

North Fork Bank v Just 2 Guys, LLC

2009 NY Slip Op 31288(U)

June 10, 2009

Supreme Court, New York County

Docket Number: 109662/07

Judge: Marilyn Shafer

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

PRESENT: Hon. Marilyn Shapiro
Justice

PART 8

Index Number : 109662/2007

NORTH FORK BANK

vs

JUST 2 GUYS, LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accord
with the annexed memorandum.

~~with~~ accompanying memorandum decision. motion is decided in accordance

FILED

JUN 15 2009
NEW YORK
COUNTY CLERK'S OFFICE

(Signature)
M. MARILYN SHAPIRO
J.S.C.

Dated: 6/19/09

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

NORTH FORK BANK,

INDEX NO. 109662/07

MOTION DATE

Plaintiff,

-against-

MOTION SEQ. NO. 002

JUST 2 GUYS, LLC, JOHN VONDRACEK, ESTATE
OF ROYCE GRAHAM and 45-34 REALTY, CORP.,

Defendants.

The following papers, numbered 1 to 7 were read on this motion for summary judgment pursuant to CPLR § 3212(a) and for entry of a default judgment pursuant to CPLR § 3215(a) :

	<u>PAPERS NUMBERED</u>
Notice of Motion – Affidavit – Affirmation – Exhibits	1,2,3
Memorandum of Law In Support	4
Affidavit In Opposition	5
Memorandum of Law In Opposition	6
Reply Memorandum of Law	7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that plaintiff’s motion is decided as follows:

This is motion for summary judgment by the plaintiff bank against one of the guarantors of a note and for a default judgment against the estate of the other guarantor and the borrower.

In 2000, plaintiff, North Fork Bank, lent the corporate defendant, Just 2 Guys, \$50,000, in the form of a line of credit, evidenced by a note personally guaranteed by the corporation’s president and secretary, John Vondracek and Royce Graham. The note required execution by all owners and contained

a corporate resolution to complete the loan transaction executed by shareholders Vondracek and Graham.

The guaranty, by its terms, was

absolute, continuing and unconditional and I/we will remain liable to the Bank despite the occurrence or non-occurrence of any event which would in the absence of this provision be deemed an equitable or legal discharge of a guarantor.

It covered "all present and future obligations, liabilities and undertakings of the Borrower [company]." Each guarantor was "jointly and severally liable" and the bank was not required "to proceed against the Borrower or any security before seeking recovery from [the guarantor]."

The bank

may do any or all of the following without notice and [the guarantors] will remain liable on this guaranty: (a) exchange, surrender, sell, substitute, liquidate, or release any security; (b) renew, extend, modify, accelerate, compromise, or release any obligation of Borrower or any Guarantor; c) take or fail to take any action with respect to the Borrower or any security or the perfection thereof.

Finally, the guaranty provided:

This is a continuing guaranty and will remain in effect unless and until I/we give notice of termination to the Bank. Termination shall be effective only upon the passage of five (5) days from the Bank's actual receipt of notice of termination at its offices at 275 Broad Hollow Road, Melville, New York 11747 and such termination shall not affect any obligation or liability then outstanding or any renewal, modification, or extension thereof, including, but not limited to, the amount of any undrawn credit line or commitment to lend, whether or not conditional.

In 2002, Vondracek, entered into an agreement with Graham to sell his interest in the company for \$232,000.

In 2004, the bank granted a request, submitted by Graham alone, for an increase in the line of credit to \$100,000.

Graham died in December 2006.

In April, 2007, the bank notified Vondracek, the company and Graham's estate that the line of credit, "dated March 30, 2004, in the original amount of \$100,000" was in default and initiated the instant action against the three entities. Only Vondracck appeared.

The bank now moves for a default judgement against the defendants who have not appeared and summary judgment against Vondracek. Vondracek opposes the motion for summary judgment against him in the that he did not assume or agree to the increased indebtedness of the second note, entered into after he sold his interest in the company and signed by Graham alone. He asserts that there was no moneys owed on the original \$50,000 line of credit at the time of the sale.

The bank argues that Vondracek's guaranty covered all future indebtedness of the company and was never terminated. Sale of his interest in the company did not terminate the guaranty, even if the bank was aware of the sale.

Discussion

The law is well settled that summary judgment is appropriate where there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. (*Andre v Pomeroy*, 35 NY2d 361 [1974])

The terms and conditions of the guaranty, and Vondracek's execution thereof, are undisputed and it appears, from the record, that Vondracek never served the bank with a notice of termination. A guaranty is an agreement to pay a debt owed by another, which creates a secondary liability and is collateral to the contractual obligation. The principal debtor is not a party to the guarantee and the guarantor is not to the principal obligation. (*Midland Steel Warehouse Corp v Godinger Silver Art Ltd*, 276 AD3d 341 [1st Dept 2000])

Under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation. As a general rule, any material or substantial alteration to the terms of a contract, for whose performance a surety is bound, when made without the surety's consent, releases the surety from its obligation. This applies to any alteration of the contract to which the guarantee applies which indirectly operates to modify the extent of the guarantee. The rationale is that the creditor and the

principal debtor may not alter the surety's undertaking to cover a different obligation without the surety's consent. If they do so, the surety is discharged because the parties substituted a new contract, to which it never agreed. (*Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312 [1989]; *White Rose Food v Saleh*, 99 NY2d 589 [2003][“[A] guaranty is to be interpreted in the strictest manner. A guarantor's obligation cannot be altered without its consent; if the original note is modified without its consent, a guarantor is relieved of its obligation.”])

However, where, as here, a guarantee is continuous, applicable to after-acquired obligations and terminable only by writing, it may not be said to have terminated due to lack of further consideration or cessation of the business relationship. A single, unlimited, continuing guaranty, supported by consideration, given once and for all time, is not automatically terminated by a change in the parties' relationship. Such a guarantee is not limited to the life of loans executed contemporaneously therewith and generally cannot expire by mere conduct, change of circumstances or lapse of time. (*Chemical Bank v Sepler*, 60 NY2d 289 [1983]; *Merchants Bank of New York v Kluger*, 221 AD2d 289 [1st Dept 1995])

Although one might be inclined to think this rule more appropriate to a 19th century novel than contemporary American jurisprudence, the Court of Appeals has explained that guarantors such as Vondracek “at all times had the power to extinguish any perceived inequity: [he] could simply have served a written termination notice upon [the bank].” (*Chemical Bank v Sepler*, at 294)

It does not appear, from Vondracek's opposition to the instant motion, that he has read the guaranty since all of his defenses have been explicitly waived. Vondracek has articulated no viable defense as a matter of law.

However, although not requested to do so, this Court finds that the termination provision of the guaranty is ambiguous on its face. The exceptions enumerated in the second sentence appear to render any termination effected in accord with the provisions of the first sentence nugatory, depending, *inter alia*, upon the referent to the word “thereof.”

Whether a writing is ambiguous is a question of law, (*WWW Assocs v Giancontieri*, 77 N.Y. 2d 157 [1990]) while the meaning of an ambiguous contract is a question of fact. (*Revson v. Cinque Cinque, P.C.*, 221 F. 3d 59 [2d Cir. 2000]). A Contract is ambiguous where its terms “suggest more than one meaning” when viewed objectively by a reasonably knowledgeable person who has examined the contents of the entire agreement.(*Scholastic, Inc v Harris*, 259 F. 3d 73 [2d Cir 2001]) In determining whether a contract is ambiguous, a Court must look at “the entire integrated agreement,” to “safeguard against adopting an interpretation that would render any individual provision superfluous.” (*Sayers v Rochester Tel Corp Supplemental Mgmt Pension Plan*, 7 F. 3d 1091 [2d Cir. 1993])

A question of fact exists as to the terms and conditions of the termination provision and, therefor, as to whether the obligation was terminated by any communication by Graham at the time of the second note, notwithstanding Vondracek’s failure to serve a notice of termination; and, if the obligation was terminated, was it terminated in whole or in part. That a question of fact exists is reflected in the bank’s own papers which inconsistently assert, in their pleadings, that Vondracek guaranteed only \$50,000 and, on this motion, the entire obligation.

This issue of the terms and conditions of the termination provision is material, since the equity of the bank’s position is predicated upon Vondracek’s failure to terminate the guaranty in accord with its terms. (*Chemical Bank v Sepler*, at 294) Of course, since the guaranty was drafted by the bank, all ambiguities are to be resolved against it. (*Community National Bank and Trust Company v Cognetta*, 88 AD2d 897 [2d Dept 1982])

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that motion by plaintiff North Fork Bank for summary judgment against defendant

John Vondracek is denied; and it is further

ORDERED that the motion by plaintiff North Fork Bank for judgment against defendants Just 2 Guys LLC and the Estate of Royce Graham is granted on default, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Just 2 Guys LLC and the Estate of Royce Graham, in the sum of \$88,768.16 plus costs, late fees and other charges, and interest at the rate of North Fork Bank Prime plus 2 1/2 % per annum from December 1, 2006 to April 23, 2007, plus default interest at the rate of North Fork Bank Prime plus 7 1/2 % per annum from April 23, 2007, plus late fees, reasonable attorneys' fees and costs and disbursements as taxed by the Clerk.

This reflects the decision and order of the court.

Dated: 6/10/09

MARILYN SHAFER
J.S.C.

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NON-FINAL DISPOSITION

FILED
JUN 15 2009
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