

HSBC Bank USA, N.A. v Wm. V. Schmidt Co., Inc.

2011 NY Slip Op 31512(U)

May 24, 2011

Supreme Court, New York County

Docket Number: 102914/2010

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

HSBC BANK USA, N.A.,

INDEX NO. 102914/2010

Plaintiff,

MOTION DATE _____

- against -

MOTION SEQ. NO. 001

WM. V. SCHMIDT CO., INC., and
MELVIN D. WEINTRAUB a/k/a
M. DOUGLAS WEINTRAUB,

FILED

MOTION CAL. NO. _____

JUN 08 2011

Defendants.

NEW YORK

The following papers, numbered 1 to 7, were read on this motion by plaintiff for summary judgment, and cross-motion by defendants to compel discovery.

COUNTY CLERK'S OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1,2,3,4

Answering Affidavits — Exhibits (Memo) _____

5,6

Replying Affidavits (Reply Memo) _____

7

Cross-Motion: Yes No

This is an action by plaintiff HSBC Bank USA, N.A. ("HSBC" or "plaintiff") to recover liquidated damages from defendants Wm. V. Schmidt Co., Inc. ("the Corporation") and Melvin D. Weintraub a/k/a M. Douglas Weintraub ("Weintraub" or "Guarantor") (collectively "defendants"), allegedly resulting from an overdraft in the Corporation's checking account. Discovery has not commenced and the Note of Issue has not been filed. Before the Court is HSBC's motion for summary judgment, pursuant to CPLR 3212, seeking judgment in its favor in the sum of \$79,826.98, plus interest, late charges, attorney's fees, costs and disbursements; and dismissing defendants' answers and affirmative defenses. Defendants have responded in opposition to the motion, and have also filed a cross-motion to compel discovery.

BACKGROUND

HSBC is a National Banking Association that merged with Republic National Bank of

New York ("Republic" or "the Bank") on December 31, 1999. The Corporation is an entity that has maintained a series of bank accounts with HSBC and/or Republic since at least September 2000. Weintraub, an individual, is an officer of the Corporation.

On September 27, 2000, the Corporation and Republic executed a Funds Transfer Agreement, pursuant to which the Corporation agreed to "pay the Bank on demand for any overdrafts in any of its accounts arising by operation of this Agreement (such overdrafts to be permitted by the Bank at its sole discretion), together with interest thereon" (Not. of Mot., Ex. E at § 10). The Corporation maintained business checking account number XXXXXX2918 with Republic as of October 5, 2000.

In connection with the Corporation's various accounts with Republic, Weintraub also executed a personal Guaranty ("the Guaranty") with Republic on September 27, 2000, which provided in pertinent part:

"In consideration of any extension of credit or other financial accommodation heretofore, now or hereafter made by Bank to or for the account of the [Corporation], whether voluntary or obligatory, Guarantor hereby absolutely, irrevocably and unconditionally guarantees, as primary obligor and not merely as surety, to Bank the prompt and complete payment and performance when due . . . of all Obligations and the performance of each of the [Corporation's] covenants and obligations under all loan agreements, documents and instruments evidencing or relating to any Obligations or under which any Obligations may have been issued, created, assumed, suffered involuntarily, or guaranteed, and all fees and expenses incurred in collecting or enforcing the same, including fees and expenses of legal counsel, as more fully set forth below, all of which conclusively shall be deemed to have been incurred in reliance upon this Guaranty, as if each of the foregoing were the direct and primary legal responsibility of Guarantor and not the [Corporation]" (*id.*, Ex. F at § 2).

The Guaranty defined "Obligations" to mean "any and all indebtedness, obligations and liabilities of the [Corporation] to Bank, and all Claims of Bank against the [Corporation], now existing or hereafter arising" (*id.* at § 1). "Bank" was defined as referring to Republic "and its

successors and assigns" (*id.*). The Guaranty also granted Republic a right to assign the Obligations without notice, and provided that each successive assignee could enforce the Guaranty for its own benefit (*id.* at § 13). In addition, the Guaranty provided that it was "absolute and unconditional in all respects" (*id.* at § 7).

On May 8, 2006, Weintraub signed a Personal Financial Statement and Agreement with HSBC containing the following provision applicable to an event of default: "If I owe you any debt, or if someone else owes you debt which I indorsed, guaranteed or otherwise agreed to pay, you have the right to call for immediate payment of that debt by me . . . if I break any promise I make to you" (*id.*, Ex. I).

Thereafter, in November 2009, the Corporation maintained account number XXX-XX936-8 ("the Account") with HSBC. HSBC alleges that, as a result, the Corporation was bound by HSBC's Rules for Deposit Accounts ("the Rules"), which contained a provision pertaining to overdrafts, stating:

"If you write a check for more money than you have in your account or against unavailable funds, the Bank may either pay the check, in which case you must pay the Bank back promptly, or return it. . . . You understand that the Bank reserves the right to pay items into overdraft, to impose overdraft fees, and to apply any later deposits . . . to those overdrafts or overdraft fees, by way of setoff" (*id.* at p.3).

The Rules additionally provided for reimbursement for any losses, costs or expenses the Bank incurred as a result of any dispute involving the account (*id.* at p.27).

On November 30, 2009, the Corporation issued check number 6264 from the Account in the sum of \$150,000. The Corporation had insufficient funds in the Account to cover the check, and Weintraub sent an email to HSCB on the same date confirming that the guaranty that HSBC had on file was "still valid" (*id.*, Ex. L). HSBC honored and paid the check on November 30, 2009, which it claims resulted in an overdraft in the Account in the sum of \$79,826.98. Defendants have failed to return this sum to HSBC despite demands to do so.

HSBC brings the present action to recover the amount of the overdraft and related sums, alleging causes of action in the complaint for, *inter alia*, breach of contract, breach of guaranty and unjust enrichment. In their respective answers, the Corporation and Weintraub raise the affirmative defenses of failure to state a cause of action, estoppel, ratification, waiver and unclean hands. They also assert that they did not agree to the Rules or the Funds Transfer Agreement, and that HSBC was the proximate cause of the claimed losses. Weintraub additionally alleges that he made a pay-off payment that satisfied the liability in 2008, thus satisfying the Guaranty.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also* CPLR 3212 [b]). When deciding the motion, the Court's views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d

223, 231 [1978]).

Here, HSBC seeks judgment as a matter of law against each defendant in the sum of \$79,826.98, plus interest, late charges, attorney's fees, costs and disbursements. It contends that defendants' liability is established by UCC §§ 4-401 and 4-406 and by the terms of the various agreements defendants executed with HSBC and/or Republic, which include the Funds Transfer Agreement, the Rules and the Guaranty (collectively "the Account Documents"). HSBC also argues that defendants have been unjustly enriched since they obtained the use and benefits of HSBC's services. HSBC seeks to recover from Weintraub under the Guaranty, which it claims is absolute and unconditional. HSBC further seeks to dismiss defendants' affirmative defenses as unsupported with sufficient facts.

Defendants oppose summary judgment on the grounds that, *inter alia*, there are questions of fact regarding whether HSBC acted negligently in creating the overdraft. Specifically, defendants claim that: (1) it was negligent for HSBC to honor the check if it had reasonable grounds to question the sufficiency of the funds in the Account; (2) HSBC acted negligently in cashing the check on the same day that it was submitted because in normal practice at least one business day passes before a valid check may be negotiated; and (3) HSBC's own bank statements indicate that the Corporation made a \$160,000 deposit into the Account on December 1, 2009, and HSBC improperly elected not to apply it to cover the overdraft even though it was sufficient to cover the overdraft. Defendants also challenge the amount that is allegedly owed, and they further assert that HSBC may not seek to enforce any of Republic's claims after 2000. Defendants cross-move to compel discovery on the basis that summary judgment is premature since there has been no preliminary conference or discovery.

HSBC concedes that the Corporation deposited \$160,000 on December 1, 2009, but claims in their reply that the check was returned on December 4, 2009, not because HSBC did not accept it, but because there were insufficient funds in the account of the drawer to cover it.

HSBC also argues, *inter alia*, that Republic's obligations under the Account Documents continued to HSBC as a result of the merger. HSBC opposes the cross-motion as essentially a fishing expedition.

It is well established under both common-law and the Uniform Commercial Code that a bank has a legitimate right to recover overdrafts against a customer (*see Jacobs v Citibank, N.A.*, 61 NY2d 869, 872 [1984]; *Center Cadillac, Inc. v Bank Leumi Trust Co. of New York*, 859 F Supp 97, 105 [SDNY 1994]). "The common-law rule, more fully explained, is that the payment of an overdraft constitutes a loan by the bank to the drawer of the overdraft, a loan for which the drawer is liable" (*U.S. Trust Co. of New York v McSweeney*, 91 AD2d 7, 9 [1st Dept 1982]; *see also Title Guarantee & Trust Co. v Emadee Realty Corp.*, 136 Misc. 328, 328-29 [Kings County 1930] ["[A]s between a banking firm and a depositor . . . , an overdraft is a loan. The payment of the latter's check when no funds stand to his credit is an advance by the firm of its own money, for the repayment of which, with the lawful interest, the customer is liable. It is payable absolutely and in full, without abatement or contingency, and so constitutes a loan in all its characteristics"] [internal quotations omitted]).

Moreover, UCC § 4-401(1) expressly provides: "As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft" (*see also McSweeney*, 91 AD2d at 9; *National Bank of N. Am.*, 75 AD2d 568, 569 [1st Dept 1980]).

The concludes, however, that summary judgment is premature, as discovery which could reveal evidentiary proof relevant to resolving the factual issues in this case has not been completed (*see CPLR 3212 [f]*; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003]; *Arez v Twin Parks Northeast Houses, Inc.*, 294 AD2d 266, 267 [1st Dept 2002]). The Court notes in particular that there are factual questions concerning the \$160,000 deposit made by the Corporation on December 1, 2009, which was a deposit made within 24 hours of the

alleged overdraft. Weintraub also raises an affirmative defense that he made a pay-off payment that satisfied the liability in 2008. Thus, at this early stage of the proceedings, defendants are entitled to discovery and summary judgment is not appropriate (*see Hawthorne v City of New York*, 44 AD3d 544, 545 [1st Dept 2007]; *Gera v All-Pro Athletics, Inc.*, 57 AD3d 726, 728 [2d Dept 2008]; *2006 Calandra Irrevocable Trust v Signature Bank Corp.*, 2010 WL 5174331, *2 [SDNY 2010] [it was premature to grant summary judgment on UCC §.4-401 claim given the factual disputes, and the plaintiffs were entitled to conduct discovery]).

Accordingly, HSBC's motion for summary judgment is denied, without prejudice to renew upon completion of discovery. Defendants' cross-motion to compel discovery is granted.

For these reasons and upon the foregoing papers, it is,

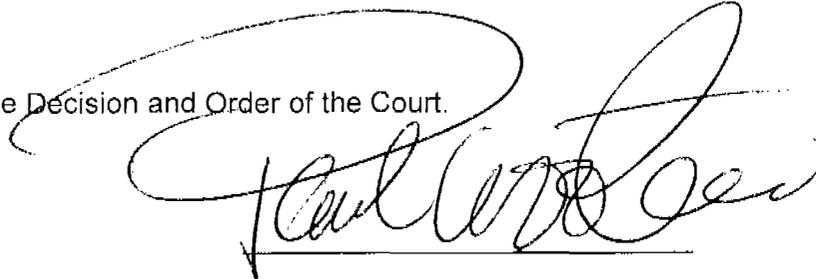
ORDERED that plaintiff's motion for summary judgment is denied, without prejudice to renew upon completion of discovery; and it is further,

ORDERED that defendants' cross-motion to compel discovery is granted, and the parties are directed to appear at a preliminary conference on June 15, 2011, at 11:00 a.m., in Part 7, at 60 Centre Street; and it is further,

ORDERED that defendants shall serve a copy of this order, with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: May 24, 2011



Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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