

Sterling Natl. Bank v Biaggi

2006 NY Slip Op 30685(U)

September 28, 2006

Supreme Court, New York County

Docket Number: 604015/04

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

STERLING NATIONAL BANK

INDEX NO. 604015104

MOTION DATE _____

- v -
MANIO S. BIAGGI, JR.
ET AL.

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

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

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 is decided in accordance with the ~~to~~ annexed Memorandum Decision and order.

FILED
OCT 05 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Sept. 28, 2006

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----- X
STERLING NATIONAL BANK,

INDEX NO. 604015/04

Plaintiff,

-against-

MARIO BIAGGI, JR., KEITH ALLEN ORLEAN, and
PHILLIP CERVONE,

Defendants

----- X
JOAN A. MADDEN, J.:

FILED
OCT 05 2006
COURT OF CLERKS

In this action for breach of guaranty and fraud, plaintiff Sterling National Bank (Sterling) seeks recovery of more \$1.95 million in damages arising out of defendants' execution of personal guaranties to secure a loan made by Sterling to non-party Merchants Ad-Vantage Corp. (Merchants).

Motion Sequence Nos. 003, 004 and 005 are consolidated for disposition. In Motion Sequence No. 003, Sterling moves for an order: (1) pursuant to CPLR 3212, awarding partial summary judgment on its breach of guaranty claims against each defendant (First, Second and Third Causes of Action in the amended complaint), and dismissing defendants' affirmative defenses and counterclaims; (2) pursuant to CPLR 3212 (e), severing its Fourth Cause of Action for fraud, for completion of discovery and trial; (3) setting a hearing before a Special Referee to report and recommend an amount of attorneys' fees to be included in a separate money judgment; and (4) pursuant to 22 NYCRR 130-1.1, imposing sanctions on defendants for their assertion of frivolous defenses and counterclaims.

In Motion Sequence No. 004, defendant Mario Biaggi, Jr. moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the First Cause of Action for breach of

guaranty and the Fourth Cause of Action for fraud as against him. In Motion Sequence No. 005, defendants Keith Allen Orlean and Phillip Cervone move for an order pursuant to CPLR 3212 granting summary judgment dismissing the Fourth Cause of Action for fraud as against them, and an order pursuant to CPLR 2201, staying this action on the ground that a criminal investigation is being conducted which impairs their ability to defend themselves in this case.

For the reasons set forth below, Sterling's motion is granted only to the extent of awarding judgment as to liability on its guaranty claims, and defendants' motions are granted only to the extent of dismissing Sterling's fraud claim.

I. BACKGROUND

Plaintiff Sterling is a national banking association. Non-party Merchants is an entity that was engaged in the business of, among other things, making loans to businesses which were secured by the business's credit card receivables. On November 12, 1999, Merchants entered into a written Loan, Security and Service Agreement (the "Loan Agreement") with Sterling, pursuant to which Sterling agreed to lend funds to Merchants, on a revolving loan basis, in amounts to be determined by Sterling from time-to-time. Subject to the limitations of the Loan Agreement, the amount available for lending to Merchants was variable and depended on the amount of eligible collateral Merchants provided to Sterling. In other words, the more eligible collateral Merchants pledged to Sterling, the more funds were available for Sterling to lend to Merchants against that collateral. The collateral consisted of future credit card receivables that retail vendors pledged to Merchants, and Merchants, in turn, assigned to Sterling.

As an additional inducement for Sterling to enter into the Loan Agreement with Merchants, and as additional security for repayment of the amount due under the Loan

Agreement, on November 12, 1999, three of Merchants' principals, defendants Biaggi, Orlean and Cervone, each executed an identical written personal guaranty of all Merchants' liabilities under the Loan Agreement (the three personal guaranties and the Loan Agreement will be referred to collectively as the "Loan Documents"). By their express terms, the guaranties provided that Biaggi, Orlean and Cervone "absolutely and unconditionally guarantee the full and prompt payment when due" and "agree that they shall be jointly and severally bound hereunder." Sterling alleges that it performed all of its obligations under the Loan Documents, including advancing millions of dollars to Merchants.

It is undisputed that on or about September 15, 2004, Merchants defaulted in its obligations under the Loan Agreement by, among other things, failing to pay when due, payments of interest and principal. By letters dated September 15, 2004, Sterling notified Merchants and the three personal guarantors of Merchants' default under the Loan Agreement, and pursuant to the Loan Documents, demanded payment of the amount allegedly owed at that time of \$1,922,248.54, together with interest, fees and expenses, including attorney's fees.

On December 1, 2004, Sterling commenced the instant action against the three personal guarantors. The First, Second and Third Causes of Action in the amended complaint assert separate claims against each guarantor for breach of guaranty and seek a money judgment in the amount of \$1,950,848.92 together with interest from November 19, 2004 at the rate provided in the Loan Agreement, and costs, disbursements and attorney's fees. The Fourth Cause of Action for fraud is asserted against the three defendants collectively, and seeks a money judgment "in amount to be determined at trial, but not less than \$1,950,848.92, together with interest from November 19, 2004 at the rate provided in the Loan Agreement, costs, disbursements and

attorney's fees.”

Each defendant interposed an answer asserting numerous and in some instances identical affirmative defenses including fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, payment, failure to act in a commercially reasonable manner, equitable and promissory estoppel, statute of frauds, statute of limitations, waiver, release, unclean hands, failure to liquidate collateral in a commercially reasonable manner and failure to liquidate collateral on demand. Defendant Biaggi also asserted counterclaims for fraud and breach of contract.¹ Defendants Orlean and Cervone asserted a counterclaim for fraud.

Sterling now moves for partial summary judgment on its First, Second and Third Causes of Action against defendants Biaggi, Orlean and Cervone, for breach of the guaranties, and to sever for discovery and trial its Fourth Cause Action for fraud. Defendants Biaggi, Orlean and Cervone move for summary judgment dismissing Sterling's fraud claim. Biaggi also moves for summary judgment dismissing the breach of guaranty claim asserted against him, and Orlean and Cervone seek to stay the instant action based on the ongoing criminal investigation.

II. DISCUSSION

A. Sterling's Motion for Summary Judgment on its Breach of Guaranty Claims

Sterling's breach of guaranty claims arise out of defendants' execution of personal guaranties to secure loans made by Sterling to Merchants. For the reasons below, this Court concludes that each of the guaranties is binding, valid, and enforceable, and that the debt they secure remains outstanding to Sterling. Moreover, the counterclaims and affirmative defenses

¹Biaggi has withdrawn his counterclaim for violation of the Equal Opportunity Credit Act, and his affirmative defense of lack of consideration.

raised by defendants were either waived in the guaranties, or are insufficient to raise a triable issue of fact. However, based on the record before the Court, Sterling is only entitled to partial summary judgment as to the issue of liability on its guaranty claims, as Sterling fails to satisfy its prima facie burden as to the amount of the outstanding balance of the indebtedness.

To prevail on a motion for summary judgment to enforce a written guaranty, plaintiff must demonstrate, by admissible evidence, the absolute and unconditional guaranty, the underlying debt, and a failure to make the required payments. See Kensington House Co. v Oram, 293 AD2d 304 (1st Dept 2002); City of New York v Clarose Cinema Corp., 256 AD2d 69, 71 (1st Dept 1998); BNY Financial Corp. v Clare, 172 AD2d 203 (1st Dept 1991); Chemical Bank v Geronimo Auto Parts Corp., 225 AD2d 461 (1st Dept 1996). To sustain its burden on damages, plaintiff must come forward with supporting documentary evidence or an explanation as to how the total amount of the debt was calculated; conclusory allegations as to the amount due are insufficient. See HSBC Bank USA v IPO, LLC, 290 AD2d 246 (1st Dept 2002); Wamco XVII Ltd. v Chestnut Estates Development Corp., 251 AD2d 888 (3rd Dept 1998); First American Bank of New York v L.V. Lowden, Inc., 197 AD2d 774 (3rd Dept 1993); Transamerica Commercial Financial Corp. v Roy A. Matthews of Scotia, Inc., 178 AD2d 691 (3rd Dept 1991).

In support of its motion for summary judgment, Sterling submits the absolute and unconditional written personal guaranties signed by defendants, principals in Merchants, in which they irrevocably agreed to guaranty all of Merchants' obligations under the Loan Agreement. Sterling also submits an affidavit from its Senior Vice President, John Gallo and supporting documentation, including the Loan Agreement, various correspondence, and a

spreadsheet as to the amount purportedly due.² While the affidavit and the supporting documents establish prima facie that Merchants and defendant guarantors breached their obligations under the Loan Document by failing to pay when due, payments and interest and principal, Sterling fails to tender sufficient evidentiary proof as to the amount of the debt. See HSBC Bank USA v IPO, LLC, *supra*; Wamco XVII Ltd. v Chestnut Estates Development Corp., *supra*; First American Bank of New York v L.V. Lowden, Inc., *supra*; Transamerica Commercial Financial Corp. v Roy A. Matthews of Scotia, Inc., *supra*.

Sterling's original moving affidavit of John Gallo includes only a conclusory statement that the total amount due as \$1,950,848.92, without any explanation or acknowledgment as to how that amount was calculated or any supporting documentary evidence. When defendants Orlean and Cervone raised this objection in their opposition papers, Sterling responded with a reply affidavit from Gallo and a six-page spreadsheet.³ Gallo's reply affidavit, however, fails to adequately explain the basis for the calculations, as he provides nothing more than the following conclusory statements:

This amount [the \$1,950,848.92] was calculated in accordance with the applicable provisions of the Loan Agreement by charging Merchants with all advances, interest and other charges on the loan and crediting Merchants with all payments

²To the extent Defendants Orlean and Cervone object to Gallo's affidavit on the ground that it is not supported by first-hand knowledge, they are correct that Gallo's March 3, 2006 affidavit does not include a statement that it was made on first-hand knowledge. Gallo subsequently cured this defect by including a statement in his reply affidavit that his March 3, 2006 affidavit "was made by me upon first hand knowledge of the facts stated therein."

³When the parties appeared before this Court in May 2005, the Court directed Sterling to provide defendants with a spreadsheet as to the "current outstanding balance" of Merchants' loan, through April 2005. In its reply papers, Sterling submits the same spreadsheet but updated through March 2006.

made on the account through November 19, 2004. Because this was a revolving loan, and because there are so many individual transactions in the loan account, which include daily credits, debits and changes in interest rates, a more detailed explanation or documentation is not possible. . . . Attached as Exhibit 1 is a spreadsheet illustrating all advances, collections and ending balances showing a total due as of March 31, 2006 of \$2,154,762.89. This represents the amount of \$1,950,848.92 – the balance due as of November 19, 2004 I previously swore to – plus all charges and less all credits through March 31, 2006.

As indicated above, Gallo refers to the spreadsheet annexed to his reply affidavit. By itself, the spreadsheet fails to constitute evidentiary proof as to the amount of the debt. The spreadsheet lists total sums for each month in columns labeled “beginning balances,” “advances,” “collections,” and “ending balance.” Presumably, the sums on the spread sheet were taken from documents in plaintiff’s possession, but Sterling submits none of those supporting documents and submits no affidavit from an employee with actual knowledge of the underlying basis for information contained in the spreadsheet. See Transamerica Commercial Financial Corp. v Roy A. Matthews of Scotia, Inc., supra. Thus, the spreadsheet alone is insufficient to establish the amount owed.

Under these circumstances, absent sufficient supporting documentary evidence or an explanation as to how the total amount of the debt was calculated, Sterling has failed to make out a prima facie case as to the amount of the debt and the issue of damages. However, as noted above, Sterling has established a prima facie case as to the issue of liability on its claims for breach of the written guaranties, so the burden shifts to defendants to establish by admissible evidence the existence of a triable issue of fact, or a meritorious defense. See Banque Indosuez v Pandeff, 193 AD2d 265 (1st Dept 1993), lv dismissed 83 NY2d 907 (1994), appeal dismissed 86 NY2d 788, lv dismissed 86 NY2d 809 (1995); Bank Leumi Trust Co. v Rattet & Liebman, 182

AD2d 54 (1st Dept 1992).

First, with respect to defendants' assertion of affirmative defenses and counterclaims, the Court notes that the guaranties executed by defendants expressly provide that they are absolute and unconditional, and are not subject to any defenses or counterclaims raised by the guarantors as to their enforceability, or concerning the validity of the underlying debt. Specifically, each defendant guarantor acknowledged that the

guaranty agreement and obligations of the undersigned hereunder [Biaggi, Orlean and Cervone] are and shall at all time continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this guaranty agreement and obligations of undersigned hereunder. . . . This guaranty agreement sets forth the entire agreement and understanding of Bank [Sterling] and undersigned, and undersigned absolutely, unconditionally and irrevocably waive any and all rights to assert any defense, set-off, counterclaim or cross-claim of any nature whatsoever with respect to this guaranty agreement or the obligations of the undersigned or the obligations of any other person or party (including, without limitation, the Obligor) [Merchants] relating to this guaranty agreement or the obligations of the undersigned under this guaranty agreement . . .

Defendant guarantors further agreed that

in any litigation (whether or not arising out of or relating to the Liabilities of any security therefore), in which Bank [Sterling] and any of them [the guarantors] shall be adverse parties, [the guarantors] waive trial by jury and the right to interpose any defense based on any Statute of Limitations or any claim of laches and set-off or counterclaim of any nature or description.

Based on the clear and unequivocal language of these provisions, each defendant guarantor explicitly waived his right to raise any defense or counterclaim concerning the validity of the guaranty, or the underlying debt owed to Sterling, and as such, is foreclosed, as a matter of law, from asserting any defenses or counterclaims as to the validity of the guaranties. See Citibank, N.A. v Plapinger, 66 NY2d 90, 91 (1985) (language of guaranties sufficiently specific

to foreclose, as a matter of law, defenses and counterclaims asserted against plaintiff based on fraud, negligence or failure to perform a condition precedent); Palm Beach Mortgage Management, LLC v Red Tulip, LLC, 18 AD3d 379, 380 (1st Dept 2005)(guaranty in which guarantor “absolutely, unconditionally and irrevocably” waived right to assert “any defense, set-off, counterclaim or cross claim of any nature whatsoever” concerning the guaranty was sufficiently specific to constitute waiver of right to plead defenses); Raven Elevator Corp. v Finkelstein, 223 AD2d 378 (1st Dept), lv dismissed 88 NY2d 1016 (1996) (assertion of defenses properly barred as a matter of law based upon absolute and unconditional disclaimer and waiver contained in personal guaranty); New York Life Insurance Co. v Media/Communications Partners Ltd. Partnership, 204 AD2d 235 (1st Dept 1994)(summary judgment granted where defenses to guaranty barred by absolute and unconditional waiver); see generally, 63 NYJur2d Guaranty and Suretyship, § 362 (2006). Moreover, as set forth below, to the extent it could be argued that defendants’ counterclaims and defenses are not waivable, they fail to raise any triable issues of material fact

In his opposition to Sterling’s motion and in support of his motion for summary judgment, defendant Biaggi admits executing the guaranty, that Sterling funded the loan to Merchants in the amounts alleged by Sterling, and that those funds were never repaid to Sterling. Biaggi, however, contends that his obligations under the guaranty were “discharged” when Sterling changed the terms of the Loan Agreement and improperly loaned money to Merchants, without his prior written consent. Biaggi also asserts that Sterling is suing on the wrong guaranty, and that notwithstanding the waiver provisions in the guaranty, he cannot waive his defense and counterclaim for fraud, and his defenses of breach of the implied covenant of good

faith and fair dealing, failure to liquidate collateral upon demand and act in a commercially reasonable manner, and estoppel.

Specifically, Biaggi argues that Sterling, without his consent, modified the Loan Agreement by “precipitously chang[ing] the terms of the Loan Agreement and the maximum amount of availability on the loan, causing Merchants to go into an economic tailspin at the end of 2001.” According to Biaggi, Sterling also improperly altered the Loan Agreement by continuing to “fund” Merchants with loan proceeds after April 16, 2001, without Biaggi’s prior written consent, and by eliminating a so-called “thirty-day float.”⁴ Biaggi, however, identifies no specific provisions in the Loan Agreement either limiting the amount of funds loaned to Merchants, requiring Biaggi’s written or oral consent to change the amount of funds loaned, or providing for a thirty-day float. To the contrary, paragraph 1.1(b)(ii) of the Loan Agreement gave Sterling “sole and absolute discretion to increase or decrease” the \$500,000 advance limit provided under paragraph 1.1(b)(1). Furthermore, paragraph 14.1 required all amendments to the agreement to be in writing and signed by both Sterling and Merchants.

In support of his assertion that the Loan Agreement was modified to require his consent, Biaggi relies on certain documentary evidence, including his October 22, 1999 letter to Sterling, Merchants’ November 6, 1999 corporate resolution for the opening of the Sterling checking account, a signature card for the Sterling checking account, and 140 funding requests dated between January 2000 and April 16, 2001, by Biaggi to Sterling to fund Merchants’ checking account from the loan, which included Biaggi’s signature. These documents, however, are

⁴According to Biaggi, the thirty day float was a “system used by Sterling” under which Merchants’ contract would not go into default unless by the 31st day after receiving the contract from Merchants, no payment had been received by Sterling from the vendor.

insufficient to establish that the Loan Agreement was modified to require Biaggi's consent in writing or otherwise. First, Biaggi's October 1999 letter to Sterling, stating that any advance on Sterling's line of credit must be approved by both Biaggi and Orlean, predates the November 12, 1999 Loan Agreement, and is not signed by a representative of Sterling. Next, the November 9, 1999 corporate resolution was made by Merchants and not Sterling, predates the Loan Agreement and makes no reference to the Loan Agreement or Sterling's obligation to advance funds to Merchants. The signature card also does not relate to the Loan Agreement but to the Sterling checking account. Finally, the funding requests, although signed by Biaggi, do not establish any agreement by Sterling not to advance loans to Merchants without Biaggi's consent.⁵

In any event, the following provision in the guaranties expressly provides that the loan to Merchants can be increased, modified or transformed by Sterling without notice to, or the consent of the guarantors:

The undersigned [the guarantors, Biaggi, Orlean and Cervone] agree . . . that the Liabilities and the obligations of any party with respect thereto may at any time or times and in whole or in part be increased, decreased, renewed, extended, accelerated, modified, compromised, transformed or released by Bank [Sterling] as it may deem advisable, without notice to or further assent by the undersigned and without affecting the obligations of the undersigned hereunder . . .

Where, as here, the guaranty allows for changes in the terms of the underlying loan agreement, and expressly waives any right of the guarantor to receive notice or approve of any modifications to the underlying loan agreement, an alleged modification of the loan agreement will not relieve

⁵Biaggi cites National Westminster Bank USA v. Ross, 676 FSupp 48 (SDNY 1987) for the proposition that, if the lender unilaterally and materially alters the express terms of a loan agreement, without the guarantor's consent, which causes the borrower to default, the guarantor may be excused from liability. However, as determined above, Biaggi identifies no specific provision of the Loan Agreement modified by Sterling.

the guarantor of his obligations. See White Rose Food v Saleh, 292 AD2d 377 (2nd Dept 2002), aff'd 99 NY2d 589 (2003)(rejecting co-guarantor's claim that he was relieved from obligations as co-guarantor on a promissory note by a subsequent agreement, made without his consent, which modified the original terms of the promissory note); Banque Worms v Andre Café Ltd., 183 AD2d 494 (1st Dept 1992)(guarantor bound by anticipatory agreement in undertaking that he will not be relieved of liability by modification of the principal contract); Country Glen, L.L.C. v Himmelfarb, 4 Misc3d 1015(A) (Sup Ct, NY Co 2004) (guarantor not relieved of obligations if the guaranty permits changes and expressly waives notice to guarantor of such changes). Accordingly, Biaggi's position that he is not liable under the guaranty based on purported modifications to the Loan Agreement is unavailing.

Next, Biaggi argues that he is not being sued on the correct guaranty. Biaggi previously raised this identical issue when he moved to dismiss the complaint for failure to state a cause of action. By a decision and order dated June 21, 2005, this Court rejected that argument, determining that the documentary proof established that the November 12, 1999 guaranty included an express provision that it would not be terminated, superceded or cancelled by the subsequent execution and delivery of a "new agreement of guarantee," and that the June 9, 2000 guarantee, on which Biaggi relied, did not provide that it had the effect of terminating, cancelling or superceding the November 1999 guaranty. Thus, under the doctrine of law of the case, Biaggi is precluded as a matter of law from relitigating this same issue. See Martin v City of Cohoes, 37 NY2d 162 (1975); Rosso v. Beer Garden, Inc., 12 AD3d 152 (1st Dept 2004).

In opposing Sterling's motion for summary judgment, Biaggi also relies on his fraud defense and counterclaim. Although he concedes that fraud in the inducement of signing a

guarantee is not a defense to an unconditional guarantee, Biaggi argues that his fraud defense and counterclaim are viable, notwithstanding the waiver language in the guaranties, as the alleged fraud occurred after the guaranties were executed. Even assuming without deciding that Biaggi and the other defendants can assert a defense and counterclaim for fraud, it nevertheless fails as legally deficient.

To establish a claim of fraud, defendants must prove, with competent admissible evidence, the misrepresentation of a material existing fact, falsity, scienter, justifiable reliance and damages. See Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 (1996); Shisgal v Brown, 21 AD3d 845 (1st Dept 2005); Monaco v New York University Medical Center, 213 AD2d 167 (1st Dept), lv dismiss in part, den in part 86 NY2d 882 (1995).

Here, defendants have failed to demonstrate that they justifiably relied to their detriment on any representation made by Sterling regarding Merchants. In considering the element of justifiable reliance, the analysis must be viewed in the context of defendants' positions as principals of Merchants whose financial condition defendants allege Sterling misrepresented. Defendants cannot show that their alleged reliance on any representations concerning the adequacy of the collateral was justifiable or reasonable. The undisputed record establishes that during the period when Sterling allegedly made representations concerning the collateral securing Merchants' loan, each defendant had direct access to all of Merchants' online information at Sterling, and was in a position to, and in fact did, freely examine and determine the status of the collateral. Sterling submits Gallo's affidavit explaining that during the course of Sterling's loan, Merchants and its principals Biaggi, Cervone and Orlean, all had unrestricted access to Sterling's online data for their account, including cash journals showing all individual payments posted to Merchants'

accounts; dealer activity reports, which are a complete listing of loan and collateral transactions; delinquency aging reports; bounce journals which list all bounced payments on a given day; statement of charges reports which include the calculation of interest on Merchants' loan on a daily basis; schedule of new accounts assigned to Sterling by Merchants; and schedule of charge backs, which is a listing of all accounts taken out of the collateral pool. Sterling also submits copies of records maintained in the ordinary course of its business showing that during the period January 2001 through August 1, 2003, Merchants accessed the online information for its account on approximately 2,450 occasions. In fact, as Merchants' principals, defendants controlled the Merchants' accounts receivable contracts that provided the basis for the collateral calculations, and thus, cannot claim justifiable reliance. See Danann Realty Corp. v Harris, 5 NY2d 317 (1959)(fraud will not lie if the misrepresentation allegedly relied on was not a matter within the peculiar knowledge of the party against whom fraud is asserted and could have been discovered by the party allegedly defrauded through the exercise of due diligence); Petraccione v Simmons, 106 AD2d 776 (3rd Dept 1984)(where information readily available to party claiming fraud, he cannot establish justifiable reliance on alleged misrepresentation).

Furthermore, in his affidavit, Biaggi admits that he had access to all relevant information concerning Merchants' collateral, that Merchants provided the collateral to Sterling, and that he was chairman of the board of directors, an employee, shareholder and investor in Merchants. Although Biaggi generally denies having involvement in Merchants' day-to-day affairs, his affidavit includes more specific statements showing his active and substantial involvement in Merchants' operations on a daily basis, as well as its strategic planning and corporate decision-making. For example, Biaggi states that he "monitored the collateral," "sought additional

investors to participate in the Merchants' loan," "if a problem arose, Sterling would notify" him and he would "intervene to get the problem corrected." Biaggi further alleges that "John Murphy, who handled [the] loan for Sterling . . . had expressed a desire to work closely with [him] to monitor co-defendants' efforts," "the investors were very specific about requiring [him] not only to obtain information from Merchants but also in order to provide an additional safeguard and ensure that such information was both accurate and up to date, obtain information from Sterling as well."

Based upon the foregoing, defendants have failed to establish a sufficient evidentiary basis to raise any issue as to whether they justifiably relied to their detriment on any representations by Sterling. Absent the essential element of justifiable reliance, defendants' fraud defenses and counterclaims fail as a matter of law, and must be dismissed.

As further grounds for opposing Sterling's motion, Biaggi relies on his affirmative defense of breach of the implied covenant of good faith and fair dealing. Biaggi argues that notwithstanding the waiver of defenses in the guaranty, an issue of fact exists as to whether Sterling breached the implied covenant by modifying the Loan Agreement. However, as indicated above in connection with Biaggi's previous argument that his obligations under the guaranty were discharged based on Sterling's modifications of the Loan Agreement, this Court has already determined that Biaggi's allegations as to Sterling's purported alteration or modification of the Loan Agreement lack factual support in the record. See pp 10-12 *infra*. Thus, the defense of breach of the implied duty of good faith and fair dealing must be dismissed.

Biaggi next asserts that his affirmative defenses that Sterling failed to act in a commercially reasonable manner and to liquidate the collateral on demand "are recognized

affirmative defenses to a motion for summary judgment based on an unconditional guarantee.” Despite the assertion of these defenses, Biaggi produces no competent evidence demonstrating that he or any other defendant ever made any demand on Sterling to liquidate the collateral, and admits in his affidavit that he “does not even know if anyone made an appropriate demand to liquidate.” This admission is fatal to the defense. In addition, Biaggi offers no evidence showing or suggesting that Sterling took any actions that were not commercially reasonable, or that have any bearing on the enforceability of the guaranties, or that Sterling took any inappropriate actions with respect to the disposition of any collateral. Biaggi provides no factual support for his bare and conclusory allegation that Sterling diverted Merchants’ collateral for the use and benefit of a undisclosed third party’s loan. Hence, these affirmative defenses fail to raise a triable issue of fact, and must be dismissed.

Biaggi further contends that he can properly assert equitable and promissory estoppel defenses, based on the authority of Rose v Spa Realty Assoc., 42 NY2d 338 (1977). That case, however, does not deal with either a guaranty or an explicit waiver of defenses. Moreover, to successfully assert such defenses, detrimental reliance must be shown. See Prospect Street Ventures I, LLC v. Eclipsys Solutions Corp., 23 AD3d 213, 214 (1st Dept 2005); Health-Loom Corp. v. Soho Plaza Corp., 272 AD2d 179, 182 (1st Dept 2000). As determined above in connection with defendants’ fraud defenses and counterclaims, defendants cannot show that they justifiably relied to their detriment on any purported promises by Sterling regarding the collateral securing Merchants’ loan since, as principals of Merchants, they had direct access to information regarding such collateral. See pp 13-15 infra. As such, the equitable and promissory estoppel defenses must be dismissed.

While Biaggi also asserts an affirmative defense of payment, he does not allege that he, Merchants or his co-defendants paid Sterling the balance due on the loan. Rather, Biaggi simply alleges, without any evidentiary support, that Sterling's return of Advantage Capital's participation funds (i.e., funds that Advantage Capital advanced to Sterling and which Sterling subsequently loaned to Merchants) creates an issue of fact as to whether the return of those funds constitutes a "payment" by Merchants of its loan. On its face this allegation lacks merit and is insufficient to raise an issue of fact as to the defense of payment.

Biaggi's remaining affirmative defenses, in addition to being waived by the clear and express terms of the guaranty, are also without merit. The breach of fiduciary duty defense must be dismissed as no fiduciary relationship exists between a bank and its guarantor. See Bank Leumi Trust Co. v Block 3102 Corp., 180 AD2d 588 (1st Dept), ly denied, 80 NY2d 754 (1992). As to the statute of limitations defense, it is not disputed that the instant action was commenced well within six years of the September 15, 2004 declaration of Merchants' default. See Seoulbank, New York Agency v. D & J Export & Import Corp., 270 AD2d 193 (1st Dept 2000). The statute of frauds defense likewise lacks merit as Sterling's claims are based on written guaranty agreements. The lack of personal jurisdiction defense has been waived as a result of Biaggi's failure to move for dismissal on such grounds, CPLR 3211(e), and in any event, Sterling submits unrefuted evidence of proper service. The defense of unclean hands is unavailable in the instant action seeking money damages. Finally, the waiver defense must be dismissed in the absence of evidentiary proof showing or suggesting that Sterling knowingly waived any of its rights with respect to the guaranties.

Defendants Orlean and Cervone submit separate opposition to Sterling's motion for summary judgment, but do not dispute any issue as to their liability for breach of the guaranties or raise any issue as to their affirmative defenses. Orlean and Cervone do not deny executing the guaranties. They also do not deny that Sterling funded the loan to Merchants in the amounts alleged by Sterling, and that those funds were never repaid to Sterling. In fact, Orlean and Cervone submit no affidavits denying any of the facts contained in Sterling's motion papers or the amended complaint. Rather, they submit only an attorney's affirmation arguing that Sterling's motion is legally insufficient in that it is not supported by a person with personal knowledge of the relevant facts or any documentary proof or an explanation as to how the debt was calculated. Those arguments are addressed above, in the context of the determination as to whether Sterling has satisfied its burden for summary judgment by making out a prima facie case. See pp 6-7 infra.

Based on the foregoing, defendants Biaggi, Orlean and Cervone have failed to establish the existence of any triable issue of material fact or meritorious defense regarding their liability on Sterling's breach of guaranty claims. Thus, Sterling is entitled to judgment as a matter of law as to the issue of liability on its First, Second and Third Causes of Action for breach of guaranty, and the issue of damages shall be determined at trial.

B. Sterling's Attorney's Fees Claim

Sterling also seeks an award of reasonable attorneys' fees incurred in enforcing the guaranty, and a hearing before a Special Referee to report and recommend an amount of attorneys' fees to be included in a separate money judgment. Each guaranty contains the following attorney's fees provision:

The undersigned [Biaggi, Orlean and Cervone] agree that, whenever an attorney is used to collect or enforce this agreement or to enforce, declare or adjudicate any rights or obligations under this agreement, whether by suit or by any other means whatsoever, a reasonable attorney's fee shall be paid by each of the undersigned against whom this guaranty agreement or any obligation or right thereunder is sought to be enforced, declared or adjudicated.

Where as here, a guaranty includes language such as this, the guaranty "is broad enough to encompass liability for the plaintiff's attorney's fees." Chase Manhattan Bank, N.A. v Marcovitz, 56 AD2d 763, 763 (1st Dept), appeal denied 42 NY2d 807 (1977); accord Int'l Business Machines Corp. v Murphy & O'Connell, 183 AD2d 681 (1st Dept 1992), appeal dismissed 81 NY2d 783 (1993). Thus, pursuant to the attorney's fees provision in the guaranties, Sterling is entitled to an award of reasonable attorney's fees incurred in enforcing its rights under the guaranties. The issue as to the amount of such fees shall either be determined at trial or referred to a Special Referee, subject to further order of this Court.

C. Defendants' Motions to Dismiss Sterling's Fraud Claim

Defendants' motions to dismiss Sterling's Fourth Cause of Action for fraud are granted. Sterling's claim for fraud as asserted in the amended complaint, seeks a money judgment that is identical to the money judgments sought in the breach of guaranty claims, i.e. \$1,950,848.92, together with interest from November 19, 2004 (the date of the breach), at the rate provided in the Loan Agreement, and costs, disbursements and attorney's fees. Where as here, Sterling's damages are the same regardless of the theory of liability, it can only recover those damages once. See Torino v. KLM Construction, Inc., 257 AD2d 541 (1st Dept 1999); Covey v. Iroquios Gas Transmission System, L.P., 218 AD2d 197, 201 (3rd Dept 1996), aff'd 89 NY2d 952 (1997); Jallow v. Kew Gardens Hills Apartments Owners, 8 Misc3d 1018(A), 803 NYS2d 18 (Sup. Ct,

Bronx Co. 2005). Thus, as judgment has been awarded to Sterling on its guaranty claims, the alternative theory of liability based on fraud is rendered academic, and must be dismissed. See Torino v. KLM Construction, Inc., supra. In view of this dismissal, that portion of Sterling's motion to sever the fraud claim for discovery and trial is denied as moot.

D. Motion by Orlean and Cervone to Stay Action

Orlean and Cervone also move for an order staying this action, on the ground that they are "targets" of a federal criminal investigation initiated as a result of a complaint by Sterling, and both have asserted their Fifth Amendment rights against self-incrimination in this case.

In view of the Court's determination herein awarding plaintiff partial summary judgment on its breach of guaranty claims and dismissing defendants' defenses and counterclaims, and as it appears that the testimony of Orlean and Cervone is not relevant to the sole remaining issue as to the amount of damages, a stay is not warranted.

E. Sterling's Request for Sanctions

Finally, Sterling's motion for an order, pursuant to 22 NYCRR 130-1.1, imposing sanctions on defendants for their assertion of frivolous defenses and counterclaims, is denied. As Sterling has not demonstrated that defendants' defenses and counterclaims completely lack merit, sanctions are not warranted. See Rudansky v. Giorgio Armani, S.p.A., 306 AD2d 174 (1st Dept 2003); Grossman v Pendant Realty Corp., 221 AD2d 240 (1st Dept 1995), lv dismiss 88 NY2d 919 (1996).

The Court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion of plaintiff Sterling National Bank (Motion Sequence No.

004) for partial summary judgment on its First, Second and Third Causes of Action in the amended complaint is granted only to the extent of liability, and the issue of damages shall be determined at trial; and it is further

ORDERED that plaintiff Sterling National Bank is entitled to an award of reasonable attorney's fees incurred in enforcing the guaranties, and the issue as to the amount of such fees shall either be determined at trial or referred to a Special Referee, subject to further order of this Court; and it is further

ORDERED that Sterling's motion for an order imposing sanctions on defendants is denied; and it is further

ORDERED that defendants' counterclaims and affirmative defenses are dismissed; and it is further

ORDERED that the motion of defendant Mario Biaggi, Jr. (Motion Sequence No. 005) and the motion of defendant Keith Alan Orlean and Philip Cervone (Motion Sequence No.006), for summary judgment is granted only to the extent of dismissing Sterling's Fourth Cause of Action for Fraud and Sterling's Fourth Cause of Action is severed and dismissed; in all other respects defendants' motions are denied.

DATED: September 28, 2006

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J.S.C.