligations”)” (*id.* at 5). Further, Elkharrat’s guaranty is continuing and remains “in full force and effect until all the Guaranteed Obligations have been paid in full” (*id.*). Whether or not Elkharrat signed any of the other relevant documents in his individual capacity is therefore irrelevant; the above language obligates him all the same (*Bank Leumi Tr. Co. v Cosmopolitan Broadcasting Corp.*, 166 AD2d 207, 208 [1st Dept 1990] [“The guaranty of CBC's obligations executed in 1984 contemplated the accrual of future indebtedness, and such credit was eventually extended by Bank Leumi to CBC”]). Similarly, Elkharrat’s argument that plaintiff cannot proceed against him without a judgment against borrower is unavailing. Elkharrat’s liability under the guaranty is “absolute, primary, unlimited and unconditional” (2007 note and security agreement, NYSCEF Doc. No. 21 at 5).

Elkharrat raises two other minor issues of fact. First, he asserts that plaintiff has variously argued that borrower defaulted in 2018, 2020, and 2021, and fixing the date of default is an element of plaintiff’s prima facie case. However, the loan payment history attached to plaintiff’s moving papers indicates that borrower began missing payments in 2018, and Elkharrat does not argue that at any point between 2018 and 2021 borrower was actually current on its payments to plaintiff. As a general matter, one may not oppose summary judgment simply by pointing to holes in the moving party’s proof (*see Bryan v 250 Church Assoc. LLC*, 60 AD3d 578 [1st Dept

2009]). In opposing summary judgment, one must “lay bare his or her proof and demonstrate the existence of a triable issue of fact” (*Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 711 [2d Dept 2007]).

Finally, Elkharrat claims that plaintiff failed to establish the actual interest rate for the arrears on the loan, as the 2012 promissory note provides for a variable interest rate (2012 note, NYSCEF Doc. No. 23 at 1). However, the 2018 agreement provides for a fixed interest rate (2018 agreement, NYSCEF Doc. No. 26 at 1), and the vast majority of the arrears accrued following the effective date of the 2018 agreement (loan payment history, NYSCEF Doc. No. 27). In any case, plaintiff established its prima facie case on the loan payment history, and Elkharrat once again fails to submit evidence that the interest rate included therein is incorrect; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Abraham Elkharrat on the third cause of action in the amount of \$382,582.22, with interest thereon at the rate of 18% per annum as set forth in the 2018 agreement, from June 4, 2024 through entry of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

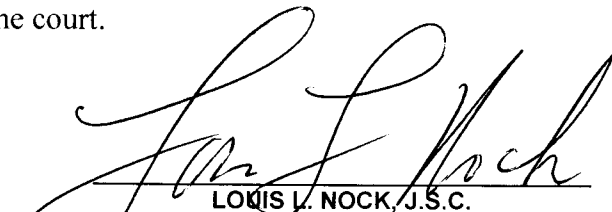
ORDERED that Elkharrat is liable to plaintiff on the fifth cause of action for plaintiff’s reasonable attorneys’ fees pursuant to Elkharrat’s guaranty (2007 note and security agreement, NYSCEF Doc. No. 21 at 5). The issue of the amount of such fees is severed and set down for a virtual hearing to be held before the court via Microsoft Teams on January 27, 2025 at 10:00 AM. Plaintiff shall submit a copy of the documents it intends to rely on by electronic filing on or

before January 13, 2025, with a copy to the principal court attorney of Part 38 at

ssyaggy@nycourts.gov; and it is further

ORDERED that the action is severed and continued as to defendant Magnificent Obsessions Ltd.

This constitutes the decision and order of the court.



LOUIS L. NOCK, J.S.C.

12/13/2024
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE