

**Sterling Natl. Bank v Biaggi**

2007 NY Slip Op 30645(U)

April 4, 2007

Supreme Court, New York County

Docket Number: 0604015/2004

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 Nat'l Bank

INDEX NO. 60401564

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 66

MOTION CAL. NO. \_\_\_\_\_

- v -

Biaggi, Mario J. Jr.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Remque decision

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 determined in accordance with the annexed decision and order.

**FILED**  
APR 10 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: April 4, 2007

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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

-----X  
STERLING NATIONAL BANK,

INDEX NO. 60401/04

Plaintiff,

-against-

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

Defendants.  
-----X

JOAN A. MADDEN, J.:

**FILED**  
APR 10 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendant Mario J. Biaggi, Jr. ("Biaggi") moves for an order pursuant to CPLR 2221 granting leave to reargue that portion of this Court's September 26, 2006 decision and order, which awarded plaintiff Sterling National Bank ("Sterling") partial summary judgment on the issue of liability as to its First, Second and Third Causes of Action in the amended complaint.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept 1979). Reargument is not intended "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application." Id at 567-568.

Applying this standard, Biaggi fails to set forth sufficient grounds for granting reargument, as he has not shown how the court misconstrued relevant facts or misapplied governing law. Rather, Biaggi merely presents new arguments that are not appropriate for resolution on reargument, and restates some of the same arguments previously considered and

properly rejected.

As to the new arguments advanced in support of reargument, Biaggi asserts that Sterling's claims should be dismissed since it will not be able to prove its damages, in light of its failure to submit sufficient proof of damages in support of its motion for summary judgment and its failure to comply with discovery demands by belatedly identifying Leonard Imperiale as a witness; Biaggi also seeks to preclude Imperiale's testimony. Even though Sterling's motion for summary judgment did not sufficiently establish a prima facie case as to damages, Sterling is nevertheless entitled to make such a showing at trial. Moreover, any issue as to compliance with discovery demands is not properly raised in this motion for reargument. However, even if the discovery issue were considered, the penalty of preclusion is not warranted, as Biaggi has not sufficiently demonstrated that Sterling's delay in identifying the witness was the result of willful or contumacious conduct which has prejudiced him. See Scherrer v. Time Equities, Inc., 27 AD3d 208, 209 (1<sup>st</sup> Dept 2006); Anagnostaros v. 81<sup>st</sup> Street Residence Corp., 269 AD2d 150 (1<sup>st</sup> Dept 2000).

As to the balance of the motion, Biaggi once again asserts, as he did in his original opposition papers, that: 1) the loan agreement between Sterling and Merchants was modified to require Biaggi's written consent prior to any loan advances; 2) Sterling breached the implied covenant of good faith and fair dealing by making loan advances without Biaggi's prior written consent; and 3) issues of fact exist as to whether Sterling failed to act in a commercially reasonable manner and to liquidate the collateral on demand. Biaggi essentially repeats and rehashes the same arguments he originally made in opposing Sterling's motion for summary judgment, which is insufficient to support a motion for reargument. See Pro Brokerage, Inc. v.

Home Insurance Co., 99 AD2d 971 (1<sup>st</sup> Dept 1994); Foley v. Roche, supra. Biaggi further fails to demonstrate that the court overlooked or misapplied the facts or any controlling principle of law in awarding Sterling partial summary judgment as to liability on its breach of guaranty claims.

Biaggi makes the identical argument that loan agreement was modified to require his written consent prior to any loan advances, and points to the same evidence he submitted in opposing the original motion.<sup>1</sup> Biaggi argues that the court improperly rejected certain documentary evidence, i.e. the 140 written “consents” from Biaggi to Sterling, and that such evidence, at the very least, creates an issue of fact as to whether the loan agreement was modified so as to permit him to depose Sterling’s witnesses to determine the existence of such modification.<sup>2</sup> Biaggi cites to the Court of Appeals decision in Rose v. Spa Realty Association, 42 NY2d 338 (1977), which holds that where a written agreement prohibits oral modification, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which is “unequivocally referable to the modification,” which means that the partial performance is inconsistent with any other plausible explanation.

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<sup>1</sup>In opposing the original motion Biaggi claimed there was a written modification to the loan agreement which required his prior written consent to any loan transfers. In connection with his estoppel defense, he also claimed there was an oral modification and cited Rose v. Spa Realty Association, 43 NY2d 338 (1977), which deals with the issue of oral modification. On reargument, Biaggi relies solely on an oral modification.

<sup>2</sup>The court’s original decision also rejected the other documentary evidence submitted by Biaggi, which consisted of a October 1999 letter from Biaggi to Sterling stating that any advance on Sterling’s line of credit must be approved by Biaggi and Orlean, which predated the November 12, 1999 loan agreement and was not signed by a representative of Sterling; a November 9, 1999 corporate resolution made by Merchants and not Sterling, which also predated the loan agreement and made no reference to the loan agreement or to Sterling’s obligation to advance funds to Merchants; and a signature card relating only to Sterling’s checking account and not the loan agreement.

See Richardson & Lucas, Inc. v. New York Athletic Club, 304 AD2d 462, 463 (1<sup>st</sup> Dept 2003).

Contrary to Biaggi's assertion, the evidence of the 141 written funding requests is not sufficient to raise a genuine issue as to the validity of the alleged oral modification. The fact that he approved or consented in writing to 141 funding requests is not "unequivocally referable" to the claimed modification requiring his written consent to *all* loan advances, as the record reveals that Sterling consistently made dozens of loan advances without any written request or consent from Biaggi.

Biaggi further argues that the court improperly dismissed his affirmative defense of breach of the implied covenant of good faith and fair dealing. To support this argument, he cites to the Appellate Division First Department decision in Sterling National Bank v. Goldberg, 277 AD2d 45 (1<sup>st</sup> Dept 2000), leave app den 96 NY2d 708 (2001), and asserts that "there is no difference between Goldberg and the case at bar," since the instant case "deals with the same plaintiff, the same unconditional guarantee, and the same affirmative defense based on the same alleged conduct by plaintiff." The court does not agree. Even though Sterling National Bank is the plaintiff in both cases, that is where the similarities end, as Goldberg does not involve the enforcement of an unconditional guaranty. Rather, defendant Steven Goldberg and his wife were the sole owners of three companies which entered into financing agreements with Sterling. Sterling sued Goldberg for conversion and replevin to recover the proceeds of a check in which it had a secured interest. The First Department held that the motion court properly granted summary judgment to Sterling on its action to recover the proceeds of the check, to which it had a superior right of possession and that such right was unaffected by Goldberg's affirmative defenses and counterclaims. The court First Department, however, reinstated Goldberg's

counterclaim for breach of the implied covenant of good faith and fair dealing, finding that issues of fact existed as to whether Sterling breached the covenant when it precipitously cut off the debtors' line of credit without notice. The Court also concluded that since Goldberg and the debtor companies were "truly one," Goldberg had standing to raise the counterclaim.

Here, however, Sterling is suing Biaggi for breach of his unconditional personal guaranty, and Biaggi answered by asserting, *inter alia*, the affirmative defense of breach of the implied covenant of good faith and fair dealing. On reargument, Biaggi asserts that an issue of fact exists as to whether Sterling breached the implied covenant by not obtaining his prior written consent to all loan advances. However, in both the original decision and on reargument, the court has rejected Biaggi's claim that the loan agreement was modified to require his prior written consent. Thus, absent an obligation on the part of Sterling to obtain Biaggi's prior written consent, Biaggi's defense predicated on the breach of such an obligation, must fail.

Finally, Biaggi argues that the court improperly dismissed his defense alleging that the collateral was disposed of in a commercially unreasonable manner, since he "should be allowed to confirm his allegations regarding the disposition of the collateral" by deposing the parties to determine whether anyone ever requested that Sterling liquidate the collateral and the details of such liquidation. In other words, Biaggi argues that summary judgment is premature and absent an opportunity "to confirm the documentary evidence and his personal beliefs, he is unable to corroborate in detail the plaintiff's unreasonable disposition of the collateral." This argument is without merit, as the "mere hope" that evidence sufficient to defeat summary judgment "may be uncovered during the discovery process is not enough." Frierson v. Concourse Plaza Assocs, 189 AD2d 609, 610 (1<sup>st</sup> Dept 1993). Rather, Biaggi must show that there is a "likelihood of

discovery leading to such evidence, i.e. that facts 'may' exist but cannot be stated at that time."

Id. Biaggi fails to satisfy this burden. He merely states that his allegations are "based upon what he's been told by the parties and the documentary evidence, such as the Farquhar release." Such bare and conclusory assertions provide no evidentiary basis to suggest that discovery may lead to relevant evidence. See Bailey v. New York City Transit Authority, 270 AD2d 156 (1<sup>st</sup> Dept 2000). Biaggi gives no details as to the substance or source of such information, and fails to explain how such information and documentary evidence, including the one document identified as the "Farquhar release," support his "personal beliefs" as to the improper disposition of the collateral, which in this case consists of accounts receivable. Under these circumstances, Biaggi offers nothing more than hope and speculation as to what evidence discovery would uncover, which is insufficient to demonstrate the likelihood of such disclosure, so as to defeat summary judgment. See Liquidation of Union Indemnity Insurance Co. v. Spira, 289 AD2d 173 (1<sup>st</sup> Dept 2001), lv app dism, 98 NY2d 672 (2002); Steinberg v. Abdul, 230 AD2d 633 (1<sup>st</sup> Dept 1996).

Accordingly, it is hereby

ORDERED that the motion by defendant Mario J. Biaggi Jr. for reargument is denied; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for April 12, 2007 at noon in Part 11, Room 351, 60 Centre Street.

DATED: April 4, 2007

ENTER:

**FILED**  
APR 10 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

J.S.C.