

JP Morgan Chase Bank, N.A. v Weinstein

2009 NY Slip Op 31282(U)

June 2, 2009

Nassau County, Supreme Court

Docket Number: 7130-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**JPMORGAN CHASE BANK, N.A., successor in
interest to THE BANK OF NEW YORK,**

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 7130-08

Motion Seq. No: 1

**ROBERT WEINSTEIN ATTORNEY AT LAW
and ROBERT WEINSTEIN,**

Defendants.

Submission Date: 5/8/09

-----X

The following papers having been read on this motion:

- Notice of Motion, Affidavit of Assignment to Commercial Part,**
- Affidavits in Support (2), Statement of Material Facts and Exhibit.....x**
- Affidavit in Opposition and Affirmation in Oppositionx**

This matter is before the Court for decision on the Motion for Summary Judgment filed by Plaintiff JP Morgan Chase Bank, N.A., successor in interest to the Bank of New York, on September 24, 2008 ("Plaintiff" or "Chase"), which was submitted on May 8, 2009.¹ The Court grants Plaintiff's motion. For the reasons set forth below, the Court 1) grants Plaintiff summary judgment against the Defendants individually, jointly and severally; 2) strikes Defendants' interposed Answer with Affirmative Defenses; and 3) dismisses Defendants' counterclaims.

¹ This Court assumed responsibility for this motion on May 8, 2009.

BACKGROUND

A. Relief Sought

Plaintiff requests an Order, pursuant to CPLR § 3212, granting summary judgment in favor of the Plaintiff and against the Defendants for the relief demanded in the Verified Complaint herein and striking the Answer, Affirmative Defenses and Counterclaims interposed by the Defendants in their Answer.

B. The Parties' History

Plaintiff, which is the undisputed successor-in-interest to the Bank of New York ("BONY"), has instituted this action with respect to three (3) instruments:

1. A Business CreditLink Agreement ("Agreement"), dated May 25, 2000, between BONY and Robert Weinstein Attorney at Law ("Weinstein/Attorney") which effects a loan by BONY to Weinstein/Attorney, initially not to exceed the sum of \$200,000 by means of Weinstein/Attorney writing checks supplied to him by BONY. This Agreement memorializes that Weinstein/Attorney promised to pay BONY the principal amount of the loan with interest on the unpaid balance computed at a rate of 1.5% per annum above BONY's prime rate but in no event higher than the maximum rate permitted under applicable law. This Agreement further provides that any principal or interest thereon which is not paid when due shall be subject to late charges/fees of 5% of the payment due;

2. A General Guarantee ("Guarantee"), dated May 25, 2000, by Robert Weinstein, individually, ("Weinstein/Individual") to BONY ". . . in consideration of loans made or to be made or credit otherwise extended or to be extended by the Bank of New York (the "Bank") to or for the account of Robert Weinstein Attorney at Law" whereby Weinstein/Individual "absolutely and unconditionally" guaranteed to the Bank the payment of "all present or future obligations and liabilities" of Robert Weinstein Attorney at Law to BONY; and

3. A Promissory Note Time/Installment ("Promissory Note"), dated November 19, 2004, between BONY and Robert Weinstein Attorney at Law (Weinstein/Attorney). This Promissory Note evidences a loan from BONY to Weinstein/Attorney in the amount of \$100,000. This Promissory Note provides that Weinstein/Attorney promises to pay BONY the principal amount of the loan in 84 equal consecutive installments, each in the amount of \$1,484.94, commencing on December 19, 2004. The interest on the principal balance is computed at a fixed rate of 6.5%

but is in no event higher than the maximum rate permitted by law. The Promissory Note further provides that any principal or interest thereon which is not paid when due shall be subject to late charges/fees equal to the higher of (i) the said rate of 6.5% plus 2%, or (ii) the prime rate plus 4%, but shall not exceed the maximum rate permitted by law.

In support of its motion for summary judgment, Plaintiff has submitted an Affidavit of Pam Crawford, an Assistant Vice President of JPMorgan Chase Bank, N.A., who states therein that the Defendant, Weinstein/Attorney, has defaulted under the terms and conditions of both the Agreement and the Promissory Note by failing to make the required payments of principal and interest. Plaintiff's verified complaint ("Complaint") contains five causes of action:

- 1) Defendant Weinstein/Attorney defaulted under the terms of the Agreement by failing to make required payments and is liable to Plaintiff in the principal amount of \$199,951.68, plus interest;
- 2) Defendant Weinstein/Attorney defaulted under the terms of the Promissory Note by failing to make required payments and is liable to Plaintiff in the principal amount of \$60,775.59, plus interest;
- 3) Defendant Weinstein/Individual is liable to Plaintiff under the Guarantee for the payments that Defendant Weinstein/Attorney owes to Plaintiff, as outlined in paragraphs 1 and 2 *supra*; and
- 4) Defendants Weinstein/Attorney and Weinstein/Individual, pursuant to the terms of the Agreement, Promissory Note and Guarantee, are liable to Plaintiff, jointly and severally, for Plaintiff's costs of collection, including reasonable counsel fees.

In paragraphs 4, 5 and 6 of the Complaint, which address the first cause of action, Plaintiff outlines the terms of the Agreement and annexes a copy of that document. Defendant Weinstein/Individual, in his answer and counterclaim ("Answer"), responds to the allegations in paragraphs 4, 5 and 6 by stating that he "denies to the extent that [the document in question] speaks for itself."² Similarly, in paragraphs 13, 14 and 15 of the Complaint, which address the second cause of action, Plaintiff outlines the terms of the Promissory Note and annexes a copy of that document. In the Answer, Defendant responds to those allegations by "[denying] to the extent the Note speaks for itself."

In paragraphs 20 and 21 of the Complaint, Plaintiff alleges that the parties executed the

² The Verified Answer and Counterclaim is in the name of Defendant/Individual, only, although counsel signs that document as "Attorney for Defendants."

Guarantee on or about May 25, 2000, annexes that document and outlines Weinstein/Individual's alleged obligations pursuant to that Guarantee. In his Answer, Defendant denies the allegations in paragraphs 20 and 21. In addition, in paragraph 23 of the Complaint, Plaintiff alleges that pursuant to the terms of the Agreement, Promissory Note and Guarantee, Defendants agreed to pay all costs of collection that Plaintiff incurred. Defendant, in his Answer, denies this allegation "to the extent the Note and Guarantee speaks [sic] for itself."

Defendant interposes two counterclaims. In the first, he alleges that, during his lengthy banking relationship with Plaintiff, Plaintiff "as a matter of custom and usage in its banking transaction with the Defendant, regularly covered checks for the Defendant as other deposits cleared the bank." Defendant alleges, further, that Plaintiff, prior to January 30, 2008, refused to continue that practice and closed Defendant's bank account, resulting in damages to Defendant.

In his second counterclaim, Defendant alleges that a contract was formed between Defendant and Plaintiff during their banking relationship. Defendant submits, further, that Plaintiff breached that contract by refusing to continue its practice of covering shortages in Defendant's bank account, causing damages to Defendant in the form of legal expenses and loss of reputation.

The Defendant, Robert Weinstein, in his affidavit in opposition, affirms the following:

Throughout my professional practice as an attorney, I conducted business with Plaintiff over the course of approximately twenty (20) years. During our business relationship, it was a regular course of conduct for Plaintiff to cover checks that I wrote until I was able to deposit funds to correct any shortfall in the accounts. This was a continuing and regular business arrangement that I always expected to continue. Prior to this litigation, Plaintiff had always provided this service to me and I never had any reason to expect it to cease.

* * *

Our course of dealing over twenty (20) years led me to rely on Plaintiff's continued practices. It is respectfully submitted that the circumstances surrounding my business relationship with Plaintiff created an implied contract in which was manifested from our course of dealing.

C. The Parties' Positions

Plaintiff affirms that Defendant Weinstein/Attorney executed the Agreement and Promissory Note and has failed to make the required payments pursuant to those agreements, thereby defaulting on his obligations and rendering him liable to Plaintiff for the unpaid

principal, plus interest. In addition, Plaintiff submits, pursuant to the terms of the Guarantee, that Weinstein/Individual is responsible to Plaintiff for the payments of Weinstein/Attorney pursuant to the Agreement and Promissory Note, as well as the costs of collection provided for in that Guarantee. Accordingly, Plaintiff argues, it is entitled to summary judgment.

Defendants oppose Plaintiff's motion for summary judgment, submitting that a material issue of fact exists with respect to an implied contract between Plaintiff and Defendants.

RULING OF THE COURT

A. Summary Judgment Standards

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." *Stewart Title Insurance Company v. Equitable Land Services, Inc.*, 207 A.D.2d 880, 881 (2d Dept. 1994); *see also Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). 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 v. McAuliffe*, 97 A.D.2d 607 (3d Dept. 1983). Once a *prima facie* showing has been made, however, 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 N.Y.2d 320, 324 (1986); *Zuckerman*, 49 N.Y.2d at 562.

Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the Court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1969). If Plaintiff meets its burden of proof, by the *prima facie* showing of entitlement to judgment as a matter of law, the burden now shifts to the Defendants, as the party opposing the motion, to produce evidentiary proof in admissible form to establish the existence of a material issue of issues of fact requiring a trial. *See Sheppard-Mobley v. King*, 10 A.D.3d 70 (2d Dept. 2004), *aff'd as mod.* 4 N.Y.3d 627 (2005), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Unsubstantiated allegations or assertions are insufficient to defeat a summary judgment motion. *Zuckerman, supra*.

B. Plaintiff Has Established Its Right to Summary Judgment

The Court concludes, based on the documentary evidence provided, that Plaintiff has established its right to judgment as a matter of law. The documentary evidence establishes that Weinstein/Attorney executed the Agreement and Promissory Note and has defaulted with respect to those obligations. Moreover, pursuant to the Guarantee, Weinstein/Individual is responsible for those payments, as well as the costs of collection pursuant to that Guarantee.

Defendants cite two cases in support of their attempt to defeat summary judgment. Neither supports their argument. The first case to which Defendants cite is *Fox v. Arctic Placer Mining*, 229 N.Y. 124 (1920). *Fox* involved a suit by plaintiff, a mining engineer, who was the vice-president and director of the defendant, a mining corporation. Plaintiff went to Alaska and oversaw the company's work there. *Id.* at 126. Plaintiff sought to be compensated for personal services he provided to defendant that were arguably separate from the duties of his office. The court reversed the trial court's dismissal of the complaint and ordered a new trial, concluding that the jury could find that an implied contract existed based on the rendition and acceptance of plaintiff's services. *Id.* at 130-131.

Second, Defendants cite *In re Altmann's Will*, 149 Misc. 115 (N.Y. Surr. Ct. Orange Cty. 1933). That case involved a claim by a former wife against the estate of her former husband for reimbursement for their children's support and education. *Id.* at 116. The court analyzed the issue of whether there was any promise, either express or implied, on the part of the decedent, to reimburse the claimant for the maintenance and education of their children. *Id.* at 120. The court concluded that, under all the circumstances, there was no evidence of such a contract and dismissed the claim. *Id.* at 121.

The Court is not persuaded by Defendants' claim of an implied contract, as it finds the cases Defendants cite wholly inapposite to the matter *sub judice*. In the *Fox* case, unlike the matter at bar, plaintiff allegedly provided personal services outside the four corners of the parties' established relationship. The *Altmann* case addressed a father's obligation to support his children, an area in which, for policy reasons, courts are particularly inclined to impose an obligation. There is no such compelling policy consideration in the matter *sub judice*, which deals with loan transactions between two business entities. The Court notes, moreover, that the claimant in the *Altmann* case was ultimately not successful. Finally, Defendants have not cited

to any contractual provision, statute, or rule supporting their claim of an implied contract, and the Court is not aware of any such support for their argument.

Accordingly, the Court awards Plaintiff summary judgment against the Defendants individually, jointly and severally, strikes Defendants' interposed Answer with Affirmative Defenses and dismisses the Counterclaims set forth therein. The Court, therefore, concludes that an inquest to determine the loan amounts due to the Plaintiff together with interest thereon to the date of judgment and reasonable attorney's fees herein is appropriate, and refers that matter to Referee Frank N. Schellace, pursuant to CPLR § 4301, to hear and determine on July 20, 2009 at 9:30 a.m., or another mutually convenient date that counsel for the parties may arrange with Referee Schellace, on or before August 21, 2009.

The Court directs Plaintiff to serve and file a Note of Issue together with a copy of this Order no later than ten (10) days prior to such date. A copy of the Note of Issue and this Order shall be served on the Clerk of the Calendar Control Part when the Note of Issue is filed.

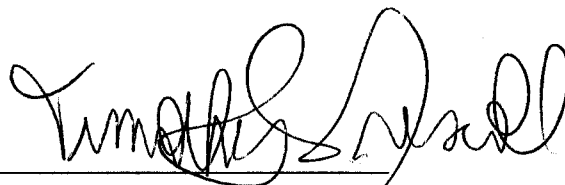
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

June 2, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 08 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE