

TD Bank, N.A. v Price Cabinets Inc.

2024 NY Slip Op 31106(U)

March 22, 2024

Supreme Court, Kings County

Docket Number: Index No. 507891/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of March 2024

HONORABLE FRANCOIS A. RIVERA

TD BANK, N.A.,

Plaintiff,

-against-

PRICE CABINETS INC. and SAM MARCUS

Defendants.

DECISION & ORDER

Index No.: 507891/2022

Oral Argument: 3/14/2024

Cal. No.: 49, Ms. No.: 1

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed by TD Bank, N.A., (hereinafter TD or plaintiff) on July 21, 2023, under motion sequence one, for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against Price Cabinets Inc. and Sam Marcus. The defendants have opposed the motion.

- Notice of Motion
- Affidavit in Support
 - Exhibits 1 to 7
 - Corrected exhibit 6
- Affirmation in Support
 - Exhibits 1 to 3
- Statement of Material Facts
- Memorandum of law in support
- Affirmation in opposition
- Affidavit in opposition
- Affirmation in reply

BACKGROUND

On March 17, 2022, plaintiff commenced the instant action by filing a summons and verified complaint (hereinafter the commencement papers) with the Kings County Clerk's office

(KCCO). On April 14, 2022, the defendants interposed and filed a joint verified answer with the KCCO. The verified complaint alleges forty-eight allegations of fact in support of three causes of action, namely, breach of a business loan agreement (hereinafter the “LOC agreement”), breach of a personal guaranty agreement, and breach of a collateral security agreement.

The verified complaint alleges the following salient facts. On April 3, 2019, Price Cabinets Inc. (hereinafter the company defendant or borrower) executed to the plaintiff a promissory note (hereinafter “Note”) which evidenced a line of credit for \$100,000 (“LOC”) extended by plaintiff to the company defendant. The LOC was made on a demand basis as set forth in the Note. The terms of the LOC were evidenced by a certain business loan agreement, dated April 3, 2019, which was executed by the company defendant and the plaintiff. The LOC is a United States Small Business Administration Loan.

Pursuant to the terms of the Note, interest due on the LOC accrues at a variable rate at 2.5% above the Wall Street Journal Prime rate (as defined in the Note), with an initial rate of 8.0%. Under the Note, company defendant agreed to make monthly payments of interest only commencing May 3, 2019, and continuing the same day each month thereafter up to and including April 3, 2024. Thereafter, the company defendant was required to make principal and interest payments on the LOC commencing May 3, 2024, and continuing the same day of each month after that, until April 3, 2029, when the company defendant would be required to pay all amounts due under the Note and LOC agreement.

Under the LOC agreement, the company defendant agreed that its final payment would include all the outstanding amounts due on the LOC, including principal, interest, costs, expenses, attorneys’ fees, and other fees. Upon the occurrence of an event of default, at the plaintiff’s option, all amounts owed to the plaintiff on LOC are immediately due and payable in

full. Company defendant agreed to pay plaintiff a late payment charge of 5% of the unpaid portion of any regularly scheduled payment that became 15 days or more late. The company defendants also agreed to reimburse plaintiff for any reasonable costs and attorneys' fees incurred by plaintiff in connection with plaintiff's attempts to enforce or preserve any rights or remedies under the Note and LOC Agreement. By correspondence dated October 4, 2021, plaintiff declared the Stated Default, accelerated the LOC, and demanded immediate payment of all amounts due on the LOC. The company defendant failed to make payment upon demand, a further default under the Note and the LOC agreement. By correspondence dated January 6, 2022, plaintiff reiterated its declaration of the Stated Default, acceleration of the LOC, and demanded payment of all amounts due on the LOC.

The company defendant is in default of the LOC for failing to pay the LOC upon demand. As of and including March 17, 2022, the principal amount of \$99,779.00 is due under the Note and LOC Agreement, plus accrued interest, late charges, and other allowed charges. Also, due and owing are loan and collection expenses, including legal fees and costs, as allowed by the Note, LOC Agreement, and by law.

To secure payment of LOC, Sam Marcus (hereinafter the guarantor) executed and delivered to plaintiff a certain guaranty, whereby guarantor absolutely and unconditionally guaranteed payment of all amounts due on the LOC (hereinafter the "Guaranty"). By virtue of the stated default, the company defendant defaulted under the terms of the Note and LOC Agreement, entitling plaintiff to payment of its obligations from guarantor under the terms of the guaranty. By correspondence dated October 4, 2021, plaintiff declared the stated default, accelerated the LOC, and demanded the guarantor immediately make payment of all amounts due on the LOC. The guarantor failed to make payment upon demand, a further default under

the Note, LOC agreement, and guaranty. By correspondence dated January 6, 2022, plaintiff reiterated its declaration of the stated default, acceleration of the LOC, and demand that the guarantor make payment of all amounts due on the LOC. The guarantor is in default of the LOC for failing to pay the LOC upon demand. As of and including March 17, 2022, the principal amount of \$99,779.00 is due under the Note, LOC agreement, and Guaranty, plus accrued interest, late charges, and other allowed charges. Also, due and owing are loan and collection expenses, including legal fees and costs, as allowed by the Note, LOC agreement, guaranty, and by law.

To further secure payment of the amounts due under the LOC, on April 3, 2019, the borrower executed and delivered to plaintiff a certain security agreement entitled "Commercial Security Agreement" (the "Security Agreement"), wherein Borrower specifically granted plaintiff a security interest in all borrower's assets as defined in the Security Agreement, the Note, LOC agreement, guaranty, security agreement, and all related loan documents are collectively referred to hereinafter as the "LOC Documents"). Plaintiff's continuing security interest in the Collateral was perfected by a UCC Financing Statement bearing Filing Number 201904115453070 filed against the borrower in the New York State Department of State on April 11, 2019. By virtue of the Stated Default, borrower is in default under the terms of the Security Agreement, entitling plaintiff to pursue its remedies against the Collateral, including repossession of the Collateral by replevin in order to inventory and sell the Collateral at a public or private auction in accordance with the Uniform Commercial Code. By correspondence dated October 4, 2021, plaintiff declared the Stated Default, accelerated the LOC, and demanded payment of all amounts due on the LOC. The defendants failed to make payment upon demand, a further default under the LOC Documents. By correspondence dated January 6, 2022, plaintiff

reiterated its declaration of the Stated Default, acceleration of the LOC, and demand that the defendants make payment of all amounts due on the LOC, and demanded borrower assemble the Collateral and make it available to plaintiff for inspection, evaluation, possession, and sale by plaintiff. The defendants failed to make payment upon demand, which constituted a further default under the LOC Documents. The borrower failed to deliver possession of the Collateral to plaintiff despite borrower's obligations under the Security Agreement and is further in default under the LOC documents as a result. Plaintiff has sustained, and will continue to sustain, immediate and irreparable harm by reason of borrower's failure to assemble and deliver possession of the collateral.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Giuffrida v Citibank*, 100 NY2d 72, 80 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all of the

evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

The essential elements of a cause of action to recover damages for breach of contract are “the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*Cruz v Cruz*, 213 AD3d 805, 807 [2d Dept 2023]).

The only sworn testimony offered in support of the plaintiff’s motion was the affirmation of Mathew P. Dolan, its counsel (hereinafter Dolan) and the affidavit of Thomas Becker, its president (hereinafter Becker).

Dolan did not offer any evidence regarding the defendants’ alleged breach of its agreement with the plaintiff. Dolan referred to five annexed exhibits labeled one through five. Exhibit 1 is a copy of the commencement papers. Exhibit 2 is the defendants’ answer. Exhibit 3 was described by Dolan as a true and correct copy of a demand letter dated January 6, 2022, sent from his office by regular and certified mail return receipt requested. Exhibit 4 is described as the affidavit of service of the commencement papers upon Price Cabinets Inc. Exhibit 5 is described as the affidavit of service of the commencement papers upon defendant Sam Marcus. In sum, Dolan had no personal knowledge regarding any of the transactions alleged in the complaint.

Becker averred personal knowledge with respect to the creation, maintenance, and storage of plaintiff’s business records. Becker then identified and authenticated seven annexed exhibits which he retrieved from the plaintiff’s electronic business records retention system. He described the annexed exhibits labeled one through six as follows. Exhibit 1 was the note between the plaintiff and the defendants. Exhibit 2 was the loan agreement between the plaintiff

and the defendant. Exhibit 3 was the guarantee between the plaintiff and defendant Sam Marcus. Exhibit 4 was described as the security agreement between the plaintiff and the defendants. Exhibit 5 was described as a UCC Financing Statement. Exhibit 6 was described as a loan history. Exhibit 7 was described as a demand letter. Becker alleged that as of and including July 10, 2023, the total amount of \$117,533.111 was due under the Note and Guaranty, consisting of \$99,779.00 in principle, plus accrued interest in the amount of \$16,818.31, late fees in the amount of \$785.80 and a site inspection fee in the amount of \$150.00. Per diem interest at the rate of \$19.80 is due on July 11, 2023, and for each day thereafter until payment is made, pursuant to the terms of the Note. Becker averred that exhibit 6 was a true and correct copy of a loan payment and disbursement history taken from TD Bank's loan accounting system.

Defendants accurately contended, among other things, that Becker's affidavit failed to state how much money was tendered to the defendants, failed to discuss how the accrued interest was computed, and did not provide any detail pertaining to the accounting of the alleged loan. The note annexed as exhibit 1 to plaintiff's motion papers reflects that the plaintiff gave the defendant a revolving line of credit.¹

The plaintiff's evidentiary submission did not establish what amounts the defendants allegedly took from the LOC, what date those amounts were taken, what amounts were repaid if any, when those amounts were repaid, what was the balance due month to month, or how those amounts were computed. The plaintiff also did not submit monthly or periodic statements issued

¹ "A line of credit (LOC) is a preset borrowing limit that can be tapped into at any time. The borrower can take money out as needed until the limit is reached. As money is repaid, it can be borrowed again in the case of an open line of credit. An LOC is an arrangement between a financial institution—usually a bank—and a customer that establishes the maximum loan amount that the customer can borrow. The borrower can access funds from the LOC at any time as long as they do not exceed the maximum amount (or credit limit) set in the agreement." (Adam Hayes, *Line of Credit (LOC) Definition, Types, and Examples* [Jan 30, 2024], available at www.investopedia.com/terms/l/lineofcredit.asp).

in the instant action. Becker's affidavit of the amount due from the defendants is therefore conclusory and unsupported. In effect, plaintiff did not establish how it determined the balance purportedly due from the defendants.

In light of these evidentiary deficiencies plaintiff did not make a prima facie showing of entitlement to summary judgment on any of its claims asserted in the complaint. The motion is therefore denied without regard to the sufficiency of defendants' opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

CONCLUSION

The motion by plaintiff TD Bank, N.A. for an order pursuant to CPLR 3212 granting summary judgment in its favor on the issue of liability on the claims asserted in its complaint against Price Cabinets Inc. and Sam Marcus is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA