

Rosenthal & Rosenthal, Inc. v Jemal

2005 NY Slip Op 30247(U)

October 17, 2005

Supreme Court, New York County

Docket Number: 0600552/2005

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. RICHARD B. LOWE, III

PRESENT: _____

PART 54

0600552/2005

Justice

ROSENTHAL & ROSENTHAL, INC.
vs
JEMAL, ROBIN

C

INDEX NO. _____

MOTION DATE 5/10/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

SUMMARY JUDGMNT/LIEU COMPLAINT

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 25 2005

NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 10/17/05

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 56

-----X
 ROSENTHAL & ROSENTHAL, INC.,

Plaintiff,

-against-

Index No. 600552/05

ROBIN JEMAL and MARVIN JEMAL,

Defendants.

-----X
RICHARD B. LOWE, III, J.:

Plaintiff Rosenthal & Rosenthal, Inc. moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint on loan guarantee agreements executed by defendants Robin Jemal and Marvin Jemal. Plaintiff contends that defendants have failed to pay the sum due and owing under a financing agreement entered into between plaintiff and The Zone Entertainment Centers, LLC (The Zone). For the reasons stated below, the motion is granted.

FACTUAL BACKGROUND

Plaintiff is a factor engaged in the business of lending money and financing receivables and inventory purchases. Defendants are the members of The Zone, an electronics and music store. It is undisputed that plaintiff and The Zone entered into a revolving asset-based financing agreement on June 15, 2004. Under the terms of the financing agreement, the aggregate lending limit was based upon The Zone's "Inventory Borrowing Base," up to a maximum of \$1,000,000. The Inventory Borrowing Base was the sum of 60% of the cost of The Zone's electronics inventory and 30% of the cost of The Zone's DVD and CD inventory. Plaintiff also maintained a lien against The Zone's inventory as collateral security. On the same date, defendants executed unconditional guarantees of payment under the financing agreement. On November 2, 2004,

plaintiff and The Zone amended the financing agreement effective September 29, 2004, whereby plaintiff agreed to lend to The Zone an additional \$500,000.

On February 11, 2005, plaintiff demanded payment from defendants within three days. The Zone filed a petition for Chapter 11 bankruptcy on February 15, 2005. This action ensued.

DISCUSSION

CPLR 3213 provides that a plaintiff may move for summary judgment in lieu of complaint “[w]hen an action is based upon an instrument for the payment of money only.” Summary judgment in lieu of complaint “‘provide[s] a speedy and effective means’ for resolving ‘presumptively meritorious’ claims” (*Banco Popular No. Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004], quoting *Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]). An instrument comes within the purview of CPLR 3213 “if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms” (*Interman*, 37 NY2d at 155). Unconditional guarantees, such as the ones involved herein, are instruments for the payment of money only (*Jason Trading Corp. v Lason Trading Corp.*, 303 AD2d 180 [1st Dept 2003]; *Valencia Sportswear, Inc. v D.S.G. Enters., Inc.*, 237 AD2d 171 [1st Dept 1997]; *Chemical Bank v Nemeroff*, 233 AD2d 239 [1st Dept 1996]).

Upon making a prima facie showing, the moving party is entitled to summary judgment unless the other party comes forward with evidentiary proof sufficient to raise an issue of fact as to the defenses to the instrument (*Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137-138 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 773 [1st Dept], *appeal dismissed in part* 59 NY2d 970 [1983], *affd* 62 NY2d 686 [1984]). Conclusory and unsubstantiated allegations set forth in affidavits submitted in

opposition are insufficient to defeat a motion for summary judgment in lieu of complaint (*see Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541, 542 [1st Dept 1992]).

By guarantees dated June 15, 2004, defendants “irrevocably and unconditionally guarantee[d] to [plaintiff] payment when due, whether by acceleration or otherwise, of any and all Obligations of the Obligor to [plaintiff]” (Kaye Aff., Exh. B). On February 11, 2005, plaintiff notified defendants that The Zone was in default of its obligations under the financing agreement and owed \$1,714,160.93 to plaintiff as of that date, with *per diem* charges of \$413.78 thereafter (Kaye Aff., Exh. D). Defendants failed to pay any part of The Zone’s debt to plaintiff (Kaye Aff., ¶ 10). Thus, plaintiff has made a *prima facie* showing of entitlement to summary judgment on the unconditional guarantees (*see Banque Indosuez v Pandeff*, 193 AD2d 265, 268 [1st Dept 1993], *lv dismissed* 83 NY2d 907 [1994], *appeal dismissed* 86 NY2d 788, *lv dismissed* 86 NY2d 809 [1995]; *European Am. Bank v Lofrese*, 182 AD2d 67, 71 [2d Dept 1992]).

In opposition, defendants submit an affidavit of Marvin Jemal, in which he avers that plaintiff was the cause of The Zone’s default. Specifically, Jemal advised plaintiff in August 2004 that he was investigating opening a Staten Island store. In September 2004, plaintiff’s executive vice president, Sheldon Kaye, represented that it would advance \$1,000,000, secured by a mortgage on Jemal’s home, to renovate and stock a new Staten Island location, The Zone relied upon this promise by entering into a lease for the store, but shortly afterwards, plaintiff advised The Zone that it was no longer willing to advance the \$1,000,000 for the Staten Island store (Jemal Aff., ¶¶ 15-18). Jemal states that The Zone then became underfunded for the obligations which plaintiff induced it to incur (Jemal Aff., ¶ 21). Jemal does not deny execution of the guarantees, that the loans were made to The Zone, or that The Zone defaulted on the loans.

In a reply affidavit, Sheldon Kaye denies that he ever offered to Jemal a \$1,000,000 loan secured by a mortgage on his home for the Staten Island location. Kaye avers that he informed Jemal that his home was already overleveraged and could not serve as collateral for any additional advances by plaintiff. In addition, Kaye states that in August 2004, Jemal only mentioned two proposed locations in Cedarhurst and Valley Stream, but not a Staten Island location (Kaye Reply Aff., ¶ 6).

Defendants' claim of fraud is not a valid defense to the guarantees. Any defense relating to this purported fraudulent representation may be asserted only by The Zone, the principal debtor. This is because a guarantee agreement is separate and distinct from the contract between the lender and the borrower, and thus a party who enters into an unconditional guarantee of payment may not assert defenses which arise separately from the guarantee (*see Medallion Funding Corp. v Norrito*, 272 AD2d 218 [1st Dept 2000]; *Marcus Dairy, Inc. v Jacene Realty Corp.*, 225 AD2d 528, 528-529 [2d Dept 1996]; *see also Ettlinger v National Sur. Co.*, 221 NY 467, 469-470 [1917]; *New Jersey Bank, Natl. Assn. v Varano*, 120 AD2d 505, 505-506 [2d Dept 1986] [no triable issue of fact raised by guarantors' defenses and counterclaims based on fraud and deceit allegedly practiced by creditor on principals]). Indeed, a guarantee may impose greater liability on the guarantor than on the principal debtor (*see Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737 [1st Dept 1983], *appeal dismissed* 61 NY2d 760 [1984]).

Moreover, a defense based on the claim that plaintiff caused The Zone's inability to repay the debt is barred as a matter of law by the plain language of the guarantees. Defendants "irrevocably and unconditionally guarantee[d] to [plaintiff] payment when due, whether by acceleration or otherwise, of any and all Obligations of the Obligor to [plaintiff]." Furthermore,

the guarantees provide that defendants “waive[d] any defense, offset or counterclaim to any liability hereunder,” that “[n]o invalidity, irregularity or unenforceability of all or any part of the liabilities hereby guaranteed or of any security therefor shall affect, impair or be a defense to this guarantee,” and that “[t]he liability of the undersigned hereunder is primary and unconditional and shall not be subject to any offset, defense or counterclaim of the Obligor.” Such waivers are enforced in New York (*see Bank of New York v Cariello*, 69 AD2d 805 [2d Dept 1979]; *Rusch Factors, Div. of BVA Credit Corp. v Sheffler*, 58 AD2d 557, 558 [1st Dept 1977]).

Defendants further argue that it is impossible to determine the amount of The Zone’s liability to plaintiff until completion of The Zone’s bankruptcy liquidation. Plaintiff properly submits the monthly statements it sent to The Zone and a so ordered stipulation of settlement in bankruptcy proceedings in response to this claim (*see CPLR 2214; Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992] [function of reply papers is to address arguments made in opposition to the position taken by the movant]). Since this documentary evidence shows that The Zone has admitted liability to plaintiff in bankruptcy proceedings in the amount of \$1,705,804.64 as of March 4, 2005 (Kaye Reply Aff., Exh. C), defendants as guarantors are liable to plaintiff under the guarantees in that amount (*see Rusch*, 58 AD2d at 558). In addition, under the guarantees, “[t]he books and records of [plaintiff] shall be admissible as prima facie evidence of the Obligations.” The Zone’s retention of monthly statements from the plaintiff without objection within a reasonable time is an account stated entitling plaintiff to summary judgment in its favor (Kaye Reply Aff., ¶ 8, Exh. B; *see Rand Rosenzweig Smith Radley Gordon & Burstein, LLP v Berger*, 248 AD2d 129, 130 [1st Dept 1998]).

Defendants’ claim that plaintiff was first required to liquidate collateral before seeking to

enforce the guarantees ignores the language of the guarantees. They provide that plaintiff may “exercise or refrain from exercising any rights against the Obligor or others (including the undersigned) or otherwise act or refrain from acting” (see *Chemical Bank v Kaufman*, 142 AD2d 526, 527 [1st Dept 1988]). Nor was plaintiff required to first seek recourse against The Zone for this same reason (see *Milliken & Co. v Stewart*, 182 AD2d 385, 386-387 [1st Dept 1992]; *Federal Deposit Ins. Corp. v Schwartz*, 78 AD2d 867, 868 [2d Dept 1980], *appeal dismissed* 54 NY2d 833, *affd* 55 NY2d 702 [1981]).

Plaintiff is also entitled to collection fees and attorneys’ fees under the guarantee agreements, which state that “[i]n the event [plaintiff] takes any action, including retaining attorneys, for the purpose of effecting collection of the Obligations or of any liabilities of the undersigned hereunder, or protecting any of [plaintiff’s] rights hereunder, the undersigned shall pay all costs and expenses of every kind for protection of the rights of [plaintiff] or for collection of the Obligations or such liabilities, including reasonable attorneys’ fees” (see *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Sempre Energy Trading Corp. v PG & E Texas VGM, L.P.*, 284 AD2d 253, 254 [1st Dept 2001]). Therefore, plaintiff’s claim for collection costs and reasonable attorneys’ fees is granted as to liability only (see CPLR 3212 [c]). The reasonableness of such fees shall be referred to a Special Referee to hear and report.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that the motion is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Robin Jemal and Marvin Jemal in the amount of \$1,705,804.64, together with interest as provided for by the parties’ agreements

beginning on March 4, 2005, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further


ORDERED that the issue of the amount of plaintiff's costs and attorneys' fees is referred to a Special Referee to hear and report with recommendations, except that, 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 referee, shall determine the aforesaid issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations 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 a Special Referee.

Dated: October 17, 2005

ENTER:



J.S.C.
HON. RICHARD B. LOWE, III
FILED
OCT 25 2005
NEW YORK
COUNTY CLERK'S OFFICE