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

PRESENT: CAROL EDMEAD J.S.C. PART 35
Justice

Ralph Marolda and Irving Rakoff

- v -

Daniel Multer and Aaron Matalon

INDEX NO. 112205/06

MOTION DATE 06/27/07

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

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

	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

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant Daniel Multer for an order pursuant to CPLR 3212, granting summary judgment against and dismissing the complaint of plaintiffs Ralph Marolda and Irving Rakoff, is granted. It is further

ORDERED that counsel for defendant Daniel Multer shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

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

Dated: 07/02/07

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

RALPH MAROLDA and
IRVING RAKOFF,

Plaintiffs,

-against-

DANIEL MULTER and
AARON MATALON,

Defendants.

Index No. 112205/06

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Daniel Multer ("Multer") moves for an order pursuant to CPLR 3212, granting summary judgment against and dismissing the complaint of plaintiffs Ralph Marolda ("Marolda") and Irving Rakoff ("Rakoff") (collectively "plaintiffs"), on the ground that there is no valid guaranty between plaintiffs and Multer.

Multer's Contentions

Although plaintiffs have already discontinued this action as to defendant Aaron Matalon, they refuse to discontinue the action as to Multer despite the fact that there is no complete, written instrument subscribed to by Multer.

According to Multer's Verified Bill of Particulars, Multer explicitly advised plaintiffs of Multer's defenses based upon the lack of a written guaranty.

Plaintiffs' Contentions

Multer waived and is barred from raising the defense of the Statute of Frauds because he failed to assert said defense in either his answer or a motion to dismiss. And, plaintiffs have been

prejudiced because they have already served discovery notices without notice that defendant was raising a Statute of Frauds defense. Further, if Multer is permitted to assert said defense, issues of fact exist since Multer clearly placed his mark at the end of the Guaranty at issue. This mark seems to be the initials "DM" circled, and is the same mark that is used to execute the lease agreement on behalf of Lex 70 Corp.

That the Guaranty is not dated or does not name a guarantor is of no consequence. There is no requirement for a contract to be dated in order to satisfy the Statute of Frauds. Marolda avers that Multer placed his mark at the end of the Guaranty in his presence. This is sufficient to raise an issue of fact regarding Multer's denials.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce

admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Wiaver and Bar to Raising Statute of Frauds

It is well settled law that if an affirmative defense is not raised in the answer or on a motion to dismiss, it will be considered waived (*see* CPLR 3018[b]; 3211[e]; *Rogoff v.San Juan Racing Assn.,* 54 N.Y.2d 883, 885, 444 N.Y.S.2d 911, 429 N.E.2d 418 [1981]; *Sheils v County of Fulton,* 14 A.D.3d 919, 920-921, 787 N.Y.S.2d 727 [2005], *lv. denied* 4 N.Y.3d 711, 798 N.Y.S.2d 724, 831 N.E.2d 969 [2005]; *Allen v Matthews,* 266 A.D.2d 782, 784, 699 N.Y.S.2d 166 [1999]). Here, however, defendant Multer did sufficiently raise the statute of frauds as an affirmative defense in his answer. Plaintiffs cannot claim prejudice or surprise since the answer with the bill of particulars put them on notice that this was a defense (*cf. Blechner v Pecoraro,* 164 A.D.2d 878, 559 N.Y.S.2d 553 [1990]).

The invalidity of the guaranty sued on may be established from the affirmative defense in the answer to the complaint itself, when read in conjunction with the Verified Bill of Particulars. When the statute of frauds is raised by motion for judgment on the pleadings as amplified by the bill of particulars, on such motion, the affirmative defense in the answer and the bill of particulars must be read together, and, when so read, they are deemed to constitute one pleading. Based on such unified pleading, the affirmative defense of statute of frauds is timely and not waived. The defendant's response to Demand No. 1 states: "Plaintiffs have failed to allege with sufficient specificity the existence of a written guaranty, the date of any alleged guaranty and the parties to the alleged guaranty."

Statute of Frauds

The statute was not meant to be utilized to evade an obligation intentionally incurred.

Subscription is required since it constitutes proof of assent to the terms of the guarantee, is associated with seriousness and deliberation, and confirms the guarantee's existence and the intent of the guarantor to be bound. (*See, Travelco, Inc. v Chain Locations of America, Inc.*, 170 A.D.2d 939, 566 N.Y.S.2d 763; *Cohrn v Sadler*, 147 A.D.2d 922, 537 N.Y.S.2d 366; *Ahouse v Herbert*, 78 A.D.2d 713, 432 N.Y.S.2d 274.) The signature required does not necessarily have to be written in ink at the bottom of the purported guarantee but may include any symbol or signature; whether written, printed or stamped; on any part of the document so long as the intent to be bound is demonstrated. (*See*, B. Wright, The Law of Electronic Commerce 16.3 **952 et seq.*, 16.4 *et seq.*; **1021 *Bazak International Corp. v Mast Industries, Inc.*, 73 N.Y.2d 113, 538 N.Y.S.2d 503, 535 N.E.2d 633.)

In the instant case, the guaranty:

- does not identify the guarantor
- is undated
- is not executed by signature of anyone

There is no evidence of prejudice to plaintiffs.

Conclusion

Plaintiffs have no cause of action here at law on the "guaranty." The statute of frauds would prevent them from holding defendant Multer liable under a writing which he did not sign. Based on the foregoing, it is hereby

ORDERED that the motion of defendant Daniel Multer for an order pursuant to CPLR 3212, granting summary judgment against and dismissing the complaint of plaintiffs Ralph Marolda and Irving Rakoff, is granted. It is further

ORDERED that counsel for defendant Daniel Multer shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: July 2, 2007

Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.