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Kirzner v Plasticware, LLC
2015 NY Slip Op 50533(U)
Decided on April 15, 2015
Supreme Court, Kings County
Demarest, J.
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Decided on April 15, 2015

Supreme Court, Kings County

Ahron Kirzner, Plaintiff,

against

Plasticware, LLC and Jacob Deutsch, Defendant.

503226/2014

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Carolyn E. Demarest, J.

The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed*23-38*

Opposing Affidavits (Affirmations)*40-41, 45, 46-48*

Reply Affidavits (Affirmations)*49-52*

Affidavit (Affirmation)

Other Papers

In this action by plaintiff Ahron Kirzner (plaintiff) against defendants Plasticware, LLC (Plasticware) and Jacob Deutsch (Deutsch) to recover on a promissory note and guaranty, plaintiff moves, under motion sequence number two, for: (1) summary judgment in his favor as against Deutsch in the amount of $800,000, plus interest from March 27, 2008 through June 9, 2008 at the rate of 12% per annum, and interest from June 10, 2008 at the default rate of 24% per annum, together with legal fees incurred by him in bringing this action, and (2) discontinuing this action as against Plasticware.

BACKGROUND

Plaintiff loaned $800,000 to Plasticware. The terms of the loan were evidenced by a promissory note dated March 27, 2008, which was executed and given by Plasticware to plaintiff. The note provided that Plasticware promised to pay to the order of plaintiff

the principal sum of $800,000, and interest at the greater of 12% per annum or prime (as published in the WSJ) plus 5%, to be paid monthly, the rate to be adjusted annually. Pursuant to paragraph 1 of the note, the loan was required to be repaid by June 9, 2008, 75 days from the date of the note. Paragraph 3 of the note provided that a default would occur if Plasticware failed to make a payment of principal or interest. This paragraph further provided that upon the occurrence of an event of default, Plasticware agreed to pay all costs and expenses, including attorneys' fees, arising in connection with any enforcement or collection action by plaintiff, and that all such costs and expenses of collection would be added to and become part of, the principal of the note, and would be collectible as part of such principal and bear interest from the date of advance until paid. This paragraph further provided that as long as an event of default continued, all outstanding obligations would bear interest at the default rate of 24%, which would apply from the demand for payment until all amounts due under the note were paid in full. In paragraph 4 of the note, however, Plasticware waived any demand or presentment for payment.

Paragraph 10 of the note stated that the note would be governed and construed in [*2]accordance with the laws of the State of New York. Paragraph 11 of the note, entitled "Beis Din," provided that "[t]he parties agree that any conflicts of the terms of this note . . . will be decided by Mechon L'Hoyroa." Paragraph 14 of the note states: "[t]his transaction is being done within the parameters of a Heter Iska as defined in Jewish Law."

Paragraph 15 of the note stated that Modechai E. Neustein (Neustein) and Samuel Meth (Meth) represented that they were the sole shareholders of Plasticware and were fully authorized to execute the note on behalf of Plasticware, and pledged their interests in Plasticware as collateral to the note. This paragraph further stated that by signing the note, Neustein, Meth, and Deutsch jointly and severally guaranteed the full and complete performance of Plasticware, as the borrower, under the terms of the note. The note was executed by Meth, on behalf of Plasticware, as the borrower. The note was also executed by Meth, Neustein, and Deutch, as joint and several guarantors of the repayment of the note.

Following Plasticware's failure to make any payments on the note, plaintiff served a notice of intention to arbitrate, dated July 18, 2013, on Deutsch, Meth, Plasticware, and Neustein. This notice provided that pursuant to the terms of the note, plaintiff intended to conduct an arbitration of the conflict between him and them in connection with their obligations to repay the loan before the Rabbinical Court of Mechon L'Hoyroa. The notice further provided that, pursuant to CPLR 7503 (c), unless Plasticware, Meth, Neustein, and Deutsch applied for a stay of arbitration within twenty days, they would, thereafter, be precluded from objecting that a valid agreement was not made or has not been complied with, and from asserting in court the bar of a limitation of time. Certified mail receipts indicate service on July 19, 2013 on Plasticware, Meth, Neustein, and Deutsch, of the notice of intention to arbitrate, together with a cover letter from plaintiff's counsel. On October 8, 2013, Plasticware, Meth, and Neustein executed an agreement to submit their dispute to binding arbitration before three arbitrators of the Rabbinical Court of Mechon L'Hoyroa and proceeded to arbitration. Deutsch, however, did not respond or apply to stay arbitration pursuant to CPLR 7503 (b). On October 17, 2013, after hearing testimony and considering the evidence presented, the arbitrators rendered an award, which provided that Plasticware, Neustein, and Meth were required to pay plaintiff the sum of $800,000, and that each of them was personally responsible for this entire sum. On August 14, 2014, plaintiff brought a proceeding, pursuant to CPLR 7510, to confirm the October 17, 2013 arbitration award (*Kirzner v Neustein*, Sup Ct, Kings County, index No. 507442/2014). By an order dated November 12, 2014, the court granted plaintiff's petition confirming the arbitration award in its entirety, and granted a judgment against Neustein, Meth, and Plasticware jointly and severally in the amount of $800,000 plus interest at the statutory rate of nine percent from October 17, 2013, plus the costs and disbursements of that action. The November 12, 2014 order directed the Kings County clerk to enter a judgment forthwith and for plaintiff to have execution therefor.

On April 14, 2014, plaintiff filed this action against Deutsch and Plasticware. Plaintiff's complaint alleges that Plasticware failed to pay him any portion of the principal amount of $800,000 or the accrued interest when due, and that, after demand for payment was made to Plasticware, it failed to pay the amounts due. Plaintiff's complaint, in its first cause of action, alleges that there is due and owing to him from

Plasticware, under the note, the principal sum of $800,000 plus interest due from March 27, 2008 through June 9, 2009 at the rate of 12% per annum, and, thereafter, at the default rate of 24% per annum. Plaintiff's second cause of action alleges that Deutsch, as a guarantor of the note, was summoned to the Rabbinical Court of Mechon L'Hoyroa to arbitrate this dispute, but did not appear, and that the above principal sum plus interest is owed by Deutsch. Plaintiff's third cause of action seeks the recovery of his attorney's fees and expenses as provided by paragraph 3 of the note. This action has not been brought as against Neustein or Meth, the other two guarantors of the note, due to their participation in the arbitration.

On June 10, 2014, Leopold Gross PLLC (Gross) appeared as the attorneys of record for Deutsch in the present action and entered into a stipulation with plaintiff's counsel extending Deutsch's time to answer. On July 10, 2014, Gross moved, by order to show cause, under motion sequence number one, pursuant to CPLR 321 (b) (2), to withdraw as attorneys for Deutsch, and, pursuant to CPLR 2201, for a stay of all proceedings for 30 days in order to afford Deutsch the opportunity to obtain substitute counsel. By order dated July 23, 2014, the court granted Gross' order to show cause and stayed this case until September

10, 2014 except that Deutsch was directed to answer the complaint by September 3, 2014, and was further directed to appear on September 10, 2014 with new counsel.

On September 3, 2014, Deutsch served a pro se answer by both e-mail and regular mail on plaintiff's counsel, Mark M. Kranz, Esq. (Kranz), which contained general denials. On September 10, 2013, Deutsch did not appear before the court with new counsel, which was noted on the record.

Thereafter, Deutsch retained Zvi A. Storch, Esq. (Storch) to represent him in this action, and, on September 22, 2014, Storch filed and served upon Kranz a notice of appearance in this action, an amended answer on Deutsch's behalf, and a notice to take the deposition of plaintiff. Defendant's amended answer contains general denials, and asserts 19 affirmative defenses. By letter dated September 23, 2014, Kranz rejected

Deutsch's amended answer, asserting that Deutsch was already in default. Thereafter, Storch served Kranz with discovery demands, dated September 29, 2014, consisting of combined demands and interrogatories.

On October 20, 2014, plaintiff e-filed his instant motion, seeking a default judgment, pursuant to CPLR 3215, against Deutsch, or, in the alternative, summary [*3]judgment, pursuant to CPLR 3212, for the sums due under the note. On January 6, 2015, Deutsch e-filed a cross motion (motion sequence number three), for an order, pursuant to CPLR 3012 (d), compelling plaintiff to accept his amended answer, and, pursuant to CPLR 3124 and 3212 (f), compelling plaintiff to respond to his discovery demands and to set a time for a deposition. At oral argument on January 14, 2015, the court denied plaintiff's motion insofar as it sought a default judgment, granted Deutsch's cross motion compelling plaintiff to accept Deutsch's amended answer, and reserved decision on plaintiff's motion insofar as it sought summary judgment. Presently before the court is plaintiff's motion for summary judgment, to be decided in light of Deutsch's amended answer.[FN1] Plaintiff also raises, in reply, the argument that the court should alternatively compel Deutsch to submit this dispute to binding arbitration before the Beth Din of Mechon L'Hoyroa.

DISCUSSION

With respect to the suggestion that the court should compel Deutsch to submit this dispute to binding arbitration, Deutsch does not seek to have this dispute arbitrated and has submitted to the jurisdiction of this court. While, pursuant to CPLR 7503 (a), "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration," plaintiff never applied for an order compelling arbitration. CPLR 7503 (c) provides that "[a] party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice . . ., and stating that unless the party served applies to stay the arbitration within twenty days after such service he [or she] shall thereafter be precluded from objecting that a valid agreement

was not made or has not been complied with and from asserting in court the bar of a limitation of time." This section requires that "[s]uch notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested," and that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him [or her] of the notice or demand, or he shall be so precluded."

It is undisputed that plaintiff served a notice of intention to arbitrate, and that Deutsch did not bring an application to stay arbitration within 20 days of such notice, which would have precluded Deutsch from objecting that a valid agreement to arbitrate was not made. However, plaintiff did not name Deutsch as a party respondent in the arbitration proceeding, and the arbitrators, therefore, did not render a default judgment against him. Nor did plaintiff seek to compel Deutsch's participation in the arbitration. Furthermore, the named respondents to the arbitration executed an arbitration agreement on October 8, 2013, prior to the hearing of the dispute by the arbitration panel, which did [*4]not include Deutsch, who did not in any way participate in the arbitration. Thus, Deutsch was not bound by the October 12, 2013 arbitration award.

While plaintiff asserts that Deutsch should now submit to arbitration, it is well established that a litigant may not compel arbitration when his or her use of the courts is "clearly inconsistent with [his or her] later claim that the parties were obligated to settle their differences by arbitration" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007] [citation and internal quotation marks omitted]; *see also Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 372 [2005], *rearg denied* 5 NY3d 746 [2005]; *Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272 [1985]; *LZG Realty, LLC v H.D.W. 2005 Forest, LLC*, 71 AD3d 642, 643 [2d Dept 2010] *Fein v General Elec. Co.*, 40 AD3d 807, 808 [2d Dept 2007]). Therefore, a party's "prior commencement of a judicial action or proceeding wherein the claims sought to be redressed embrace the same issues as those contained in the claim for which arbitration is sought," operates as a waiver of arbitration of such claim (*Great N. Assoc. v Continental Cas. Co.*, 192 AD2d 976, 979 [3d Dept 1993]; *see also De Sapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]; *Matter of Waldman v Mosdos Bobov, Inc.*, 72 AD3d 983, 983 [2d Dept 2010], *lv denied* 15 NY3d 715 [2010]; *Tengtu Intl. Corp. v Pak Kwan Cheung*, 24 AD3d 170,

171 [1st Dept 2005]). Thus, plaintiff has waived whatever right to arbitration he may have had under the note by bringing this court action for determination of his claim and moving for summary judgment (*see Sherrill*, 64 NY2d at 272; *Matter of United Paper Mach. Corp. [Di Carlo]*, 14 NY2d 814, 815 [1964] [where it was held that an action commenced three days after the making of a demand for arbitration constituted a waiver]; *Matter of Waldman*, 72 AD3d at 983; *Matter of Hawthorne Dev. Assoc. v Gribin*, 128 AD2d 874, 875 [2d Dept 1987]; *Bell v Herzog*, 39 AD2d 813, 815 [3d Dept 1972]; *Matter of Redmond v Redmond*, 39 AD2d 527, 527 [1st Dept 1972], *affd* 32 NY2d 644 [1973]). Consequently, this action is properly before the court for determination and it is for the court to resolve plaintiff's present motion for summary judgment.

In support of his motion, plaintiff has annexed the note and, in his affidavit, attests that he loaned $800,000 to Plasticware to be repaid by June 9, 2008, that one of the guarantors of the note was Deutsch, and that no part of the loan, including interest, has ever been paid. Plaintiff has thus made a prima facie showing of his entitlement to judgment as a matter of law by submitting evidence of the existence of the note and Deutsch's personal guaranty, which was absolute and unconditional, and Plasticware's failure to make payment in accordance with the terms of the note (*see Manufacturers & Traders Trust Co. v Capital Bldg. & Dev., Inc.*, 114 AD3d 912, 912-913 [2d Dept 2014]; *Griffon V, LLC v 11 E. 36th, LLC*, 90 AD3d 705, 706-707 [2d Dept 2011]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Thus, the burden shifted to Deutsch to raise a genuine issue of fact with respect to a bona fide defense in opposition to plaintiff's motion (*see Griffon V, LLC*, 90 AD3d at 707; *Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789 [2d Dept 2011]; *Cutter Bayview Cleaners, Inc. v Spotless [*5]Shirts, Inc.*, 57 AD3d 708, 710 [2008]; *Provident Bank v Tropp*, 43 Misc 3d 1204[A], 2014 NY Slip Op 50488[U], *3 [Sup Ct, Kings County 2014]).

Deutsch, in opposition to plaintiff's motion, contends that he has several meritorious defenses. In his affirmation in opposition to plaintiff's motion, Deutsch asserts that he has reviewed the note and does not recognize his signature, and that he is "not sure" if he ever signed the note.[FN2] He attaches his driver's license, in which his signature differs from his signature on the note. However, Deutsch's claimed

uncertainty as to his signature is unavailing since he stated, at paragraph 15 of his affirmation in support of his cross motion, that "[t]he guarantee [he] signed only guarantee[d] repayment of this note,'" thereby admitting that he, in fact, signed the guarantee. Furthermore, Deutsch does not actually deny signing the note despite the fact that the question of whether he signed the note is a matter which is necessarily within his own knowledge. Thus, Deutsch's claimed uncertainty as to signing the note is patently insufficient to create a genuine issue of fact to defeat plaintiff's entitlement to summary judgment.

Deutsch also argues that the note sued upon is not a debt instrument, but, rather, a partnership document under a Heter Iska. He states that at the time the note was drafted, he was considering entering into a business enterprise with Meth and Neustein, and, as part of that partnership, he was going to guarantee the note, but the partnership "fell through." Other than this conclusory statement, Deutsch does not provide any details whatsoever of this alleged partnership or its relationship to the note. Deutsch, however, points to paragraph 14 of the note, which stated that "[t]his transaction is being done within the parameters of a Heter Iska as defined in Jewish law." He asserts that he cannot be liable for the non-payment of money due to a business loss because the guaranty that he signed only guaranteed repayment of the note and not partnership losses.

This argument must be rejected. A Heter Iska "was a device developed in the 12th to 14th centuries to overcome the Biblical prohibition against charging interest by one Jew to another" (*Leibovici v Rawicki*, 57 Misc 2d 141, 144 [Civil Ct, NY County 1968], *affd* 64 Misc 2d 858 [App Term 1969]; *see also Arnav Indus., Inc. Empl. Retirement Trust v Westside Realty Assoc*, 180 AD2d 463, 463 [1st Dept 1992]; *Madison Park Investors LLC v 488-486 Lefferts LLC*, 2015 WL 471786, *10 n 3; 2015 NY Slip Op 30178[U] [Sup Ct, Kings County 2015]; *Wiesel v Rubinstein*, 12 Misc 3d 1168[A], 2006 NY Slip Op 51107[U], *1 [Sup Ct, Nassau County 2006] [noting that a Heter Iska is a Talmudic doctrine which was devised to avoid the religious proscription against lending money for interest"]). It has been described as a "loan structured in a certain way under Jewish law that allows interest" (*Muller v Wertzberger*, 39 Misc 3d 1237[A], 2013 NY [*6]Slip Op 50915[U], *4 n 2 [Sup Ct, Kings County 2013], *rearg denied* 41

Misc 3d 1229[A], 2013 NY Slip Op 51928[U] [Sup Ct, Kings County 2013]).

It has been held that a Heter Iska constitutes " merely a compliance in form with Hebraic law,'" and does not create a partnership, joint venture, or profit sharing agreement (*Arnav Indus., Inc. Empl. Retirement Trust*, 180 AD2d at 464, quoting *Barclay Commerce Corp. v Finkelstein*, 11 AD2d 327, 328 [1st Dept 1960], *appeal denied* 11 AD2d 1019 [1st Dept 1960]; *see also Barclays Discount Bank v Levy*, 743 F2d 722, 724 n 2 [9th Cir 1984]; *VNB New York Corp. v Lynbrook LLC*, 2012 NY Slip Op 30207[U] [Sup Ct, Nassau County 2012]; *Jedwab v Brite Candle & Gifts, Inc.*, 2006 WL 4547646 [Sup Ct, NY County 2006]; *Heimbinder v Berkovitz*, 175 Misc 2d 808, 818 [Sup Ct, Kings County 1998], *mod on other grounds* 263 AD2d 466 [2d Dept 1999], *lv denied* 94 NY2d 755 [1999]). Here, Deutsch has not shown that any separate Heter Iska or partnership agreement exists which could be asserted to vary the terms of the note. Rather, the explicit language of the note designated Plasticware as a borrower and provides for payment of the note, without any terms relating to a partnership agreement. The note merely states that the loan evidenced by the note was "being done within the parameters of a Heter Iska," indicating an intent to avoid religious restrictions so as to allow the charging of interest and comply with the requirements of Jewish Law.

Moreover, it has been specifically held that "a Heter Iska agreement does not alter the clear civil law terms of a note" (*VNB New York Corp.*, 2012 NY Slip Op 30207[U]). Here, paragraph 10 of the note provided that the note "in any and all respects shall be governed by, and construed in accordance with the laws of the State of New York." This explicit language reflects the parties' clear and unambiguous intent to be bound by the civil laws of New York. An agreement must be construed according to the expressed intent of the parties (*see Lobacz v Lobacz*, 72 AD3d 653, 654 [2d Dept 2010]; *Ditmars-31'St. Dev. Corp. v Punia*, 17 AD2d 357, 361 [2d Dept 1962]). Consequently, the note is governed by New York law, not Hebraic law.

In addition, in the arbitration proceeding, this same note was enforced as a note (as opposed to a partnership agreement), according to its terms, and Plasticware, Neustein, and Meth, who are in privity with Deutsch, were directed to pay the principal amount

$800,000. Moreover, in his affirmation, Deutsch does not, in any way, describe any partnership agreement that existed between him and plaintiff, Meth, or Neustein. Thus, Deutsch's claim regarding a Heter Iska fails to raise any genuine issue of fact (*see Barclay Commerce Corp.*, 11 AD2d at 328).

Deutsch, in opposing plaintiff's motion, also contends that the note provided for a usurious rate of interest under General Obligations Law § 5-501 and Banking Law § 14-a (1).[FN3] This contention is wholly devoid of merit. A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16%" (*Abir v Malky, Inc.*, 59 AD3d [*7]646, 649 [2d Dept 2009]; *see also* General Obligations Law § 5-501 [1]; Banking Law §14-a [1]). It "is usurious under criminal law when it imposes an annual interest rate exceeding 25%" (*Abir*, 59 AD3d at 649; see also Penal Law §§ 190.40, 190.42). "A usurious contract is void and relieves the [borrower] of the obligation to repay principal and interest thereon" (*Abir*, 59 AD3d at 649; *see also* General Obligations Law § 5-511; *Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 740 [1992]; *Stanley Weisz, P.C. Retirement Plan v NCHD Assoc*, 237 AD2d 276, 277 [2d Dept 1997]).

As to the defense of civil usury, however, the interest rate charged under the terms of the note is 12% per annum, which is well under the 16% rate and, thus, is not usurious. Furthermore, pursuant to Limited Liability Company Law § 1104 (a), a limited liability company is not entitled to impose a defense based upon civil usury in any action, except in circumstances not applicable here.[FN4] Plasticware would be precluded from raising the defense of civil usury as a matter of law, and Deutsch, as "an individual guarantor may be viewed as standing in the shoes of the principal," can avail himself of only those defenses which would be available to Plasticware (*see General Phoenix Corp. v Cabot*, 300 NY 87, 95 [1949]; *Schneider v Phelps*, 41 NY2d 238, 239 [1977]; *European Am. Bank & Trust Co. v Boyd*, 131 AD2d 629, 630-631 [2d Dept 1987]; *Manganello v Park Slope Advanced Med. PLLC*, 42 Misc 3d 1222[A], 2014 NY Slip Op 50141[U], *2 [Sup Ct, Suffolk County 2014]; *Nextbridge Arc Fund, LLC v Vadodra Prop., LLC*, 31 Misc 3d 1202[A], 2011 NY Slip Op 50466[U], *2 [Sup Ct, Queens County 2011]; *East W. Bank v 7128 Fresh Meadows, LLC*, 31 Misc 3d

1228[A], 2011 NY Slip Op 50892[U], *6 [Sup Ct, Queens County 2011], *rearg denied* 34 Misc 3d 1242[A], 2012 NY Slip Op 50506[U] [Sup Ct, Queens County 2012]). Consequently, Deutsch, as a guarantor of the note, is precluded from relying upon the defense of civil usury since Plasticware is a limited liability company prohibited from interposing this defense (*see General Phoenix Corp.*, 300 NY at 95; *European Am. Bank & Trust Co.*, 131 AD2d at 630-631).[FN5]

Furthermore, with respect to the default rate of interest of 24% per annum, it is [*8]well settled that " the defense of usury does not apply where . . . the terms of the . . . note impose a rate of interest in excess of the statutory maximum only after default or maturity'" (*Kraus v Mendelsohn*, 97 AD3d 641, 641 [2d Dept 2012], quoting *Miller Planning Corp. v Wells*, 253 AD2d 859, 860 [2d Dept 1998]; *see also Hicki v Choice Capital Corp.*, 264 AD2d 710, 711 [2d Dept 1999]; *Zara Realty Holding Corp. v E & J Deli & Grocery, Inc.*, 34 Misc 3d 1234[A], 2012 NY Slip Op 50364[U], *7 [Sup Ct, Queens County 2012]). Therefore, apart from the fact that the rate does not constitute a criminally usurious rate (*see* Penal Law §§ 190.40, 190.42), such defense is not available to Deutsch since the 24% applies only upon default (General Obligations Law § 5-501 [6]).

Deutsch also claims, upon information and belief, that the note was modified, extended, and/or voided by plaintiff and Plasticware, who entered into either a new note or modified the terms of the note.[FN6] He has submitted an unsigned Amended and Restated Promissory Note, dated February 2009. The terms of this purported note provided that Deutsch similarly personally guaranteed the payment of the principal sum of $800,000, but extended the maturity date of the note to January 1, 2016 and provided for additional interest-only payments of $9,000 per month, to commence on May 1, 2009 and continue to the maturity date. Deutsch argues that this purported second note voids the guaranty that he made.

This argument must be rejected. Plaintiff sued on the original note, and Deutsch has submitted no evidence whatsoever that this replacement note was ever executed. Indeed, Deutsch admits that he was contacted about consenting to this amended note, and that he refused to sign and guarantee this second note. Moreover, plaintiff, in

response to this assertion by Deutsch, has submitted a supplemental affidavit, in which he specifically attests that the terms of the original note were never modified, extended, and/or voided. Furthermore, Deutsch's assertion that the note was invalidated by a replacement note is belied by the arbitration award on the note, which found Plasticware and the other guarantors responsible for payment under the note, thereby evidencing that the maturity date of the note had not been extended. Thus, such unsubstantiated speculation and surmise by Deutsch are insufficient to defeat plaintiff's motion for summary judgment (*see Friedman v Hyperion Assoc.*, 157 AD2d 963, 964 [3d Dept 1990]).

Deutsch further argues that plaintiff has failed to provide any evidence of the default under the note, except for his own self-serving statements. He states that plaintiff has not provided any letters or other demands for payment which state that the note has not been paid. He contends that he needs to conduct discovery in order to have an opportunity to examine the records of plaintiff, subpoena non-parties, and cross-examine [*9]plaintiff as to his statements regarding the default under the note.

The court rejects Deutsch's argument that because no discovery has yet taken place, this motion must be denied as premature in order to afford him an opportunity to conduct such discovery. CPLR 3212 (f) provides that if it appears from affidavits submitted in opposition to the motion for summary judgment "facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." However, "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" to warrant denial of a motion for summary judgment (*Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488 [2d Dept 2006]). The granting of a summary judgment motion should not be postponed to allow for discovery where the proponent of the additional discovery has failed "to demonstrate that the discovery sought would produce relevant evidence" (*Frith v Affordable Homes of Am.*, 253 AD2d 536, 537 [2d Dept 1998]).

"A grant of summary judgment cannot be avoided by a claimed need for discovery

unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]; *see also Freiman v JM Motor Holdings NR 125-139, LLC*, 82 AD3d 1154, 1156 [2d Dept 2011]; *Dempaire v City of New York*, 61 AD3d 816, 817 [2d Dept 2009]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621 [2d Dept 2008]; *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [2d Dept 1999], *lv dismissed in part, denied in part* 93 NY2d 956 [1999]). "A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay determination on the issue of summary judgment" (*Lambert v Bracco*, 18 AD3d 619, 620 [2005]; *see also Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 717 [2d Dept 2003]; *Weltmann v RWP Group*, 232 AD2d 550, 551 [2d Dept 1996]). Here, Deutsch has failed to offer any basis to believe that any relevant evidence could possibly be uncovered if an opportunity for further discovery is afforded to him, so as to justify postponing a determination of this summary judgment motion.

Deutsch also asserts, as an affirmative defense in his amended answer, that plaintiff must first attempt to collect from Plasticware before he can attempt to collect from him as a guarantor on the note.[FN7] This affirmative defense, however, is without merit. A guarantor of payment on a note is bound jointly and severally with the principal debtor, and has a primary obligation as distinguished from a secondary liability. "A plaintiff need not prove that it unsuccessfully attempted to obtain payment from the principal" in order to recover against a guarantor (*European Am. Bank*, 131 AD2d at 630). As a general rule, a guaranty of payment of a note is an absolute undertaking that [*10]the borrower will pay the note when due, and that, if the borrower fails to do so, the guarantor will pay, becoming immediately liable on the default of the principal (*see General Phoenix Corp.*, 300 NY at 92; *Federal Deposit Ins. Corp. v Schwartz*, 78 AD2d 867, 868 [2d Dept 1980], *affd* 55 NY2d 702 [1981]). Here, the guaranty is one of payment, as opposed to a guarantee of collection, and, as such, plaintiff is not required to first attempt to collect on its judgment against Plasticware before attempting to collect from Deutsch on his guaranty (*see European Am. Bank*, 131 AD2d at 630).

Of course, a guarantor is liable only to the extent that the holder has not already recovered on the note. However, pursuant to CPLR 3002, since Plasticware and Deutsch's liability to plaintiff is joint and several, the mere rendition of a judgment against Plasticware following the confirmation of the arbitration award, does not bar plaintiff's claim in this action against Deutsch (*see generally Gillespie v Flight Line Pub*, 2 AD3d 1014, 1015 [3d Dept 2003]). Only if plaintiff's judgment against Plasticware and the co-guarantors of the note has already been satisfied would this act as a barrier to a judgment against Deutsch under the simple rule that the law does not allow duplicative recoveries.

Deutsch's affirmative defense that plaintiff failed to join Meth and Neustein as necessary parties to this action [FN8] is likewise devoid of merit. Judgment has already been entered against them in the action brought under index number 507442/2014, wherein the arbitration award was confirmed, and plaintiff claims that the debt to him has remained

unsatisfied. Thus, neither Meth nor Neustein will be inequitably affected by a judgment entered in favor of plaintiff and against Deutsch (*see* CPLR 1001 [a]; *European Am. Bank*, 131 AD2d at 630).

Deutsch's other affirmative defenses set forth in his amended answer (which have not been discussed in his opposition papers) are wholly unsupported, conclusory, and devoid of merit. Therefore, inasmuch as Deutsch has failed to raise any triable issue of fact with respect to any bona fide defense, plaintiff's motion for summary judgment must be granted (*see* CPLR 3212 [b]). Consequently, plaintiff is entitled to recover the principal amount of $800,000, plus interest from March 27, 2008 through June 9, 2008 (the maturity date of the note) at the rate of 12% per annum, and interest from June 10, 2008 to the entry of judgment on this Order at the default rate of 24% per annum, as provided by the terms of the note. Plaintiff shall set forth the computation of the amount of interest to be awarded in a proposed judgment to be served with plaintiff's documentation regarding attorneys' fees. Accompanying such proposed judgment shall be an affidavit from plaintiff regarding any payment of the judgment awarded against

Plasticware and the other guarantors, which must be deducted from the judgment to be entered against Deutsch.

In addition, since paragraph 3 of the note provided for the recovery of attorney's [*11]fees by plaintiff, plaintiff is entitled to recover his reasonable attorney's fees. Plaintiff shall submit an affidavit by his counsel, together with appropriate documentation, as to the basis of the legal fees charged to him, on notice to Deutsch, within 30 days of the date of this decision. Deutsch may respond to such demand for fees within 20 days thereafter. If the amount to be awarded as reasonable attorney's fees cannot be agreed upon by plaintiff and Deutsch, a hearing will be ordered.

Plaintiff, in his motion, also requests that this action be discontinued as against Plasticware due to its submission to binding arbitration, which has resulted in an arbitration award that the court has confirmed. "In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted" (*Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881, 883 [2d Dept 2013] [internal quotation marks omitted]). There is no opposition by Deutsch to plaintiff's application for this relief, and the court finds that there would be no prejudice to any party by the granting of such request. Thus, the granting of plaintiff's motion, insofar as he seeks to voluntarily discontinue this action as against Plasticware, is warranted (*see* CPLR 3217 [b]).

CONCLUSION

Accordingly, plaintiff's motion, insofar as he seeks summary judgment in his favor as against Deutsch, is granted for the principal amount of $800,000, plus accrued interest and reasonable attorney's fees incurred in this litigation, less any sums already recovered. Plaintiff shall promptly comply with the procedure set forth above to determine the amount of interest and attorneys' fees. Plaintiff's motion is also granted insofar as he seeks an order

discontinuing this action as against Plasticware.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.

Footnotes

Footnote 1: Although Deutsch's amended answer contains 19 affirmative defenses, Deutsch's opposition papers only contain assertions and arguments related to certain of these defenses, which the court addresses below.

Footnote 2: In his twelfth affirmative defense in his amended answer, Deutsch alleges that plaintiff's claims are barred by the statute of frauds and he reserves the defense that the note and the personal guaranty under which plaintiff seeks recovery were not signed by him.

Footnote 3: The defense of usury is alleged in the tenth affirmative defense of Deutch's amended answer.

Footnote 4:I.e., where the limited liability company has, as its principal asset, a one or two family dwelling and the limited liability company was organized, or the controlling interest acquired, within six months prior to execution by the limited liability company of the note evidencing the indebtedness (*see* Limited Liability Company Law § 1104).

Footnote 5: In addition, General Obligations Law § 5-501 (6) (a) provides that "[n]o law regulating the maximum rate of interest which may be charged, taken or received, except section 190.40 and section 190.42 of the penal law, shall apply to any loan or forbearance in the amount of two hundred fifty thousand dollars or more, other than a loan or a forbearance secured primarily by an interest in real property improved by a one or two family residence." Here, it is not alleged that the loan was secured by an interest in real property improved by a one or two family residence, and the loan was in the principal amount of $800,000, and, thus, constituted a loan which was more than $250,000.

Footnote 6: The fifteenth affirmative defense in Deutch's amended answer alleges that the note was modified and/or a new note was executed which modified the terms of the note, rendering the guaranty executed by him void.

Footnote 7: This is raised in Deutsch's second affirmative defense in his amended answer.

Footnote 8: This is alleged as Deutsch's sixteenth affirmative defense in his amended answer.

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