SUPREME COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

-----------------------------------------------------------------X Index No.:

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Plaintiff, **AFFIDAVIT IN SUPPORT OF**

**MOTION FOR SUMMARY**

-against- **JUDGMENT IN LIEU OF**

**COMPLAINT**

AMERITRUST MORTGAGE BANKERS, INC,

DAVID BAKHSHI, THOMAS CALABRO, and

YOEL MOVTADY,

Defendants.

-----------------------------------------------------------------X

STATE OF )

) ss.:

COUNTY OF )

, being duly sworn, deposes and says that:

1. I am the plaintiff in the above-captioned action, am personally and fully familiar with all of the facts and circumstances herein, and make this affidavit in support of the instant motion for summary judgment in lieu of complaint pursuant to CPLR § 3213.

**NATURE OF ACTION**

2. This is an action to recover a total amount of $600,000.00 pursuant a series of promissory notes and personal guarantees. It is respectfully submitted that relief under CPLR § 3213 is appropriate here since defendants failed to pay me a sum certain ($600,000.00) and the amount is determinable from an instrument for the payment of money as required by CPLR 3213. There is no legitimate basis for defendants’ failure to pay the amounts due. Accordingly, summary judgment against all defendants should be granted pursuant to CPLR § 3213.

**PARTIES**

3. Plaintiff \_\_\_\_\_\_\_\_\_\_\_\_ (hereinafter “Plaintiff”) resides in the State of California.

4. Upon information and belief, defendant Ameritrust Mortgage Bankers, Inc. (hereinafter “Ameritrust”) is an active domestic corporation duly organized and existing under the laws of the State of New York with its principal place of business located at 1981 Marcus Avenue, #C129, Lake Success, New York 11042.

5. Upon information and belief, defendant Yoel Movtady (herinafter “Movtady”) resides at 18 Twin Pond Road, Kings Point, County of Nassau, State of New York.

6. Upon information and belief, at all times relevant herein, defendant Movtady was the president of All Documents, Inc. (hereinafter “All Documents”) and Secondary Marketing, Inc. (hereinafter “Secondary Marketing”) and a principal or agent of Ameritrust.

7. Upon information an belief, defendant David Bakhshi (herinafter “Bakhshi”) resides at 102 Wild Wood Road, Great Neck, County of Nassau, State of New York.

8. Upon information and belief, at all times relevant herein, defendant Bakhshi was the president of defendant Ameritrust.

9. Upon information and belief, defendant Thomas Calabro resides at 41 Harbour Drive, Blue Point, County of Suffolk, State of New York.

10. Upon information and belief, at all times relevant herein, defendant Calbro was the chief financial officer of defendant Ameritrust.

**JURISDICTION AND VENUE**

11. This Court has jurisdiction over all defendants pursuant to CPLR §301.

12. Venue is proper pursuant to CPLR § 501.

**FACTS COMMON TO ALL CAUSES OF ACTION**

**A. Promissory Notes**

13. On or about November 1, 2007, Plaintiff loaned the sum of $150,000.00 to defendant Ameritrust under the terms and conditions set forth in a promissory note executed by Plaintiff and defendant Ameritrust (hereinafter “Note 1”), a copy of which is annexed hereto as **Exhibit “A”**.

14. On or about November 1, 2007, defendants Calabro and Bakshi executed separate personal guarantees of payment of Note 1 in the amount of $150,000.00 (collectively referred to as “Guarantees 1”), copies of which are annexed hereto as **Exhibit “B”**.

15. Under the terms of Guarantees 1, in consideration of the loan by Plaintiff to defendant Ameritrust, defendants Calabro and Bakshi agreed to the prompt payment when due of defendant Ameritrust’s debts and obligations to Plaintiff under Note 1, plus all costs and expenses of collection, including reasonable attorney’s fees.

16. On or about November 1, 2007, Plaintiff loaned the sum of $200,000.00 to Secondary Marketing under the terms and conditions set forth in a promissory note executed by Plaintiff and Secondary Marketing (hereinafter “Note 2”), a copy of which is annexed hereto as **Exhibit “C”**.

17. On or about November 1, 2007, defendant Movtady executed a personal guaranty of payment of Note 2 in the amount of $200,000.00 (hereinafter “ Guaranty 2”), a copy of which is annexed hereto as **Exhibit “D”**.

18. Under the terms of Guaranty 2, in consideration of the loan by Plaintiff to Secondary Marketing, defendant Movtady agreed to the prompt payment when due of Secondary Marketing’s debts and obligation to Plaintiff under Note 2, plus all costs and expenses of collection, including reasonable attorney’s fees.

19. On or about May 6, 2008, Plaintiff loaned the sum of $100,000.00 to All Documents under the terms and conditions set forth in a promissory noted executed by Plaintiff and All Documents (hereinafter “Note 3”), a copy of which is annexed hereto as **Exhibit “E”**.

20. On or about May 6, 2008, defendant Movtady executed a personal guaranty of payment of Note 3 in the amount of $100,000.00 (hereinafter “Guaranty 3”), a copy of which is annexed hereto as **Exhibit “F”.**

21. Under the terms of Guaranty 3, in consideration of the loan by Plaintiff to All Documents, defendant Movtady agreed to the prompt payment when due of All Document’s debts and obligation to Plaintiff under Note 3, plus all costs and expenses of collection, including reasonable attorney’s fees.

22. On or about June 9, 2008, Plaintiff loaned the sum of $150,000.00 to All Documents and defendant Ameritrust under the terms and conditions set forth in a promissory note executed by Plaintiff, All Documents, and defendant Ameritrust (hereinafter “Note 4”), a copy of which annexed hereto as **Exhibit “G”**.

23. On or about June 9, 2008, defendants Movtady, Calabro, and Bakhshi executed a personal guaranty of payment of Note 4 in the amount of $150,000.00 (hereinafter “Guaranty 4”), a copy of which is annexed hereto as **Exhibit “H”**.

24. Under the terms of Guaranty 4, in consideration of the loan by Plaintiff to All Documents and defendant Ameritrust, defendants Movtady, Calabro, and Bakhshi agreed to the prompt payment when due of All Document’s and defendant Ameritrust’s debts and obligations to Plaintiff under Note 4, plus all costs and expenses of collection, including reasonable attorney’s fees.

25. On or about June 30, 2008, Plaintiff entered into a promissory note with All Documents wherein All Documents agreed to assume all debts and obligations of Secondary Marketing under Note 2, including, but not limited to, timely payment of Secondary Marketing’s debt to Plaintiff in the amount of $200,000.00 (hereinafter “Note 5”), a copy of which is annexed hereto as **Exhibit “I”**.

**B. Amended Promissory Notes**

26. On or about March 23, 2011, defendants Ameritrust and Bakhshi executed an amended promissory note with Plaintiff in the amount of $300,000.00 (hereinafter “Amended Note 1"), a copy of which is annexed hereto as **Exhibit “J”**.

27. Under the terms of Amended Note 1, for good an valuable consideration, the receipt and sufficiency of which is acknowledged, the maturity dates of Note 1 and Note 4, executed by defendant Ameritrust, were extended to March 31, 2013, allowing for monthly interest payments in the amount of $2,250.00 to be paid no later than the last day of each month until this extended maturity date, at which time the entire principal amount became fully due.

28. Under the terms of Amended Note 1, defendants Ameritrust and Bakhshi waive presentment for payment, notice of dishonor, protest, and notice of protest.

29. In addition, defendants Ameritrust and Bakhshi waive any and every right to seek injunctive relief, interpose a counterclaim in this action, or object to the jurisdiction and venue of this Court.

30. On or about March 23, 2011, defendant Bakhshi executed a personal guaranty of payment of Amended Note 1 in the amount of $300,00.00 (hereinafter “Bakhshi Guaranty”), a copy of which is annexed hereto as **Exhibit “K”**.

31. Under the terms of the Bakhshi Guaranty, in consideration for the above-referenced extensions, defendant Bakshshi agreed to the prompt payment when due of all debts and obligations to Plaintiff under Amended Note 1, and agreed to pay all costs and expenses of collection, including reasonable attorney’s fees.

32. On or about March 23, 2011, defendant Movtady executed an amended promissory note with Plaintiff in the amount of $300,000.00 (hereinafter “Amended Note 2"), a copy of which is annexed hereto as **Exhibit “L”**.

33. Under the terms of Amended Note 2, for good an valuable consideration, the receipt and sufficiency of which is acknowledged, the maturity dates of Note 3 and Note 5, executed by All Documents, were extended to March 31, 2013, allowing for monthly interest payments in the amount of $2,250.00 to be paid no later than the last day of each month until this extended maturity date, at which time the entire principal amount became fully due.

34. Under the terms of Amended Note 2, defendant Movtady waives presentment for payment, notice of dishonor, protest, and notice of protest.

35. In addition, defendant Movtady waives any and every right to seek injunctive relief, interpose a counterclaim in this action, or object to the jurisdiction and venue of this Court.

36. On or about March 23, 2011, defendant Movtady executed a personal guaranty of payment of Amended Note 2 in the amount of $300,000.00. (hereinafter “Movtady Guaranty”), a copy of which is annexed hereto as **Exhibit “M”**.

37. Under the terms of the Movtady Guaranty, in consideration for the above-referenced extensions, defendant Movtady agreed to the prompt payment when due of all debts and obligations to Plaintiff under Amended Note 2 and agreed to pay all costs and expenses of collection, including reasonable attorney’s fees.

38. Under the terms of Amended Note 1 and Amended Note 2, the debts and obligations of defendant Calabro under Guaranty 1 and Guaranty 2 remain in full force and effect.

39. Plaintiff has performed all covenants, conditions, and promises required under all above-referenced promissory notes, including, but not limited to, the loaning of money to All Documents, Secondary Marketing and defendant Ameritrust in the total amount of $600,000.00.

**AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS AMERITRUST, BAKHSHI AND CALABRO**

40. Plaintiff repeats, reiterates and re-alleges each and every allegation as set forth in paragraphs “1” through “39” with the same force and effect as if fully set forth herein.

41. Although Amended Note 1 requires monthly interest payments of $2,250.00, payable no later than the last day of each month, defendants Ameritrust and Bakhshi failed to make these monthly payments when due.

42. The last payment by defendants Ameritrust and Bakhshi under Amended Note 1 was made in July of 2011.

43. Pursuant to the terms of Amended Note 1, defendants Ameritrust and Bakhshi are now in default.

44. No part of the sum of $300,000.00, which by the terms of Amended Note 1 became due to Plaintiff upon default, has been paid by defendants Ameritrust or Bakhshi despite repeated demands therefor made to defendants Ameritrust and Bakhshi by Plaintiff.

45. Pursuant to the terms of the Bakshi Guaranty, defendant Bakhshi is personally responsible for the repayment of the defaulted debt to Plaintiff under Amended Note 1 in the amount of $300,000.00

46. Pursuant to Guaranty 1 and Guaranty 2, defendant Calabro is personally responsible for the repayment of the defaulted debt to Plaintiff under the terms of Note 1, Note 2, in the amount of $300,000.00.

47. There is no meritorious defense to this action.

48. By reason of the foregoing, Plaintiff is entitled to judgment against defendants Ameritrust, Bakhshi and Calabro, jointly and severally, in the amount of $300,000.00, together with interest from August 1, 2011, the costs and disbursements of this action, reasonable attorneys fees, and such other and further relief as this Court deems just and proper.

**AS AND FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT MOVTADY**

49. Plaintiff repeats, reiterates and re-alleges each and every allegation as set forth in paragraphs “1” through “48” with the same force and effect as if fully set forth herein.

50. Although Amended Note 2 requires monthly interest payments of $2,250.00, payable no later than the last day of each month, defendant Movtady failed to make these monthly payments when due.

51. The last payment by defendant Movtady under Amended Note 2 was made in July of 2011.

52. Pursuant to the terms of Amended Note 2, defendant Movtady is now in default.

. 53. No part of the sum of $300,000.00, which by the terms of Amended Note 2became due to Plaintiff upon default, has been paid by defendant Movtady despite repeated demands therefor made to defendant Movtady.

54. Pursuant to the terms of the Movtady Guaranty, defendant Movtady is personally responsible for the repayment of the defaulted debt to Plaintiff under Amended Note 2 in the amount of $300,000.00

54. There is no meritorious defense to this action.

55. By reason of the foregoing, Plaintiff is entitled to judgment against defendant Movtady in the amount of $300,000.00, together with interest from August 1, 2011, the costs and disbursements of this action, reasonable attorneys fees, and such other and further relief as this Court deems just and proper.

56. No prior application has been made to this or any other court for the relief requested herein.

**CONCLUSION**

57. I respectfully suggest that relief under CPLR § 3213 is appropriate since the underlying obligations of all defendants to me, and the amount due from all defendants to me are clearly determinable and ascertainable; and there is proof, by means of this affidavit, that the specific amounts were not paid. Since a personal guarantee qualifies as an instrument for the payment of money, and there is proof of nonpayment, summary judgment in lieu of a complaint under CPLR § 3213 is warranted. E.D.S. Sec. Systems, Inc. v. Allyn, 262 A.D.2d 351, 691 N.Y.S.2d 567 (2d Dep’t. 1999)(“The plaintiffs sustained their initial burden of demonstrating their entitlement to judgment as a matter of law by submitting proof of the existence of an underlying note, a guarantee, and the failure to make payment in accordance with their terms”); Council Commerce Corp. v. Paschalides, 92 A.D.2d 579, 459 N.Y.S.2d 463(2d Dep't 1983).

WHEREFORE, it is respectfully submitted that this Motion should be granted in its entirety, and that Summary Judgment, in lieu of a complaint, should be granted in my favor as follows:

(a) On the First Cause of Action, against defendants Ameritrust, Bakhshi and Calabro, jointly and severally, in the amount of $300,000.00, together with interest from August 1, 2011, the costs and disbursements of this action, reasonable attorney’s fees, and such other and further relief as this Court deems just and proper.

(b) On the Second Cause of Action, awarding Plaintiff judgment against defendant Movtady in the amount of $300,000.00, together with interest from August 1, 2011, the costs and disbursements of this action, reasonable attorney’s fees, and such other and further relief as this Court deems just and proper.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Sworn to before me this

\_\_\_day of November, 2011

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NOTARY PUBLIC