

**North Fork Bank v Peek A Boo'Tique, Inc.**

2007 NY Slip Op 31747(U)

June 15, 2007

Supreme Court, Suffolk County

Docket Number: 0025322/2006

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
**I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

\_\_\_\_\_  
NORTH FORK BANK,

Plaintiff,

-against-

PEEK A BOO'TIQUE, INC., DAVID B.  
KLEEMAN, FRED M. KLEEMAN, MARSHA  
C. KLEEMAN and VANESSA L. KLEEMAN,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: FEBRUARY 20, 2007  
FINAL SUBMISSION DATE: MARCH 1, 2007  
MTN. SEQ. #: 001  
MOTION: MG *CDISPSUBJ*

ORIG. RETURN DATE: FEBRUARY 20, 2007  
FINAL SUBMISSION DATE: MARCH 1, 2007  
MTN. SEQ. #: 002  
CROSS-MOTION: XMD

**PLTF'S/PET'S ATTORNEY:**  
LAZER, APTHEKER, ROSELLA & YEDID, P.C.  
225 OLD COUNTRY ROAD  
MELVILLE, NEW YORK 11747-2712  
631-761-0800

**DEFT'S/RESP ATTORNEY:**  
MICHAEL B. SCHULMAN & ASSOCIATES, P.C.  
145 PINELAWN ROAD - SUITE 310N  
MELVILLE, NEW YORK 11747  
631-622-2080

Upon the following papers numbered 1 to 10 read on this motion and cross-motion  
**FOR SUMMARY JUDGMENT**

\_\_\_\_\_  
Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers  
4-6; Replying Affirmation and supporting papers 7, 8; Replying Affirmation and supporting  
papers 9, 10; it is,

**ORDERED** that this motion by plaintiff for an Order, pursuant to  
CPLR 3212, granting summary judgment in favor of plaintiff and against the  
defendants herein, is hereby **GRANTED**; and it is further

**ORDERED** that this cross-motion by defendants for an Order,  
pursuant to CPLR 3212, granting summary judgment in favor of defendants and  
against plaintiff, is hereby **DENIED**.

The instant matter is one sounding in breach of contract and to collect upon a guaranty. On May 17, 2001, the defendant PEEK A BOO'TIQUE, INC. applied for an Elite Credit Account with the plaintiff NORTH FORK BANK. Defendants DAVID B. KLEEMAN, FRED M. KLEEMAN, MARSHA C. KLEEMAN and VANESSA L. KLEEMAN, executed the application in their capacity as officers of the corporate defendant, and also each executed a personal guaranty as set forth within the small business financial services application. The line of credit provided to defendant PEEK A BOO'TIQUE was in the amount of \$20,000.

The corporate defendant failed to make the monthly payment due on April 15, 2006, and any payments thereafter. By letter dated August 15, 2006, the plaintiff advised the corporate defendant that it was in default and demanded payment of the entire principal balance plus interest. The paragraph entitled "ENTIRE BALANCE DUE/DEFAULT" on page numbered "2" of the Elite Credit Agreement provides in pertinent part:

You will be in default and the Bank need not permit any further withdraws against your Loan Account and may require that you pay everything that you owe to it if one or more of the following occur (each such event being referred to as an "Event of Default"): (1) you fail to make any payment required hereunder when due ... .

The plaintiff seeks judgment against the corporate defendant as well as defendants DAVID B. KLEEMAN, FRED M. KLEEMAN, MARSHA C. KLEEMAN and VANESSA L. KLEEMAN, individually as guarantors. The subject agreement provides a guaranty as follows:

I/we hereby absolutely and unconditionally guaranty to NORTH FORK BANK, its successors, endorsees and ... the prompt payment and performance of all present and future obligations, liabilities, and undertakings of the applicant ... this application to the Bank ("Borrower"), including but not limited to all loans, interest, late charges, fees and attorney fees. I/we give this guaranty in consideration of the Bank granting credit to the Borrower and making loans thereunder. Each person who signs this guaranty is jointly and severally liable to

the Bank. I/we agree to pay the Bank all of its costs, expenses, and legal fees in enforcing this guaranty. The Bank does not have to proceed against the Borrower or any security before seeking recovery from me/us. I/we will be liable hereunder regardless of the validity or enforceability (sic) of the obligation of the Borrower.

In opposition to plaintiff's motion, defendants have filed a cross-motion seeking summary judgment in favor of defendants dismissing plaintiff's complaint. Defendants argue that they were unaware the application they signed contained a personal guaranty, and that if they were aware of such a guaranty, they never would have executed the application. Further, defendants argue that the personal guaranty contained in the application was misleading and ambiguous, in violation of General Obligations Law § 5-701(2). However, the Court notes that defendants have not disputed the fact that the credit line is in default, or the amounts claimed by plaintiff thereunder.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that the plaintiff has made an initial *prima facie* showing of entitlement to judgment as a matter of law (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361,

*supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The burden then shifted to the defendants to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). It is undisputed that the corporate defendant, by its officers, executed the elite agreement, failed to make payment thereunder and, pursuant to the terms of the agreement, is in default. Accordingly, plaintiff has met its burden with respect to the corporate defendant.

With respect to defendants, DAVID B. KLEEMAN, FRED M. KLEEMAN, MARSHA C. KLEEMAN and VANESSA L. KLEEMAN, an unambiguous personal guaranty with proof of non-payment generally lends itself to summary relief (see *North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676 [2007]; *Moezinia v Baroukhian*, 247 AD2d 452 [1998]; *Vamattam v. Thomas*, 205 AD2d 615 [1994]). Herein, the plaintiff has also met its burden. It is undisputed that the defendants, DAVID B. KLEEMAN, FRED M. KLEEMAN, MARSHA C. KLEEMAN and VANESSA L. KLEEMAN executed the subject agreements which contained the personal guaranty, that the defendants defaulted on the promissory agreement, and as of January 2, 2007, are in default in the amount of \$12,151.66. It is well-settled that where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement (see *National Westminster Bank v Sardi's, Inc.*, 174 AD2d 470 [1991]; *Manufacturers and Traders Trust Company v Weiss*, 169 AD2d 632 [1991]; *State Bank of India v Patel*, 167 AD2d 242 [1990]). Notwithstanding the individual defendants' allegations, the Court finds that the agreement clearly provides for a personal guaranty on the page that they executed.

In view of the foregoing, plaintiff's motion for summary judgment as against all defendants is granted, and defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and Order of the Court.

SUBMIT JUDGMENT

Dated: June 15, 2007

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court