

<b>HSBC Bank USA, N.A. v Four Season Reading Corp.</b>
2007 NY Slip Op 32574(U)
August 14, 2007
Supreme Court, New York County
Docket Number: 0603310/2006
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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HSBC BANK USA, NATIONAL ASSOCIATION

Plaintiff,

Index No.: 603310/06

-against-

DECISION  
and ORDER

FOUR SEASON READING CORP. and ,  
MOON HO YOON

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
AUG 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

This is an action to recover for monies due under a line of credit agreement executed by defendant Four Season Reading Corp., ("Four Season") and guaranteed by defendant Moon Ho Yoon. Plaintiff here moves for summary judgment seeking: (1) to recover the principal sum of \$100,000, with interest and late fees; (2) attorneys' fees; and (3) dismissal of defendants eight affirmative defenses. Defendants do not oppose.

I. *Statement of Facts*

Plaintiff's Vice President Robert Morigga avers the following. On or about April 22, 2004, Four Season entered into a Revolving Credit Loan Term Agreement ("the Agreement") with plaintiff HSBC Bank USA, National Association ("HSBC"). That same day, Yoon entered into a written guarantee in which he unconditionally guaranteed HSBC full and prompt payment of all debts and obligations owed by Four Season under the agreement. Pursuant to the terms of the agreement, HSBC lent Four Season the principal sum of \$100,000, with interest at the banks prime rate, plus 2% per annum. Interest would increase at an additional rate of 3% per annum if the amount due was not paid after maturity. The agreement and guarantee each state that

defendants shall pay all costs and expenses incurred by HSBC in connection with the enforcement of Four Season's loan obligations including HSBC's reasonable expenses and attorneys' fees.

The agreement also provides that if any installment is not paid within ten days of the due date, Four Season owes HSBC a late charge of an amount equal to the greater of 5% of the unpaid installment or \$15.00. Four Season defaulted under the agreement by failing to pay HSBC the installment due on July 10, 2006 and all subsequent installments. HSBC declared the principal amount, accrued interest and all other charges due under the agreement, to be immediately payable on August 1, 2006. Four Season has failed to make any payments toward the principal and has only paid interest through June 10, 2006.<sup>1</sup>

## II. *Conclusions of Law*

### A. *Summary Judgment*

A party moving 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. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

Here, plaintiff has submitted signed copies of the agreement, guarantee, and also a copy of HSBC's Loan History Report which accounts for all of the payments and charges associated

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<sup>1</sup>From June 11 to June 28, 2006, the prime rate was 8% per annum. From June 29, 2006 through the present, the prime rate is 8.25% per annum.

with this loan. These documents serve as evidence of executed contracts between HSBC and each defendant, which are in default due to non-payment. Further, since defendants do not oppose this motion, they have in effect admitted these facts. See *John William Costello Associates, Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 229 (1<sup>st</sup> Dept 1984) (facts appearing in movant's papers, which opposing party does not controvert, are deemed admitted).

Nor do defendants' affirmative defenses undermine plaintiff's case. Defendants first affirmative defense is that the court lacks personal jurisdiction due to improper service. CPLR 3211(e) states that "an objection that the summons and complaint...was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading." Here, defendants served their answer on October 18, 2006, conclusorily setting forth this defense, and have yet to move for judgment on this ground. Accordingly, defendants first affirmative defense is dismissed.

Defendants second and sixth affirmative defenses allege that HSBC did not properly notify defendants of their default or of the commencement of this action. However, there is no language in the Agreement requiring HSBC to provide notice before commencing any legal proceedings. Further, the guarantee states "[i]f any default shall be made...Guarantor hereby agrees to pay the same in full:...(ii) without requiring protest, presentment or notice of non-payment or notice of default to Guarantor, to Debtor, or to any other person..." As a result, defendants second and sixth affirmative defenses are dismissed.

Defendants third and fourth affirmative defenses allege that they have already paid off substantial amounts of the loan and that HSBC has not properly accounted for these payments. HSBC has provided a copy of its Loan History Report which details all of the payments and

charges associated with the loan. This report shows that as of May 24, 2007, defendants were in default. Defendants have offered no evidence to show that they have made all payments towards the loan or that HSBC improperly accounted for any of these alleged payments. Thus, defendants third and fourth affirmative defenses are dismissed.

Defendants seventh affirmative defense is that the complaint fails to state a cause of action. The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants failure to perform; and (4) damages. *Furia v. Furia*, 116 A.D.2d 694 (2<sup>nd</sup> Dept 1986). In order to plead a breach of contract cause of action, the complaint must allege the provisions of the contract upon which the claim is based. *Sud v. Sud*, 211 A.D.2d 423, 424 (1<sup>st</sup> Dept 1995). Here, in its complaint, plaintiff has set forth all of the elements required for breach of contract and has alleged the provisions of the contract upon which the claim is based. Therefore, defendants seventh affirmative defense is dismissed.

Defendants eighth affirmative defense is waiver. Waiver, the intentional relinquishment of a known right, is not lightly presumed and must be clearly established. *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966 (1988); *Barbour v. Knecht*, 296 A.D.2d 218, 226 (1<sup>st</sup> Dept 2002). The intent to waive a right must be unmistakably manifested and cannot be inferred from any doubtful or unequivocal acts. *Navillus Tile, Inc. v. Turner Constr. Co.*, 2 A.D.3d 209, 211 (1<sup>st</sup> Dept 2003).

Here, other than the conclusory allegation made in its answer, defendants have not offered any evidence of waiver on the part of HSBC. It is a well settled principal that mere allegations or bold conclusory statements, even if believable, are not enough to defeat a motion

for summary judgment. See *Lighting Horizons, Inc. v. E.A. Kahn & Co., Inc.*, 120 A.D.2d 648, 649 (2<sup>nd</sup> Dept 1986); *Jeffcoat v. Andrade*, 205 A.D.2d 374, 375 (1<sup>st</sup> Dept 1994).

Therefore, pursuant to the agreement and guarantee, defendants owe HSBC the following: the principal sum of \$100,000, with interest (i) from June 11, 2006 to June 28, 2006 at a rate of 10% per annum (the prime rate of 8% plus an additional 2%), (ii) from June 29, 2006 to July 31, 2006 at a rate of 10.25% per annum (the prime rate of 8.25% plus an additional 2%, and (iii) from August 1, 2006 at a rate of 13.25% per annum (the prime rate of 8.25% plus an additional 2% plus an additional 3% per annum of default interest), together with late fees of \$153.59 as of May 21, 2007. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted on default and the Clerk is directed to enter judgment in favor of HSBC Bank USA, National Association against defendants Four Season Trading Corp., and Moon Ho Yoon in the amount of the principal sum of \$100,000, with interest (i) from June 11, 2006 to June 28, 2006 at a rate of 10% per annum, (ii) from June 29, 2006 to July 31, 2006 at a rate of 10.25% per annum, (iii) from August 1, 2006 at a rate of 13.25% per annum, together with late fees of \$153.59; and it is further

ORDERED that all eight affirmative defenses asserted in defendants answer are dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the issue of reasonable attorneys' fees is referred to a Special Referee to hear and determine; and it is further

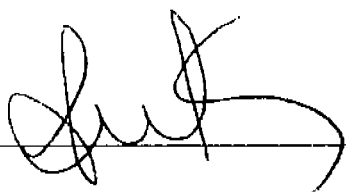
ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is

further

ORDERED that the Clerk shall notify all relevant parties of the date of the hearing.

ENTER

DATE: August 14, 2007  
New York, NY

  
\_\_\_\_\_ J.S.C.

**FILED**  
AUG 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE