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

PRESENT: RICHARD B. LOWE III PART 56

Index Number : 603062/2006

ROITBERG, MICHAEL

VS

MARQUEE GROUP LTD.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/23/07

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/MEMORANDUM

FILED
OCT 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/23/07

RICHARD B. LOWE III
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

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MICHAEL ROITBERG and BEN-ZION ROITBERG,

Plaintiffs,

-against-

THE MARQUEE GROUP, LTD., a New York corporation, DOMINICK SARTORIO, ESTATE OF BRIAN MIECNIKOWSKI, and LYNN MIECNIKOWSKI, individually and as Administrator of the Estate of Brian Miecnikowski,

Defendants.

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Index No: 603062/06

DECISION AND ORDER

RICHARD B. LOWE III, J:

This action arises from the collection of a promissory note and a corresponding guaranty. Plaintiffs Ben-Zion Roitberg and Michael Roitberg (collectively, the "Roitbergs") move pursuant to CPLR 3212(a) seeking summary judgment against Defendants Marquee Group, Ltd. ("Marquee") and Dominick Sartorio ("Sartorio").[1]

BACKGROUND

In May 2002, the Roitbergs, Mel Blum ("Blum") and Marquee entered a Stock Purchase Agreement in which the Roitbergs and Blum agreed to sell their shares in four companies to Marquee. The agreed upon purchase price was $6,000,000, with $3,000,000 payable to Blum and the remaining $3,000,000 payable to the Roitbergs. Prior to closing, Marquee acquired

[1]Plaintiffs voluntarily agreed to withdraw its motion for summary judgment as to Defendants Lynn Miecnikowski and the Estate of Brian Miecnikowski.

Blum's entire interest in the companies to be sold. Consequently, the Stock Purchase Agreement was amended on October 17, 2002 to provide that the purchase price was reduced to $3,000,000 reflecting the value of the remaining interests of the Roitbergs.

On October 17, 2002, Marquee entered into a Promissory Note ("Note") whereby it agreed to pay Plaintiffs $2,600,000, with $400,000 at once and the remaining $2,200,000 over the course of twelve quarterly payments. The Note was signed by Brian Miecnikowski ("Miecnikowski"), the President of Marquee. Miecnikowski served as the President and CEO of Marquee until his death on November 10, 2002. Sartorio is currently the CEO of Marquee.

On the same day, Miecnikowski and Sartorio entered into a Guaranty Agreement ("Guaranty") whereby they agreed to be jointly and severally liable for Marquee's obligations under the Note.

Also on that day, Miecnikowski and Sartorio executed an Indemnity Agreement in which they agreed to indemnify and hold Plaintiffs harmless from any claims arising from a loan between a bank and one of the companies being sold.

Marquee made the initial payment of $400,000 and ten of the twelve quarterly installment payments. However, Marquee failed to make the last two installment payments under the Note. In addition, Sartorio and Miecnikowski failed to make payment for Marquee's outstanding obligations under the Note.

Upon Marquee's failure to make the final two quarterly payments, Plaintiffs made a demand on Marquee under the Note as well as on Sartorio and the Estate of Miecnikowski (the "Estate") to make payments under the Guaranty. Marquee, Sartorio, and Miecnikowski failed to make payments.

Plaintiffs filed a two count complaint against Marquee for breach of contract with respect to the Note and against Sartorio, Lynn Miecnikowski, and the Estate for breach of contract with respect to the Guaranty. Defendants Marquee and Sartorio assert a number of defenses including fraudulent inducement and contract invalidity.

DISCUSSION

Summary Judgment

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). 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 (CPLR 3212 [b]; *Zuckerman*, 49 NY2d at 562). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]).

In an action to recover upon a note for failure to make payment, "plaintiff establishes a prima facie case by proof of the note and a failure to make payments called for by its terms" (*Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791, 792 [2d Dept 1985], *affd* 67 NY2d 627 [1986]). Similarly, a "prima facie right to recover under a guaranty agreement is established by showing the execution thereof and a failure to pay in accordance

therewith" (*Samsung Am. v Noah*, 209 AD2d 367, 367 [1st Dept 1994], citing *117-14 Union Turnpike Assoc. v County Dollar Corp.*, 187 AD2d 357 [1st Dept 1992]).

Although Sartorio submits an affidavit on behalf of himself and Marquee, he does not state that he has personal knowledge of all the facts therein (*see* CPLR 3212[b]). In light of Sartorio's claims of nescience, it is unclear to which facts he can speak on behalf of Marquee. In his affidavit, Sartorio states that he has "not ever seen the Guaranty, Note, or Amended Stock Purchase Agreement prior to [the] lawsuits being filed" (Aff in Opp ¶ 6). If Sartorio does not possess personal knowledge of the contractual relationship between Plaintiffs and Marquee, his affidavit offers no probative value for Marquee in opposing the motion for summary judgment (*Lane v Fisher Park Lane Co.*, 276 AD2d 136, 140 [1st Dept 2000]). Notwithstanding the deficiency, this Court briefly addresses the allegations asserted on Marquee's behalf under the assumption that Sartorio possesses the requisite personal knowledge of facts.

Here, Plaintiffs' affidavits demonstrate that Marquee executed a promissory note, pursuant to which Marquee promised to pay $2,600,000. Of that amount, $400,000 was to be paid at the outset and the principal balance was to be paid in twelve installment payments. On January 1, 2006 and April 1, 2006, Marquee failed to make the required quarterly payments, and was therefore in default under the Note. Marquee does not deny that it failed to make the final two installment payments under the Note. Indeed, Sartorio's affidavit is devoid of any allegation that Marquee is unaware of the Note or that Marquee did not fail to make payment on the final two installments. Thus, existence of and default on the Note were established and not denied.

Additionally, Miecnikowski and Sartorio executed a Guaranty, guaranteeing to pay for Marquee's obligation under the Note. Upon Marquee's failure to pay its last two installments,

Plaintiffs demanded payment from Sartorio and the Estate of Miecnikwoski. Neither made payment for Marquee's obligations under the Note. Therefore, existence of the Note and default in payment were established by Plaintiffs' motion papers and were not denied by Defendants. Furthermore, Plaintiffs' affidavits established the existence of the Guaranty and the failure to make payment under the Guaranty. Accordingly, Plaintiffs have established entitlement to summary judgment. To that end, it is imperative for Defendants to put forth proof of evidentiary facts showing the existence of a triable issue with respect to its asserted defenses to the action on the Note and Guaranty.

Defenses

Defendants have asserted a number of defenses to avoid summary judgment. As to the breach of contract cause of action against Marquee, Sartorio, speaking for Marquee, claims that Marquee was fraudulently induced into giving the Note. As to the breach of contract cause of action against Sartorio, he claims that he was fraudulently induced into entering the Guaranty, the signature on the Guaranty is not his, and the Guaranty is not valid.

Fraudulent Inducement

Defendants Marquee and Sartorio both assert fraudulent inducement in defense of the respective claims against them.

In order to sustain a cause of action of fraudulent inducement, plaintiffs must show "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Sokolow v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]).

Additionally, each element of the defense must be pleaded with particularity (CPLR 3016[b]; *Anos Diner, Inc. v Pitios Gourmet, Ltd.*, 100 AD2d 948, 949 [2d Dept 1984]). In *Sokolow*, the court reversed the lower court's ruling that the movant for summary judgment demonstrated an absence of genuine issues of fact on the opponent's counterclaim of fraudulent inducement. The court found that the opponent raised a viable counterclaim by alleging: that plaintiffs made representations concerning the experience of its partners; that such representations were false when made and were known to be false; that they were made for the purpose of inducing defendant to execute the agreement; that defendant relied upon the truth of those representations; and that had defendant known these representations were false he would not have executed the agreement.

Here, the allegations set forth by Marquee and Sartorio do not create a triable issue of fact with respect to their fraudulent inducement defense. Unlike the showing in *Sokolow*, Defendants do not allege that the omissions were material in nature; that the omissions were false and known to be false; that the omissions were made for the purpose of inducing Defendants to execute the agreement; or that Defendants would not have executed the agreement had they known of the omissions. Instead, the substance of Defendants' defense is that Plaintiffs failed to make certain disclosures. While Defendants discuss at length the disclosures that Plaintiffs allegedly failed to make, Defendants do not allege that Plaintiffs were under any duty to make the disclosures (*see P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 378 [1st Dept 2003]). Defendants proceed to allege in conclusory fashion that the "representations and warranties made by plaintiffs to Marquee were false and misleading" (Aff in Opp Ex A, ¶ 64), and that "Marquee reasonably relied upon plaintiffs' representations and warranties when entering into the Closing

Documents and the transaction represented thereby" (Aff in Opp Ex A, ¶ 65). The claim of fraudulent inducement is not supported by specific and detailed allegations of fact. Even if Defendants could support their allegations with the requisite evidentiary basis, the allegations themselves are still insufficient to demonstrate that issues of fact exist as to its fraudulent inducement defense. Moreover, Plaintiffs' responses, supported by evidentiary proof, demonstrate that Defendants' defense is without merit.

As to each individual defendant's assertion of fraudulent inducement, Plaintiffs do not directly challenge the viability of Defendants' fraudulent inducement claim. Instead, they respond to Defendants' defense by arguing that fraudulent inducement is unavailable because Sartorio entered into a Guaranty that contained language waiving all defenses and because Marquee ratified the Note by making ten of twelve installment payments.

With respect to Sartorio's defense, Plaintiffs respond that the "Guaranty Absolute and Unconditional" provision in the Guaranty precludes Sartorio from asserting the defense of fraudulent inducement. Generally, language in a guaranty specifying that it is absolute and unconditional will negate a claim of fraudulent inducement (*see e.g. Citibank, N.A. v Plapinger*, 66 NY2d 90, 96 [1985]; *Bank Leumi Trust Co. v D'Evori Int'l, Inc.*, 163 AD2d 26, 33 [1st Dept 1992]; *BNY Financial Corp. v Clare*, 172 AD2d 203, 203 [1st Dept 1991]).

Here, Plaintiffs rely on the following language in the Guaranty:

> Guarantor understands and agrees that this Guaranty shall be construed as a continuing, absolute and unconditional guarantee of payment without regard to (i) the validity, regularity or enforceability . . . (ii) any defense, setoff or counterclaim . . . which may at any time be available to or be asserted by the Borrower or Guarantor against the Lender, or (iii) any circumstance whatsoever (with or without notice to or knowledge of the Borrower or Guarantor) which constitutes, or might be construed to constitute, an equitable or legal discharge of the

> Borrower for the Obligations, or of the Guarantor under this Guaranty, in bankruptcy or in any other instance.

The Court finds that the disclaimer language found in the guaranty to be no different from the language found to bar the claims and defenses of fraudulent inducement in the cases cited above. Accordingly, this Court finds that Sartorio waived the defense of fraudulent inducement.

With respect to Marquee's defense, Plaintiffs respond that the Marquee's ratification by making the first ten of twelve quarterly installment payments over the course of three years precludes Marquee from asserting the defense of fraudulent inducement. Plaintiffs contend that Marquee was aware as early as May 2003 of the facts that Plaintiffs are alleged to have failed to disclose. Despite being aware of these facts, Marquee continued to make payments under the Note as late as October 2005. Indeed, Defendants indicate that they were alerted to some degree of the facts Plaintiffs are alleged to have failed to disclose, yet Defendants continued to make payments under the Note (Aff in Opp ¶ 23-24 ["During that time [where Marquee continued to make payments after learning of certain defects,] Marquee did not know of the full nature and extent of the damage to Marquee nor the full costs to Marquee from all of the misrepresentations."] [emphasis in original]). Having made ten of twelve payments for three years under the Note, Marquee may not now escape its remaining obligation under the Note by claiming that it was fraudulently induced into entering it (*New York Life Ins. Co. v Media/Communications Partners Ltd. Partnership*, 612 NYS2d 144, 145 [1st Dept 1994]; *cf. Sheindlin v Sheindlin*, 88 AD2d 930, 931 [2d Dept 1982]). Because Marquee ratified the note, it has failed to show that a triable issue of fact exists as to its fraudulent inducement defense.

Recollection of Guaranty and Validity of Signature Therein

In addition to asserting the defense of fraudulent inducement, Sartorio asserts that he has no knowledge of signing the Guaranty. Additionally, Sartorio asserts that he has never seen the Note or the Amended Stock Purchase Agreement.

"Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 383-84 [2004]). "Averments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*id.* [internal citations and quotations marks omitted]; *see also DDS Partners, LLC v Celenza*, 6 AD3d 347, 349 [1st Dept 2004] [finding defendant's claim that the note was not authentic to be conclusory and unsubstantiated by the record, and, therefore, insufficient to defeat plaintiff's motion for summary judgment]; *Joint Venture Asset Acquisition v Tufano*, 203 AD2d 102, 102 [1st Dept 1994] [same]).

While Sartorio asserts fraudulent inducement as a defense, he curiously contends that he has "not ever seen the Guaranty, Note, or Amended Stock Purchase Agreement prior to the lawsuits being filed" (Aff in Opp ¶ 6). Clearly, Sartorio cannot both be unaware of the Guaranty and have been fraudulently induced to enter into it. Moreover, Sartorio's denial of knowledge of the Note or Amended Stock Purchase Agreement is negated by his letter to Plaintiffs' counsel remitting an installment payment. In the letter, Sartorio writes: "Please find enclosed a check in the amount of $223,361.11 for the scheduled payment required per the Michael-Roitberg/Ben-Zion agreement" (Greenberg Aff Ex D). As Plaintiffs point out, the original Stock Purchase Agreement did not provide for installment payments. Only after the Amended Stock Purchase Agreement and the Note were executed did the terms change to provide for installment payments. The Michael-Roitberg/Ben-Zion agreement referred to in the letter could not be the

original Stock Purchase Agreement. Thus, Sartorio's claim that he never saw the Amended Stock Purchase Agreement or the Note is flatly contradicted by his letter. Accordingly, the argument that his signature is not authentic fails to raise a triable issue of fact because of the inconsistency between Sartorio's claims of ignorance and inducement as to the Guaranty (*cf. Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002] ["A party's affidavit that contradicts her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment."]).

Tellingly, Sartorio does not state for certain that he did not sign the Guaranty, but rather, he "believes" that he did not sign it. Sartorio does not offer the opinion of a handwriting expert, or any other form of proof to rebut the presence of his signature. Moreover, Sartorio's signature is on an Indemnity Agreement, executed on the same day as the Amended Stock Purchase Agreement, Note, and Guaranty were executed. Thus, the denial of genuineness of Sartorio's signature on the Guaranty is at odds with the presence of his signature on the Indemnity Agreement, both executed on the same day and related to the same transaction. Accordingly, Sartorio's bald, conclusory and unsubstantiated allegation that the signature on the Guaranty lacks authenticity is insufficient to raise an issue of fact to preclude summary judgment in this action (*see Banco Popular*, 1NY3d at 384 [no issue of fact where there was an absence of factual assertions supporting a claim of forgery and [defendant] has not demonstrated that [defendant's] prelitigation conduct was consistent with a denial of genuineness.]).

Because Sartorio does not believe the signature on the Guaranty is his, he requests discovery of the original document and expert examination of the same. Sartorio's request for further discovery is based on mere speculation and is inadequate to defeat summary judgment

(*see Rogan v Giannotto*, 151 AD2d 655, 656 [2d Dept 1989]).

Validity of the Guaranty Based On Ambiguity and Adequate Consideration

Sartorio claims that because he was not provided with a copy of the Note to which the Guaranty is alleged to be referable, the Guaranty is ambiguous, and therefore invalid. However, the case Sartorio cites for the that proposition is inapposite. In *Kantor v. Mesibov*, the guaranty failed to indicate which note, among three notes, the obligation of the guaranty applied (2006 NY Slip Op 51776U, *4-5 [Sup Ct Nassau County 2006]). Here, there is no ambiguity created by the existence of multiple notes. There is only one promissory note and one guaranty. Moreover, the guaranty refers to the note given by Marquee to the Roitbergs for a sum certain, and shares the same execution date as the other stock purchase related documents. The Guaranty states: "The term 'Obligations' shall mean the entire principal balance and interest due under a certain promissory note made by Borrower [Marquee] to Lender [the Roitbergs] of even date herewith in the original principal sum of $2,600,000.00." Thus, Sartorio has failed to raise a triable issue of fact as to its claim of ambiguity.

Sartorio also argues that the Guaranty contained a condition precedent which was not fulfilled, and therefore invalid. Namely, Sartorio argues that the alleged condition required the Plaintiffs to provide future financial accommodations to Marquee. The opening paragraph of the Guaranty states:

> In consideration of financial accommodations given or to be given or continued to or for the account of THE MARQUEE GROUP, LTD. (the "Borrower"), by MICHAEL ROITBERG & BEN-ZION ROITBERG (the "Lender"), each of the parties listed on the signature pages hereto (each, a "Guarantor"), hereby agrees with the Lender as follows:

In arguing that Plaintiffs failed to provide *continuing* financial accommodations, Sartorio

narrowly construes the above paragraph. Sartorio concludes that the Guaranty is lacking in consideration and therefore unenforceable. However, Sartorio fails to account for the disjunctive clause following "financial accommodations." Giving the paragraph its plain meaning, the parties agreed that adequate consideration was given, would be given, or would continue to be given. Contrary to Sartorio's contention, continuing to give financial accommodations was not the only form of adequate consideration.

Plaintiffs contend that the condition was satisfied because the financial accommodations contemplated in the Guaranty were given when Plaintiffs agreed to reduce the purchase price and allowed Defendants to pay $2,600,000 in installment payments rather than in one lump sum. Defendants have not argued that the reduction in price and allowance for installments were not a financial accommodation. Because financial accommodations were given and because Defendants have not controverted this allegation, there is no triable issue of fact that the Guaranty was not supported by sufficient consideration (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970] ["It was essential for the defendants, in claiming absence of consideration, to state their version of the facts in evidentiary form."]).

Other Defenses

Defendants' answer also asserts the affirmative defense that the venue chosen by Plaintiffs violates CPLR 503 and should be changed pursuant to CPLR 510(1) and (3) and 511. Plaintiffs argue that the Note provides that Marquee "irrevocably waives . . . any objection with respect to venue." (B. Roitberg Aff Ex F, at 2.) Additionally, Defendants assert as a defense that the Guaranty was not properly delivered to Sartorio.

Without any additional explanation from Sartorio's affidavit, Defendants fail to amplify

their defenses in opposition to Plaintiffs' motion for summary judgment with evidentiary proof (*Zuckerman*, 49 NY2d at 562 ["to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact"] [internal quotation marks omitted]). Accordingly, Defendants have failed to raise a triable issue of fact as to the claims of improper venue and improper delivery of the Guaranty.

CONCLUSION

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendants Marquee Group Ltd. and Dominick Sartorio in the amount of $441,827.20, together with interest as prayed for allowable by law at the rate of ___% per annum from the date of _____, 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: October 23, 2007

ENTER:

RICHARD B. LOWE, III, J.S.C.