

**Israel Discount Bank of N.Y. v Schwebel**

2009 NY Slip Op 30058(U)

January 13, 2009

Supreme Court, New York County

Docket Number: 101357/2007

Judge: Shirley Werner Kornreich

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

JUDGE SHIRLEY WERNER KORNREICH

PRESENT: \_\_\_\_\_  
*Justice*

PART 54

Index Number : 101357/2007  
ISRAEL DISCOUNT BANK OF NEW  
VS.  
SCHWEBEL, AVROHOM M.  
SEQUENCE NUMBER : 005  
REARGUMENT/RECONSIDERATION

INDEX NO. 101357/2007  
MOTION DATE 10/30/08  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion: 2  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

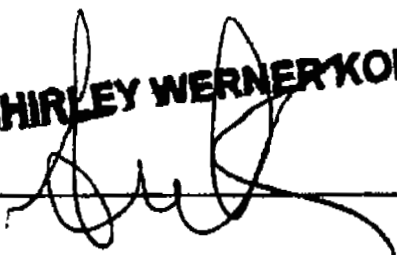
**FILED**

JAN 14 2009

COUNTY CLERK'S OFFICE  
NEW YORK

HON. SHIRLEY WERNER KORNREICH

Dated: 1/13/09

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

ISRAEL DISCOUNT BANK OF NEW YORK, IDB  
FACTORS DIVISION,

Plaintiff,

-against-

AVRAHOM M. SCHWEBEL (a/k/a Avi Schwebel),  
LEONARD FRIEDMAN, VOLVI LOWY (a/k/a  
William Lowy) & IRWIN JACOBS,

Defendants.

Index No.:101357/2007

**DECISION and  
ORDER**

**KORNREICH, SHIRLEY WERNER, J.:**

In this action plaintiff Israel Discount Bank of New York, IDB Factors Division ("plaintiff") seeks to collect from defendants on their guarantees of a \$1,779,412.40 debt incurred by Timing Group, LLC ("Timing") under a factoring agreement. By Order dated July 7, 2008, the court granted plaintiff's motion for summary judgment against defendants, guarantors of that agreement, and referred the issues of proportional damages and attorney's fees and costs to a referee for a hearing. Plaintiff now moves for reargument of that motion on the ground that no hearing is required to determine the issue of proportional damages, because defendants are each jointly and severally liable up to \$1,000,000.00 under their guarantees. Defendant Schwebel has filed a cross-motion seeking reargument, and defendant Jacobs has filed a cross-motion seeking to renew and reargue. Plaintiff's motion is granted and defendants' cross-motions are denied.<sup>1</sup>

---

<sup>1</sup>After this Court issued its Order granting summary judgment on liability for plaintiff, defendant Jacobs moved before Justice Judith Gische, who is presiding over Jacobs' s separate

### ***I. Legal Standard***

A party seeking reargument must comply with the requirements of CPLR 2221(d), which provides,

(d) A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. Shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

A party seeking renewal must comply with the requirements of CPLR 2221(e), which provides,

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

### ***II. Discussion and The Court's Rulings***

#### **Plaintiff's Motion For Reargument**

Plaintiff seeks reargument on the ground that the Court misapprehended the law by ordering a hearing on proportional damages, because the defendants are jointly and severally

---

action against Schwebel, et al. (Index No. 600145/2007), to consolidate the three related action. Plaintiff in this case (IDB) opposed and that motion remains pending.

liable under the guarantees. Plaintiff is correct that the issue of contribution is between the guarantors after judgment has been entered for plaintiff, the lender. In referring the matter to a Referee to determine proportional damages, the Court cited the case of *Slutsky v. Leftt*, 160 Misc. 2d 959 (N.Y. Civ. Ct. 1993). That case is procedurally inapposite to this case as it addressed a guarantor's post-judgment suit for contribution from a co-guarantor. The principle that "[t]he obligation of one of two co-sureties is to pay the whole debt," as relied on by the *Slutsky* court (*supra* at 961), is equally applicable to this case, which involves the lender's suit against co-guarantors who are jointly and severally liable under the guarantees. Plaintiff's motion is granted.

#### ***Schwebel's Cross-Motion for Reargument***

Schwebel argues that reargument is necessary because page 2 of his Guaranty was missing from the copy filed by plaintiff in support of its summary judgment motion. This is not sufficient to meet the standard for reargument under CPLR 2221(d). Here, Schwebel claims that the missing page 2 "negates" the evidence relied on by the Court to rule that he signed a guaranty that, by its terms, was "absolute, unconditional and continuing, regardless of the validity, regularity or enforceability of any of the Obligations." That page 2 was missing from the exhibit does not show that the Court "overlooked or misapprehended" a matter of fact or law, and Schwebel does not offer a reasonable explanation to the contrary. The evidence presented to the Court in support of summary judgment established the undisputed fact that defendants signed identical personal guarantees.<sup>2</sup> Schwebel did not controvert this conclusion, and does not even do

---

<sup>2</sup>The additional four pages of his guaranty are identical to the other guarantees and no party disputed summary judgment on the basis of lack of identity. Nor could a lack of identity have been shown, as evidenced by the actual page 2 now submitted by plaintiff as part of

so now, choosing instead to argue that lacking page 2, his guaranty "may be different." Schwebel Cross-Motion, pg. 2. Schwebel has no reasonable basis for this claim, which is rejected.

Furthermore, Schwebel's argument is, if anything, one for *renewal*, as it seeks reconsideration based on evidence that was not before the court. Schwebel did not identify his cross-motion as one for renewal, which alone is a sufficient basis for denial. CPLR 2221(e)(1). Nor did Schwebel mention the missing page in his opposition to plaintiff's summary judgment motion. As the First Department explained in *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979), "[r]enewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." See *Spectrum Painting Contrs., Inc. v. Kreisler Borg Florman Gen. Constr. Co., Inc.*, 54 A.D.3d 748, 749 (2d Dep't 2008) (motion to renew denied where no reasonable excuse provided).

Schwebel makes a second claim in support of reargument, that the waiver language included on page 2, which the Court relied on to grant summary judgment, "does not bar him from asserting counterclaims" based on fraud and bad faith. Schwebel Cross-Motion, pg. 3. Schwebel misreads the applicable case law, especially the controlling case of *Citibank v. Plapinger*, 66 N.Y.2d 90, 92 (1985). In *Citibank* the Court of Appeals held that a defense alleging fraudulent inducement of a guaranty was barred by the express terms of the guaranty, which stated that it was "absolute and unconditional irrespective of any lack of validity or enforceability of the guarantee or any other circumstance which might otherwise constitute a defense." *Id.* Relying on *Citibank*, New York courts have consistently upheld broadly worded waiver language of this type to preclude the assertion of defenses to a guaranty. See *Gannett Co.*

---

Schwebel's completed guaranty. Plaintiff's Opp., Exh. H.

*v. Tesler*, 177 A.D.2d 353 (1991); see also *Banco do Estado de Sao Paulo v. Mendes Jr. Intl. Co.*, 249 A.D.2d 137, 138 (1998); *General Trading Co. v. A & D Food Corp.*, 292 A.D.2d 266, 267 (2002).

As in *Citibank*, the factoring agreement and the guarantees were negotiated by sophisticated businessmen, who in this case had experience in factoring arrangements. The District Court in *WestRM-West Risk Mkts. v. Lumbermens Mut. Cas. Co.*, 314 F. Supp. 2d 229, 236 (S.D.N.Y. 2004), in construing a broad disclaimer in a guaranty, stated principles that apply here:

'[S]pecificity is less important where "the drafter and more sophisticated party in the transaction now claims that the disclaimer is too broad and not specific enough." ... [citation omitted] Similarly, the fact that the clause in question did not disclaim defenses to its own validity was not relevant, because the fraud claim asserted by defendants did not seek to challenge the validity of the bond, but of the transaction memorialized in the underlying documents.'

*Id.*; quoting *Valley Nat'l Bank v. Greenwich Ins. Co.*, 254 F. Supp. 2d 448, 453 (S.D.N.Y. 2003). Defendants claim that plaintiff engaged in misconduct that caused the obligor, Timing Group, to become insolvent and unable to pay its debts to plaintiff. This allegation goes directly to the "validity" and "enforceability" of the obligations secured by the guaranty and, consequently, come within the express waiver language.

Schwebel's reliance on the case of *GTE Automatic Elec. Inc. v. Martin's Inc.*, 127 A.D.2d 545 (1<sup>st</sup> Dept. 1987) does not compel a different result. The Court in *GTE* distinguished that case from *Citibank*:

In our case, while the action is to recover the balance due under the promissory notes, the notes were issued in payment for equipment sold under purchase financing agreements and there is nothing, either in the agreements or in the notes, to preclude defendant from reliance upon fraud as a defense. As stated, the

[\*7]  
recitation that the notes are "absolute and unconditional" does not bar proof of fraud in the inducement.

*GTE, supra*, 127 A.D.2d at 547. Schwebel's cross-motion is denied.

***Jacobs' Cross-Motion to Renew and Reargue***

Jacobs claims that a decision by Supreme Court Judge Ramos, in the separate action brought by plaintiff against Timing Group, LLC (Index No. 600230/2007) for breach of the underlying factoring agreement, is new evidence that compels a different result in this case. Judge Ramos' decision is not "new evidence" regarding plaintiff's right to enforce Jacobs' guaranty of Timing's obligation, and even if it were, it would not compel a different result.

The procedural history of the proceedings before Judge Ramos, although confusing, shows that he did grant summary judgment to plaintiff in that action on its claim that Timing breached the factoring agreement. The merits of Timing's counterclaims, which allege breach of the same factoring agreement, were not adjudicated. Judge Ramos stayed entry of judgment pending resolution of plaintiff's further motion for summary judgment on the counterclaims. The delay resulted from Timing's late filing of an Answer to the Complaint. Jacobs infers from the stay that Judge Ramos believes Timing's counterclaims have merit. Yet Jacobs' inference is unsupported by the facts and incongruous in light of Judge Ramos' decision to stay discovery pending decision on plaintiff's motion for summary judgment on the counterclaims.<sup>3</sup> In any event, the action pending before this Court is on the guarantees, which contain an express waiver precluding Jacobs from raising the defenses and counterclaims being raised by Timing in the other matter. The factoring agreement does not contain the same waiver language.

---

<sup>3</sup>This Court reviewed Judge Ramos' decision of 1/7/08, and the transcript of a 10/20/08 hearing.

Nor does Jacobs' reliance on the Federal case of *JP Morgan Chase Bank v. Liberty Mutual Insurance Company*, 189 F.Supp.2d 24 (S.D.N.Y. 2002) compel a different result. *JP Morgan* is persuasive, not controlling authority, and is distinguishable from this case, as well as the controlling New York State authority on this issue. *See eg. Citibank v. Plapinger*, 66 N.Y.2d 90, 92 (1985) and its progeny, discussed *supra*. As explained by the District Court in *WestRM-West Risk Mkts. v. Lumbermens Mut. Cas. Co.*, 314 F. Supp. 2d 229, 235-236 (S.D.N.Y. 2004),

In *JPMorgan*, defendants had issued bonds to guarantee what they believed were sales of gas and oil by Enron Corporation to Mahonia Limited and Mahonia Natural Gas Limited ("Mahonia"). In reality, according to defendants, the transactions were simple loans from plaintiff's predecessor, the Chase Manhattan Bank ("Chase"), to Enron, which were disguised as asset sales so that Enron could book them as revenue. Chase loaned Mahonia the money to purchase the gas and oil from Enron, and Enron secretly agreed to repurchase the same gas and oil from Mahonia-controlled entities, at a price equal to what Mahonia owed Chase. Defendants claimed that only by disguising the loans could Chase and Mahonia induce them to guarantee the transactions. ... The court held that broad disclaimers in the bonds did not waive this claim of fraudulent inducement. ... This conclusion was based largely on the fact that when the defendants had negotiated the disclaimers, they were completely unaware that other parties were negotiating separate agreements that transformed the asset sales into loans.

*Id.* *JPMorgan* is limited to its extreme factual scenario, which at its core, involved the nature of the underlying transaction being guaranteed and the existence of secret transactions material to the initial decision to execute guarantees. Jacobs' allegation concerns the parties' course of dealing under the factoring agreement, and not the nature of that agreement or the existence of secret transactions that would have been material to his decision to guaranty it. Jacobs' motion is denied. Accordingly, it is

ORDERED that plaintiff's motion for reargument and for entry of judgment in the amount of \$1,000,000.00 against defendants jointly and severally, together with interest from

January 11, 2007, is granted; and it is further

ORDERED that only plaintiff's claim of attorney's fees and costs will be referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, the Special Referee shall determine the aforesaid claim; and it is further

ORDERED that defendant Schwebel's motion for reargument is denied; and it is further

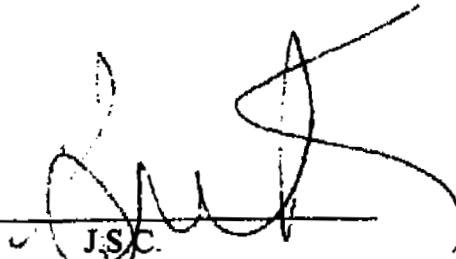
ORDERED that defendant Jacob's motion to renew and reargue is denied; and it is further

ORDERED that a copy of this order shall be served upon the Clerk of the Reference Part (Rm. 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing; and it is further

ORDERED that the Clerk shall enter Judgment accordingly.

ENTER:

  
\_\_\_\_\_  
J.S.C.

Date: January 13, 2009  
New York, N. Y.

**FILED**  
JAN 14 2009  
COUNTY CLERK'S OFFICE  
NEW YORK