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

PRESENT: MARTIN SHULMAN J.S.C. Justice PART 1

Index Number : 112132/2008

WELLS FARGO BANK

VS.

KIRST, MARK D.

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 112132-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5, 6
Replying Affidavits	7, 8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
FEB 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: February 20, 2009

MARTIN SHULMAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

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WELLS FARGO BANK, NATIONAL ASSOCIATION,

Plaintiff,

Index No. 112132/08

-against-

MARK D. KIRST, RICHARD P. KIRST, ROBERT W. KIRST, JAMES H. KIRST, WILLIAM A. KIRST, DANIEL J. KIRST, ROBERT J. REED and RONALD J. SCHREINER, each an individual,

Defendants.

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SHULMAN, J.:

Plaintiff Wells Fargo Bank, National Association ("Wells Fargo") moves for summary judgment dismissing the affirmative defenses interposed by defendants Mark D. Kirst, Richard P. Kirst, Robert W. Kirst, James H. Kirst, William A. Kirst, Daniel J. Kirst, Robert J. Reed and Ronald J. Schreiner (collectively "Defendants") in their answer, and for summary judgment in its favor against them.

The Defendants are the shareholders of E.P. Kirst & Sons, Inc. (the "Corporation"). In August 2004, the Corporation entered into an Amended and Restated Credit and Security Agreement (the "Agreement") with Wells Fargo Business Credit, Inc. ("WFBC"), plaintiff's predecessor-by-merger, pursuant to which, *inter alia*, a revolving line of credit was extended to the Corporation in the maximum amount of $5,500,000. The Corporation executed and delivered to WFBC a revolving note and a term note, both dated August 27, 2004, each in the maximum principal amount of $5,000,000 in connection with this line of credit. On the same date, each of the

Defendants executed and delivered to WFBC a guaranty in connection with this line of credit (the "Guaranties").

Wells Fargo alleges that the Corporation utilized the line of credit and has defaulted under the terms of the Agreement by, *inter alia*, failing to pay and fully satisfy the obligations due thereunder no later than March 21, 2008. Wells Fargo claims that the balance of the outstanding debt, as of October 27, 2008, is $581,363.66.

Wells Fargo commenced the instant action against the Defendants to enforce the Guaranties to recover the alleged outstanding balance. Defendants' answer, *inter alia*, set forth fourth affirmative defenses: that Wells Fargo lacked standing to sue in New York State (first); that defendants did not agree to an extension of time for payment of the note (second); and that Wells Fargo's alleged commercially unreasonable conduct in the disposition of the collateral, and impairment of the collateral, discharges the Defendants' obligations (third and fourth).

Wells Fargo now moves for summary judgment dismissing the defendants' four affirmative defenses, and for judgment against Defendants for the alleged outstanding balance. On a motion for summary judgment to enforce written guaranties, the creditor is required to prove absolute and unconditional guaranties, the underlying debt, and the guarantors' failure to perform under the guaranties (*see City of New York v Clarose Cinema Corp.*, 256 AD2d 69 [1st Dept 1998]).

In support of Wells Fargo's application, Christopher Hill, Wells Fargo's Vice President, submits copies of the documents evidencing the loan (Exhs. B - G to motion), together with the guaranties signed by the Defendants (Exhs. H - O to motion).

He also proffers three forms, entitled "Acknowledgment and Agreement of Guarantor," signed by each of the Defendants (Exhs. P - R to motion). However, while Hill maintains that, as of the date of the application, the outstanding unpaid balance due to Wells Fargo was $581,363.66, he fails to submit any supporting evidence or an explanation as to how the total amount of the debt was calculated, as is required to satisfy plaintiff's initial burden (*see HSBC Bank, USA v IPO, LLC*, 290 AD2d 246 [1st Dept 2002]). Mere conclusory allegations are insufficient (*see id.*), particularly where, as here, the Defendants deny the amount of the indebtedness claimed.

Hill further argues that, since the express terms of the Guaranties contain the Defendants' waiver of any and all defenses, claims and setoffs the borrower could have interposed against Wells Fargo, the Defendants' affirmative defenses raised in their answer, including the impairment of collateral affirmative defenses (third and fourth), should be dismissed. Defendants do not oppose the dismissal of their first and second affirmative defenses, and thus, they are dismissed.

However, the Defendants contend that their third and fourth affirmative defenses, based on Wells Fargo's alleged commercially unreasonable disposition of the collateral, cannot be waived, and therefore, may not be dismissed. As argued by Defendants, "a lender's obligation to deal in a commercially reasonable manner with collateral securing a loan may not be waived by a guarantor as a matter of law" (*see NatWest Bank N.A. v Grauberd*, 228 AD2d 337, 338 [1st Dept 1996]).

Here, the Defendants sufficiently raise triable issues of fact related to Wells Fargo's alleged commercially unreasonable conduct related to the collection of the

Corporation's accounts receivable of over $800,000, and its real property at 5727 South Park Avenue, Hamburg, New York (the "Building"). Defendant Robert Reed ("Reed"), the Corporation's collection manager of accounts receivable, maintains, *inter alia*, that: (1) by May 2008, after the proceeds from the Corporation's sale of its assets to non-party, Finkle and Sons, Inc., and the collection of some accounts receivable by the Corporation, the outstanding debt owed to Wells Fargo was reduced to approximately $600,000; (2) upon Wells Fargo's demand, the Corporation contracted with University Management Consultants, Corp. ("University") to collect the remaining receivables totaling approximately $800,000 (the "Contract"); and (3) the Contract provided, *inter alia*, that litigation could not be commenced against any of its customers, without advance written consent of the Corporation, and if litigation was commenced, University's commission increased from 6% to 30%.

Additionally, Reed contends that in July 2008, Wells Fargo authorized the commencement of lawsuits against Queen City and Brothers Tobacco, two of its customers, without the Corporation's authorization, which resulted in a payment schedule with Queen City of $5,000 per month and, after the reduction of University's commission of 30%, only the application of a net of $3,500 monthly to the Corporation's reduction of the debt. Reed contends that the Corporation had previously negotiated a payment plan with Queen City for 100% of the debt that the Corporation had been remitting to Wells Fargo, and that Wells Fargo's conduct resulted in a substantial loss of approximately $60,000 on the Queen City collection alone.

Defendant Daniel Kirst ("Kirst"), the Corporation's president, also alleges that, in addition to the collection of accounts, the Corporation entered into a contract for the

sale of the Building, and that Wells Fargo is impairing the Corporation's equity in the Building by its refusal, as of May 2008, to continue to pay the mortgage thereof, which it had been doing since January 2008, when the Corporation began the wind-up of its business. Kirst claims that he has been advised by the mortgagor that the Building is going to be foreclosed upon, which Kirst attributes to Wells Fargo's failure to protect this collateral pending the sale.

In reply, Hill does not deny that Wells Fargo participated in the decision to commence litigation against the Corporation's customers, but instead contends that neither Reed nor Kirst objected to the litigation. With respect to the Building, he claims that Wells Fargo made advances to the Corporation from January 2008 through August 2008 to meet its obligation for, *inter alia*, mortgage payments, but that such advances were made voluntarily, although it had no obligation to do so.

Additionally, Paul Rome, president of the New Jersey Division of University, acknowledges that he had weekly telephone conference calls with Hill, Reed and Kirst to discuss the status of University's collection efforts, including its recommendations to commence litigation. He further maintains that, while the Corporation did not initially agree that litigation should be pursued against Queen City and Brothers Tobacco, that Kirst and Reed ultimately did consent. Thus, there are factual disputes, including whether Wells Fargo authorized the commencement of litigation against the Corporation's customers without the Corporation's consent, whether Wells Fargo had any obligation to continue to advance monies to the Corporation for the Building's mortgage payments pending its sale, and whether Wells Fargo engaged in commercially unreasonable conduct with respect to the collection of the Corporation's

accounts receivables and the Building. Therefore, that branch of Wells Fargo's application for dismissal of the third and fourth affirmative defenses based on collateral impairment defenses is denied (*Weinsten v Fleet Factors Corp.*, 210 AD2d 74 [1st Dept 1994]).

Accordingly, it is

ORDERED that Wells Fargo's motion for summary judgment dismissing the Defendants' affirmative defenses, and granting judgment in its favor, is granted to the extent of dismissing the first and second affirmative defenses, and is otherwise denied.

Counsel for the parties are directed to appear for a preliminary conference on March 24, 2009 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

The foregoing is the decision and order of this court. Copies of this decision and order have been sent to counsel for plaintiff and defendants.

Dated: New York, New York
February 20, 2009

Hon. Martin Shulman, J.S.C.