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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 : 004

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE 8/9/07

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 MEMORANDUM DECISION

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

Dated: 11/19/07

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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MERRILL LYNCH BUSINESS FINANCIAL SERVICES INC.,

Plaintiff,

-against-

Index № 603740/06

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

Defendants.

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RICHARD LOWE III, J.:

Under motion sequence 004, defendants Bruce Zablow (Zablow), David Inkeles (Inkeles), and Sunil Trasi (Trasi), together, the Zablow defendants, once again, seek an order granting them summary judgment against Maureen Matturri (Matturri), or against both Matturri and Joel Bloom (Bloom),[1] on their first and third cross claims, for unjust enrichment and subrogation, respectively.

In this breach of contract action for non-payment of a loan guaranty, Merrill Lynch Business Financial Services Inc. (Merrill Lynch) obtained a decision and order, dated September 13, 2007 (the Prior Order), granting summary judgment, jointly and severally, in the amount of $480,100.73, plus interest, costs, fees, and disbursements against all defendants.

The defendants were shareholders in a professional corporation, Manhattan Imaging Associates, P.C. (MIA), which was also referred to by the parties as Diagnostic Radiology Associates, P.C. While familiarity with the underlying facts is presumed (See Decision, September 13, 2007) , as is relevant here, pursuant to an unconditional guaranty executed on July

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[1]Although the pleadings and motion papers do not clarify whether the Zablow defendants' cross claims are against one or both of these co-defendants, the decision and order of the court is not affected by this lack of clarification.

2, 1999 by defendants in favor of Merrill Lynch, payment was guaranteed by Zablow, Inkeles, Trasi, and Bloom, in the event that their professional corporation failed to provide payment in full on a revolving commercial loan (Revolver Loan).[2] The exposure of these guarantors was limited to $4.5 million and their liability was joint and several. On July 15, 1999, Matturri executed a separate unconditional guaranty in favor of Merrill Lynch which was virtually identical to that signed by the other guarantors except that Matturri's unconditional guaranty was written in the singular, without the "joint and several liability" language, and it limited her exposure to $3.5 million. In August 2000, MIA and Merrill Lynch entered in to a Loan Modification and Extension Agreement (Loan Modification) which effectively reduced the size of the monthly loan payments and extended the maturity date of the Revolver Loan. It is undisputed that, despite requests to do so, Matturri neither signed the Loan Modification, nor did she put up additional security.

As a result of MIA's inability to keep up with its loan payments, Merrill Lynch declared the loan in default in April of 2006, and made a demand for payment in full on the outstanding loan balance of $1,490,023.01. Merrill Lynch foreclosed on the pledged securities and as of October 24, 2006, the loan balance, exclusive of attorneys' fees and other costs, totaled $480,100.73. The Prior Order granted plaintiff's motion against Zablow, Inkeles, Bloom, Matturri and Trasi, jointly and severally, in the principal sum of $480,100.73 plus the interest, costs, fees, and disbursements as provided for in the WCMA Agreement, and directed a separate assessment for plaintiff's recovery of attorneys' fees.

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[2]On July 2, 1999, Merrill Lynch and MIA executed the Working Capital Management Account Reducing Revolver - Loan and Security Agreement No. 862-07U65 (WCMA Agreement) by which Merrill Lynch extended the revolving commercial loan to MIA.

It has been brought to the court's attention that Matturri has not, as of yet[3], agreed to pay her pro rata share of the judgment, nor has she agreed to contribute to her pro rata share of the $1,009,932 already paid by her co-guarantors/defendants. Arguing that they have already contributed more than their pro rata share of 20% each, the Zablow defendants seek an order granting their cross claims for unjust enrichment and subrogation.

The essence of a claim for unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned. The Prior Order granted joint and several liability against all defendants based upon the unconditional guarantees executed by each of them in favor of Merrill Lynch. Therefore, to the extent that any of the defendants have not paid his or her pro rata share, the Zablow defendants contend that he or she has been "enriched." However, under both Illinois and New York law, the motion for summary judgment on their cross claim for unjust enrichment must be denied. "[W]here there is a specific contract that governs the relationship of the parties, the doctrine of unjust enrichment has no application" (Guinn v Hoskins Chevrolet, 361 Ill App3d 575, 604; 836 NE2d 681, 704 [1st Dist 2005] [internal citation and quotation marks omitted]; see also Sergeants Benevolent Assn. Annuity Fund v Renck, 19 AD3d 107, 112 [1st Dept 2005]). Therefore, where, as here, the cross claim for unjust enrichment is based upon language contained in the unconditional guaranty which guarantees payment on the Revolver Loan, it is "based on subject matter governed by a contract" and therefore, does not state a claim for unjust enrichment (The Limited, Inc. v

[3]A letter addressed to the court from defense counsel Schlam Stone & Dolan LLP, dated October 16, 2007, states, relevant part, that "the Zablow Defendants and Dr. Bloom have already paid Plaintiff $1,009,923 in pursuant to their guaranties, for which they have received no contribution from Defendant Matturri."

McCrory Corp., 169 AD2d 605, 607 [1st Dept 1991]).

Furthermore, subrogation "has been defined as the substitution of another person in the place of a claimant whose rights he succeeds in relation to the debt or claim asserted which has been paid by him involuntarily" (North American Ins. Co. v Kemper Nat. Ins. Co., 325 Ill App3d 477, 481; 758 NE2d 856, 859 [1st Dist 2001][citation and quotation marks omitted]). New York, similar to Illinois, recognizes this procedural device by which one party stands in the place of an original claimant, and adheres to the general rule that "in order to be equitably subrogated to the claim of a creditor with respect to another's obligation, a person must have completely discharged the obligation" (Federal Ins. Co. v Arthur Anderson & Co., 75 NY2d 366, 374 [1990]). Neither the complaint nor the cross claim contain allegations that the Zablow defendants have succeeded Merrill Lynch with respect to repayment under the loan and unconditional guarantees, nor is there proof that these underlying financial obligations have been discharged (id.). Accordingly, the Zablow defendants are not entitled to recovery based on a theory of subrogation.

As stated in the Prior Order, the liability of the co-defendants is joint and several, entitling Merrill Lynch to seek the entire debt from any or all of them. Furthermore, to the extent that "a guarantor has paid more than his or her proportionate share of a common liability, [that guarantor] is entitled to contribution from any co-guarantors" by way of a cause of action for contribution (Leo v Levi, 304 AD2d 621, 623 [2nd Dept 2003]; Trossman v Philipsborn, 373 Ill App3d 1020, 869 NE2d 1147 [Ill App 1st Dist 2007]; Pozsgay v Free, 87 Ill App3d 1113, 409 NE2d 554 [5th Dist 1980]).

Accordingly, it is

ORDERED that the motion by Bruce Zablow, David Inkeles, and Sunil Trasi for an order, pursuant to CPLR 3212, granting them summary judgment on their first and third cross claims, for unjust enrichment and subrogation, respectively, is denied.

Dated: November 19, 2007

ENTER:

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