

HSBC Bank USA, N.A. v Dallas Decorators, Inc.

2008 NY Slip Op 30918(U)

March 19, 2008

Supreme Court, New York County

Docket Number: 0601844/2007

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

- Index Number : 601844/2007

HSBC BANK USA N.A.

vs

DALLAS DECORATORS INC

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

NOTION DATE _____

NOTION SEQ. NO. _____

NOTION CAL. NO. _____

The following papers, numbered 1 to _____ 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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION:**

FILED

MAR 26 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/19/08

J. Gische
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE *Per + Report*

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
HSBC Bank USA, National Association,

Plaintiff,

-against-

Dallas Decorators, Inc., and
Morris Laniado,

Defendants.

-----x

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
HSBC n/m §3212 and order of seizure, BA affid, exhs	1
Defs' opp w/ML affid, MK affirm, exhs	2
HSBC reply	3
Transcript 1/24/08	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff HSBC Bank USA, N.A. ("HSBC") to recover damages in the amount of \$94,858.31 against defendants who are a corporation ("corporate defendant) and its president ("Mr. Laniado"). Issue has been joined. The court has before it a timely motion for summary judgment by plaintiff that will be considered. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The motion is opposed.

Arguments

Both defendants are represented by the same lawyer. Although they have filed a single affidavit in opposition, defendants only oppose plaintiff's motion insofar as HSBC

DECISION/ORDER

Index No.: 601844/07

Seq. No.: 001

Present:

Hon. Judith J. Gische

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seeks a money judgment against Mr. Laniado, individually. The corporate defendant expressly admits to borrowing money from a line of credit extended to it by HSBC. The corporate defendant does not deny entering into a Business Credit Agreement with HSBC dated June 1, 2005 ("business credit agreement"), or that it immediately drew down the entire line of credit (\$95,000). The corporate defendant also obtained a MasterCard BusinessCard with an additional \$5,000 line of business credit. The corporate defendant does not deny taking a cash advance in almost the entire amount, or that it has defaulted in making payments on the card as well. The date of default on the business line of credit is January 16, 2007 ("date of default"). The date of default on the credit card is May 21, 2006.

Mr. Laniado, however, denies that he is personally liable for any of the corporate debt. He contends that although he applied for a business line credit on behalf of the corporate defendant, and he also obtained a credit card for it, he contends he did not personally guaranty any of these debts. He contends he was defrauded by the defendants in a number of ways. As will be seen, not only are these arguments inconsistent with the position taken by the corporate defendant, even were he to prove these claims at trial they do not support his fraud defense.

Mr. Laniado contends he was defrauded because no one affiliated with the defendants expressly told him, or explained to him, that he was personally guaranteeing the business line of credit when he applied for it on behalf of the corporation. Mr. Laniado contends that an HSBC representative or officer came to his home with the business credit application to sign. When it was handed to him, it was blank. Although Mr. Laniado does not explain why he agreed to this arrangement, he contends that he

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signed the agreement in blank and let the officer fill in the other information on the application form for him. He makes no claim that the officer forced him to sign the application, or that he was not allowed to read it. Mr. Laniado does not even state that he did not read the form. He does, however, contend that the terms about personally guaranteeing the loan are interspersed throughout the application and the representative did not "flag" those terms for him. Mr. Laniado claims he should have been warned because the application, unlike others he has signed, does not have a separate guarantee section. He contends further that English is not his native language and while he understands English well, he does not read it "too well." He never asked for the document to be translated, however, or for the opportunity to discuss the agreement with anyone else before signing it. Although he signed the section stating that he received a copy of the Business Lending Agreement, he nonetheless contends he did not, in fact, receive it.

Plaintiff asserts that none of these defenses are effective against their claims and they are entitled to summary judgment in the full amount against both the corporate and individual defendant, individually and severally. Plaintiff asserts that the application is unambiguous and he signed it both as president of the corporate defendant and individually. The plaintiffs contend this was a condition of the line of credit, otherwise it would not have been approved. They contend further that defendants' signature on the application is evidence he received the business lending agreement. The business lending agreement, and the application itself, sets forth the rights of the parties and their obligations, including Mr. Laniado's personal guarantee of the corporate defendant's debt. Plaintiff contends it has a perfected security interest in the corporate

defendant's collateral and it asks the court to issue an order allowing it to seize the corporate defendant's assets (5th cause of action) pledged as security.

In relevant part, the business credit application includes a section entitled "OWNERS & GUARANTORS." This section provides that "[a]ll owners and partners must sign as a guarantor. Ownership percentage must be 100%. . ." That section identifies Mr. Laniado as the 100% owner and president of the corporate defendant. At the bottom of the 3rd page is the signatures section. It states as follows: "SIGNATURES (All owners and partners must sign. . .) We certify to the truth of our statements above and authorize the Bank to obtain personal credit reports in connection with this Application . . ." This section provides further that "[o]ur signatures are binding on us and the Business."

Following this section, are these terms:

"THE BUSINESS ACKNOWLEDGES RECEIPT OF THE BUSINESS LENDING AGREEMENT ("Agreement") AND UNDERSTANDS AND AGREES THAT ITS EXECUTION OF THE BUSINESS CREDIT APPLICATION SHALL HAVE THE SAME BINDING EFFECT AS IF IT HAD EXECUTED THE AGREEMENT."

Below these terms it provides further that:

"EACH PERSON SIGNING BELOW PERSONALLY GUARANTIES ALL OF THE INDEBTEDNESS INCURRED ON ANY BLOC, LOC, RCTL OR LOAN YOU MAKE AVAILABLE TO THE BUSINESS EVEN THOUGH A TITLE MAY BE INCLUDED BELOW ANY NAME. OUR OBLIGATIONS AS A GUARANTOR SHALL BE AS SET FORTH IN PART III-UNCONDITIONAL CONTINUING GUARANTY OF THE AGREEMENT."

Following those terms is the signature block. Mr. Laniado signed as "Authorized signature (and as Guarantor)"

[*6]

The acceptance letter HSBC sent to the defendants dated June 14, 2005, notified them that "[y]our acceptance of any advance under your Line will mean you agree to all of the terms and conditions contained in the Business Lending Agreement and this Acceptance Letter."

Discussion

A personal guaranty must be in writing signed by the person to be charged. Schulman v. Westchester Mechanical Contractors, Inc., 56 A.D.2d 625 (2nd Dept. 1977). Moreover, the intent to guarantee payment must be clear and explicit. Salzman Sign Co. v. Beck, 10 N.Y.2d 63 (1961); PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 (1st Dept. 2001). Whether a guarantee is clear and explicit is a matter of law for the court to decide, and established by the language contained in the guaranty. Salzman Sign Co. v. Beck, supra; Harrison Court Associates v. 220 Westchester Avenue Assoc., 203 A.D.2d 244 (2nd Dept. 1994).

The application for the line of credit, as well as the business lending agreement, are unambiguous. By signing the application, Mr. Laniado not only did so on behalf of the corporate defendant, as its owner, but also in his individual capacity as the personal guarantor for the debt. The application expressly provides that the defendants were provided with a copy of the Business Lending Agreement. The corporate defendant has not raised any claims that it did not receive a copy of the agreement. Although Mr. Laniado claims he does not remember receiving it, or contends it was not provided, whether he did or not is not a basis to deny plaintiff summary judgment. By signing the agreement, Mr. Laniado represented that he had, in fact, actually received it. Moreover, the application itself contains numerous references about the owner of the company

* 7] .
borrowing money signing as an officer, and also individually as the guarantor. Mr. Laniado also authorized the bank to obtain a personal credit report about him in connection with the application. These were all conditions of the loan.

Other claims by Mr. Laniado, that the personal guaranty provisions were not "flagged" for him, or he was told something different by the bank's representative, do not set forth factual disputes for trial that defeat plaintiff's motion. A party will not be excused from an agreement he or she executed by reason of his or her having failed to read it. Huang v. Cheng, 182 A.D.2d 600 (1st Dep't 1992); Sofio v. Hughes, 162 A.D.2d 518 (2d Dep't 1990). "There is a heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties and a correspondingly high order of evidence is required to overcome that presumption . . ." Chimart Associates v. Paul, 66 N.Y.2d 570, 574 (1986) (*internal citations and quotations omitted*).

Although Mr. Laniado contend he was "defrauded," his factual claims do not support the fraud claim he has asserted against HSBC. The essential elements of a cause of action for common-law fraud (of a fraud defense) include the representation of a material existing fact, falsity, scienter, reliance and injury. Albert Apartment Corp. v. Corbo Co., 182 A.D.2d 500 (1st Dept. 1992). Even assuming the representative told Mr. Laniado that he was not personally guaranteeing the corporate defendant's debts, the agreement Mr. Laniado signed specifically states that he is. Mr. Laniado's claim that he did not realize this, or it should have been made clearer to him, does not present a factual dispute for trial. Whether he understood this or not, the agreement contains the material terms that make him responsible as the corporation's guarantor. No one prevented Mr. Laniado from reading the application. Maines Paper and Food Service

[* 8] .
Inc. v. Adel, 256 A.D.2d 760 (3rd Dept 1998). There was no duress. Maines Paper and Food Service Inc. v. Adel, supra. Mr. Laniado's claim, that English is not his native language, does not set forth a triable issue of fact. Mr. Laniado did not ask whether someone could translate the document for him. Id.

Plaintiff has proved it is entitled to summary judgment on its claims against both defendants. They have failed to set forth factual disputes that require a trial. Neither defendant challenges plaintiff's right to legal fees and costs in bringing this action to enforce the debts they are owed. Therefore, the issue of plaintiff's reasonable legal fees, other fees and costs are referred for a hearing before a special referee who will report his or her recommendation as to the court.

Order of Seizure

Neither defendant opposes that branch of plaintiff's motion seeking an order of seizure of Dallas Decorators, Inc.'s collateral that HSBC has a secured interest in. The business credit agreement defines collateral as equipment, fixtures, inventory, accounts, chattel papers, documents, instruments, investment property and deposit accounts. Plaintiff filed a UCC financing statement perfecting its security interest. HSBC has the right to possession of all the corporate defendant's collateral, as defined in the business credit agreement. HSBC also seeks an order directing the defendants not to dissipate any of the chattel, accounts, pledged as collateral. That motion is granted without opposition as well. Dallas Decorators, Inc. shall not dissipate, hypothecate, transfer, sell, encumber, destroy, etc., any of the chattel, accounts, or property that HSBC has a security interest in, unless it first seeks an order from this court.

HSBC has proved its claims in the complaint against both defendants on the first, second and sixth causes of action in the amount of \$94,858.31, together with interest from January 16, 2007. HSBC has also proved its claims in the complaint against both defendants on the third and fourth causes of action in the amount of

* 9]

\$4,274.59, together with interest from May 21, 2006. Plaintiff is also granted summary judgment on its seventh and eighth causes of action for costs and legal fees (seventh and eighth causes of action) which are to be heard by a special referee who will prepare a report for the court with recommendations. Plaintiff has also proved it has a perfected security interest in the collateral pledged by the corporate defendant, and is, therefore awarded summary judgment on its fifth cause of action as well. Plaintiff's motion, for a restraining order, directing Dallas Contractors, Inc. to not dissipate, etc., the collateral HSBC has a security interest in has also been granted.

Conclusion

Plaintiff's motion for summary judgment is granted in its entirety.

Accordingly, It is hereby

ORDERED that the clerk shall enter judgment in favor of plaintiff HSBC Bank, USA National Association, against Dallas Decorators, Inc. and Morris Laniado, individually and severally in the amount of \$94,858.31, on the first, second and sixth causes of action, together with interest from January 16, 2007; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff HSBC Bank, USA National Association, against Dallas Decorators, Inc. and Morris Laniado, individually and severally in the amount of \$4,274.59, on the third and fourth causes of action, together with interest from May 21, 2006; and it is further

ORDERED that the issue of the reasonable legal fees and other costs that plaintiff can recover from the defendants is referred for a hearing before a special referee who will report his or her recommendation as to the court; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon the clerk in the Office of the Special Referee so that this reference can be scheduled and assigned; and it is further

ORDERED that HSBC has a secured interest in collateral pledge by Dallas Decorators, Inc. and Dallas Decorators, Inc. shall not dissipate, hypothecate, transfer,


sell, encumber, destroy, etc., any of the chattel, accounts, or property that HSBC has a security interest in, unless it first seeks an order from this court.

ORDERED that any relief not addressed is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
March 19, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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