

**JPMorgan Chase Bank, N.A. v United States Power
Washing Corp.**

2007 NY Slip Op 33349(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0107841/2007

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART _____

Index Number : 107841/2007
JPMORGAN CHASE BANK, N.A.
vs
UNITED STATES POWERWASHING
Sequence Number : 003
SUMMARY JUDGMENT

X NO. _____
ION DATE _____
ON SEQ. NO. _____
ON CAL. NO. _____

The 1 _____ 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
This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of plaintiff JPMorgan Chase Bank, N.A. for summary judgment in its favor and against defendant Daniel Desimone is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgement in favor of plaintiff JPMorgan Chase Bank, N.A. and against defendant Daniel Desimone (a) in the principal amount of Seven Thousand Six Hundred Sixteen Dollars and 55/100 (\$7,616.55), plus pre-judgment interest through July 24, 2007 totaling Two Hundred Forty-One Dollars and 19/100 (\$241.19), together with additional pre-judgment interest at the rate of 14.25% from July 24, 2007 through the date of entry of judgment, and late fees of Twenty Dollars (\$20.00) and costs and (b) in the principal amount of Seventy-Nine Thousand Seven Hundred Forty-Seven Dollars and 61/100 (\$79,747.61), plus pre-judgment interest through July 3, 2007 totaling Two Thousand Five Hundred Seventy-Nine Dollars and 61/100 (\$2,579.61), together with additional pre-judgment interest at the rate of 9.25% from July 24, 2007 through the date of entry of judgment, and late fees of Five Hundred Ten Dollars and 45/100 (\$510.45) and costs as assessed by the Clerk of the Court. It is further

HON. CAROL EDMEAD

Dated: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

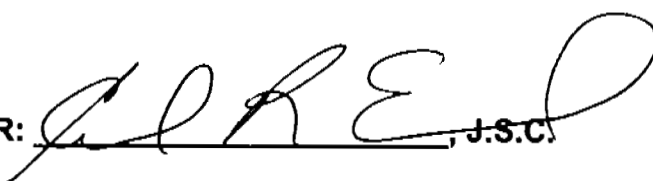
FILED
OCT 18 2007
NEW YORK COUNTY CLERK'S OFFICE

ORDERED that counsel for plaintiff JPMorgan Chase Bank, N.A. shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendant Daniel Desimone .

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. CAROL EDMEAD

Dated 10/15/07

ENTER: , 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

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

UNITED STATES POWERWASHING CORP.,
RICHARD HOROWITZ and
DANIEL DESIMONE,

Defendants.

EDMEAD, J.S.C.

Index No. 107841/07

DECISION/ORDER

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff JPMorgan Chase Bank, N.A. ("plaintiff") moves pursuant to CPLR 3212, for an order granting summary judgment in its favor and against defendant, Daniel Desimone ("defendant").

On June 1, 2007, plaintiff commenced this action by a complaint, to recover a total of Eighty Nine Thousand One Hundred Ten Dollars and 26/100 (\$89,110.26).

By Business Checking Credit Line Agreement dated on or about December 30, 1999 (the "BCLA"), defendant United States Powerwashing Corp. ("U.S. Powerwashing") promised to pay JPMorgan Chase the amount loaned to U.S. Powerwashing up to the maximum amount of \$10,000.00. The BCLA provides that U.S. Powerwashing shall repay the loans made pursuant to the BCLA at a rate per annum equal to the Bank's prime rate of 8.25% plus 6% in 36 equal monthly installments.

By Business Revolving Credit Account Agreement dated on or about December 8, 2000 (the "BRCA"), defendant U.S. Powerwashing promised to pay JPMorgan Chase up to the

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principal amount of \$50,000 with interest to be paid at the Bank's prime rate of 8.25% plus 1% compounded annually, which amount was to be paid in thirty-six (36) equal consecutive monthly installments.

By Business Revolving Credit Account Agreement dated on or about July 15, 2002 (the "2002 BRCA"), JPMorgan Chase and defendant U.S. Powerwashing increased the "Maximum Amount" that could be borrowed pursuant to the BRCA to \$100,000.00.

JPMorgan Chase remains the current owner and holder of the BCLA, BRCA and the 2002 BRCA, which have not been modified and remain in full force and effect.

Defendant personally guaranteed the obligations and liabilities owed by defendant U.S. Powerwashing, by personal guaranty dated December 28, 1999 (the "BCLA Guaranty"); dated December 7, 2000 (the "BRCA Guaranty"); dated on or about January 23, 2002 (the "2002 BRCA Guaranty"). The guarantys have not been modified and remain in full force and effect.

On or about February, 2007, defendant U.S. Powerwashing defaulted under the BCLA, BRCA, and the 2002 BRCA, by failing to pay the monthly installment due and has failed to make any monthly installments due thereafter.

Notice of default and demand for immediate payment was sent by letter dated January 29, 2007. Despite demand, the repayment has not been made.

Defendant's Opposition

Plaintiff has not set forth the necessary aspects to prove that there was a contract in existence between defendant DeSimone and plaintiff. Further plaintiff has failed to adequately identify the documents attached to its motion and has nowhere alleged that the documents contain defendant's signature anywhere on the documents.

Plaintiff has not established that defendant is liable under the alleged guarantys. Moreover, defendant spoke with plaintiff's representative on several occasions who informed defendant specifically not to pay the amounts in default as the parties would be working out a settlement agreement. And, defendant left the defendant corporation shortly after the alleged loan documents were made. He did not receive any compensation and was unaware of what, if any, withdrawals were made.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). 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). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

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 A.D.2d 69, 71, 681 N.Y.S.2d 251 [1st Dept 1998]). Here, plaintiff has established the *prima facie* elements necessary to enforce Desimone’s written guaranty. Plaintiff has submitted to the court

the absolute and unconditional guaranty signed by defendant in which defendant:

[a]bsolutely and unconditionally guarantee[d] ...the prompt payment of each and every obligation and liability of every nature and description of [United States Powerwashing Corp.] whether now existing or arising in the future....

And, the *prima facie* case for such relief requires documentary evidence or an explanation of how the indebtedness is calculated, other than in the form of mere conclusory allegations (*First Am. Bank of N.Y. v L.V. Lowden, Inc.*, 197 A.D.2d 774, 602 N.Y.S.2d 720). Plaintiff has met that burden.

Conclusion

After reviewing the motion papers and documentary evidence attached thereto in support of plaintiff's motion for summary judgment, this court finds that plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law and defendant has failed to submit sufficient evidence to establish the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Preferred Capital, Inc. v IGHMA*, NYLJ, Oct. 9, 2003 [App Term, 9th and 10th Jud Dists]).

Based on the foregoing, it is hereby

ORDERED that the motion of plaintiff JPMorgan Chase Bank, N.A. for summary judgment in its favor and against defendant Daniel Desimone is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgement in favor of plaintiff JPMorgan Chase Bank, N.A. and against defendant Daniel Desimone (a) in the principal amount of Seven Thousand Six Hundred Sixteen Dollars and 55/100 (\$7,616.55), plus pre-judgment interest through July 24, 2007 totaling Two Hundred Forty-One Dollars and 19/100 (\$241.19), together with additional pre-judgment interest at the rate of 14.25% from July 24, 2007 through

* 8]

the date of entry of judgment, and late fees of Twenty Dollars (\$20.00) and costs and (b) in the principal amount of Seventy-Nine Thousand Seven Hundred Forty-Seven Dollars and 61/100 (\$79,747.61), plus pre-judgment interest through July 3, 2007 totaling Two Thousand Five Hundred Seventy-Nine Dollars and 61/100 (\$2,579.61), together with additional pre-judgment interest at the rate of 9.25% from July 24, 2007 through the date of entry of judgment, and late fees of Five Hundred Ten Dollars and 45/100 (\$510.45) and costs as assessed by the Clerk of the Court. It is further

ORDERED that counsel for plaintiff JPMorgan Chase Bank, N.A. shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendant Daniel Desimone .

This constitutes the decision and order of this court.

Dated: October 15, 2007

HON. CAROL EDMOND



Carol Robinson Edmead, J.S.C.

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE