

**Great Plains Capital Corp. v Elli's Plates &  
Collectibles, Ltd.**

2007 NY Slip Op 31881(U)

June 22, 2007

Supreme Court, Suffolk County

Docket Number: 0026137/2005

Judge: Peter Fox Cohalan

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INDEX # 26137-05  
 RETURN DATE: 5-5-06  
 MOT. SEQ. # 001 & 002

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

**PRESENT:**

Hon. PETER FOX COHALAN

-----x  
 GREAT PLAINS CAPITAL CORPORATION as  
 successor in interest to FLEET NATIONAL BANK, as  
 successor in interest to NATWEST BANK, N.A.,

Plaintiff,

-against-

ELLI'S PLATES & COLLECTIBLES, LTD. and DAVID  
 BILSKY, Individually,

Defendants.  
 -----x

CALENDAR DATE: January 24, 2007  
 MNEMONIC: Mot D. ; XMG; C/Disp.

PLTF'S/PET'S ATTORNEY:

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 Port Washington, NY 11050

DEFT'S/RESP ATTORNEY:

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment \_\_\_\_\_;  
 Notice of Motion/Order to Show Cause and supporting papers 1-13 \_\_\_\_\_; Notice of Cross-Motion and  
 supporting papers 14-18 \_\_\_\_\_; Answering Affidavits and supporting papers 19-28 \_\_\_\_\_;  
 Replying Affidavits and supporting papers 29-32 \_\_\_\_\_; Other \_\_\_\_\_; and after hearing counsel in  
 support of and opposed to the motion it is,

**ORDERED** that this motion and cross-motion by the plaintiff, Great Plains Capital Corporation (hereinafter Great Plains) as successor in interest to Fleet Bank et. al., and the defendant, David Bilsky (hereinafter Bilsky) for summary judgment pursuant to CPLR §3212, respectively, are hereby decided as follows;

**ORDERED** that the plaintiff's motion for summary judgment pursuant to CPLR §3212 is granted as to the defendant, Elli's Plates & Collectibles, LTD. (hereinafter Elli's) and the plaintiff is awarded judgment in the amount of \$30,415.31 with interest from January 15, 2003 and denied as to Bilsky;

**ORDERED** that Bilsky's motion for summary judgment and dismissal of the plaintiff's complaint as against him, pursuant to CPLR §3212 on the alleged written guarantee is granted and the plaintiff's action is dismissed against Bilsky.

The plaintiff instituted this action against Elli's for a sum of money allegedly owed on a Business & Professional Line of Credit and Security Agreement executed on February 21, 1996 by the President of Elli's, Eleanor Bilsky (now deceased). Elli's operated from 35 Betty Ann Drive in Centereach, Suffolk County on Long Island, New York. I was granted a \$40,000 business line of credit with NatWest Bank N.A. (hereinafter NatWest). This credit line was individually guaranteed by Eleanor Bilsky, David Bilsky and Noreen Bilsky and the plaintiff as successor in interest claims the business credit line was renewed on December 19, 2001 with a maturity date of November 16, 2006. The plaintiff claims that Fleet National Bank (hereinafter

Fleet) assumed this obligation from NatWest and that Great Plains is the successor in interest to Fleet. There is presently owing on the revolving credit line \$30,415.31 plus interest from January 15, 2003 and the plaintiff instituted this lawsuit against the company, Elli's, and one of the guarantors, David Bilsky, though it is unexplained why the guarantor Noreen Bilsky is not named, though the guarantor, Eleanor Bilsky, is now deceased.

The plaintiff now moves for summary judgment pursuant to CPLR §3212 on its complaint seeking the sum of \$30,415.31 plus interest from January 15, 2003 as against Elli's and Bilsky, one of the guarantors of Elli's business line of credit. Elli's has not appeared or opposed the motion but Bilsky has and argues that Great Plains has not established its standing to bring this lawsuit as successor in interest to NatWest and Bilsky also claims that while he signed the original guarantee with NatWest, he never re-signed or acknowledged or permitted his guarantee to be renewed when the obligation (line of credit) was subsequently renewed by Fleet on December 19, 2001.

For the following reasons, the plaintiff's motion for summary judgment pursuant to CPLR §3212 is granted as to Elli's and the plaintiff is awarded judgment against Elli's in the amount of \$30,415.31 with interest from January 15, 2003 and the motion is denied as to the defendant Bilsky. Bilsky's cross-motion for summary judgment and dismissal of the plaintiff's complaint as against him pursuant to CPLR §3212 on the alleged written guarantee is granted and the plaintiff's action is dismissed against Bilsky.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of

fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. **S.J. Capelin Assoc., v. Globe**, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [**VanNoy v. Corinth Central School, District**, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. **DiSabato v. Soffee**, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); **Usefof v. Yamali**, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980). Here, in the case at bar, the plaintiff has established its entitlement to summary disposition pursuant to CPLR §3212 on the business line of credit established for Elli's and it is awarded judgment in the amount of \$30,415.31 with interest from January 15, 2003 along with costs and disbursements associated with this action. Notwithstanding Bilsky's argument that the plaintiff, Great Plains, did not establish its standing as successor in interest, plaintiff indeed established that NatWest, the originator of the commercial line of credit, was merged into Fleet in May 1996 along with all its assets including all outstanding loans. On June 13, 2005 Fleet merged into Bank of America National Association and Elli's commercial business line of credit was sold and assigned to Great Plains. Therefore, Great Plains has standing to sue and is a proper party to seek a judgment for the amounts due and owing under the Business & Professional Line of Credit and Security Agreement executed on February 21, 1996 by Elli's and allegedly guaranteed by the co-defendant, Bilsky.

However, having reached that result, the plaintiff is denied summary disposition as against the individual guarantor Bilsky because the plaintiff is unable to establish that Bilsky's guarantee survived the first maturity date in 1997 nor can the plaintiff establish that the line of credit renewed by Fleet with Elli's in 2001 was adopted or ratified by Bilsky. Bilsky has set forth sufficient proof that he never re-signed or acknowledged a continuing guarantee of Elli's debt and therefore, the plaintiff's motion is denied and Bilsky's cross-motion is granted and the plaintiff's action against Bilsky is dismissed.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. **Romano v. St. Vincent's Medical Center of Richmond**, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); **Barrett v. General Electric Company**, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); **McCormack v. Graphic Machinery Services, Inc.**, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). Here, in the instant case, the plaintiff has failed to assemble or bare its proof as to

what, if any, actions Bilsky did to re-acknowledge that his guarantee survived the renewal of Elli's debt not only beyond the 1997 maturity date but the subsequent five year period from the original line of credit. As Bilsky notes, he never guaranteed Elli's debt to Fleet or signed any documents to establish a continuing guarantee that would run forever with Elli's obligation.

The plaintiff is unable to establish any proof or even raise an inference from some fact pattern suggesting that Bilsky guaranteed Elli's debt past its original maturity date and subsequently when the Business & Professional Line of Credit and Security Agreement was renewed by Elli to Fleet in 2001. The agreement between Elli and NatWest provided in paragraph 2 B that "unless extended in writing by the bank, this agreement shall terminate... on August 31, 1997." Surely, if the original obligation is renewed for an additional five years in December 2001, some four years after its original expiration, there must be some writing, representation or agreement by the guarantors to the financial institution that their guarantee is a continuing one. See, 665-75 Eleventh Ave. Realty Corp. v. Schlanger, 265 AD2d 270, 697 NYS2d 270 (1<sup>st</sup> Dept. 1999); 29 Holding Corp. v. Diaz, 3 Misc.3rd 808, 775 NYS2d 807 (2004); But see, Oak Beverage, Inc. v. Erlich, 224 AD2d 403, 637 NYS2d 758 (2<sup>nd</sup> Dept. 1996). The plaintiff's inability to raise an issue of fact as to the survival of Bilsky's guarantee past its original maturity date is fatal to its claims against Bilsky and warrants summary disposition to Bilsky and dismissal of the action as against him. See, GOL §5-701 (2). This case is unlike the fact pattern in North Fork Bank v. R & T Corp. of OW, 279 AD2d 512, 719 NYS2d 265 (2<sup>nd</sup> Dept. 2001) wherein the guarantee was clear, continuing in nature and contemplated not only renewals and extensions but extinguishment could be achieved only in writing by the guarantor. While the Court finds Great Plains has standing to bring this action, the statute of limitations applies and the action against Bilsky is time barred as Bilsky's guarantee of Elli's debt matured on August 31, 1997 and more than six years has elapsed to bring suit on Bilsky's guarantee. In any event, the plaintiff is unable to show that Bilsky's guarantee was a continuing one and was re-established or reaffirmed when the line of credit was renewed in 2001.

As has been stated so many times in the past, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. V. Savino Oil and Heating Co. Inc. v. Rana Management Corp., 161 AD2d 635, 555 NYS2d 413 (2<sup>nd</sup> Dept. 1990); Dabney v. Ayre, 87 AD2d 957, 451 NYS2d 218 (3<sup>rd</sup> Dept. 1982). See, also, Marine Midland Bank N.A. v. Idar Gem Distributors, Inc., 133 AD2d 525, 519 NYS2d 898 (4<sup>th</sup> Dept. 1987). Accordingly, Bilsky's cross-motion for summary judgment and dismissal of the plaintiff's complaint as against him pursuant to CPLR §3212 on the alleged written guarantee of Elli's debt, dated February 21, 1996 is granted and the plaintiff's action is dismissed against Bilsky.

As the Court noted in Andre v. Pomeroy, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

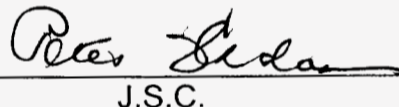
"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (Millerton Agway Co-op v. Briarcliff Farms, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

The plaintiff is granted judgment as to defendant Elli's Plates & Collectibles, LTD. and is awarded judgment in the amount of \$30,415.31 with interest from January 15, 2003 along with costs and disbursements associated with this action. The action against David Bilsky is dismissed for the reasons stated herein.

#### **Settle Judgment**

The foregoing constitutes the decision of the Court.

Dated: June 22, 2007



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J.S.C.