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

PRESENT: Cahn Justice

PART 49m

Ralco, Inc

INDEX NO. 604345/02

MOTION DATE 3/7/05

- v -

MOTION SEQ. NO. 004

Citibank, N.A.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/21/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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RALCO, INC., RAVINDER SAWHNEY and
SARANLEEN SAWHNEY,

Plaintiffs,

-against-

Index No.
604395/02

CITIBANK, N.A., as Successor in interest to
EUROPEAN AMERICAN BANK and
EUROPEAN AMERICAN BANK,

Defendants.

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Herman Cahn, J.:

Defendants Citibank, N.A. and European American Bank (EAB) move for summary judgment, CPLR 3212, to dismiss the complaint, and to grant their counterclaim for attorneys' fees and expenses incurred by EAB in defending this action, or alternatively, to strike the jury demand.

Facts:

Plaintiff Ralco, Inc. had a borrowing relationship with EAB from 1994 through 1999, evidenced by a number of master notes with various maturity dates. After the master note matured in October 1999, EAB did not extend or renew the credit facility. EAB demanded repayment from Ralco, and commenced an action in January 2000. Shortly thereafter, Ralco repaid the loan in full.

This action was commenced three years later by plaintiff, asserting a number of claims for breach of contract, as well as tort. On a prior motion to dismiss, this court dismissed all claims

except one alleging breach of the implied duty of good faith, based upon EAB's alleged failure to give sufficient notice so that Ralco could seek alternate credit. EAB now moves for summary judgment on this cause of action, asserting that, on the undisputed facts, it exercised good faith in its loan renewal process. It also seeks reimbursement of its attorneys' fees and expenses in defending this action, based on the language of the parties' agreements.

BACKGROUND

Ralco is a closely-held corporation in the business of importing and selling consumer electronics products. Deposition of Ravinder Sawhney, dated August 24, 2004 (Sawhney I Dep.), at 8. Plaintiff Ravinder Sawhney is Ralco's President and sole shareholder, and he and his wife, plaintiff Saranleen Sawhney, are guarantors of Ralco's obligations to EAB. Sawhney I Dep. 6-7; Exhibit T to Exhibits in Support of Motion.

Ralco began borrowing from EAB in 1994. Each year the parties would execute a Master Note with a one-year maturity, and a General Security Agreement and financing statements, pursuant to which EAB was granted a security interest in Ralco's inventory and receivables. Exhibits 20, T and HH to Exhibits in Support. The master notes provided that Ralco's line of credit was subject to certain conditions, including an annual "clean-up" for a 30-day period (see Exhibit 22, ¶ 9), supplying EAB with a year-end balance sheet and income statements, within 150 days of the end of Ralco's fiscal year, which is December 31 (see id.; Sawhney I Dep. 99-100; Deposition of Ravinder Sawhney, dated August 24, 2004 [Sawhney II], at 91). There were often delays in the renewals of the credit facilities, and interim master notes were executed, because of Ralco's delays in providing its year-end financial statements. See Exhibit 22 to Exhibits in Support. Ralco was to provide its financial statements by the end of May for its

annual loan review scheduled for June. Deposition of William Cimbol, dated November 10, 2004, at 36; Deposition of Thomas Mulry, dated December 14, 2004, at 75.

In December 1998, upon review of Ralco's 1997 year-end financial statements, EAB, while finding sufficient collateral to cover the outstanding borrowing, was concerned about increasing inventory, and the fact that Ralco was distributing all its earnings through dividends. Exhibit FF to Exhibits in Support. Based on this, in December 1998, EAB reduced Ralco's credit facility to $750,000 from $1 million (id.; Exhibits 16 and 42 to Exhibits in Support), and added loan covenants that required Ralco to maintain a minimum capital base of $870,000, and limited dividend distributions to 40% of net income at December 31, 1998. Deposition of Lee Siracuse, dated November 12, 2004, at 95-96; Mulry Dep. 77-79; Exhibits 19, 36 to Exhibits in Support.

The December 1998 Master Note matured on June 30, 1999. Exhibits 16 and 42 to Exhibits in Support. On July 12, 1999, Ralco executed an interim master note, while EAB waited for Ralco to provide its 1998 year-end financial statement. This interim master note was in the reduced amount of $600,000, and matured on August 31, 1999. Exhibits 18, T and S, and Mulry Dep. 22-24, to Exhibits in Support.

On September 8, 1999, Ralco executed another master note (the September 1999 Master Note), in a further reduced amount of $400,000, pending review of the 1998 financial statement, which Ralco had not yet provided. Exhibits 20 and V to Exhibits in Support; Cimbol Dep. 62-63, 65. The September 1999 Master Note matured on October 30, 1999, and payment was due on that date. Exhibit 20 to Exhibits in Support at R100054. This note, like the previous ones, contained a broad discretionary advance provision, permitting EAB to decline to make advances

to Ralco at its "sole and absolute discretion," and EAB "without notice to the undersigned, may decline to make any advance requested by the undersigned." Id. at R100054. It also provided that Ralco "hereby waives demand . . . for payment, . . . and any and all other notices or demands in connection with the delivery, acceptance, performance, default, or enforcement of this Note." Id. at R100056. The September 1999 Master Note prohibited oral modification, stating that "[n]o change, amendment, modification, termination, waiver or discharge, in whole or in part, of any provision of this Note shall be effective unless in writing and signed by [EAB]." Id. It further provided that the failure by EAB "at any time to exercise any such right shall not be deemed a waiver thereof, nor shall it bar the exercise of any such right at a later date." Id. at R100055. "[EAB] shall not, by any act, delay, omission or otherwise, be deemed to have waived any of its rights and/or remedies hereunder." Id. at R100056.

In October 1999, Ralco provided its 1998 year-end financial. Sawhney II Dep. 47, 68-69; Cimbol Dep. 167. The financial statement showed that Ralco's operating revenues declined nearly 40% from $4.1 million in 1997 to $2.5 million in 1998. Exhibit 1 to Exhibits in Support at R200480. Its operating profits had also decreased, and its pre-tax income declined 40%, from $93,000 in 1997 to $55,600 in 1998. Id.

The line of credit had loan covenants, set forth in a December 14, 1998 letter, in which Ralco agreed to limit dividend distribution to 40% of net income, and to maintain a net worth capital base of $870,000. Cimbol Dep. 161-65; Exhibit 1, 19, 36, J and W to Exhibits in Support. The financial statement showed that at the end of 1998, Ralco's capital base was only $690,000, and that Mr. Sawhney had taken a dividend distribution of over $187,000; over $100,000 more than in 1997, and more than three times Ralco's net income of $57,000 in 1998.

Id.

In connection with the negotiations for renewal of the credit line, Ralco was asked to provide an aged accounts receivable and inventory estimate. Exhibit J to Exhibits in Support. An aged accounts receivable shows the amounts owed Ralco by its customers, which customers owed money, how long the receivables were outstanding, and whether customers with receivables outstanding had past due accounts. Cimbol Dep. 32, 36.

On October 14, 1999, EAB's loan officer and an EAB vice president, William Cimbol, wrote to Ralco stating that an aged accounts receivable is a necessary part of the information required to decide whether the line of credit should be renewed, and reminded Ralco that the loan expired at the end of October. Exhibit 21 to Exhibits in Support. In response, Ralco sent a note that the total amount of receivables "as of September 30, 1999, was US $261,360.00," and they were "all current good and collectabile [sic]." Exhibit P to Exhibits in Support. EAB regarded this response as unsatisfactory. Cimbol Dep. 40, 44; Mulry Dep. 55. Ralco provided only a verbal inventory estimate of $100,000 to $200,000. Cimbol Dep. 92; Exhibit J to Exhibits in Support. Based on this information, EAB concluded that the outstanding loan to Ralco was under-collateralized. Cimbol Dep. 108; Exhibit J to Exhibits in Support.

EAB also informed Ralco that it wanted to conduct a collateral audit, reviewing Ralco's books and records. Cimbol Dep. 75-80. Ralco wanted the audit done in January 2000. Cimbol Dep. 78-79. Ralco also sought to condition the audit on EAB providing financing of a collection item in the amount of $70,000, which would have brought Ralco over the limit of its credit facility. Id. at 78-79, 94, 170-71. EAB refused to finance the collection item, and the collateral audit was not scheduled or conducted. Id. at 103, 171. Cimbol attempted to determine the state

of Ralco's inventory and assets, and asked about Ralco's borrowing needs, but Mr. Sawhney was unable to answer his questions. Cimbol Dep. 166, 171; Exhibit J to Exhibits in Support. When Cimbol, and his supervisor, Thomas Mulry, went to Ralco's offices, they did not observe customer-related activity or significant inventory. Cimbol Dep. 169; Mulry Dep. 41. When the September 1999 Master Note matured, on October 30, 1999, Ralco owed EAB $380,000 of its $400,000 credit facility. Exhibits 20 and A to Exhibits in Support.

In early November 1999, Cimbol and Mulry recommended that Ralco's loan be downgraded and transferred to EAB's Asset Recovery Division based on the decline in sales and earnings, which was a continuing trend for Ralco; the excessive dividend distribution, which was eroding Ralco's capital base; the delays and failure in providing financial information; the under-collateralization; and the lack of activity in Ralco's business. Cimbol Dep. 163-66; Wilinski Dep. 76-77; Mulry Dep. 84-88; Exhibits J, Y, and Z to Exhibits in Support. EAB's decision not to renew Ralco's credit facility was approved by four levels of lending officers, and the Asset Recovery Division leader. Cimbol Dep. 114-16, 121-22, 125; Mulry Dep. 85-87.

EAB scheduled a meeting with Mr. Sawhney in mid-November to introduce the Asset Recovery officer, Catherine Wilinski. Cimbol Dep. 136-37. At a meeting, Ms.Wilinski requested certain financial information, and Mr. Sawhney advised that he did not know the answers, but that he would get his accountant to respond. Sawhney Dep. 84, 86.

After the meeting, EAB did not forward a new master note to Ralco. Instead, on November 29, 1999, Ralco received EAB's demand and default letter, dated November 23, demanding repayment of the outstanding balance. Exhibit E to Exhibits in Support; Complaint ¶ 62.

On December 1, 1999, EAB posted a credit in the amount of $3,124.44 to Ralco's account. Complaint ¶¶ 65-66. In further negotiations, Mr. Sawhney rejected Wilinski's proposal to repay the loan on a term or installment basis, Wilinski Dep. 47, 75, 77-78. On December 7, 1999, the $3,124.44 credit was reversed, and a notice was sent to Ralco informing it that the credit had been made in error. Slip Opinion, Ralco v Citibank, Index No. 604395/02 (Sup Ct, NY County, March 17, 2004, at 3, Exhibit to Order to Show Cause.

On January 26, 2000, EAB commenced an action in Supreme Court, Nassau County, seeking payment of the entire balance. Complaint ¶¶ 72-73. EAB did not seize or restrain Ralco's inventory, dishonor any checks, set off against Ralco's bank accounts, or put its account debtors on notice. Sawhney II Dep. 102-08. On February 17, 2000, the parties settled the matter without prejudice, and a check was delivered by Mr. Sawhney, for the outstanding balance, including interest. Id. ¶ 76; Slip Opin. at 4; Sawhney II Dep. 139-40; Exhibit 28. EAB then returned the September 1999 Master Note and the guarantees to Mr. Sawhney. See Sur-Reply Affirmation of Roger A. Raimond, dated March 7, 2005, and annexed exhibits.

The Within Action;

On December 4, 2002, plaintiffs commenced this action. Upon defendants' pre-answer motion to dismiss, five of the six causes of action were dismissed. This court found that the September 1999 Master Note had expired by its own terms on October 30, 1999, and held that there was no basis to claim that EAB had an obligation to extend the loan under the terms of the agreement. Slip Opinion, Exhibit to Order to Show Cause, at 13-15. The only claim left remaining was for breach of the implied covenant of good faith and fair dealing, based on plaintiffs' claim that EAB had an obligation to provide Ralco with sufficient notice of the

decision not to renew so that it could obtain alternate financing.

EAB now moves for summary judgment, urging that, as a matter of law, it did not breach the implied covenant of good faith. It contends that, because it acted in accordance with the rights expressly provided in the September 1999 Master Note, it cannot be held liable. EAB also urges that it had valid business reasons, which precluded it from providing such advance notice. These reasons included Ralco's deteriorating financial condition, and its late submission and withholding of necessary financial data. Further, EAB contends that its actions did not cause damage to Ralco. It asserts that Ralco's financial decline was caused by the decline in sales and income, by excessive dividend distributions which eroded Ralco's capital base, and by Ralco's attempt to transition to the importation and sale of batteries, for which it had no established market presence or major supplier. Exhibit 1 to Exhibits in Support; Sawhney II Dep. 125-31, 180; Cimbol Dep. 71-72.

Finally, EAB seeks summary judgment on its counterclaim for attorneys' fees. It states that the General Security Agreement (Exhibit T to Exhibits in Support at C000170), and the September 1999 Master Note (Exhibit 20 to Exhibits in Support at R100055), both contain Ralco's express agreement to pay EAB's attorneys' fees. It contends that under the guarantees, the individual plaintiffs Ravinder and Saranleen Sawhney, each guaranteed Ralco's obligation to pay the attorneys' fees EAB incurred in defending this action. Alternatively, if its motion on the complaint is denied, EAB seeks to have the jury demand stricken because plaintiffs expressly waived a jury trial in the parties' agreements.

In response, Ralco argues that EAB breached the covenant of good faith when it discontinued Ralco's credit line and thereby put Ralco out of business. It urges that while EAB

had the discretion to advance or not to advance funds, it had to exercise that discretion in good faith, and that whether it had valid business reasons was an issue of fact for trial. Ralco also contends that EAB waived its contractual right to forego giving notice of a demand for payment through both its words and acts. Ralco argues that the agreement between the parties was not executory, it was completed, so that a written amendment was not required. It points to Cimbol's deposition testimony that "it was always our practice to provide ninety days or so to find alternate financing, depending on the circumstances," as evidence of EAB's waiver of the non-notice provision in the master note. Cimbol Dep. 106. It additionally relies on EAB's actions in purportedly extending additional credit on November 1 and 2, 1999, and in early December, even though the Master Note matured on October 30, 1999. Finally, it asserts that EAB's written notice of November 23, 1999, demanding payment, is additional proof that EAB waived the non-notice provision.

Ralco responds to EAB's claim that the termination of the credit line was not a proximate cause of Ralco's damages, by contending that there are triable issues of fact on causation. It submits affidavits from several former foreign suppliers, stating that in 1999 they agreed to provide Ralco with consumer electronic goods, but could not complete the deals because Ralco's credit line was abruptly discontinued. See Affidavits of Kiran Hingorani, Dhanesh Tewani, and Vijay Chandhok Annexed to Ralco's Response.

On EAB's counterclaim, Ralco contends that the provisions for attorneys' fees in the note, and General Security Agreement only pertain to actions between EAB and third parties, not to this dispute between the parties to the contract. Moreover, Mr. Sawhney asserts, in a sur-reply, that the note and guarantees were returned to him upon payment of the debt, apparently

contending that the obligation to pay attorneys' fees does not survive. Therefore, Ralco argues that EAB is not entitled to attorneys' fees.

DISCUSSION

Defendants' motion for summary judgment is granted, and the complaint is dismissed. Summary judgment on liability on defendants' counterclaim for attorneys' fees is also granted. The issue of the amount of such fees is referred to a Special Referee to hear and report.

Plaintiffs' claim for the breach of the implied duty of good faith is dismissed as a matter of law, based on EAB's express rights under the line of credit agreements. The courts recognize, in appropriate circumstances, that an obligation of good faith and fair dealing on the part of a party to a contract may be implied and enforced. Sabetay v Sterling Drug, Inc., 69 NY2d 329 (1987). This "'implied obligation is in aid and furtherance of other terms of the agreement of the parties.'" Id. at 335, quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304-05 (1983). Therefore, no obligation can be implied which would be inconsistent with other terms of the parties' agreement. Id.; see also SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352 (1st Dept 2004).

The obligation of good faith may not frustrate the exercise of an express contractual term bargained for at arm's length. National Westminster Bank, U.S.A. v Ross, 130 BR 656, 679 (SD NY 1991), affd sub nom Yaeger v National Westminster Bank, 962 F2d 1 (2d Cir 1992). The terms of the parties' agreement governs their rights and obligations. "The parties' contractual rights and liabilities may not be varied, nor their terms eviscerated, by a claim that one party has exercised a contractual right but has failed to do so in good faith." Id. Therefore, a "party which acts in accordance with rights expressly provided in a contract cannot be held liable for

breaching an implied covenant of good faith." In re Minpeco, USA, Inc., 237 BR 12 (SD NY 1997). The implied covenant also does not extend so far as to undermine a party's "general right to act on its own interests in a way that may incidentally lessen" the other party's anticipated benefits from the contract. Van Valkenburgh, Nooger & Neville, Inc. v Hayden Publ. Co., 30 NY2d 34, 46, cert denied 409 US 875 (1972); M/A-Com Security Corp. v Galesi, 904 F2d 134 (2d Cir 1990).

The September 1999 Master Note contained several relevant provisions. First, in the Master Note, Ralco waived "presentment, demand for payment, protest, notice of dishonor, and any and all other notices or demands in connection with the delivery, acceptance, performance, default or enforcement of this Note." Exhibit 20 to Exhibits in Support at R100056. Thus, Ralco specifically and unequivocally waived the notice it is claiming as the basis for its breach of the implied covenant of good faith. The UCC expressly recognizes that a provision dispensing with notice is valid unless, in operation, it creates an unconscionable state of affairs. UCC § 2-309 (3) and Comment 8. There was nothing unconscionable here. The undisputed facts show that Ralco was given a number of reasonable opportunities to demonstrate the security of EAB's position. Thus, this waiver was valid.

The September 1999 Master Note further provided that "[a]ll advances under the Line are at the Bank's sole and absolute discretion and the Bank . . . without notice to [Ralco] may decline to make any advance requested by [Ralco]." Id. at R100054. The broad discretion thus given, permitted EAB to decline to make advances, without notice, to Ralco. Where a contract grants a party broad discretion, that party can breach the implied covenant of good faith only by exercising that discretion arbitrarily or irrationally. See Dalton Educ. Testing Serv., 87 NY2d

384, 389 (1995). There is no evidence of arbitrariness or irrationality on EAB's part. Moreover, to find that EAB's exercise of its discretion without sufficient notice to Ralco, in the circumstances here, was a breach of the implied covenant would frustrate EAB's exercise of an express contractual right. See National Westminster Bank, U.S.A. v Ross, supra; In re Minpeco, USA, Inc., supra. By the clear terms of the September 1999 Master Note, EAB was not obligated to extend credit to Ralco, it was not obligated to renew the terms of the master note following its expiration, nor was it required to provide notice that it was declining to make advances. To find a breach in the face of these express provisions, would eviscerate these terms from the parties' contract, and rewrite their agreement. Accordingly, these provisions together bar the claim for breach of the implied covenant of good faith. An examination of the facts shows that EAB had more than sufficient grounds to decline to continue to extend the loan. It was not unreasonable to call the loan when it did.

Ralco's reliance on Components Direct, Inc. v European Amer. Bank and Trust Co. (175 AD2d 227[1st Dept 1991]) is misplaced. There, the court, on a motion to dismiss, found that, absent valid business reasons, the bank's failure to give the debtor notice that it was terminating its credit, where the debtor depended on the funds for its existence, could state a claim for breach of the implied duty of good faith. Id. at 229-30. It held that "under the circumstances of this case, a covenant to give notice is inferred." Id. at 230. The court, however, specifically noted that the loan agreement, drafted by the bank, failed to expressly state that the bank had the right to terminate credit without notice, and that if the bank desired to have that right, it should have so stated in the contract. Id. at 230; see also Sterling Natl. Bank v Goldberg, 277 AD2d 45 (1st Dept 2000), lv denied 96 NY2d 708 (2001) (relying on Components Direct, Inc in finding factual

issues as to breach of duty of good faith in bank's failure to honor payroll checks after letter agreement, with no explicit right to terminate without notice).

Here, in contrast, the September 1999 Master Note expressly gave EAB the right to terminate credit to Ralco without notice in both the broad discretionary advance provision, and in the waiver of notice provision. Accordingly, unlike the circumstances in Components Direct, Inc. v European Amer. Bank and Trust Co. (supra), EAB was exercising its express contractual rights. See Bonnie & Co. Fashions, Inc. v Bankers Trust Co., 281 AD2d 223 (1st Dept 2001).

Further, the September 1999 Master Note explicitly provides that no amendment or modification of any provision of the note is effective unless it is in writing signed by EAB. Exhibit 20 to Exhibits in Support at R100056. It also provides that EAB's "failure to exercise any such right shall not be deemed a waiver thereof, nor shall it bar the exercise of any such right at a later date." Id. at R100055. EAB "shall not, by any act, delay, omission or otherwise, be deemed to have waived any of its rights and/or remedies hereunder." Id. at R100056. These provisions bar the argument that EAB orally waived the notice provision, or amended the agreements to provide for a ninety day advance notice of non-renewal.

Contractual provisions barring oral modification generally are enforced by their terms. See Rose v Spa Realty Assocs., 42 NY2d 338, 343 (1977); Tierney v Capricorn Investors, L.P., 189 AD2d 629, 631 (1st Dept), lv denied 81 NY2d 710 (1993). New York General Obligations Law (GOL) § 15-301 requires a writing signed by the party against whom enforcement is sought, in this case, EAB, before an oral modification will be enforced when the contract requires written amendments. See SAA-A, Inc. v Morgan Stanley Dean Witter & Co., 281 AD2d 201, 203 (1st Dept 2001). It is undisputed that there is no such writing here.

Ralco's contention that the rule does not apply because the September 1999 Master Note was not executory, because it was repaid, is unpersuasive. At the time that Ralco claims the loan agreements were orally modified, the loan was still outstanding.

In addition, the oral modification argument fails, because there is no consideration for EAB's waiver of the "no oral modification" provision, or for waiver of the no notice provision. See Tierney v Capricorn Investors, L.P., 189 AD2d at 631.

The limited exceptions to the requirement of a written modification, i.e., partial performance or estoppel, are not applicable here. In order for partial performance to obviate the requirement of a writing, it must be "unequivocally referable" to the alleged modification. Rose v Spa Realty Assocs., 42 NY2d at 345; SAA-A, Inc. v Morgan Stanley Dean Witter & Co., 281 AD2d at 203. The evidence on which Ralco relies is not unequivocally referable to any oral agreement to provide 90-days advance notice. In addition, the alleged modification obligates Ralco to do no more than it was already required to do under the loan agreements. Therefore, it cannot claim its performance was induced by reliance upon EAB's alleged promise. See SAA-A, Inc. v Morgan Stanley Dean Witter & Co., supra. Further, the doctrine of equitable estoppel does not apply on the facts here. See Tierney v. Capricorn Investors, L.P., 189 AD2d at 631.

To the extent that Ralco claims that EAB's claimed extension of credit after the October 30, 1999 maturity date indicates that EAB waived the oral modification and the waiver of notice provisions, the claim is rejected. The record does not show any post maturity credit extension, except for the one mistakenly made on December 1, 1999, which was quickly reversed as an error on December 7, 1999. See Exhibit N to Exhibits in Support. The other examples offered by Ralco were, as pointed out by EAB, debits, not credits, to its account. See Exhibit 1 to

Ralco's Response. Finally, EAB's default letter did not waive the no notice requirement contained in the note. See Exhibit 20 to Exhibits in Support at R100055-56. Thus, there are no genuine factual issues raised, and the claim for breach of the implied duty of good faith is dismissed.

The Claim for Attorneys' Fees:

EAB also is granted summary judgment on liability on its counterclaim for attorneys' fees. The September 1999 Master Note contains the following agreement with regard to attorneys' fees:

> The undersigned agrees to pay, on demand, all of [EAB's] costs and expenses, including reasonable counsel fees . . . in connection with . . . the enforcement of [EAB's] rights under this Note.

Exhibit 20 to Exhibits in Support at R100055. The "enforcement of [EAB's] rights" includes its defense in this action of its right to decline to renew the master note. In addition, the General Security Agreement provides that Ralco would pay, on demand, "[a]ny and all fees, costs and expenses, of whatever kind or nature, including reasonable attorneys' fees and legal expenses incurred by [EAB]" in "defending or prosecuting any actions or proceedings arising out of or related to the transaction to which this Security Agreement relates." Exhibit T to Exhibits in Support at C000170. The loan and its termination at issue here is a "transaction to which th[e] Security Agreement relates." Id.

The attorneys' fees provisions are very broad, clearly covering EAB's defense of Ralco's claims of breach of contract and tort. See Breed, Abbott & Morgan v Hulko, 139 AD2d 71 (1st Dept 1988), affd 74 NY2d686 (1989); Center Cadillac, Inc. v Bank Leumi Trust Co. of N.Y., 878

F Supp 626, 627-28 (SD NY), affd 99 F3d 401 (2d Cir 1995). Contrary to Ralco's contentions, there is no language in the loan agreements which limits the scope of EAB's recovery of such fees to actions between EAB and third parties. See Sagittarius Broadcasting Corp. v Evergreen Media Corp., 243 AD2d 325 (1st Dept 1997); Cf. Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487 (1989) (attorneys' fees clause referred to subjects that were susceptible only to third-party claims, and other contract provisions unmistakably related to third-party claims). Mr. Sawhney's argument, in a sur-reply submission, that because the debt was paid in February 2000, and the guarantees returned to him, that there is no longer any obligation to pay such fees, is rejected. This action was brought by Mr. Sawhney and Ralco to enforce their rights under the parties' loan agreements, so the attorneys' fees provisions in those agreements are enforceable by EAB.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the defendants' motion for summary judgment on liability on its counterclaim for attorneys' fees is granted; and it is further

ORDERED that the issue of the amount of defendants' 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 other person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is

further

ORDERED that the 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 a Special Referee.

Dated: June 22, 2005

ENTER:

J.S.C.