

<b>Bank of Am., N.A. v National Home Lo-Kators LLC</b>
2010 NY Slip Op 30913(U)
April 14, 2010
Supreme Court, Suffolk County
Docket Number: 39685/2009
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

*Present:* HON. EMILY PINES  
 J. S. C.

Original Motion Date: 11-23-2009  
 Motion Submit Date: 02-03-2010  
 Motion Sequence.: 001 RRH

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**BANK OF AMERICA, NATIONAL  
 ASSOCIATION, AS SUCCESSOR BY MERGER  
 TO FLEET NATIONAL BANK,**

**Plaintiff,**

**-against-**

**NATIONAL HOME LO-KATORS LLC,  
 PATRICIA SAINT LAURENT,  
 PATRICK SAINT LAURENT,**

**Defendants.**

\_\_\_\_\_ X

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**ORDERED, ORDERED**, that the motion (motion sequence number 001) by plaintiff pursuant to CPLR §3212 for summary judgment is granted; and it is further

**ORDERED**, that the affirmative defenses contained in defendants' Answer are dismissed pursuant to CPLR §3211(b); and it is further

**ORDERED**, that a hearing on counsel fees is scheduled for May 10, 2010 at 9:30 a.m. before the undersigned; and it is further

**ORDERED**, that submission of Judgment shall abide the determination on counsel fees.

Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about August 8, 2009 and issue was joined by defendants' service of an Answer dated

September 24, 2009. The submissions reflect that on or about April 5, Fleet National Bank and defendant, National Home Lo-Kators LLC (“National Home”), entered into a line of credit agreement captioned Fleet Small Business Services Credit Agreement (the “Agreement”). Plaintiff, Bank of America National Association is the successor by merger to Fleet National Bank. This Agreement extended credit to Anchor in the amount of \$100,000.00 at an interest rate of prime plus 4.75 percent. The Agreement further provided for a default interest rate of 6% above the interest rate, late fees and counsel fees.

Defendants Patrick Saint Laurent and Patricia Saint Laurent, executed the Agreement containing a personal guaranty that provides in relevant part as follows:

In consideration of Fleet National Bank or any affiliate thereof (collectively, “Bank”) extending credit to Applicant, the person(s) signing on the reverse **jointly and severally** and unconditionally guarantees to Bank and its successors and assigns, payment and performance of all present and future obligations, liabilities and undertakings of Applicant to Bank of every kind (“Obligations”). Guarantor’s liability hereunder shall be immediate and unlimited in amount. This Guaranty shall operate as a continuing and absolute guaranty until five business days after receipt by Bank of written notice of revocation by certified mail, return receipt requested... . Guarantor waives all requirements of notice, demand, presentment or protest, all other defenses that may be available to a surety and any right Guarantor may have to require Bank first to proceed against Applicant or any other person or entity, or first to realize on any security held by Bank before proceeding against Guarantor hereunder. Guarantor waives all rights of setoff, or subrogation until the Obligations shall have been paid in full. Guarantor agrees to pay the costs and expenses (including attorney’s fees) of Bank in enforcing this Guaranty. Guarantor grants Bank the right of setoff for all matured and unmatured Obligations against all deposits and property of Guarantor now or hereafter in the possession or control of Bank or its affiliates without regard to the adequacy of collateral. This Guaranty shall be binding upon Guarantor’s successors and assigns. This Guaranty may be modified only by a written agreement signed by Bank. THIS GUARANTY IS GOVERNED BY FEDERAL LAW AND THE LAWS OF RHODE ISLAND. HOWEVER, IF PERMITTED BY THE LAW OF THE STATE WHERE THE AUTHORIZATION AGREEMENTS IS SIGNED, GUARANTOR WAIVES TRIAL BY JURY AND WAIVES ANY RIGHT TO NOTICE OR HEARING BEFORE BANK SEEKS A PREJUDGMENT REMEDY. GUARANTOR ACKNOWLEDGES THIS IS A COMMERCIAL TRANSACTION AND NOT A CONSUMER TRANSACTION. Guarantor agrees that Bank may rely on a facsimile of this Guaranty. This Guaranty is intended to take effect as an instrument under seal.

In support of the motion, plaintiff has submitted an affirmation of counsel, an affidavit by Sabine Fetting (“Fetting”), assistant vice president of plaintiff, establishing the default, a copy of the Agreement containing the guaranty, the pleadings and a memorandum of law. According to Fetting, National Home

defaulted on its obligations under the Agreement by its failure to make monthly payments since on or about January 30, 2009. As a result, plaintiff asserts that pursuant to the Agreement, the entire balance of principal plus accrued interest became immediately due and payable and that the outstanding balance on the loan at the time of default was \$99,216.39. Plaintiff states that the total amount due and owing is \$114,111.15, which is comprised of \$99,216.39 in principal, and \$14,894.76 in accrued interest. Plaintiff states that it accelerated payment and demanded payment in full on June 23, 2009 and since then statutory interest has been accruing at the rate of \$34.60 per diem. Plaintiff also seeks counsel fees in the amount of \$5,548.00 as of the date of the motion, plus additional fees for anticipated services, and submits an affirmation of counsel in support thereof.

Defendants oppose the motion and submit affidavits by both individual defendants and a memorandum of law. The Court notes at the outset that defendants are not denying that National Home entered into the Agreement and has defaulted in payment. However, Patrick and Patricia Saint Laurent submit separate affidavits wherein each asserts that they did not sign the Agreement containing the personal guaranty and the signatures contained on the document did not belong to either of them. Patrick Saint Laurent Swift submits a correspondence from the Bank dated April 7, 2004, wherein it states that the line of credit was approved subject to receipt of a properly signed and witnessed "Authorization/Personal Guaranty Form". Patrick Saint Laurent States that this letter, dated after the signature on Agreement, demonstrates that he did not sign the Agreement. Therefore, defendants argue there is a question of fact precluding the granting of summary judgment against the individual defendants.

In reply, plaintiff argues that it has met its prima facie burden by the submission of the Agreement, and the affidavit of default and defendants have failed to raise a triable issue of fact. Plaintiff notes that defendants do not contest National Home's liability and the bald, conclusory allegations that they did not sign the Agreement containing the personal guaranty clause, with no proof from a handwriting expert or any other source, is insufficient to raise a triable issue of fact. Plaintiff further submits copies of the individual defendants' signatures on bank documents to demonstrate the similarity between the signatures. Also, plaintiff submits an affidavit by Yocasta Sanchez ("Sanchez"), who processed defendants' Agreement for the Bank. Sanchez states that the procedure for processing a loan application required verification of the signatures and identity of the applicants by the submission

of a driver's license. She states that the application would not have been processed if the signature was not verified. Based on the foregoing, plaintiff requests that the motion for summary judgment be granted in its entirety and the affirmative defenses dismissed.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). In an action to recover on a promissory note, plaintiff demonstrates a prima facie showing by establishing the existence of the note and the defendant's failure to make payments according to its terms. *Pennsylvania Higher Education Assistance Agency v. Musheyev*, 68 A.D.3d 736, 888 N.Y.S.2d 911 (2d Dept. 2009); *VereLa v. Citrus Lake Development, Inc.*, 53 A.D.3d 574, 862 N.Y.S.2d 96 (2d Dept. 2008). Defendants' submission of unsupported and conclusory allegations are insufficient to demonstrate a triable issue of fact. *Hestnar v. Schetter*, 284 A.D.2d 499, 728 N.Y.S.2d 479 (2d Dept. 2001).

Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract." *Dunkin' Donuts v. Liberatore*, 138 A.D.2d 559, 526 N.Y.S.2d 141 (2d Dept. 1988). See also, *Chrysler Credit Corp. v. Kosal*, 132 A.D.2d 686, 518 N.Y.S.2d 162 (2d Dept. 1987). Where a guaranty clearly indicates that the signatory would "unconditionally guarantee" the performance of the corporation and is unambiguously identified as a "guaranty" it will be enforceable against the guarantor. *Suffolk Cement Products, Inc., v. Empire Concrete Enterprises, Inc.*, 234 A.D.2d 447, 650 N.Y.S.2d 801 (2d Dept. 1996); *Dunkin Donuts, supra*. As recently stated by the Appellate Division, Second Department quoting the Court of Appeals in *Banco Popular Am v Victory Taxi Mgt*, 1 NY 3d 381, 774 N.Y.S.2d 480, 806 N.E.2d 488, "(s)omething more than a bald assertion of

forgery is required to create an issue of fact contesting the authenticity of a signature". *Acme American Repairs, Inc v Uretsky*, 39 A.D.3d 675, 834 N.Y.S. 2d 542 (2d Dept. 2007). In *Acme, supra*, the Plaintiff, a tenant in a commercial lease, sought a declaration that a 1984 written and executed lease was valid. The Defendant landlord claimed such was a forgery and submitted a different document with a shorter term. The Appellate Court in that case granted Plaintiff Summary Judgment where the signatures appeared the same, the totality of the evidence including an apparent admission by the defendant indicated the genuineness of the signature, and no expert proof was tendered to create an issue of fact.

In the case at bar, plaintiff has met its prima facie burden by submission of the Agreement and guaranties and affidavit establishing the default and amount due and owing. *Agai v. Diontech Consulting, Inc.*, 64 A.D.3d 622, 882 N.Y.S.2d 503 (2d Dept. 2009); *Cutter Bayview Cleaners, Inc., v. Spotless Shirts, Inc.*, 57A.D.3d 708, 870 N.Y.S.2d 395 (2d Dept. 2008). In opposition, defendants have failed to raise a triable issue of fact. The guaranty establishes defendants' unconditional obligation to pay the debt and establishes joint and several liability against each defendant. Defendants' conclusory allegations that they did not sign the guaranty, without expert proof or other documentation is insufficient to raise a triable issue of fact. A review of the documents submitted by plaintiff demonstrates sufficient similarity to defendants' signatures on the Agreement.

Based on the foregoing, the motion for summary judgment is granted and the affirmative defenses contained in the Verified Answer are dismissed. The amount of counsel fees and disbursements as provided for in the Agreement shall be determined at a hearing on May 10, 2010 at 9:30 a.m. before the undersigned. *Cutter Bayview Cleaners, supra*. Submission of Judgment shall abide the determination of counsel fees.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 14, 2010  
Riverhead, New York

  
EMILY PINES  
J. S. C.