Merrill Lynch Bus. Fin. Servs. Inc. v Zablow

2007 NY Slip Op 32939(U)

September 13, 2007

Supreme Court, New York County

Docket Number: 0603740/2006

Judge: Richard B. Lowe

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SCANNED ON 9/20/2007

[* 1]

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

PRESENT: HON. RICHARD B. LOWE, III

PART 56

Index Number : 603740/2006

MERRILL LYNCH BUSINESS

vs

ZABLOW, BRUCE

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE 5/22/07

MOTION SEQ. NO. ______

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

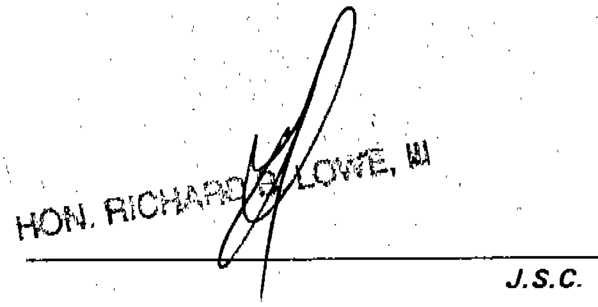
Upon the foregoing papers, it is ordered that this motion

FILED SEP 20 2007 COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9/13/07



HON. RICHARD B. LOWE, III

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

---X

MERRILL LYNCH BUSINESS FINANCIAL
SERVICES INC.,

Plaintiff,

-against-

Index № 603740/06

BRUCE ZABLOW, DAVID INKELES, JOEL BLOOM,
MAUREEN MATTURRI, and SUNIL TRASI,

Defendants.

---X

RICHARD LOWE III, J.:

Motion sequence numbers 001 and 003 are consolidated for disposition.

In this breach of contract action for non-payment of a loan guaranty, plaintiff Merrill Lynch Business Financial Services Inc. (Merrill Lynch) moves, pursuant to CPLR 3212, for summary judgment against defendants Bruce Zablow (Zablow), David Inkeles (Inkeles), Joel Bloom[1] (Bloom), Maureen Matturri (Matturri) and Suntil Trasi (Trasi), jointly and severally, in the principal sum of $480,100.73, plus interest, costs, fees, and disbursements. Plaintiff also seeks an order severing its claim for attorney's fees and directing an inquest be held on this matter. Defendants Zablow, Inkeles, and Trasi cross-move for an order declaring the liability of each defendant to be limited to 20% of the total of any judgment entered in plaintiff's favor. Defendant Matturri cross-moves for an order, pursuant to CPLR 3212, dismissing the cross claims asserted against her by Zablow, Inkeles and Trasi.

FILED
SEP 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Background

On February 27, 1998, physicians Zablow, Inkeles, Bloom, Matturri, and Trasi[2] jointly

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[1]Joel Bloom does not submit opposition to the motion or cross motion.

[2]The Spreader Agreement also contains the name of a sixth physician signatory, non-party Joan A. Kedziora. The pleadings do not provide any further information about Dr. Kedziora.

executed a written agreement, called a "Spreader Agreement," by which each became a "stockholder" or "shareholder" in a professional corporation concerned with the practice of radiology. As signatories to the Spreader Agreement, Zablow, Inkeles, Bloom, Matturri, and Trasi became officers, partners and/or shareholders of Manhattan Imaging Associates, P.C. (MIA), an entity which the parties frequently and alternately refer to as Diagnostic Radiology Associates, P.C. (DRA).

By letter, dated August 26, 1998, Matturri resigned from DRA, effective December 31, 1998. In her brief letter, Matturri stated her intention to continue to work for DRA, but that she would do so only on a part-time basis of two and a half days a week. Approximately three years later, Matturri sent a second letter to DRA/Zablow, dated July 13, 2001, in which she wrote, in relevant part:

> I am submitting this letter as my notice, pursuant to Paragraph 10.8 of my Agreement, of my intention to terminate part-time employment effective Friday, October 26, 2001. It is my understanding of the agreement, pursuant to Paragraph 15, that by submitting the letter to Diagnostic Radiology Associates and yourself, I am fulfilling all notice obligations required of me. If I am mistaken in this regard, please so advise."

Turning to the breach of contract action for non-payment of a loan guaranty, it is undisputed that on July 2, 1999, Merrill Lynch and MIA, by MIA's president Zablow and secretary Trasi, executed the Working Capital Management Account Reducing Revolver - Loan and Security Agreement No. 862-07U65 (WCMA Agreement) by which Merrill Lynch extended a revolving commercial loan to MIA (the Revolver Loan). Article 1.1 (o) of the WCMA Agreement provides that the "'[l]oan amount' shall mean the amount equal to the lesser of: (i) 100% of the amount required by [MIA] to satisfy or fulfill the Loan Purpose, (ii) the aggregate

amount which [MIA] shall request be advanced by [Merrill Lynch] on account of the Loan Purpose on or prior to the Conversion Date, or (iii) $4,500,000.00."

On the same date (July 2, 1999), Zablow, Inkeles, Bloom, and Trasi executed an unconditional guaranty in favor of Merrill Lynch, guaranteeing payment in full on the Revolver Loan under the terms of the WCMA Agreement. The unconditional guaranty states, in relevant part, that in order to induce Merrill Lynch to advance, extend, or continue to extend credit to MIA under the WCMA Agreement, these guarantors:

> jointly and severally unconditionally guarantee to [Merrill Lynch] (subject, however, to the limitation of liability hereinafter set forth): (i) the prompt and full payment when due, by acceleration or otherwise, of all sums now or any time hereafter due from [MIA] to [Merrill Lynch] . . . and (iii) the prompt and full payment and performance of all other indebtedness, liabilities and obligations of [MIA] to [Merrill Lynch], however created or evidenced, and whether now existing or hereafter arising (collectively, the "Obligations").

A few days later, on July 15, 1999, Matturri also executed an unconditional guaranty in favor of Merrill Lynch. However, Matturri's pre-printed unconditional guaranty varies slightly from that signed by the other guarantors in that it is written in the singular, does not contain "joint and several liability" language, and limits her exposure to $3.5 million.

The parties acknowledge that MIA had difficulty in making its monthly loan payments in accordance with the terms of the WCMA Agreement. As a result, in or about August 2000, and at the request of MIA, MIA and Merrill Lynch entered into a Loan Modification and Extension Agreement (Loan Modification). The Loan Modification reduced the size of the monthly loan payments and extended the maturity date of the Revolver Loan. The Loan Modification was executed in favor of Merrill Lynch by Zablow, his wife Robin Zablow (limited to the collateral in Robin Zablow's name), Inkeles, Bloom, Trasi, MIA, Radiology Associates of Manhattan, P.C.

and DRA, and it is undisputed that Matturri did not sign off on this document. The Loan Modification provides, in relevant part, that:

> WHEREAS, Customer [MIA] failed to make the payments required by paragraph 3.6 of the Loan Agreement commencing January 31, 2000 and has requested that [Merrill Lynch] reduce the amount of each such payments, extend the Termination Date (as such term is defined in the Loan Agreement), and permit such reduced payments to commence on September 30, 2000, in the manner set forth below;
>
> WHEREAS, certain of the Guarantors have agreed to pledge additional collateral for the Loan; and
>
> WHEREAS, the parties have agreed to modify and extend the Loan on the terms set forth below;
>
> * * *
>
> 2. Indebtedness. Customer and the Guarantors signing below acknowledge and agree that the outstanding principal balance of the Loan as of August 23, 2000 is $4,499,998 and that such amount remains outstanding . . . is due and payable in full without offset, deduction or counterclaim of any kind, and is subject to increase as a result of interest from August 1, 2000 forward and fees and charges . . . .
>
> 3. Modifications to Loan Agreement. The Loan Agreement is modified as follows:
>
> i. The term "Termination Date" is modified to mean . . .
>
> ii. Paragraph 3.6 of the Loan Agreement is modified to read as follows:
>
> 3.6 . . . the Maximum WCMA Line of Credit shall be reduced by an amount equal to one-eighty-fourth (1/84th) of the Loan Amount per month.
>
> * * *
>
> 6. Increase in Pledged Collateral. Simultaneously herewith, Bruce Zablow (and/or Robin Zablow), David Inkeles, Joel Bloom and Sunil Trasi, M.D. shall each cause an additional sum to be deposited into the Securities Account established under the Pledge Agreement signed by them . . .
>
> * * *
>
> 10. . . . Customer [MIA], Radiology Associates of Manhattan, P.C., Diagnostic Radiology Associates, P.C., and the Guarantors signing below hereby acknowledge and agree that the Guarantees and Security Agreements signed by them, as the case may be, remain in full force and effect, and that they jointly and severally continue to guaranty repayment of the Loan in the accordance with the terms of the Loan Documents, as modified by this Agreement. Nothing contained herein is a waiver of [Merrill Lynch's] right to pursue Maureen Matturri on the Guaranty executed by her.
>
> * * *
>
> 14. Not a Novation. This Agreement is not a novation, nor is it to be construed as a release or modification of any of the terms, conditions, warranties, or rights set forth in the Loan Documents except as expressly provided herein.

Although Merrill Lynch had extended the Loan Modification to its customer, on

February 13, 2002, MIA filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Nevertheless, MIA continued to make timely payments, as per the Loan Modification, until 2005. According to Merrill Lynch, in or about January 2005, MIA began underpaying on the Revolver Loan, and that by December 28th of that year, MIA had accumulated an aggregate arrearage of nearly $300,000.00.

Despite efforts by MIA and Merrill Lynch to come a solution which would enable MIA to avoid default, in or about April 2006, Merrill Lynch did declare the WCMA Agreement in default and made a demand for payment in full on the outstanding loan balance ("called the loan"), which at that time was $1,490,023.01. Merrill Lynch and MIA continued their efforts to work out a mutually satisfactory resolution before any further action was taken against MIA and the guarantors. However, Merrill Lynch did end up foreclosing on the pledged securities, which were then liquidated and their proceeds applied to the outstanding loan balance. According to Merrill Lynch, as of October 24, 2006, the loan balance, exclusive of attorneys' fees and other costs, amounted to $480,100.73, and despite due demand, the defendants have failed to remit the sums owed.

Discussion

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (City of New York v Clarose Cinema Corp., 256 AD2d 69, 71 [1st Dept 1998]). To this end, Merrill Lynch has produced copies of the WCMA Agreement, the July 2, 1999 and July 15, 1999 unconditional guaranties, the Loan Modification, and the sworn affidavit of Edmond Blough, a vice president for Merrill Lynch, who, as an

individual with knowledge, provides the basis for Merrill Lynch's demand for $480,100.73, plus interest, together with Merrill Lynch's demand for collection fees in the sum of $74,501.15, plus costs, and disbursements.

Where, as here, the pleadings, affidavits, and supporting documentation demonstrate that there are no genuine issues as to any material fact, the moving party is entitled to judgment as a matter of law (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). Accordingly, the burden shifts to Matturri to establish the existence of a triable issue of fact precluding summary judgment (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Summary Judgment as to Matturri

Matturri contends that: (1) the portion of the previously unpaid loan (the Revolver Loan) which she did guarantee, has since been satisfied; (2) she was not a party to the Loan Modification which, despite its name, was actually a new loan; (3) the outstanding balance of $480,100.73 stems solely from monies owed on the new loan; (4) only Zablow, Inkeles, Bloom, and Trasi guaranteed the new loan agreement, and therefore, they are the only parties to whom Merrill Lynch can look for satisfaction on this debt.

As is relevant here, the WCMA Agreement provides:

> Article 1.1 (s): "[o]bligations" shall mean all liabilities, indebtedness and other obligations of [MIA to Merrill Lynch], howsoever created, arising or evidenced, *whether now existing or hereafter arising*, whether direct or indirect, absolute or contingent, due or to become due, primary or secondary or joint or several, and without limiting the foregoing, shall include interest accruing after the filing of any petition in bankruptcy, and all present *and future* liabilities, indebtedness and obligations of [MIA] under this Loan Agreement [emphasis added].
>
> Article III, § 3.4 provides:
> [MIA] hereby promises to pay to the order of [Merrill Lynch] at the times and in the manner set forth in this Loan Agreement . . . (a) the WCMA Loan Balance; (b)

> interest at the Interest Rate, or, if applicable, at the Default Interest Rate on the outstanding WCMA Loan Balance . . . until the date of payment of all WCMA Loans in full; and (c) on demand, all other sums payable pursuant to this Loan Agreement, including, but not limited to, any collection fees. Except as otherwise expressly set forth herein, [MIA] hereby waives presentment, demand for payment, protest and notice of protest, notice of dishonor, notice of acceleration, notice of intent to accelerate and all other notices and formalities in connection with this WCMA Note and this Loan Agreement.

The unconditional guaranty Matturri signed expressly states that:

> FOR VALUE RECEIVED, and in order to induce [Merrill Lynch] to advance moneys or extend or continue to extend credit to or for the benefit of . . . [MIA] . . . the undersigned ("Guarantor") hereby unconditionally guarantees to [Merrill Lynch] . . .: (i) the prompt and full payment when due, by acceleration or otherwise, of all sums now or any time hereafter due from [MIA] to [Merrill Lynch] under the Guaranteed Documents, . . . (iii) the prompt and full payment and performance of all other indebtedness, liabilities and obligations of [MIA] to [Merrill Lynch], however so created or evidenced, and whether now existing or hereafter arising (collectively, the "Obligations").
>
> * * *
>
> The liability of Guarantor[s] hereunder shall in no event be affected or impaired by any of the following, any of which may be done or omitted by [Merrill Lynch] from time to time, without notice to or the consent of Guarantor: (a) any renewals, amendments, modifications or supplements to any of the Guaranteed Documents . . . (c) any failure, neglect or omission on the part of [Merrill Lynch] to realize upon or protect any of the Obligations . . . (e) any application of payments or credits by [Merrill Lynch]; (f) the granting of credit from time to time by [Merrill Lynch] to [MIA] in excess of the amount set forth in the Guaranteed Documents.

Both the WCMA Agreement and the unconditional guaranty state that the guarantor's (Matturri's) liability could not be limited or compromised by any modifications or additions to the Revolver Loan/WCMA Agreement, "however so created or evidenced, and whether now existing or hereafter arising."

Matturri, however, seeks to avoid summary judgment against her on the ground that the Loan Modification constitutes a new loan or novation, releasing her from liability. Despite the

language contained in Section 14 of the Loan Modification which specifically states that it is not a novation, Matturri contends that discovery into the internal handling of the Loan Modification would yield proof that it actually was a new loan. In support of this argument, Matturri offers a letter, dated July 28, 2000, from Zablow to Merrill Lynch as proof that MIA was, in fact, seeking a new loan.

Upon review of the letter, it is evident that Matturri's reliance on it is misplaced. Rather than request a new or additional loan, Zablow was imploring Merrill Lynch not to turn down MIA's request for a Loan Modification simply because Matturri refused to sign off on this document. Zablow's statement that "I am sure you are aware that although Dr. Matturri did sign to be personally obligated for the first 3.5 million dollar loan, she did not sign to be personally liable when DRA increased the loan to 4.5 million" does not constitute proof that there was a first loan for $3.5 million and a second loan for $4.5 million, or that the first loan was raised by one million dollars. Matturri's interpretation of this sentence is not only mistaken; it asks the court to ignore the clear language of the WCMA Agreement, the unconditional guarantees, and the Loan Modification itself.

It is well settled that "[t]he best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (Greenfield v Philles Records, 98 NY2d 562, 569 [2002] [internal quotation marks and citations omitted]). Here, the Loan Modification clearly and unambiguously states that it is not a novation, that its purpose is to extend the termination date of the Revolver Loan and to permit reduced payments, and that plaintiff's right to pursue Matturri on her unconditional guarantee is

not waived by any of the modifications contained in this document. Moreover, even if the Loan Modification could be viewed as a new loan or novation, discovery would be unavailing as Matturri would, nevertheless, not be exempt from liability. As stated above, Matturri's unconditional guaranty is neither limited nor compromised by any liabilities, indebtedness and/or other obligations of MIA to Merrill Lynch, howsoever created, arising or evidenced, *whether now existing or hereafter arising.* Furthermore, her unconditional guaranty permits all modifications and extensions without requiring either the consent of, or any notice to, the guarantor.

Finally, Matturri also opposes summary judgment on the ground that her loan guaranty was satisfied when the outstanding balance on the Revolver Loan diminished from $4,499,998.00 (as of the Loan Modification on August 23, 2000) to $1,490,023.01 (as of the April 2006 when the loan was declared in default) to $480,100.73 (as of October 24, 2006 after the pledged securities had been liquidated). It is her position that the guaranteed debt being the first in time should be retired first, or said another way, her guaranty was satisfied because it only covered the first $3.5 million of the loan (Beyer Bros. of Long Is. Corp. v Kowalevich, 89 AD2d 1005, 1006 [2nd Dept 1982]).

Again, Matturri presents an argument which ignores the plain language of the WCMA Agreement and the plain language of the unconditional guaranty. Specifically, paragraph six of the unconditional guaranty states that:

> [Merrill Lynch] is hereby irrevocably authorized by Guarantor at any time during the continuance of an Event of Default under the Loan Agreement or any other of the Guaranteed Documents or in respect of any of the Obligations, in its sole discretion and without demand or notice of any kid, to appropriate, hold, set off and apply toward the payment of any amount due hereunder, in such order of

application as [Merrill Lynch] may elect. . . .

Therefore, by executing the guaranty, Matturri granted Merrill Lynch the option of applying any payments received to any amount due as a result of the (underlying) Revolver Loan, and in any order of application as Merrill Lynch elects. As stated above, the Revolver Loan, from the beginning, was capped at $4.5 million (WCMA Agreement, Article 1.1 [o] [iii]), and co-guarantors Zablow, Inkeles, Bloom, and Trasi each personally guaranteed repayment up to the full amount of the loan, $4.5 million. Matturri also personally guaranteed repayment under the WCMA Agreement, but from the beginning, her liability was capped at $3.5 million (Matturri Unconditional Guaranty, ¶ 11). Furthermore, despite Matturri's repeated claims to have withdrawn from MIA, there is no evidence that she ever revoked, or attempted to revoke, her guaranty.

"The law is well-settled, however, that where the language of a guaranty is clear and unambiguous, and by its terms the guaranty is a continuing one that limits the guarantor's liability to a certain fixed sum, the guarantor will not be discharged from liability merely because the debtor incurred debts over and above the sum fixed in the guarantee" (Federal Deposit Ins. Corp. v Schwartz, 78 AD2d 867, 868 [2nd Dept 1980] affd 55 NY2d 702 [1981]).

When MIA accessed the full $4.5 million and could not meet its monthly loan payments, the creditor and debtor(s) executed the Loan Modification as a measure to avoid the ramifications of a loan default. Matturri's liability is premised neither on her status as a shareholder under the Spreader Agreement, nor on the existence of the Loan Modification which she refused to sign, but is premised solely on the unconditional guaranty she executed on July 15, 1999. Accordingly, Matturri has failed to rebut plaintiff's prima facie showing of entitlement to

judgment as a matter of law (CPLR 3212).

With respect to the cross motion by Matturri for an order dismissing the cross claims against her for unjust enrichment, common-law indemnification, and common-law subrogation, for the reasons discussed above, this cross motion is denied.

Summary Judgment as to Remaining Defendants

Defendant co-guarantors Zablow, Inkeles, and Trasi, apparently, no longer dispute liability under their unconditional guaranty. Instead, these defendants cross-move for an order declaring that the liability of each named defendant shall not exceed 20% of the total of any judgment entered in favor of Merrill Lynch. Zablow, Inkeles, and Trasi contend that, because Illinois law governs the WCMA Agreement (§ 4.7 [i]), each guarantor cannot be required to contribute more than his or her pro rata share of any monies owed to Merrill Lynch. Their cross motion, however, is denied.

Pursuant to the unconditional guaranty, the liability of Zablow, Inkeles, Bloom, and Trasi is "joint and several," entitling Merrill Lynch to seek the entire debt from any or all of them. In the event that any individual guarantor pays Merrill Lynch more than his/her fair share, both New York and Illinois afford that guarantor a right to seek contribution from the other guarantors. "[A] guarantor who has paid more than his or her proportionate share of a common liability is entitled to contribution from any co-guarantors" (Leo v Levi, 304 AD2d 621, 623 [2nd Dept 2003]; Trossman v Philipsborn, 312 Ill Dec 156, 869 NE2d 1147 [Ill App 1st Dist 2007]; Pozsgay v Free, 87 Ill App 3d 1113, 409 NE2d 554 [5th Dist 1980]).

This court has examined the remaining contentions of the parties and finds them to be without merit.

Accordingly, it is

ORDERED that the motion by plaintiff for summary judgment against defendants Bruce Zablow, David Inkeles, Joel Bloom, Maureen Matturri and Suntil Trasi, jointly and severally, is granted in the principal sum of $480,100.73, plus the interest, costs, fees, and disbursements as provided for in the WCMA Agreement to be calculated by the Clerk of the Court; and it is further

ORDERED that that part of plaintiff's motion that seeks to recover the recovery of attorney's fees is severed and an assessment thereof is directed, and it is further

ORDERED that copy of this order with notice of entry be served upon the Trial Support Clerk (Room 158) who is directed upon filing the filing of a Note of Issue and a Statement of Readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the cross motions are denied.

Dated: September 13, 2007