

**Commercial Servs. of Perry, Inc. v Permanent
Foliage, Inc.**

2007 NY Slip Op 32108(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0602563/2006

Judge: Richard B. Lowe

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOWE

PART 56

Index Number : 602563/2006
COMMERCIAL SERV. OF PERRY, INC
VS
PERMANENT FOLIAGE INC.
Sequence Number : 001
DEFAULT JUDGMENT

INDEX NO. 602563/06
MOTION DATE 5/18/07
MOTION SEQ. NO. 001
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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/26/07

RICHARD B. LOWE III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X

COMMERCIAL SERVICES OF PERRY, INC., as
Assignee of FDIC as Receiver for Reliance Bank,

Index No: 602563/06

Plaintiff

-against-

DECISION AND ORDER

PERMANENT FOLIAGE, INC., PERMANENT
FOLIAGE INTERNATIONAL, INC.,
JOHN H. WALKER, and BRENDA J. JOHNSON

Defendants

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

RICHARD B. LOWE III, J:

Plaintiff Commercial Services of Perry, Inc, as Assignee of FDIC as Receiver for Reliance Bank ("Plaintiff"), brings the instant action against Defendants Permanent Foliage, Inc ("Permanent Foliage"), Permanent Foliage International, Inc. ("Permanent International"), John H. Walker ("Walker"), and Brenda J. Johnson ("Johnson") (collectively, "the Defendants") for payment on a loan and for the possession of the assets that secured said loan. ¹ Defendants Permanent Foliage, Permanent International, and Walker assert affirmative defenses that the assets were not secured properly and the entire claim is without merit. They also counterclaim that the Plaintiff made false

¹ On March 28, 2007, Johnson filed for bankruptcy pursuant to Chapter 7 of the U.S. Bankruptcy Code. Accordingly, the action against her is stayed under *11 U.S.C. § 362*.

representations in order to induce them to enter into the contractual relationship. In the instant motion, the Plaintiff moves pursuant to CPLR 3212 for summary judgment on its claims, and the Defendants' affirmative defenses and counterclaim. The Defendants oppose the motion.

BACKGROUND

Permanent Foliage is organized and exists under New York law, with its principal place of business in New York County. It is engaged in the business of creating artificial botanical arrangements. Permanent International is also a New York company with its place of business here.

On or about December 28, 2000, Permanent Foliage entered into a Revolving Credit Agreement in connection with the receipt of credit-line financing from Reliance Bank. Pursuant to the agreement, Reliance Bank was to make loan advances to Permanent Foliage in the maximum principal amount of \$150,000.00. Permanent Foliage agreed to pay interest on the aggregate loan advances on the first of each month commencing on February 1, 2001. The interest was to be a variable rate of 2 3/4% above the "Prime Rate" as published in the *Wall Street Journal's Money Section*. In the event of default, the interest rate would increase to the lesser of 5% above the pre-default interest rate or the maximum interest rate permitted by law.

Reliance Bank advanced \$150,000.00 in loans to Permanent Foliage between December 28, 2000 and December 31, 2003. Permanent Foliage originally agreed to repay the principal and interest by January 1, 2004. However, on that day the parties entered into an Agreement of Modification and Extension, which extended the due date of the then- outstanding \$146,351.81 in principle and interest to July 10, 2004.

In addition to the Revolving Credit Line issued on December 28, 2000, the parties executed a term-loan agreement in the amount of \$50,000.00, with an initial 11 3/4% *per annum* interest rate.

This rate was to adjust on the first of every month, commencing on February 1, 2001, to reflect 2 1/4% above the prime rate published in *The Wall Street Journal*. Upon each interest-rate adjustment, the monthly payment was to adjust to reflect the sum necessary to amortize the then-outstanding principal balance. Payments were to commence on February 1, 2001. In the event of default, a late charge equal to 5% of the amount due and not paid would be assessed.

On December 28, 2000, Permanent Foliage executed a security agreement with Reliance Bank. The former granted the latter a security interest in all of its assets in order to secure the obligations under the Revolving Credit and Term Loan agreements. The Plaintiff avers that the security interest was perfected when it a) advanced the loans and b) filed a financing statement with the New York Secretary of State. Upon Permanent Foliage's default, the security agreement permits Reliance Bank to enter the former's premises and take possession of the collateral. The Defendants dispute that Permanent Foliage's assets remain encumbered with a security interest.

Walker is a New York resident, domiciled in Queens County. Johnson is also a New York residence, and is domiciled in New York County. Walker is Permanent Foliage's president; Johnson is one of its Managing Directors. The Plaintiff alleges that Walker and Johnson individually and jointly guaranteed the aforementioned loans. They also allege that Walker and Johnson executed Pledge and Security Agreements, which granted Reliance a security interest in shares of common stock issued by Permanent Foliage that they owned.

On or about March 19, 2004, the Federal Deposit Insurance Corp. ("FDIC") was allegedly appointed Reliance Bank's receiver. By virtue of this appointment, FDIC assumed Reliance Bank's assets, which included the rights under the agreements with Permanent Foliage. On or about May 30, 2006, the FDIC allegedly assigned its rights and interest in Permanent Foliage's obligations to

the Plaintiff.

The Plaintiff avers that Permanent Foliage defaulted on its obligations, and it commenced the instant action on July 15, 2006. The Plaintiff alleges that it is owed \$190,089.48 on the revolving credit loan, which includes unpaid loan advances of \$146,226.20; interest of \$27,738.34; and late charges of \$16,124.94. Additionally, it avers that it is owed \$27,904.55 on the term loan, which includes \$19,867.14 in principal; \$3,653.85 in interest; and \$4,383.56 in late fees. They also allege that Permanent Foliage fraudulently transferred its assets to Permanent International in order to prevent the Plaintiff from taking possession.

In the instant action, the Plaintiff seeks the money it contends it is owed, as well as possession of the collateral allegedly used to secure the loan obligations. In their answer, the Defendants raise the affirmative defenses that the Plaintiff's security in the assets is defective and that the complaint fails to state a claim. They also assert a counterclaim that Reliance Bank made the false representation that it was solvent when the contract was formed in order to induce Permanent Foliage to enter into it.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (*CPLR 3212 [b]*), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). "The motion must be supported by an affidavit of a person having knowledge of the facts. . ." (*S.J. Capelin Associates, Inc v Globe Mfg. Corp*, 34 NY2d 338 [1974].) However, when the affidavit is based upon documentary evidence that is admissible at trial, "it is sufficient to support a motion for summary judgement." (*Marine Midland*

Bank, NA v Embassy East, Inc., 160 AD 2d 420 [1st Dept 1990].) To defeat a summary judgement motion, the opposing party must “show facts sufficient to require a trial of any issue of fact” (*CPLR* 3212 [b]).

I. The First, Second, and Fourth Causes of Action/ The Fifth Affirmative Defense : Payment on the Loans

The Plaintiff’s first and second cause of action seeks the payment it avers it is owed on the Revolving Credit and Term-Loan Agreements, respectively. (*See, Complaint at pages 10-11, ¶ 32; at page 11, ¶ 34*) In the fourth cause of action, it seeks recovery from Walker, as the alleged guarantor, on the loan agreements. (*See, Id at page 12, ¶ 38*)² The Defendants aver that the entire complaint fails to state a cause of action. (*See, Answer at page 2, ¶ 9*)³

“A contract must be interpreted in accordance with the intention of the parties and where their intention is unequivocally set forth in the agreement, the language used controls.” (*Kohman v Rochambeau Realty & Development Corp.*, 17 AD 3d 151 [1st Dept 2005].) This is to say that, where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of the writing alone. (*Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986].) “Clear and complete writings should generally be enforced according to their terms. . .” (*Collins v E-Magine, LLC*, 291 AD 2d 350 [1st Dept 2002].) Here, there are three contracts that the Plaintiff contends it is owed money under: the Revolving Credit Agreement, the Term-Loan Agreement, and the Guaranty Agreement.

² *See, supra*, Note 1.

³ The Defendants’ Answer’s paragraphs are misnumbered; there are two paragraphs labeled number 9. The first paragraph 9 asserts the affirmative defense; the second one is the first of three paragraphs alleging the counterclaim.

Here, the Revolving Credit Agreement, dated December 28, 2000, provides that

[Reliance] Bank has agreed to establish a revolving credit facility in favor of [Permanent Foliage] in the maximum principal amount of ONE HUNDRED FIFTY THOUSAND AND 00/100 DOLLARS (\$150,000.000) on the terms and conditions set forth below. . .

(Memo at Law, Ex A at page 1)

Furthermore, it initially provided that it had a January 1, 2004 maturity date, and was signed by Walker on behalf of Permanent Foliage, and Gregory D. Hasel, on Reliance Bank's behalf. *(See, Id at page 2, § 1.13; at page 15)* The maturity date, however, was amended in the Agreement of Modification and Extension of Loan, which provided that

[A]s of January 1, 2004, the unpaid principal balance of the Loan is \$146,351,81 plus accrued interest. . .[and]. . .the Maturity Date of the Loan. . .shall be extended to July 10, 2004.

(Id, Ex B, at page 2, ¶ 1-2)

Furthermore, this extension was signed again by Walker on behalf of Permanent Foliage, and Christopher Strauss on Reliance's behalf. *(See, Id, at page 3)*

Here, the Term-Loan Agreement, dated December 28, 2000, provides that

[Reliance] Bank has agreed to make a term loan to [Permanent Foliage] in the principal sum of FIFTY THOUSAND AND 00/100 DOLLARS (\$50,000.00) on the terms and conditions set forth herein. . .

(Memo at Law, Ex C at page 1)

The agreement also provides that the maturity date is December 28, 2005, and is signed again by Walker and Hasel. *(See, Id at page 2, § 1.18; at page 13)*

Finally, the Guaranty and Suretyship Agreement, dated December 28, 2000, provides that

To induce [Reliance] Bank to make loans, extensions of credit, or other financial accommodations to [Permanent Foliage]. . .and with full knowledge that [Reliance] Bank would not make the said loans. . .without this Guaranty and Suretyship Agreement. . .each Guarantor, jointly and severally and unconditionally agrees [to guarantee the loans]. . .

(Id, Ex D, at page 1)

Walker and Johnson signed the agreement, obligating them as the Revolving-Credit and Term-Loan Agreement's Guarantors. *(Id at page 11)*

As to the default, the Plaintiff proffers Don Wilson's affidavit. Wilson is the Plaintiff's asset manager, and is charged with calculating the amount in arrears from any loans originating or acquired by the Plaintiff. *(See, Wilson Reply Aff'd at page 2, ¶ 5)* Attached to the affidavit is a document entitled "Revolving Credit Obligation", which itemizes the amounts allegedly due on the loan and the interest calculation. *(Wilson Aff'd, Ex K)* Furthermore, Wilson attaches a letter sent to Permanent Foliage demanding payment on the loan as proof that Permanent Foliage is in arrears. *(Id, Ex L)* But Wilson does not attest to how he calculated the amount due. Nor does the demand letter prove as a matter of law that the Defendants are indeed in default.

The Defendants do not deny they are in default. Walker attests that Permanent Foliage entered into the loan agreements with Reliance Bank, and made all payments on the loan up to and including February 2004. *(See, Walker Aff'd, at pages 4-5, ¶ 10 & 13)* Indeed, he acknowledges that \$19,867.00 remain outstanding on the Term-Loan, and the "line of credit was almost fully utilized." *(Id, at page 4, ¶ 10)* This comports with the Plaintiff's allegation that the loan is in default. "When the language of a loan agreement is plain and unambiguous", a court may grant summary judgment based on the borrower's payment default. *(Campione v Rose Hill Property Assoc., 216 AD 2d 130 [1st Dept 1995].)* Accordingly, the Defendants fail to raise a triable issue of fact as to whether they defaulted on the loan.

The Defendants aver that the Plaintiff's motion is procedurally defective because it does not contain an affidavit from someone with personal knowledge about the loans and guarantee's

execution. (*See, CPLR 3212(b)*) However, the Plaintiff's proffer the relevant loan documents along with Walker's guarantee, which are sufficient alone to warrant the granting of a summary judgment motion. (*See, Olan v Farrell Lines, Inc, 64 NY 2d 1092 [1985].*) Accordingly, this assertion does not raise an issue of fact with respect to the loan's default.

Finally, the Defendants contend that there is a factual, triable issue as to whether the FDIC was appointed Reliance Bank's receiver and whether the Plaintiff was actually assigned the rights pertaining to the Reliance-Permanent Foliage agreement. In support of its motion, the Plaintiffs offer Wilson's affidavit, whose role "is to supervise the purchase by Plaintiff of defaulted loans from various sources, including. . .[the FDIC]. . .[and]. . .calculate the sums due for the defaulted loan and keep a running account of any additional arrears. . ." (*Wilson Reply Aff'd, at pages 1-2, ¶ 3-4*) Attached to the Wilson affidavit is a letter, with the State of New York's Banking Department's letterhead, appointing the FDIC as Reliance Bank's receiver. (*See, Wilson Aff'd, Ex J*) In addition, Wilson attests that "on or about May 30, 2006, the FDIC assigned its right[s]. . .in the Revolving Credit and Term Loan agreements to plaintiff for valuable considering." (*Wilson Aff'd, at page 8, ¶ 21*) Wilson, as the Plaintiff's employee charged with collecting loans, knows first-hand about FDIC's receivership appointment and the Plaintiff's assignment.

This Court finds that, as a matter of law, the Defendants are in default of the Revolving Credit and Term Loan Agreements. Accordingly, the Plaintiff's motion for summary judgment on the first, second, and fourth causes of action, along with the fifth affirmative defense, is granted.

II The Third Cause of Action/First-Fourth Affirmative Defenses: The Collateral's Securitization

The Plaintiff's third cause of action seeks to take possession of the collateral that secured

both the Revolving Credit and Term Loan. (*See, Complaint at page 11, ¶ 36; at page 13, ¶ 44*) The Defendants' first and fourth affirmative defenses aver that the Plaintiff failed to properly perfect its security interest, and continue said perfection. (*See, Answer at page 1, ¶ 2; at page 2, ¶ 7-8*)

Pursuant to the General Security Agreement

Debtor hereby grants to Secured Party a continuing security interest in and a right of setoff against. . .to secure the payment. . .of all indebtedness. . .[and]. . .the Collateral is described in Schedule A.

(*Memo in Law, Ex E, § 3*)

Furthermore, Schedule A provides, summarily, that Plaintiff has a security interest in Permanent Foliage's inventory, equipment, fixtures, accounts, chattel paper, instruments, documents, and general intangibles. (*Id*) Walker signed the agreement on Permanent Foliage's behalf. (*Id*)

"A filed financing statement is effective for a period of five years after the date of filing."

(*UCC § 9-515(a)*) "The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed. . ." (*UCC § 9-515(c)*) "A continuation statement may only be filed within six months before the expiration of the five-year period. . ." (*UCC 9-515(d)*)

Here, the Plaintiff proffers a financing statement, filed with the State of New York, which provides a security interest in the aforementioned collateral. However, this statement was filed in May 2006. (*Memo in Law, Ex H*) The Plaintiff does not proffer a financing statement from 2000 or 2001, when the security agreement was executed. Rather, they offer something labeled a "Uniform Commercial Code Report", which does list January 4, 2001 as the filing date for its security interest in Permanent Foliage's collateral. (*Id*). This indeed raises a factual issue as to whether the Plaintiff properly filed its security interest in the collateral on January 4, 2001 since the proffered report does

not bear the same weight as the actual financing statement. Furthermore, there is indeed no evidence that the Plaintiff complied with UCC 9-515(c) & (d) and filed a continuation statement in August 2005, six months prior to the alleged first-filing's expiration. The May 2006 financing statement includes the declaration that "This financing statement is for the express intent of reinstating the original UCC-1 filed on 1-4-01 as filing #002738" ⁴. But this is in contravention of UCC § 9-515(d) because a financing statement filed five months *after* expiration does satisfy the Code's requirement that the continuation is filed six months *before* lapse. An issue of fact therefore remains as to whether the Plaintiff, or its Assignor, properly perfected the security interest in Permanent Foliage's collateral. Accordingly, the Plaintiff's motion for summary judgment on its third cause of action and the first and fourth affirmative defenses is denied.

In their second and third affirmative defenses, the Defendants aver that the description of the collateral in the security agreement and financing statement is insufficient to meet the requirements of Article 9. (*See, Answer at page 1, ¶ 3; at page 2, ¶ 5*) However, since the Plaintiff did not proffer the alleged January 2001 financing statement, this Court cannot determine as a matter of law that the financing statement's collateral description is insufficient; the Plaintiff's motion for summary judgment on the second affirmative defense is denied. This Court therefore will examine whether the security agreement identifies the collateral as required by Article 9.

"A security interest attaches to collateral when it becomes enforceable against the debtor. . ." (*UCC § 203(a)*) "A security is enforceable against the Debtor. . .only if. . .the debtor has authenticated a security agreement that provides a description of the collateral. . ." (*UCC § 203(b)(3)(A)*) "A description of 'all the debtor's assets' or 'all the debtor's personal property' or

⁴ See, Memo in Law, Ex H.

using words of similar import does not reasonably identify the collateral.” (*UCC § 9-108(c)*)
However, “a description of the collateral reasonably identifies the collateral if it identifies the collateral by . . .category. . .[or]. . .a type of collateral defined in the Uniform Commercial Code.” (*UCC § 9-108(b)(3)*)

Here, the security agreement grants the Plaintiff a security interest in Permanent Foliage’s equipment, general intangibles, inventory, proceeds, accounts, chattel paper, documents, fixtures, goods, and instruments. (*See, Memo in Law, Ex E*). It does not use a super-generic term such as “all property” to describe the collateral that secures the loan obligation. Rather, it specifies the collateral by category or by its UCC definition. This is in compliance with *UCC 9-108(b)*, and the motion for summary judgment with respect to the third affirmative defense is granted.

III The Fifth, Sixth, and Eight Causes of Action: Permanent International’s Liability & Fraudulent Transfer

The Plaintiff’s fifth and sixth cause action are premised on its belief that Permanent Foliage transferred some of the assets securing the loan obligations to Permanent International for little or no consideration. (*See, Complaint at page 12, ¶ 41*) It therefore alleges that a fraudulent conveyance occurred, and they seek to recover the assets transferred and its value, ascertained to be no less than \$1,000,000.00. (*Id, at page 13, ¶ 44; at page 14, ¶ 47*).

Here, the Plaintiff fails to proffer the affidavit of an individual with first-hand knowledge about an alleged transfer. Wilson asserts a conclusory attestation that “all or some” of the assets were transferred, but he does contend that he possesses first-hand knowledge that they actually were. (*Wilson Aff’d, at page 9, ¶ 32*) In its memo of law, the Plaintiff attempts to prove a fraudulent

conveyance by proffering Permanent International's articles of incorporation, filed in April 2004. But this exhibit does nothing but prove that Permanent International was incorporated on said date, and counsel for the Defendants will accept service on its behalf. (*Memo in Law, Ex Q*). Accordingly, the Plaintiff's motion for summary judgment on the fifth and sixth causes of action is denied. Similarly, the Plaintiff's request for attorneys fees premised on the alleged fraudulent transfer in their eighth cause of action is also denied.

IV. The Seventh Cause of Action: Attorney's Fees

In its seventh cause of action, the Plaintiffs seek recovery for the legal fees accrued for commencing the instant action and filing the instant motion. Awarding attorney's fees are best reserved until there is an ultimate determination on the action's merits. (*See, Polkowski v Mela*, 143 AD 2d 260 [2nd Dept 1988].) Since this case has yet to be fully disposed of, the motion for summary judgment on the seventh cause of action is denied.

V. The Defendants' Counterclaim: Reliance on Reliance Bank's Continued Solvency

The Defendants assert a single counterclaim that

[They] entered into a revolving credit account with Plaintiff's Assignor based upon the representations and assurances of [Reliance] that said account would always be available. . .for cash flow purposes. . .

(*Answer at page 2, ¶ 9*)

[Reliance] became insolvent and subsequently collapsed and failed to perform and provide the monies needed by Defendants to maintain the cash flow and as a result caused Defendants' business to become insolvent and collapse.

(*Id at page 3, ¶10*)

By reason of the foregoing, Defendants have been damaged in an amount reasonably estimated to be \$500,000.00. . .

(*Id, ¶ 11*)

The Plaintiff avers that, as a matter of law, this counterclaim cannot remain. They contend that the line of credit expired on December 30, 2003, approximately three months before the FDIC allegedly became Reliance's receiver in March 2004. Indeed, by the revolving-credit agreement's clear terms, the \$150,000.00 must have been available through December 2003. There is no dispute that \$146,351.81 was drawn down from the credit line, evidenced by the Modification Agreement to extend the maturity date to July 2004, which Permanent Foliage signed. The Plaintiff has made a prime facie showing that it is entitled to judgment as a matter of law on this issue because the credit was made available, and utilized practically in its entirety, by the agreement's termination date. Now the Defendants, in order to avoid judgment against them, must provide this Court with a triable issue of fact in respect to their counterclaim.

Here, Walker expands on the counterclaim and attests that Reliance Bank induced Permanent Foliage to enter into the agreement "based upon the promise of continued financial support of the Defendants. . ." (*Walker Aff'd at page 18, ¶ C*) Walker apparently alleges that Reliance Bank made promises of continued loans beyond those provided for in the contract, and Permanent Foliage relied on this to their detriment.

However, there is nothing to substantiate the allegation that an additional loan agreement exists between the parties aside that which is the subject of the instant litigation. "Expressions of hope or unsubstantiated allegations or assertions are insufficient." (*See, Zuckerman, supra*) Accordingly, the Defendants have failed to raise a triable issue of fact as to whether Reliance's insolvency damaged their business. The Plaintiff's motion for summary judgment on the counterclaim is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the Plaintiff's motion for summary judgment on its First, Second, and Fourth causes of action is granted; and it is further

ORDERED that the Plaintiff's motion for summary judgment on its Third, Fifth, Sixth, Seventh, and Eight causes of action is denied; and it is further

ORDERED that the Plaintiff's motion for summary judgment on the Defendants' First, Second, and Fourth Affirmative Defenses is denied; and it is further

ORDERED that the Plaintiff's motion for summary judgment on the Defendants' third and fifth affirmative defenses, and the counterclaim, is granted.

This shall constitute this Court's decision and order.

Dated: June 26, 2007

ENTER:


RICHARD B. LOWE III

Richard B. Lowe III, J.S.C.

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE