

Merrill Lynch Bus. v Trataros Constr. Inc.

2004 NY Slip Op 30370(U)

May 28, 2004

Supreme Court, New York County

Docket Number: 601335/2003

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: _____

PART _____

0601335/2003

MERRILL LYNCH BUSINESS
VS
TRATAROS CONSTRUCTION INC.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion


Motion is decided in accordance with
accompanying Memorandum Decision.

FILED

JUN - 4 2004

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 5/18/04


CHARLES E. RAMOS J.S.C.
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK;COMMERCIAL DIVISION

-----X
MERRILL LYNCH BUSINESS FINANCIAL
SERVICES INC.,

Plaintiff,

-against-

TRATAROS CONSTRUCTION, INC. and
COSTAS N. TRATAROS,

Defendants.
-----X

Index No.
601335/2003

Charles Edward Ramos, J.S.C.:

The plaintiff, Merrill Lynch Business Financial Services, Inc. ("MLBFS"), moves for an order, pursuant to CPLR 3212, granting it summary judgment as against the defendants Trataros Construction, Inc. ("TCI") and Costas N. Trataros, in the principal sum of \$6,414,910.39, with interest from April 23, 2003, costs and disbursements, and for an order severing its claim for attorneys' fees and directing an inquest on attorneys' fees. The defendant TCI and Costas Trataros cross move for an **order** granting them summary judgment dismissing this action as against them.

This action arises out of a loan agreement and promissory note executed by TCI and a personal unconditional guaranty executed by Costas Trataros. On or about September 7, 1994, MLBFS and TCI entered into a Working Capital Management Account Agreement, entitled **WCMA** Note and Loan Agreement (hereinafter "Loan Agreement"). Pursuant to the Loan Agreement, MLBFS **provided** TCI with a formula-based commercial line of credit in the initial amount of \$500,000. On or about September 7, 1994,

defendant Costas Trataros and his father Nicos Trataros, not a party to this action, executed an unconditional guaranty, in which they jointly and severally guaranteed TCI's obligation under the Loan Agreement.

A subsequent letter agreement, dated November 21, 2000, provided for an extension of the maturity date of the line of credit to September 30, 2001 and increased the amount of the line of credit to \$6,000,000. This letter was executed by James Xintaris, Senior Relationship Manager of MLBFS, and signed as accepted by TCI's Treasurer/CFO, as well as signed as approved by Costas Trataros. By letter, dated December 21, 2001, MLBFS again extended the maturity date to September 30, 2002. By letter, dated December 2, 2002, MLBFS notified the defendants that the maturity date would not be further extended and on or about April 16, 2003, MLBFS sent a notice of default demanding that defendants comply with their obligations under the loan agreement and guaranty by April 21, 2003.

MLBFS in support of this motion submitted an affidavit from William Kocolowski, one of its vice presidents, alleging TCI had failed to pay the loan and seeking judgment as against TCI, the borrower, and Costas Trataros, a guarantor of the loan, jointly and severally, in the principal sum of \$6,414,910.39, along with interest from April 23, 2003.

The defendants' opposition maintains that MLBFS is not entitled to summary judgment and instead argue that they are entitled to summary judgment dismissing this complaint on the

[*4]

grounds that (1) MLBFS seeks judgment on an account number which differed from the account number of the subject loan, (2) MLBFS **failed** to show the advances allegedly made under the line of credit and it failed **to** explain how the indebtedness was calculated, (3) MLBFS did not comply with a condition precedent necessary for the letter agreement of November 21, 2000 to become a valid agreement, and (4) MLBFS failed to get Trataros' written consent to the increase in the line of credit necessary to him hold personally liable as a guarantor.

As to the change in the loan number, the loan agreement provides that modifications and amendments need be in writing and signed by MLBFS. On September 14, 1994, prior to even the increase in the line of credit, the loan account number was changed from 855-07F23 to 855-07F26, as reflected in a letter signed by Joanne Alessi on behalf of MLBFS.

Defendants argue that the November 21, 2000 letter, which increased the line of credit and extended the maturity date, is invalid based upon MLBFS' failure to comply with a condition precedent. This **letter** agreement provided it would become effective after "an officer of MLBFS shall have reviewed and approved this Letter Agreement as being consistent in all respects with the original internal authorization hereof."

It would **appear** the above language did not constitute a condition precedent to the formation or existence of the contract itself but rather an act which had to occur before MLBFS was obligated to perform a promise an existing contract.

Therefore, whether **or** not MLBFS was obligated to perform, it, nevertheless, did perform by increasing the line of credit and extending the maturity date, benefits accepted by TCI. Accordingly, defendants' argument lacks any validity and is rejected.

As to the argument concerning the liability of Costas Trataros, the unconditional guarantor, whether he signed the letter agreement of November 21, 2000, as a guarantor or merely as the President and CEO of TCI, does not alter the fact that his unconditional guaranty of September 7, 1994, expressly consented to all amendments to the loan agreement. This would include any increase in the amount of the loan. Consent clauses such as the one found in this unconditional guaranty are widely enforced by courts in New York (*Compagnie Financiere de CIC et du L'Union Europeenne v Merrill Lynch, Pierce, Fenner & Smith*, 188 F.3d 31 [2d Cir. 1999]).

Finally, concerning whether or not MLBFS has made a *prima facie* showing of the amount of the indebtedness, MLBFS in its reply papers has submitted the affidavit of Peter Maddocks, the Administrative Manager of the White Plains branch of Merrill Lynch, Pierce, Fenner & Smith, Inc., an affiliate of MLBFS, along with account statements for TCI's line of credit. The parties disagree as to whether this court should consider the evidence submitted in the reply papers. The defendants' position is that arguments raised for the first time in reply papers should not be considered relying on *Clearwater Realty Company v Hernandez*, 256

[*6]
A.D.2d 100 [1st Dept 19981. MLBFS' stance is its reply papers are merely a response to matters raised **by** defendants' opposition and should be considered, relying on *Lebar Construction Corp. v HRH Construction Corp.*, 292 A.D.2d 506 [2d Dept 20021. This court finds, especially since the defendants had the opportunity and did submit a reply to MLBFS' reply based upon their submission of a cross motion, that MLBFS' reply should be considered.

After consideration, this court finds that MLBFS is entitled to summary judgment on the issue of liability and the defendants cross-motion for summary judgment is denied. This court, however, even considering MLBFS' reply is unable to determine the amount due to MLBFS. The Portfolio Summary Review, submitted in MLBFS' reply, fails to show the actual advances under the line of credit. In addition, while MLBFS alleges principal of \$6,098,965.85, there is no showing as to why the principal exceeded the \$6 million dollar line of credit by approximately \$100,000.

Therefore, the issue **of** the amount due and owing to MLBFS as well as the reasonable costs including attorneys' fees incurred by MLBFS in connection with enforcement of the loan should be referred to a Special Referee to hear and report with recommendations.

ORDERED that the issue of the amount due and owing by defendants to the plaintiff as well as the reasonable costs incurred, including attorneys' fees, in connection with

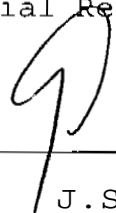
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enforcement of the loan is referred to a Special Referee to hear and report with recommendations, except in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, **or** another person designated by the parties to serve as a referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a **copy of** this order with notice of entry shall be served on the **Clerk** of the Judicial Support Office (Room 311) to arrange a date for the reference to the Special Referee.

Dated: May 28, 2004



J.S.C.

CHARLES E. RAMOS
CHARLES E. RAMOS

FILED

JUN - 4 2004

CLERK OF THE COURT
JUDICIAL SUPPORT OFFICE