

HSBC Bank USA v Consorcio Empresarial Hispano
2007 NY Slip Op 30462(U)
March 26, 2007
Supreme Court, New York County
Docket Number: 0107497/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 10

Index Number : 107497/2006

HSBC BANK USA, N.A.

vs

CONSORCIO EMPRESARIAL HISPANO,

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and prelim conf scheduled for 4/29/07 @ 9:30 am in Part 10

FILED

APR 02 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: March 23, 2007

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Supreme Court of the State of New York
County of New York: IAS Part 10

HSBC BANK USA, National Association,
successor by merger to
HSBC BANK USA formerly known as
Marine Midland Bank,
successor by conversion to
Marine Midland Bank, N.A.

Plaintiffs,

-against-

CONSORCIO EMPRESARIAL
HISPANO and SEFERINO LEBRON,
Defendants.

DECISION/ORDER
Index # 107497/06
Mot Seq. #001

Present:
Hon Judith J. Gische
J.S.C.

Pursuant to CPLR sec. 2219(a) the following numbered papers were
considered by the court in connection with this motion:

PAPERS

Notice of Motion, RM affidavit, exhibits	1
EHH affid. In Opp., exhibits	2
DR reply Affirm., exhibits	3

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APR 02 2007
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Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff bank has brought this action stating six causes of action relating to an unpaid line of credit extended to defendant Consorcio Empresarial Hispano ("Consorcio"). It now seeks summary judgment on its first and second causes of action. Both defendants oppose the motion.

Issue has been joined and this motion has been brought before any note of issue has been filed. It is therefore timely and can be considered by the court on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The first cause of action is against Consorcio for failure to pay back a loan under a revolving line of credit. The second cause of action is against defendant Lebron based upon his guaranty of the loan. Defendants oppose the motion primarily claiming that they do not owe the money, plaintiff has failed to join a necessary party, plaintiff is required to proceed against its collateral before bringing this action and summary judgment should not be granted until after they have had a chance to engage in discovery. As the proponent for summary judgment, plaintiff bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to summary judgment in its favor without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851; Zuckerman v. City of New York, 49 NY 2d 557, 562 (1980). If this burden is met, only then will defendants need to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of the action. Zuckerman v. City of New York, *supra*.

Plaintiff has established its prima facie case and the following facts:

In December 2004 Consorcio, a corporation, executed a written agreement for a revolving line of credit up to \$25,000. At or about the same time co-defendant Lebron executed a written guaranty of the credit line. Consorcio drew down \$21,500 from that line of credit. Consorcio made sporadic payments toward interest due over the next several years. The principal loan was never paid. On April 7, 2006 plaintiff demanded that full amount of the loan and any unpaid interest thereon be immediately paid in full before April 18, 2006. No such payments were made.

Defendants claim that the money is not owed is rejected. They admit that Consorcio withdrew \$21,500 from the credit line and that it is still outstanding. They argue however that because they are up to date on their obligation to pay the interest, the principal amount of the loan is not due. Section 7 of the written agreement between the parties permits the bank to cancel the loan at any time, at which time the entire outstanding amounts become due. Here the bank has done just that.

Defendants argue that because the plaintiffs failed to join a necessary party they cannot proceed in this action. The claimed necessary party is the Small Business Association, which was a partial guarantor of the revolving credit line. Neither the agreements in question nor legal precedent require a bank to sue every party who may have guaranteed a loan in the same action and at the same time. This argument is ineffective to defeat summary judgment.

Defendants' argument, that plaintiff needs to first proceed against the security for the loan before proceeding directly against defendants, is also unavailing. Defendants' argument based upon RPAPL § 1301 has no application to the instant action. Moreover CPLR § 3212 (e) expressly permits a party to move for summary judgment on some but not all of their asserted causes of action.

Defendants' claim that this action is premature because there has been no discovery yet is rejected. CPLR § 3212 (f) While in certain circumstances summary judgment should be denied for the completion of discovery if the moving party has information which would be necessary to defeat the motion,

such is not the case here. Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004). The agreements and the history of payment are known to defendants and they have not indicated any other information they need, but do not have access to, that would establish a defense to this action.

Finally, any claim that the motion in chief was not technically correct because there were pages missing from the complaint annexed as an exhibit have been corrected. There is no claim that defendants were not served with a full copy of the complaint.

Accordingly it is hereby :

ORDERED that the motion for partial summary judgment is granted, and it is further

ORDERED that the first and second causes of action in the complaint are severed, and it is further

ORDERED that the clerk is directed to enter a judgment on the first cause of action in favor of plaintiff and against defendant Consorcio Empresarial Hispano, Inc. in the amount of \$21,500 plus interest at the rate set forth in the parties' agreement (prime plus 3%) from April 18, 2006 until the date judgment is entered and it is further

ORDERED that the clerk is directed to enter a judgment on the second cause of action in favor of plaintiff and against defendant Seferino Lebron in the amount of \$21,500 plus interest at the rate set forth in the parties agreement (prime plus 3%) from April 18, 2006 until the date judgment is entered and it is further

ORDERED that a preliminary conference on the remaining causes of action is set before this court on **April 29, 2007 at 9:30 am** and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 26, 2007

SO ORDERED:



J.G. J.S.C.

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