SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

JP MORGAN CHASE BANK, N.A.,

Plaintiff,

INDEX No. 12062/06

MOTION DATE: Oct. 15, 2007
Motion Sequence # 001

-against-

CBF DEVELOPMENT CORPORATION,
SARA G. BROOKS,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation X

This motion, by the plaintiff, for an order of summary judgment in favor of plaintiff pursuant to CPLR § 3212 and such other further relief as may be just and proper, is determined as hereinafter set forth.

FACTS

This is an action in which the plaintiff, JP Morgan Chase Bank, N.A. (hereinafter "Chase") alleges that the defendants, CBR Development Corporation ("CBF") and Sara G. Brooks (" Brooks") defaulted on a payment due pursuant to a Business Revolving

Credit Agreement ("BRCA") between the parties. The defendants applied and were approved for a BRCA on our about July 28, 2000 in the amount of $100,000. In October of 2002, the defendants applied and were approved for an increase to the BRCA in the amount of $10,000. The defendant defaulted on January 28, 2006. The plaintiff's first cause of action is against CBF, the second cause of action is against Brooks and the third cause of action is against CBF and Brooks, jointly and severally.

PLAINTIFF'S CONTENTIONS

The plaintiff contends that summary judgment is warranted because the defendants have clearly defaulted on their payment.

The plaintiff asserts that, while the defendants applied and were approved for a BRCA, the defendant Brooks knowingly and voluntarily executed a personal guarantee for the BRCA, and the defendants are personally and individually, jointly and severally liable to the plaintiff for any outstanding debt arising under the BRCA. The plaintiff argues that there are no material issues of fact in dispute in this matter. In order to recover under the terms of a note, the obligee must establish a **prima facie** case by providing proof of the underlying obligation, the guarantee and the failure by the guarantor to make payment in accordance with its terms. The plaintiff asserts that they have demonstrated all three of these elements in the exhibits attached to the motion.

The plaintiff argues that the defendants answer contains a general denial to the complaint and fails to raise any viable issue of fact sufficient to prevent a finding of summary judgment in favor of the plaintiff. The plaintiff argues that case law supports its assertion. Additionally, the plaintiff contends that the affirmative defenses raised by the defendant are without merit; that the first defense, of failure to state a cause of action, the plaintiff has in fact provided sufficient information supported by relevant evidence to show that the defendants have defaulted and are liable for the debt. Furthermore, a defense that a Complaint does not state a cause of action cannot be interposed in a defendant's answer. In reference to the second defense, of no personal guarantee, the plaintiff provides the specific language of the agreement which acknowledges liability on behalf of the signer (defendant Brooks). Moreover, if the defendants are implying that the guarantee was not in fact executed by the defendant Brooks, then the defendants have failed to properly allege such implication. The plaintiff contends that unsupported allegations of forgery are insufficient to overcome a summary judgment motion.

The third affirmative defense alleging abuse of process is also unsupported by the facts and evidence of this action in that in order to establish an abuse of process claim, the movant must allege that intent to harm was the sole motive. In addition, a showing of malicious intent alone is not enough; the movant must show interference with one 's person or property under color of process.

The defendants' fourth defense, that the plaintiff improperly declared a default and improperly accelerated the agreement, is also meritless. The plaintiff argues that it has provided evidence that the defendants defaulted on the agreement on January 28, 2006 when they failed to pay the amount due pursuant to the agreement. As per the agreement, the plaintiff was entitled to move for default without notice to the defendants as soon as payments were not made in accordance with the terms of the BRCA. Therefore, the plaintiff did not improperly declare a default and was correct in accelerating the note.

The defendant's fifth and sixth defenses sound in lack of personal jurisdiction. The plaintiff asserts that this defense is also without merit because the defendants were properly and sufficiently served with process pursuant to section 306 of the Business Corporation Law (BCL) and CPLR 308(4). Furthermore, the fact that the defendants' Answer contains the affirmative defense of lack of personal jurisdiction is an insufficient foundation upon which to ground a conclusion of lack of personal service. The plaintiff also notes that the defendants have failed to move this court for dismissal based upon lack of proper service. The plaintiff contends that if the objecting party does not move for judgment on the ground of improper service within sixty days after serving the pleading, such an objection is waived. The defendants' Answer was served on or about August 24, 2006 and, therefore, the sixty days to make a motion have expired and the affirmative defense fails.

The seventh defense of the defendants is that the plaintiff has failed to satisfy a condition necessary to accelerate payment. The plaintiff responds by explaining that there is no such condition precedent set forth in the BRCA or guarantee and the defendants have failed to sufficiently allege such a condition. In fact, the BRCA states that, "All obligations will become immediately due without notice or demand from the Bank if the Applicant at any time breaches any term or condition of the note or Account Agreement…". Therefore, the plaintiff argues there is no condition precedent and this defense must be dismissed.

The defendants' final defense is that the plaintiff's contract is unenforceable as a

matter of law. The plaintiff contends that basic contract law provides that a contract is valid and enforceable when it can be found that there is a valid offer, a valid acceptance, and when consideration is provided. Clearly a valid contract exists where the plaintiff agreed to lend the defendants $100,000 and in return, the defendants agreed to pay the principal to the plaintiff in monthly installments with interest. Since the plaintiff has provided sufficient proof of said contract, the plaintiff asserts the contract is valid. Based on the foregoing, the plaintiff argues that the motion for summary judgment should be granted in its entirety, together with such other and further relief as this Court deems just and proper.

DEFENDANTS' CONTENTIONS

The defendants contend that the plaintiff has not made a prima facie showing of entitlement to summary judgment in this action. They argue that the plaintiff has chosen to predicate this action on a BRCA loan agreement that was superseded by another agreement and contained substantially different terms from the agreement currently in effect. The defendants also claim that the Affidavit of Pamela Crawford contained in the plaintiff's moving papers, is insufficient to support a motion for summary judgment since she has little or no knowledge of the underlying transaction. A review of the Affirmation of Dawn Tan, Esq., reveals that Ms. Tan is equally unfamiliar with the underlying factual relationship between the parties.

The defendants contend that the loan from the plaintiff was opened with essentially no documentation. The defendant Brooks argues that if she intended to personally guarantee a revolving line of credit, she simply would have encumbered her home for a similar amount at a much lower interest rate. Brooks claims that she clearly never executed said agreement in her individual capacity, and that she merely executed said documents in her corporate capacity and as an agent for the corporation. Moreover, the plaintiff's moving papers include letters from two of the plaintiff's bank officers stating that all of the terms of the un-executed loan agreement would be binding without a signature of the document. It appears as if the plaintiff was well aware, at that time, that there was no personal guarantee executed by Brooks previously and that the plaintiff was attempting to bind Brooks with personal liability only after the documents were executed. In addition, the enforcement of said alleged personal guarantee contained in the original BRCA is a factual question exclusively within the province of a jury. The defendant refers to case law holding that an agent who signs an agreement on behalf of a corporation, even if there is a statement that the signer is liable, the signer cannot be held

liable personally unless that was her intent. The defendant also contends that said documents are illegible and the terms of the agreement can barely be read. The document annexed to pleadings also appears to have been physically pieced together into its current form and certainly is not an original. In fact, the paragraphs and the type do not physically match. The document is further deceptive in that the plaintiff did not provide for a separate signature line wherein the borrower would be well aware that a personal guarantee was to be executed.

The defendants assert that subsequent to that first loan, the terms of the line of credit were re-written, on at least two occasions. On the last occasion in 2005, the entire agreement was replaced with a new writing. The plaintiff's instant case is not premised upon the current loan and seemingly ignores its existence and terms. The current loan agreement bears a different account number, different principal amount and different interest rate. The individual defendant explains that CBF suffered a devastating fire in 2005 and the records of this transaction for the most part were destroyed. However, the defendant was able to recover a BRCA statement dated August 10, 2005 which clearly indicates that the loan in question was re-written and the terms indexed therein differ significantly from the loan documents which are annexed to the moving papers and upon which this action is premised. The amount of the credit line was $150,000 in the year 2005, not $110,000. The defendant asserts that said amount increased because the entire loan was re-written. The defendant also argues that this new loan agreement certainly was not personally guaranteed. In fact, Edward DeWalters, the bank official that was assigned the new loan, specifically represented to CBF that the new loan was also not personally guaranteed.

The defendant contends that discovery in this action has not been conducted although a demand for examination before trial was served upon the plaintiff at the time issue was joined. However, the plaintiff brought this motion prior to producing any witnesses for deposition. The defendant asserts that after said discovery is conducted, the plaintiff's action will be dismissed as the existence of the new loan agreement will be established leading to the dismissal of the current action. The defendant argues that a default relating to the new loan cannot be declared pursuant to the terms of the old retired loan. The defendant contends that any attempt to bind them to the old loan agreement certainly is an issue of fact to be determined by a jury. Even if the plaintiff denies the existence of a new BRCA, any such denial should be refuted by the existence of a new credit line principal amount approximating $50,000 greater than the original BRCA upon which the plaintiff erroneously premised the instant action. Based on the foregoing, the defendant argues that the motion for summary judgment be denied in its entirety.

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PLAINTIFF'S REPLY

The plaintiff contends that the defendants fail to raise a triable issue of fact. The plaintiff refers to case law stating that mere conclusory allegations without any evidentiary proof are insufficient to defeat a motion for summary judgment.

The plaintiff again argues that Brooks' claim, that she should not be bound by her personal guarantee in the BRCA, does not preclude summary judgment. In commercial context, it is black letter law that a party's failure to review a document does not relieve that party of the obligations imposed by such document. The defendant Brooks also went on to make unsubstantiated allegations as to the quality and authenticity of the exhibits produced by the plaintiff. However, Brooks did in fact sign the BRCA which stated, "This Personal Guarantee and Collateral Agreement is an individual personal liability whether or not signed below in an individual capacity…". The clear and unambiguous language of this statement shows the clear intent of the parties to establish personal liability and therefore the Court must interpret the contract to establish such liability. Brooks' lack of intent to be personally bound is inconsequential. Courts have uniformly upheld guarantees nearly identical to the one used herein. Furthermore, the sole condition precedent for a guarantor's liability is non-payment of the indebtedness. Based on all the foregoing, there are no triable issues of fact as to the guarantor's personal liability.

The plaintiff contends that the underlying BRCA loan is documented and the balance sued upon, which is based on a subsequent increase of the credit line to $150,000, is subject to the same terms and conditions and interest rate. The plaintiff asserts that the allegation of a "new loan agreement" by the defendants is a red-herring designed solely to distract this Court from the plain facts at bar. The defendants do not deny that money is owed to the plaintiff, they are merely alleging that the subsequent new BRCA was at a lower interest rate. However, the defendants have not produced any documentary evidence to support the new loan agreement and lower interest rate. The document produced by the defendants as proof of a new loan agreement, in fact, serves as further proof that the existing BRCA was approved for an increased credit line of $150,000 at the original contractual interest rate agreed upon. The plaintiff argues that the contractual rate throughout the entire existence of the BRCA was prime rate plus 0.5%. The change in account numbers as explained by the defendants, is not proof a new loan agreement but rather a change caused by internal reassignment of account numbers to all of the plaintiff's accounts. Moreover, the different interest rate is not caused by a different base contractual interest rate resulting from a new agreement but merely reflects the

fluctuation of the prime rate in existence during the course of the BRCA's history. In the affidavit of Rosetta Taylor, the Recovery Officer and Assistance Vice-President of the plaintiff, Chase, it is not the plaintiff's practice to enter into new agreements with borrowers each and every time a request is made to increase an existing credit line. Based on all the foregoing, the plaintiff argues that the Court grant summary judgment in the principal amount of $81,850.78 plus 8.75% interest from January 28, 2006, the date of default through to and including the date of entry of judgment.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

In applying the above legal principles to the facts of the case at bar, this Court has thoroughly examined the entire record, as presented, in the context of the applicable case law and statutory law. In construing the evidence in the light most favorable to the

defendant (**Museums at Stony Brook v Village of Patchogue Fire Department**, 146 AD2d 572, 536 NYS2d 177, 2nd Dept., 1989), summary judgment herein is warranted in favor of the plaintiff.

In order to recover under the terms of a note, the obligee must establish a **prima facie** case by providing proof of a promissory note executed by the non-moving party and a default. (**MDJR Enterprises Inc., v LaTorre**, 268 AD2d 509, 703 NYS2d 54, 2nd Dept., 2000; **Layden v. Boccio**, 253 AD2d 540, 686 NYS2d 763, 2nd Dept., 1998). In order to recover under the terms of the guarantee, the obligee must establish a **prima facie** case by providing proof of (1) the underlying obligation; (2) the guarantee; and (3) the failure by the guarantor to make payment in accordance with its terms. (**Key Bank of Long Island v Burns**, 162 AD2d 501, 556 NYS2d 829, 2nd Dept., 1990).

There is no evidence of any changes in the terms of the agreement and the obligations of the defendant. The defendants' assertion is that discovery may produce evidence which may pose a question of fact is insufficient to defeat summary judgment. "Allegations of mere hope that the discovery will reveal something helpful. . ." (**Bryan v City of New York**, 206 AD2d 448, 614 NYS2d 554-5, 2nd Dept., 1994), especially since the inconsistencies set forth by the defendants have been sufficiently explained by the plaintiff.

Additionally, the Court notes that, inasmuch as the guarantor/defendant acknowledges the increased credit limit, but asserts that she has not guaranteed the credit, it is incumbent upon this Court to examine the Guaranty. The Guaranty provides, in pertinent part as follows:

> "If this application is approved, I/we individually and jointly, absolutely and unconditionally guarantee to The Chase Manhattan Bank or Chase Bank of Texas, N.A. (collectively referred to as "Chase") and its assigns the prompt payment of each and every obligation and liability of every nature and description of the Applicant to

the Bank, whether now existing or arising in the future ("Obligations"). I agree that all Obligations will become immediately due without notice or demand from the Bank if the Applicant at any time breaches any term or condition of the note or Account Agreement(s) for which the Applicant has applied. This Guarantee will continue even if the Bank is unable, for whatever reason, to obtain payment from the Applicant or other guarantor, or if any of the Obligations have been released or such Obligations are renewed or time for payment is extended. I waive presentment, demand, protest, notice of non-payment or protest thereof, and furthermore waive all Rules and Suretyship law, rights of subrogation and any defenses which could be asserted by the Applicant, the undersigned or other guarantor. This Guarantee shall continue in effect unless and until I give written notice to the Bank terminating my future liability under this Guarantee, in which event I recognize that this Guarantee shall continue in effect with respect to any and all Obligations incurred prior to the time the Bank receives such notice, including the amount of any undrawn revolving credit line or commitment to lend, whether or not conditional". (emphasis supplied).

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The clear and unambiguous language of that Guaranty, that the defendant Brooks signed and acknowledged, continues her obligation to any subsequent loan or credit line that the plaintiff extended to her and her business, the corporate defendant. Therefore, notwithstanding the defendants' assertion that the credit limit was increased from $100,000 to $150,000 pursuant to some undocumented agreement, the language of the Guaranty quoted hereinabove is controlling, in that she guarantees payment ". . .whether now existing or arising in the future".

Accordingly, the plaintiff's motion for summary judgment is **granted**.

Plaintiff's counsel may obtain a Clerk's Judgment for the sums demanded in the complaint.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated DEC 5 2007

XXX J.S.C.

ENTERED

DEC 10 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE