

Wells Fargo Bank, N.A. v Economical Realty, LLC

2010 NY Slip Op 32246(U)

July 29, 2010

Supreme Court, Queens County

Docket Number: 25597/08

Judge: Orin R. Kitzes

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MEMORANDUM

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES**PART 17****Justice**

-----X

**WELLS FARGO BANK, N.A.,
A NATIONAL BANKING ASSOCIATION, AS
BOTH ORIGINATING CREDITOR AND AS
ASSIGNEE OF FIRST TENNESSEE
BANK NATIONAL ASSOCIATION ,
TRADING AS FIRST HORIZON (“BANK”),
Plaintiff,**

Index No.:

**Index No.: 25597/08
Motion Date: 7/21/10
Motion Cal. No.: 53**

-against-

**ECONOMICAL REALTY, LLC and
KAMAL S. SALFARLIE both individually and
doing business as SALFARLIE FINANCIAL
MANAGEMENT**

DATED: July 29, 2010**Defendants.**

-----X

Plaintiff's motion pursuant to CPLR§3212 (b) granting summary judgment in favor of Plaintiff WELLS FARGO BANK, N.A., A NATIONAL BANKING ASSOCIATION, AS BOTH ORIGINATING CREDITOR AND AS ASSIGNEE OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION , TRADING AS FIRST HORIZON (“Wells Fargo”) and against Defendants ECONOMICAL REALTY, LLC and KAMAL S. SALFARLIE, as Guarantor, in the sum of (1) \$19,713.78, together with interest from February 28, 2008, and (2) \$44,167.36 together with interest from June 23, 2008, together with attorneys' fees, costs and disbursements of this action; and an order pursuant to CPLR §3212(b) granting summary judgment in favor of Plaintiff Wells Fargo and against Defendant KAMAL S. SALFARLIE both individually and doing business as SALFARLIE FINANCIAL MANAGEMENT in the amount of \$48,362.02 plus interest from June 23, 2008, attorney's fees and the costs and disbursements of this action; and an order dismissing Defendants' Affirmative Defenses pursuant to CPLR §3211(b) and (e) are granted.

In this action, Plaintiff Wells Fargo seeks judgment against Defendants ECONOMICAL REALTY, L.L.C. and KAMAL SALFARLIE, as guarantor, stemming from the default in payment for credit charges and cash advances incurred on two credit card/ business line of credit accounts in the amount of \$63,881.14, plus interest, attorney's fees and the costs and disbursements of this action. Plaintiff also seeks judgment against Defendant SALFARLIE d/b/a SALFARLIE FINANCIAL MANAGEMENT stemming from the default in payment for credit charges and cash advances incurred on one credit card/ business line of credit account in the amount of \$48,362.02, plus interest, attorney's fees and the costs and disbursements of this action. Plaintiff commenced this action for causes of action sounding in breach of contract, breach of guarantee and account stated.

Plaintiff has submitted an affidavit of John Williams, a person employed by Plaintiff as a Credit Investigator, a copy of an e-mail application, regarding Account Number One, submitted by Defendant KAMAL SALFARLIE on behalf of Defendant ECONOMICAL REALTY, LLC, a signed Credit Agreement, and a copy of the BusinessLine Customer Agreement, evidencing Defendant ECONOMICAL REALTY's agreement to pay Plaintiff WELLS FARGO, "when due, the total of all purchases and advances made" on the account, all finance charges and other charges and "all costs and expenses including any attorney's fees incurred in enforcing this Agreement". Regarding Account Number Two, Plaintiff has also submitted a copy of a written application submitted by Defendant KAMAL SALFARLIE on behalf of Defendant ECONOMICAL REALTY and a copy of the BusinessLine Customer Agreement, evidencing Defendant ECONOMICAL REALTY's agreement to pay Plaintiff WELLS FARGO, when due, the total of all purchases and advances made on the account, all finance charges and other charges and "all costs and expenses including any attorney's fees incurred in enforcing this Agreement". Regarding Account Number Three, Plaintiff has also submitted a copy of an application submitted by Defendant KAMAL SALFARLIE doing business as SALFARLIE FINANCIAL MANAGEMENT for a business line of credit account from First Horizon Bank. The account was thereafter assigned to Plaintiff WELLS FARGO, which has provided a copy of the BusinessLine Customer Agreement evidencing Defendant SALFARLIE's agreement pay "when due, the total of all purchases and advances made" on the account, all finance charges and other charges and "all costs and expenses including any attorney's fees incurred in enforcing this Agreement". Plaintiff has also supplied monthly statements evidencing the Defendants' use of the subject credit card/line of credit account, including cash advances, purchases and payments made for the three accounts.

Initially, the Court notes that, while the above mentioned items were submitted by Plaintiff with its motion, the items were improperly labeled and, in part, not properly identified in the Affirmation in Support. However, Plaintiff has submitted the full and corrected set of Exhibits A-K with its Reply Papers. With this submission, any confusion has been corrected.

Regarding Account Number 1, Plaintiff has established the existence of the agreement between the parties, existence of a personal guarantee, issuance and use of the credit card and line of credit, notice to Defendants at their principal place of business of the amounts due and owing and breach of the agreement by Defendant's failure to pay. With respect to the claim sounding in account stated, Plaintiff has similarly established, Plaintiff issued to Defendants a statement reflecting an outstanding balance of \$19,713.78 as of February 28, 2008. Plaintiff has also demonstrated that all statements were addressed to both Defendants and delivered to Defendants' principal business address, received, accepted and retained by Defendants without objection. Finally, Plaintiff has established Defendants' failure to pay despite Plaintiff's demand for such.

Regarding Account Number Two, Plaintiff has established that it provided Defendant ECONOMICAL REALTY statements of its accounts indicating the indebtedness due and

owing by Defendant, that said statements were delivered to, received, accepted and retained by defendants without objection, resulting in an agreed balance on Account Number Two at the time of the account was assigned to Plaintiff WELLS FARGO on November 16, 2007 and when the account was ultimately closed on June 23, 2008, at which time Defendant was indebted to Plaintiff in the amount of \$44,167.36

Regarding Account Number Three, Plaintiff has established that it rendered to Defendant SALFARLIE d/b/a SALFARLIE FINANCIAL MANAGEMENT monthly accounts of the indebtedness due and owing by Defendant, that said statements were delivered to, received, accepted and retained by Defendant without objection, resulting in an agreed balance on Account Number Three at the time the account was closed on June 23, 2008 in the amount of \$48,362.02.

The Court finds that Plaintiff's proof is sufficient to establish Plaintiff's initial burden of demonstrating its entitlement to judgment as a matter of law. Sacco v. Sutura, 266 AD2d 446, (2d Dept 1999.) Therefore, it became incumbent upon the Defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact with respect to a bona fide defense. *Id.*

Defendants claim Plaintiff has not submitted sufficient evidence to establish its claims regarding Account numbers Two and Three. Defendants claims relate to the improperly labeled exhibits and since this has been clarified and rectified, this claim fails to raise an issue of fact. Defendants also claim that Wells Fargo did not render monthly statements to Defendants and thus cannot maintain a claim for account stated. They also claim that the account statements provided are not consistent in reciting the amounts owed and the account numbers. Furthermore, Defendants claim Plaintiff has failed to show it had an agreement with Defendants and Defendants have submitted an affidavit of Defendant Salfarlie stating he never had any dealings with Plaintiff. Defendants also claim that there is no proof of an assignment of the subject accounts from First Horizon Bank to Plaintiff.

Initially, the Court finds that, Defendants do not raise any issue of fact with respect to their liability for the indebtedness owed on Account No. 1, and specifically limit their arguments in opposition to Account Numbers 2 and 3 Accordingly, summary judgment is granted in Plaintiff's favor in the sum of \$19,713.78 on Account No. 1, together with interest from February 28, 2008, attorney's fees and costs and disbursements on Account number one, and against Defendants Economical Realty, L.L.C and Salfarlie, as guarantor of that account.

Regarding Account Numbers 2 and 3, Defendants' claims and evidence have not raised an issue of fact that prevents this Court from granting summary judgment in Plaintiff's favor on these Accounts. With respect to Account No. 2, Plaintiff has submitted the application for credit submitted by Defendant Salfarlie on behalf of Defendant Economical Realty. While the account originated with First Horizon Bank, the First Horizon statement dated November 23, 2007 that was sent to Defendants reveals a balance of \$42,537.66, and that this Account was sold by balance transfer and the account was closed. Thereafter, as established by Mr. Williams and his supporting documents, Plaintiff Wells Fargo, through the aforementioned balance transfer, became owner of the account. Plaintiff then delivered a BusinessLine

Customer Agreement to Defendants, assigned the account a new Wells Fargo Account number and began issuing monthly statements of account to Defendants, reflecting that Plaintiff Wells Fargo was the owner of the account. The fact that Plaintiff Wells Fargo was the new account owner explains the discrepancy between the accounts pointed out by Defendants in their opposition.

Furthermore, Plaintiff has shown it did render monthly statements to Defendants; the first statement issued by Wells Fargo to Defendants on November 23, 2007 stated, on page 2 of 2, "We are pleased to welcome you as a Business Custom Capital Line of Credit Customer. If you have any questions about your new Business Custom Capital Account, Please call us" Additionally, Plaintiff sent statements to Defendants, dated January 24, 2008, and February 22, 2008, that advised Defendants that the account was past due. In fact, Plaintiff has shown that Defendants did, in fact, contact Plaintiff Wells Fargo by telephone, and thereafter made payments to Wells Fargo by telephone to reduce the debt after being notified that the account was past due. Thus, it is clear that Defendant Salfarlie received a benefit from Plaintiff and was aware of the assignment of this account to Plaintiff. Accordingly, Defendants have failed to raise a question of fact warranting denial of summary judgment as to Plaintiff's standing to assert its claim with respect to Account No. 2. Thus, summary judgment in the amount of \$44,167.38, together with interest from June 23, 2008, attorney's fees, costs and disbursements of this action, is granted in Plaintiff's favor against Defendants Economical Realty, L.L.C. and Kamal Salfarlie as Guarantor.

Regarding Account Number 3, Defendants' claims and evidence have not raised an issue of fact that prevents this Court from granting summary judgment in Plaintiff's favor on this Account. Plaintiff has shown that it extended credit directly to and had direct dealings with Defendant Salfarlie, contrary to his claims in opposition to this motion. Specifically, Plaintiff extended credit in the amount of \$50,000 to Defendant Salfarlie d/b/a/ Salfarlie Financial Management, issued a credit account to Defendant Salfarlie, and assigned account number 5586 6935 0006 9284 to the account. Thereafter, from November 23, 2007 through June 23, 2008, Plaintiff rendered to Defendant Salfarlie and Salfarlie Financial Management monthly accounts of the indebtedness due and owing by Defendant as a result of purchases, cash advances and other charges made on the account, and said statements were delivered to, received, accepted and retained by Defendant Salfarlie without objection, resulting in an account stated in the amount of \$48,362.02. Accordingly, Defendants have failed to raise a triable issue of fact on the account stated cause of action with respect to Account No. 3, and summary judgment in favor of Plaintiffs and against Defendants Salfarlie and Salfarlie Financial Management in the amount of \$48,362.02, plus interest from June 23, 2008, attorney's fees and costs and disbursements, is granted.

The Court notes that Defendants have failed to make a motion to dismiss on service/jurisdictional grounds within sixty days of service of the Answer, and have failed to allege any undue hardship warranting an extension of such time to do so (*see* CPLR 3211[e]; *Reyes v Salbertson*, 62 AD3d 855 [2d Dept 2009]). In any event, no allegations of fact have been asserted by either Defendant to raise a triable issue on service. Thus, Defendants' claim

that a traverse hearing is warranted has been waived, and in any event is not supported by any legal or factual arguments and should be summarily denied.

The branch of the motion seeking attorneys fees is granted since such is pursuant to the parties' agreements. Finally, the Court notes that with respect to all three accounts, Defendants have not denied that they applied for the credit in question, and, in fact, received credit cards and credit from Plaintiff Wells Fargo to make the purchases and obtain cash advances as reflected on the monthly statements.

Based on the above, Plaintiff's motion for summary judgment pursuant to CPLR§3212 and a judgment in favor of Plaintiff and against Defendants in the sum of \$19,713.78, together with interest from February 28, 2008, and \$44,167.36 together with interest from June 23, 2008, together with attorneys' fees, costs and disbursements of this action; and an order pursuant to CPLR §3212(b) granting summary judgment in favor of Plaintiff Wells Fargo and against Defendant KAMAL S. SALFARLIE both individually and doing business as SALFARLIE FINANCIAL MANAGEMENT in the amount of \$48,362.02 plus interest from June 23, 2008, attorney's fees and the costs and disbursements of this action is granted. Plaintiff shall submit an itemized list of attorney's fees with its proposed Judgment. Based on the above analysis, the branch of the motion seeking an order dismissing Defendants' Affirmative Defenses pursuant to CPLR §3211(b) and (e) is also granted.

SETTLE JUDGMENT

.....
ORIN R. KITZES, J.S.C.