

Romagnolo v Pandolfini

2008 NY Slip Op 30646(U)

February 1, 2008

Supreme Court, Richmond County

Docket Number: 0100225/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 100225/05
Motion No.: 3**

**JOSEPH ROMAGNOLO and
SOUTH SHORE IMAGING, INC.,**

Plaintiffs
against

**AMENDED
DECISION & ORDER
HON. JOSEPH J. MALTESE**

**JASON PANDOLFINI, RON PANDOLFINI, Jr.,
US BANK PORTFOLIO SERVICES, and
DVI FINANCIAL SERVICES, INC.,**

Defendants

The following items were considered in the review of this motion for summary judgment.

| <u>Papers</u> | <u>Numbered</u> |
|--------------------------------------------------|---------------------------|
| Notice of Petition and Affidavits Annexed | 1 |
| Answering Affidavits | 2 |
| Replying Papers | 3 |
| Exhibits | Attached to Papers |
| Memorandum of Law | |

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Counterclaim Plaintiff, Lyon Financial Services, Inc., d/b/a U.S. Bank Portfolio Services (“USBPS”), brings this motion for summary judgment pursuant to CPLR § 3212 seeking to recover from South Shore Imaging, Inc. (“South Shore”), Joseph Romagnolo (“Romagnolo”), Jason Pandolfini, and Ron Pandolfini (collectively the “Counterclaim Defendants”) the amounts allegedly due under the Lease and the Individual Guaranties at issue in this action, and the right to immediately repossesses the equipment. The motion is hereby granted in part and denied in part. This court notes that the Jason Pandolfini and Ron Pandolfini (“Pandolfinis”) advance the same arguments as Romagnolo as to the issue of individual liability.

Facts

The Counterclaim Defendants entered into a Lease with DVI Financial (“DVI”) whereby DVI

leased certain equipment to Counterclaim Defendants. On January 5, 2001, DVI and South Shore, as lessee, entered into a Master Lease. On or about November 29, 2001, DVI and South Shore entered into a certain schedule ("Schedule 1") which provided for the lease of certain items of medical imaging equipment. Under Schedule 1, South Shore defaulted and thereafter restructured its debt with DVI by entering into a second schedule ("Schedule 2") on March 20, 2003. It is undisputed that South Shore, the primary obligor under the Lease, has failed to make the required payments under the agreements, and has not timely cured those defaults. As a result of the payment defaults, USBPS, the successor servicer after DVI Financial filed a Chapter 11 Bankruptcy, claims that the Counterclaim Defendants owe USBPS in excess of \$902,065.98 plus interest and attorney's fees. Counterclaim Defendants oppose this motion by raising four affirmative defenses, which the court will address in turn. This court notes that Pennsylvania law governs this action under the choice of law clause in the Lease and Guaranties, but New York law applies to procedural questions.¹

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."² Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."³ The court's role upon a motion for summary judgment is one of issue finding rather than issue determination.⁴ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁵

¹*See U.S. Mortgage & Trust Co. v Ruggles*, 258 NY 32 [1932]; *In re Nicol's Trust*, 148 NYS2d 854 [Sup Ct 1956].

²CPLR §3212[b].

³*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [App Div 2nd Dept 1990].

⁴*McKinney v. Setteducatti*, 183 AD2d 879 [2d Dept 1992].

⁵*American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [App Div 1st Dept 1994].

The Counterclaim Defendants first claim that USBPS lacks standing to assert its causes of action as successor servicer of the Leases, and as agent for the Trustee. This claim is without merit. USBPS has established that DVI Financial filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code and that By Order, dated February 3, 2004, the Bankruptcy Court approved a Settlement Agreement between DVI Financial, USBPS, among others, pursuant to which USBPS was appointed successor servicer.

Second, the Counterclaim Defendants contend that the affidavit of Jane Fox submitted by USBPS cannot be admitted into evidence because she has no personal knowledge of DVI's records. In turn, USBPS argues that the affidavit is admissible pursuant to CPLR §4518 as a business records hearsay exception. CPLR §4518 does not require an affiant to have personal knowledge of the facts; rather, [a]n affiant need only demonstrate that he or she possesses personal knowledge of the office practices such that the affiant can lay a sufficient foundation to establish that such documents are business records.”⁶ Here, although Jane Fox had no personal knowledge of the documents, her affidavit establishes that she has knowledge of the office practices of USBPS and DVI Financial. Therefore, Jane Fox's affidavit is admissible, in its entirety.

The Counterclaim Defendants' third argument is that Romagnolo cannot be held personally liable because the guaranty was not signed by him in his individual capacity. In support of their argument, they mistakenly rely on the case *150 Broadway N.Y. Assoc. v Bodner*,⁷ which holds that if a corporation enters into a contract through its officers, the officers will not be liable in their individual capacity if that corporation breaches the contract. Here, Romagnolo signed as an officer guaranteeing the corporation's debt. Therefore, his inclusion of “Treasurer” below his signature is merely descriptive, and does not evidence an intention to sign in a purely corporate capacity which would, in any event, be

⁶*Dan Med., P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 829 NYS2d 404 [NY App Term 2d Dept 2006].

⁷784 NYS2d 63 [1st Dept 2004].

inconsistent with the nature of the guaranty.⁸

Furthermore, Counterclaim Defendants' argue that the obligations under the alleged guaranty signed in 2001 were totally satisfied by the 2003 agreement. Therefore, since a second guaranty was not executed, Romagnolo argues that he cannot be held according to the terms of the new contract (i.e., Schedule 2). USBPS, in opposition, contends that the parties entered into Schedule 2 because Schedule 1's obligations were not satisfied and that Schedule 2 was merely a modification and extension of the existing payment terms of Schedule 1. Thus, USBPS argues that the Guaranty language bars Romagnolo's argument. Having stated this proposition, USBPS points to the following paragraph in the Guaranty:

Until all of the Guaranteed Obligations are completely fulfilled to the satisfaction of DVI and each and every one fo the terms, covenants and conditions of this Agreement are fully performed, the liability of Surety will not be released, discharged or in any way impaired by (I) any amendment or modification of, supplement to or extension or renewal of any Loan Document or any agreements made by or between DVI and any Obligor with respect to the Guaranteed Obligations. . .

This court cannot agree with USBPS that the provision in the Guarantee gave it the right to enter into a separate contract with a new greater amount without executing another Guaranty. *Williston on Contracts* states that “[a] surety can be held only to the contract that it has made.”⁹ It continues that the basis for this general rule is that “the surety cannot be held according to the terms of the new contract, because the surety never assented to it. . . If the change is material in the sense that it affects the substantial meaning of the contract, it discharges the surety, even though the change may not have been

⁸*Commonwealth Nat. Bank v Boetzelen*, 338 PaSuper 237 [1985], citing *Atlanta Corp v Ohio Provision Co*, 489 Pa 389 [1980]; see also, *Chemical Bank v Masters*, 176 AD2d 591 [1st Dept 1991], *Chemical Bank v Kaufman*, 142 AD2d 526 [1st Dept 1988].

⁹§§61F:63 to 61F:67, quoting *Lakeshore Commercial Finance Corp. v Drobac*, 107 Wis2d 445 [1982].

material in the sense of being very important.”¹⁰

Here, the Guaranty that was executed with Schedule 1 was for the amount of \$929,806.80. Under Schedule 2, the amount was for \$1,097,367.60. This court agrees that when Schedule 2 was executed, the guaranty ceased to exist with the satisfaction of the 2001 agreement. Moreover, the increased amount of \$167,560.80 due under Schedule 2 is material because the surety now has a different obligation from the one originally made.¹¹ Thus, when Schedule 2 was made, a separate Guaranty should have been executed.

Lastly, the Counterclaim Defendants argue that the terms of the Master Lease, Schedule 1 and Schedule 2 are usurious because the interest on the past due amount is being compounded, resulting in greater than a 25% interest. The courts have addressed the issue of the meaning of “compound interest.” In *Household Finance Corp v Goldring*,¹² the court held that the term “compound interest” does not apply where interest has already fallen due and has become a debt which, like any other debt, may either be paid in cash or reloaned to the debtor under a new agreement that it shall bear interest.”¹³ Here, it is undisputed that South Shore was first in default for the amount of \$167,560.80 in accrued unpaid interest. This interest does not amount to “compound interest” when the loan was restructured through the execution of Schedule 2. Therefore, the amount sought by USBPS cannot be deemed “usurious.”¹⁴

Accordingly, it is hereby:

¹⁰*Id.*, citing *Hall & Co. v Continental Cas. Co.*, 34 AD2d 1028 [3d Dept 1970].

¹¹*See, e.g., Jacob Sall Bldg. & Loan Ass’n. v Heller*, 314 Pa 237 [1934].

¹²263 AD 524 [1st Dept 1942].

¹³*Id.*

¹⁴*See Nikezic v Balez*, 585 NYS2d 86 [NY App Div, 2d Dept, 1992].

ORDERED, that the US Bank Portfolio Services' motion for summary judgment against South Shore Imaging, Inc., is granted; and it is further

ORDERED, that the US Bank Portfolio Services' motion for summary judgment against Joseph Romagnolo individually, is denied; and it is further

ORDERED, that the US Bank Portfolio Services' motion for summary judgment against Jason Pandolfini and Ron Pandolfini, Jr., individually, is denied; and it is further

ORDERED, that the US Bank Portfolio Services has the right to immediately repossess the equipment and sell it at fair market value and to offset such net recovery from the total due it. Settle Judgment on Notice.

ENTER,

DATED: February 1, 2008

Joseph J. Maltese
Justice of the Supreme Court