Israel Discount Bank of N.Y. v Bunnie Shops, LLC

2005 NY Slip Op 30444(U)

May 17, 2005

Supreme Court, New York County

Docket Number: 602466/04

Judge: Bernard J. Fried

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SCANNED ON 5/19/2005

[* 1]

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

PRESI BERNARD J. FRIED J.S.C. PART 60

0602466/2004

ISRAEL DISCOUNT BANK OF NY
VS
BUNNIE SHOPS, LLC

SEQ 02

MO. _____

N DATE _____

N SEQ. NO. _____

ON 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

This motion is decided in accordance with the accompanying Memorandum Decision.

A conference will be held on June 14, 2005, at 10:00 a.m., in Part 60 Room 300, 60 Centre Street..

SO ORDERED

FILED
MAY 18 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/17/05

Ben J. Fried
J.S.C.
BERNARD J. FRIED

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 60

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ISRAEL DISCOUNT BANK OF NEW YORK,

Plaintiff,

-against- Index No.: 602466/04

BUNNIE SHOPS, LLC, BUNNIE TOWNE, INC., ESCAVA BROTHERS, RALPH ESCAVA, ROBERT ESCAVA, DAVID ESCAVA, HYMAN ESCAVA, NATHAN ESCAVA, ISAAC ESCAVA and SEYMOUR ESCAVA,

Defendants.

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FRIED, J.

Israel Discount Bank of New York (IDB) commenced this action seeking to recover $2,697,737.00, plus interest, pursuant to two Amended and Restated Demand Collateral Promissory Notes (the Notes), executed by Bunnie Shops, LLC and Bunnie Towne, Inc. (collectively, the Borrowers), in connection with loans and advances made by IDB to the Borrowers (the Loan). IDB also seeks to recover on guarantees (the Guarantees) allegedly executed by the defendants in connection with the Notes and Loan.[1]

IDB moves for summary judgment against David, Ralph, Robert, Hyman, Nathan, Isaac and Seymour Escava (collectively, the Escava Defendants),[2] on the Guarantees allegedly

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[1] On November 17, 2005, at oral argument, I stayed discovery in this action pending resolution of this motion.

[2] The Escava Defendants are all related and certain of them have interests in the Borrowers and in Escava Brothers, a partnership that owns real estate in New Jersey.

executed by them, and for attorney's fees pursuant to the Guarantees.[3]

The Escava Defendants cross move, pursuant to CPLR 3211 (a)(1) and RPAPL § 1301(3), to dismiss the complaint on the ground that IDB is estopped from recovering on the Notes because it commenced a foreclosure action on property in New Jersey (New Jersey Property) mortgaged by Escava Brothers in connection with the Loan. In addition, certain of the Escava Defendants also seek an order directing that IDB provide them with an accounting of payments and credits made by and to IDB, and for other relief concerning rents they claim IDB is improperly garnishing from the New Jersey Property.

According to the complaint, from March 2002 through March 2004, IDB extended credit and financial accommodations to the Borrowers as evidenced by an Amended and Restated Accounts Financing, Inventory and Equipment Security Agreement, dated March 14, 2002 (the Amended Finance Agreement), and the Notes. The original principal amounts of the Notes were $2,500,000.00 and $250,000.00, respectively. In March 2002, all of the Escava Defendants allegedly executed Guarantees on the Borrowers' then-existing, and thereafter incurred, obligations and liabilities to IDB. Also, Escava Brothers allowed its New Jersey Property to be mortgaged to secure the Loan, according to the affidavit of Hyman Escava, a partner of Escava Brothers.

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In addition to its summary judgment motion, IDB also moved for a default judgment, pursuant to CPLR 3215, against Bunnie Shops, LLC, Bunnie Towne, Inc. and Escava Brothers. After learning that these defendants answered the complaint, however, IDB withdrew that request for relief and here moves only against the individual Escava Defendants.

A. IDB's Motion for Summary Judgment

In support of its summary judgment motion against the Escava Defendants on the Guarantees, IDB submits copies of the Notes and the Guarantees and the affidavit of its vice president, Barry Solomon. IDB has not submitted a copy of the Amended Finance Agreement. According to Solomon, in reliance upon the Guarantees, IDB made loans and advances to the Borrowers which, as of April 13, 2004, amounted to $2,697,737.00 together with interest.

As the basis for recovery from the Escava Defendants on the Guarantees, Solomon states that subsequent to March 17, 2004, the Borrowers failed and refused to make payments on the Loan. He does not, however, state the basis for this knowledge, and IDB has submitted no other documentary evidence in its moving papers to support this claim.

In opposition, Isaac Escava, the Borrowers' president, submits a portion of the Amended Financing Agreement, and argues that pursuant to it, an event of default is a predicate to IDB's recovery on the Notes. Hyman and Isaac Escava, both swear that there was no such default, and that they have personally ensured that all payments required of the Borrowers were made. Hyman Escava states that until the inception of this lawsuit, he regularly viewed the Borrowers' bank statements and loan ledgers and saw that the Loan payment amounts were deducted.

Isaac Escava adds that payments for the Loan were "regularly deducted on a monthly basis from [the Borrowers'] IDB account until the inception of this lawsuit" (Isaac Escava, Aff. at 2, ¶ 4). To wit, Isaac Escava submits bank checking account statements for one of the Borrowers, Bunnie Shops, LLC (Bunnie LLC), for the months of April, June and July 2004. He claims these statements contain debits that were for payments on the Loan. He also

submits a ledger report and interest statement for the Loan.

The submitted interest statement indicates that $13,486.26 was due on June 30, 2004. The ledger report, which is for the period ending June 30, 2004, indicates that $13,486.36 was charged to Bunnie LLC's account and Bunnie LLC's July checking account statement indicates that $13,486.36 was debited therefrom on July 1, 2004. Isaac Escava submits this evidence to support his claim that the payments on the Loan were current at the time IDB brought this action in early August 2004.

IDB does not dispute that the Borrowers' failure and refusal to make required payments on the Loan is a predicate to recovery on the Guarantees. IDB also does not dispute defendants' claim that it debited Bunnie LLC's checking account, as shown in the checking account statements.

In his reply affidavit, however, Solomon states that the debits to Bunnie LLC's checking account were merely "overdrafts" and that the defendants have provided no proof of payments made on the Loan. He points out that Bunnie LLC's opening June checking account balance was an overdraft of $13,630.92 (a negative $13,630.92 balance), and that on June 1, 2004 the interest payment due on the Loan was charged to the account which resulted in an overdraft balance of $27,140.26 (a negative $27,140.26 balance). He further states that each of the monthly statements show similar overdrafts.[4]

IDB claims that the Borrowers failed and refused to make payments on the Loan after

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[4] Bunnie LLC's July checking account statement reflects a $13,486.36 debit on July 1, 2004, a and a negative $41,008.44 closing balance.

March 17, 2004.[5] The April checking account statement, however, reflects that after what appears to be a debit for the Loan payment on April 1, 2004, funds were thereafter credited to the account rendering its balance positive on April 19, 2004. Moreover, IDB has provided no support in the law for its contention, made only on reply, that the debits to Bunnie LLC's checking account, did not constitute payments toward the Loan, because they were checking account "overdrafts."[6] IDB has also failed to provide documentary evidence or, even an explanation of its agreement with Bunnie LLC regarding overdrafts on its checking account, and it is, of course, the movant's burden to affirmatively demonstrate the merit of its claim and to tender sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable (*International Customs Assoc., Inc. v Bristol-Meyers Squibb Co.*, 233 AD2d 161,

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At oral argument, IDB's counsel specifically stated that IDB debited Bunnie Shop LLC's checking account on April 1, 2004 after payment was not timely made in March (Tr. 38: 19-20), however in the verified complaint and the affidavits submitted by IDB, it claims only that the Borrowers failed and refused to make payments subsequent to March 17, 2004, and not that payment was not timely made in March.

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Pursuant to New York law, the payment of an overdraft by a bank constitutes a loan to the drawer (see *United States Trust Company of New York*, 91 AD2d 7, 9 [1st Dept 1982]; NY UCC 4-401 ["Official Comment"]). IDB claims, on reply, that they are owed from the Borrowers an additional $42,711.97 for Bunnie LLC's overdraft balance on its checking account. In addition, there is what appears to be an interest charge on the overdraft balance in the documentation submitted by IDB on reply (*see* Solomon Reply Aff. in Further Support, Exh. P, "Current Account Enquiry") and an "overdraft charge" on every checking account statement, all of which appears consistent with treating the overdraft as a loan.

162 [1st Dept 1997] ; *St. Andrews Homeowners Assn, Inc. v Saint Andrew's Golf Club*, 289 AD2d 388 [2d Dept 2001]). IDB's mere statement, made on reply, that the debited amounts were overdrafts, without more, is not enough to resolve, as a matter of law, the disputed issue of whether the debits were payments on the Loan. There thus exists a disputed issue of fact as to whether the Borrowers made payments to IDB after March 17, 2004, rendering summary judgment inappropriate.[7]

With its reply, IDB submits a copy of a Loan Ledger Report (Solomon Reply Aff., Exh. P), dated January 7, 2005, and argues that it demonstrates a principal balance past due and outstanding of $2,739,446.48, as of that date. IDB argues, that pursuant to the Notes, its records are dispositive as to the amounts of advances made and the dates and amounts of payments of principal and interest. The Loan Ledger Report, submitted only on reply, does not address, and thus does not definitely dispose of, the issue raised by the defendants regarding the debits on Bunnie LLC's checking account made after March 17, 2004. As the checking account statements and other documentary evidence submitted raises an issue of fact relevant to all of the defendants, the remaining arguments in opposition need not be addressed.

B. Defendants' Cross Motions

In his affidavit in support of the cross motion to dismiss the complaint, Hyman Escava states that Escava Brothers, in addition to allowing the New Jersey Property to be mortgaged to secure the Borrowers' debt, also executed an assignment which allowed IDB, upon the Borrowers' default on the Loan, to garnish rental income from the New Jersey Property.

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[7] IDB has also not demonstrated a valid basis for attorney's fees at this point.

Hyman Escava and certain of the other Escava Defendants point out that IDB commenced the present action in August 2, 2004, notwithstanding that it had previously initiated foreclosure proceedings on the New Jersey Property on July 2, 2004 and argue that, pursuant to RPAPL § 1301(3), IDB is estopped from recovery in this action.

RPAPL § 1301(3) provides that while a foreclosure proceeding is "pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." However, "New York courts have long interpreted RPAPL 1301(3) and its predecessors to have no application--and held that no election of remedies need be made--where the indebtedness is secured by a mortgage on real property located outside the state" (*Wells Fargo Bank Minnesota, N.A. v Cohn*, NYLJ, Jul. 23, 2003, at 19, col. 2 [Sup Ct, New York County, Cahn, J.] *affd* 4 AD3d 189 [1st Dept 2004]; *see Fielding v Drew*, 94 AD2d 687 [1st Dept 1983]).

Although defendants appear to concede that RPAPL § 1301 does not prohibit a litigant from commencing simultaneous actions when the property at issue is outside the state, they claim an exception to this rule, because the mortgage on the New Jersey Property contains a New York choice of law provision. There is no basis for such an exception (see *Wells Fargo Bank Minnesota, N.A. v Cohn*, NYLJ, Jul. 23, 2003, at 19, col 2 [involving a New York choice of law provision in the mortgage]). Consequently, defendants' argument fails.

Hyman, Isaac, Robert, Ralph and Nathan Escava also move for various other relief, including an order: (1) directing that IDB provide them with a detailed accounting of payments and credits made by and to IDB; (2) directing that IDB cease and desist from garnishing the

rental income from the New Jersey Property; (3) appointing a judicial hearing officer to determine how the monies garnished from the New Jersey Property are to be applied or whether they should be returned to Escava Brothers; and (4) "to assess damages upon IDB for their willful and unilateral anticipatory breach of contract." The defendants may, of course, demand from IDB Loan payment and credit information relevant to this action through discovery. The remainder of the defendants' request for relief, however, is inappropriate as the defendants have not interposed a counterclaim and there is no action against IDB here.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the defendants' motion to dismiss is denied; and it is further

ORDERED that the defendants' request for additional relief as set forth in the decision above is denied; and it is further

ORDERED that the November 17, 2005 order staying discovery in this action is vacated; and it is further

ORDERED that a conference is set for June 14, 2005, at 10:00 a.m. in Part 60.

FILED

MAY 18 2005

COUNTY CLERK'S OFFICE NEW YORK

Dated: 5/17/05

Enter:

J.S.C.

BERNARD J. FRIED
J.S.C.