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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 109017/2006

BEHR, EHUD

VS.

DIASTAR, INC.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 as decided on

as decided

FILED
AUG 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: [redacted] 8/[redacted]/07

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 17

----------X

EHUD BEHR,

Plaintiff,

-against-

Index No. 109017/06

DIASTAR, INC.,

Defendant.

----------X

EMILY JANE GOODMAN, J.S.C.:

Plaintiff Ehud Behr brings this action to recover sums that he allegedly paid as a guarantor on defendant Diastar, Inc.'s debt. Plaintiff now moves for summary judgment for the relief demanded in the complaint, contending that he is entitled to indemnification by implied contract, and in the alternative, under an unjust enrichment theory. For the reasons set forth below, the motion is granted.

BACKGROUND

The underlying facts are undisputed. Plaintiff is the former president and owner of non-party U-N-US, Inc. (U-N-US), a jewelry manufacturer. In October 2000, plaintiff sold U-N-US to defendant, which purchased the company with money and/or credit loaned by MTB Bank (MTB), one of U-N-US's creditors. Plaintiff executed a security agreement securing defendant's loan payments to MTB.

Connecticut Bank of Commerce (CBC) subsequently purchased the loan from MTB. After defendant allegedly defaulted and failed to remit payments to CBC, plaintiff commenced an action in Supreme Court, New York County (Index No. 124397/01) (Action No. 1), seeking a temporary restraining order and preliminary injunction enjoining CBC from foreclosing on

certain collateral that was used to secure defendant's obligations.

CBC brought a separate action against plaintiff and defendant herein in Supreme Court, New York County (Index No. 606093/01) (Action No. 2), seeking: (1) payment under a note executed by defendant in the principal amount of $551,422.80; and (2) payment under a guarantee and reaffirmation of guarantee, which were executed by plaintiff.

Pursuant to a so-ordered stipulation dated February 6, 2002, Action No. 1 was consolidated with Action No. 2 (the Consolidated Action). On June 26, 2002, the Connecticut Department of Banking closed CBC and appointed the Federal Deposit Insurance Corporation (FDIC) as the receiver of CBC.

On January 6, 2003, the FDIC, plaintiff, defendant, and CBC entered into a settlement agreement (the Settlement Agreement) to settle the Consolidated Action. Pursuant to that agreement, defendant agreed to pay the FDIC $550,125.63 plus attorneys' fees of $30,976.59, for a total of $581,102.22, payable according to a specific schedule. In addition, plaintiff agreed to guarantee the new debt and executed another guarantee (the Guarantee).

Thereafter, the FDIC assigned defendant's indebtedness to State Street Resources (SSR). After various payments, defendant defaulted under the Settlement Agreement. SSR brought an action against plaintiff and defendant herein for breach of the Settlement Agreement. SSR agreed to a settlement of $457,500 in full and complete settlement of its claims against them (the SSR Settlement). Plaintiff alleges that SSR was paid this amount, of which $200,000 was paid by defendant, and that plaintiff was compelled to pay $257,500. On May 5, 2006, plaintiff demanded that defendant repay the $257,500, but defendant has failed and refused to repay that sum to plaintiff. Defendant also refused to pay $10,000 for plaintiff's attorneys' fees. The

complaint contains two causes of action for: (1) indemnification; and (2) unjust enrichment.

DISCUSSION

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence in admissible form to establish that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant meets this burden, then the burden shifts to the opposing party to demonstrate, also through admissible evidence, that there are triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*id.*).

Plaintiff argues that he is entitled to reimbursement from defendant on an implied contract, because he was compelled to pay $457,500 under the terms of the Guarantee, and defendant only repaid him $200,000. He further asserts that, by virtue of the implied contract, defendant was unjustly enriched in failing to repay him.

"'A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation. The principal debtor is not a party to the guarantee and the guarantor is not a party to the principal obligation'" (*Midland Steel Warehouse Corp. v Godinger Silver Art*, 276 AD2d 341, 343 [1st Dept 2000], quoting *Shire Realty Corp. v Schorr*, 55 AD2d 356, 359-360 [2d Dept 1977]). Thus, the guarantor will be required to make payment only when the primary obligor has first defaulted (*Weissman v Sinorm Deli*, 88 NY2d 437, 446 [1996]).

Further, it is well settled that a guarantor is entitled to full indemnity against the consequences of a principal obligor's default (*Lori-Kay Golf v Lassner*, 61 NY2d 722, 723

[1984]; *Blanchard v Blanchard*, 201 NY 134, 138 [1911]; *Leghorn v Ross*, 53 AD2d 560 [1st Dept 1976], *affd* 42 NY2d 1043, *rearg denied* 43 NY2d 835 [1977]). Even when there is no express contract for indemnification, the right to indemnification is implied by law where a party agrees to become a guarantor at the behest of the principal obligor (*Blanchard*, 201 NY at 138; *Tanenbaum v Dolgin*, 251 AD2d 492, 493 [2d Dept 1998]). The guarantor is "'entitled to call upon [the principal] for reimbursement not only of what he may have been obliged to pay in discharge of the obligation for which he was surety, but also of all reasonable expenses legitimately incurred in consequence of such default, or for his own protection'" (*Barr v Raffe*, 97 AD2d 696 [1st Dept 1983], quoting *Thompson v Taylor*, 72 NY 32, 34 [1878]).

It is undisputed that plaintiff agreed to unconditionally guarantee, as a primary obligor, the payment of principal and interest under the Settlement Agreement (Marion Affirm., Exh. C, §§ 1 [a], 4). There is also no dispute that defendant defaulted under the terms of the Settlement Agreement (Answer, ¶ 16). Pursuant to the SSR Settlement, SSR agreed to settle the action against plaintiff and defendant herein for $457,500. Plaintiff paid SSR a down payment of $5,000 and an additional $452,500 out of proceeds from mortgaging his home on December 30, 2005 (Plaintiff Aff., ¶ 12; Marion Affirm., Exhs. G, H). Defendant repaid plaintiff $200,000, but has refused to repay the remaining $257,500 to him (Plaintiff Aff., ¶¶ 12, 13). When plaintiff entered into the Guarantee, defendant "impliedly engaged that [it] would indemnify [plaintiff] and reimburse him in case he was compelled to pay" (*Blanchard*, 201 NY at 138).

Defendant argues that, under the language of the Guarantee, plaintiff was not only a

guarantor but was also a primary obligor of the debt.[1] Defendant fails to raise an issue of fact sufficient to defeat summary judgment. As this guarantee was one of payment, the FDIC was not required to first seek recovery against defendant herein upon its default, and the term "primary obligor" serves to confirm that fact (*see Milliken & Co. v Stewart*, 182 AD2d 385, 386-387 [1st Dept 1992]; *Simon v Landau*, 27 Misc 2d 269, 272 [Sup Ct, Queens County 1960] [term "primary obligor" in guarantee agreements did not render guarantors co-obligors liable jointly with principal obligor for its indebtedness]). Indeed, if plaintiff were a principal obligor of the debt, as defendant contends, plaintiff's promise would be to answer for his own debt, and not for the debt of another (*see New York Plumber's Specialties Co. v 91 E. End Corp.*, 42 NY2d 865, 866 [1977]; *Anti-Hydro Co. v Castiglia*, 92 AD2d 741, 742 [4th Dept 1983]). However, the Guarantee clearly provides that plaintiff agrees to secure the debt of another as the "Obligations" therein include the principal and interest owed by defendant under the Settlement Agreement. To the extent that the Guarantee refers to certain other monetary obligations of either plaintiff or defendant under "the Financing Documents" or the Settlement Agreement, defendant has not shown that the amount plaintiff paid to SSR included any such obligations of plaintiff. Plaintiff's affidavit indicates that the amounts sought herein were amounts owed by defendant under the Settlement Agreement, and did not include amounts owed by plaintiff. Defendant produces no evidence to the contrary and therefore, summary judgment is granted.[2]

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[1]Section 1 of the Guarantee provides in relevant part that "[t]he Guarantor guarantees as a primary obligor and not merely as a surety, the Obligations."

[2] Defendant also claims that the unjust enrichment claim fails because plaintiff's recovery is governed by written contracts. However, plaintiff seeks to recover against defendant on an implied contract for indemnification. In any event, defendant has failed to raise an issue of fact as to plaintiff's right to indemnification.

Because interest on the amount that the guarantor is entitled to recover runs from the date of payment (*Maryland Cas. Co. v Farley*, 11 AD2d 756, 757 [1st Dept 1960]), the interest should run from the date that plaintiff paid SSR – December 30, 2005 (Plaintiff Aff., ¶ 12; Marion Affirm., Exh. G).

As for plaintiff's claim for attorneys' fees, he has failed to show that he is entitled to those fees. Plaintiff requests $15,000 in attorneys' fees that were "reasonably necessary to compel repayment" (Marion Affirm., at 6-7). A guarantor is equitably entitled to attorneys' fees expended in defending an action against its principal (*Lori-Kay Golf*, 61 NY2d at 723; *Bank of New York, Albany v Hirschfeld*, 59 AD2d 976 [3d Dept 1977], *appeal dismissed* 44 NY2d 732 [1978]). However, attorneys' fees that were "expended in securing reimbursement" of sums paid by the guarantor are not recoverable (*Bank of New York*, 59 AD2d at 976). Because plaintiff's attorneys' fees were "expended in securing reimbursement," he is not entitled to those fees.

Accordingly, it is

ORDERED that the motion (seq. no. 003) for summary judgment by plaintiff Ehud Behr is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Diastar, Inc. in the amount of $257,500, together with interest as prayed for allowable by law at the rate of 9% per annum from December 30, 2005, until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: ~~September~~ 4, 2007

FILED
AUG 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.
EMILY JANE GOODMAN