

Brown Bark I, L.P. v Digangi

2009 NY Slip Op 32429(U)

October 6, 2009

Supreme Court, Nassau County

Docket Number: 005143-07

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

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**BROWN BARK I, L.P., as successor in interest to
BANK OF AMERICA, N.A., successor in interest
to FLEET NATIONAL BANK,**

-against- Plaintiff,

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

**Index No: 005143-07
Motion Seq. Nos: 3, 4 and 5
Submission Date: 8/3/09**

**JOHN T. DIGANGI, ALBERT DIGANGI and
MICHAEL J. DEMARCO,**

Defendants.

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Papers Read on these Motions:

- Notice of Motion, Affirmation in Support,
Affidavits in Support (2) and Exhibits A - HX**
- List of Exhibits and Documents, and Exhibits I - Q (3 separate binders).....X**
- Memorandum of Law in SupportX**
- Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X**
- Notice of Cross Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition.....X**
- Affirmation in Reply to Digangi Defendants' Opposition.....X**
- Reply Affirmation in Opposition.....X**
- Affirmation in Reply to Defendant Demarco's Opposition.....X**

This matter is before the court on 1) the motion filed by Defendants John T. DiGangi and Albert DiGangi (the "DiGangis") on May 28, 2009, 2) the motion filed by Defendant Michael DeMarco ("DeMarco") on May 29, 2009, and 3) the cross motion filed by Plaintiff Brown Bark I, L.P., as successor in interest to Bank of America, N.A., successor in interest to Fleet National Bank ("Brown Bark") on June 19, 2009, all of which were submitted on August 3, 2009. For

the reasons set forth below, the Court 1) grants the motion by the DiGangis for summary judgment dismissing the complaint (“Complaint”) against them; 2) grants the motion by DeMarco for summary judgment dismissing the Complaint against him; and 3) denies the motion by Plaintiff Brown Bark for summary judgment in its favor.

BACKGROUND

A. Relief Sought

The DiGangis move for an Order, pursuant to CPLR § 3212, granting them summary judgment and dismissing all causes of action in the Complaint against them.

DeMarco moves for an Order, pursuant to CPLR § 3212, granting it summary judgment and dismissing all causes of action in the Complaint against him.

Brown Bark opposes Defendants’ applications, and moves for an Order, pursuant to CPLR § 3212, granting summary judgment in Brown Bark’s favor, against all Defendants.

B. The Parties’ History

The background of this matter is set forth in the Decision and Order of the Honorable Leonard B. Austin, dated January 10, 2008 (“Prior Decision”) and the Court incorporates that Prior Decision herein by reference. The Prior Decision addressed 1) Brown Bark’s motion to strike the affirmative defenses of DeMarco and John T. DiGangi (“John”), and for summary judgment against those Defendants, and 2) Albert DiGangi’s (“Albert’s”) motion to vacate the default judgment entered against him (collectively “Prior Motions”).

In the Prior Decision, the Court 1) denied Brown Bark’s motion for summary judgment against DeMarco and John for payment of a corporate line of credit pursuant to personal guarantees, after the corporation defaulted. but granted Brown Bark’s motion to strike the affirmative defenses of DeMarco and John; and 2) granted Albert’s motion to the extent that the Court scheduled the matter for a traverse hearing before Special Referee Thomas V. Dana, and otherwise held its decision in abeyance pending the hearing and determination of the Special Referee. In reaching the Prior Decision, the Court noted that Brown Bark was unable to produce the original guarantee allegedly signed by DeMarco and John and, instead, “relie[d] upon lost document affidavits made by officers of Bank of America which aver that Michael [DeMarco] and John personally guaranteed [the corporation’s] obligations.” (Prior Decision at p. 4)

As noted in the Prior Decision, Brown Bark has not produced a document clearly evincing that any of the Defendants executed a personal guaranty. Brown Bark acquired this loan from Bank of America, which merged with Fleet Bank, the bank that made the loan and is no longer in existence. Brown Bark presented a lost document affidavit in support of its prior motion, in light of its inability to produce the original guaranty.

In connection with the Prior Motions, Brown Bark produced a one-sided copy of a credit application. The following language, which the Court cited in the Prior Decision, appears at the bottom of this document, directly above the signature line and in small print:

By signing below I acknowledge that I have read and agree to the terms and conditions of the Authorization Agreement, the Personal Guaranty, the Fair Credit Reporting Act Notice and the USA PATRIOT Act Notice on the reverse side of this application. Notwithstanding any title that I have included next to my signature, I also agree to be personally liable as a Guarantor under the Personal Guaranty.

Each of the Defendants signed this document below this language. The copies of this document, which Brown Bark presented to the Court with Defendants' signatures, were blank on the reverse side. The Court, in the Prior Decision, concluded that the copies of the credit application signed by Defendants reflected that they were personally guaranteeing the corporate obligation "in accordance with the terms of the personal guarantee contained on a document not provided to the Court." (Prior Decision at p.8) The Court, in the Prior Decision, also held that "Brown Bark has failed to establish that any of the Defendants personally guaranteed [the corporation's] pre-existing obligations to Fleet or the extent to which the obligations upon which Brown Bark sues is borrowing upon the extension of [the corporation's] line of credit." (Prior Decision at p. 10)

Plaintiff now attempts to remedy this evidentiary deficit on its present cross-motion by providing a "template" of the credit application, namely, a blank sample credit application form which does contain an Authorization Agreement, a Personal Guaranty, a Fair Credit Reporting Act Notice and the USA PATRIOT Act Notice on the reverse side of the application. In addition, Plaintiff submits the acknowledged declaration of Tamara Laughinghouse, a Senior Vice President of Bank of America, who states that the original credit application has been lost, that the terms and conditions contained on the template are identical to the terms and conditions

on the credit application signed by Defendants because both have the notation “(4/04)” at the bottom right corner, and that to the best of her knowledge, loans were not approved if the terms contained in the template were removed, altered or otherwise amended.

C. The Parties’ Positions

The DiGangis submit that in light of Plaintiff’s failure to produce the original guaranty, and its inability to produce a witness with personal knowledge of the guaranty and/or its terms, the Court must grant the DiGangis’ motion for summary judgment and dismiss the Complaint against them.

DeMarco, similarly, submits that he is entitled to summary judgment and dismissal of the Complaint against him, in light of Plaintiff’s inability to establish the existence of the guaranty.

Brown Bark opposes Defendants’ motions, submitting that Brown Bark’s submission of the template of the two-sided credit application that the Defendants executed, which is allegedly identical to the application that the Defendants signed that contained the guarantee, establishes Defendants’ execution of a guaranty. Thus, Brown Bark argues, the Court should deny Defendants’ motions for summary judgment, and grant summary judgment to Brown Bark.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincheran*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986).

B. Plaintiff's New Submissions Do Not Establish the Guaranty

To establish a *prima facie* case of entitlement to summary judgment on a guaranty, movant must establish the following: (1) the underlying obligation, (2) the guaranty executed by the defendant, and (3) a failure to make payment according to the terms of the underlying obligation and the guaranty. *Provident Bank v. Giannasca*, 55 A.D.3d 812 (2d Dept. 2008); *Verela v. Citrus Lake Development, Inc.*, 53 A.D.3d 574 (2d Dept. 2008); *Northport Car Wash Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008); *JP Morgan Chase Bank v. Gamut-Mitchell, Inc.*, 27 AD3d 622 (2d Dept. 2006). Here, Plaintiff has not satisfied the requirement of establishing the guaranty itself.

Ms. Laughinghouse's template and declaration are not sufficient to make a *prima facie* showing of Plaintiff's entitlement to relief. Under the unusual circumstances of this case, including the Prior Decision of Justice Austin which this Court may not overrule or modify, *see Cellarmare v. Lakeman*, 36 A.D.3d 905 (2d Dept. 2007); *Vaseghi v. Vaseghi*, 114 A.D.2d 501 (2d Dept. 1985), Plaintiff has not made a *prima facie* showing of its entitlement to relief. Indeed, Plaintiff may never be able to demonstrate that Defendants personally guaranteed the corporate loan at issue in accordance with the Personal Guaranty on the reverse side of the template because (1) the original documents no longer exist; (2) complete copies were never kept; and (3) Plaintiff is unable to present testimony from any person with personal knowledge of the subject loan. The issue of whether the credit application that Defendants signed contained the same terms and conditions on its reverse side as the template is a matter of speculation and conjecture.

Based on the foregoing, the Court is constrained to conclude that Defendants are entitled to summary judgment dismissing the Complaint, and 1) grants Defendants' motions for summary judgment and to dismiss the Complaint; and 2) denies Plaintiff's cross-motion for summary judgment. Accordingly, it is hereby

ORDERED, that the motion of Defendants John T. DiGangi and Albert DiGangi for summary judgment and dismissal of the Complaint is granted; and it is further

ORDERED, that the motion of Defendant Michael J. DeMarco for summary judgment and dismissal of the Complaint is granted; and it is further

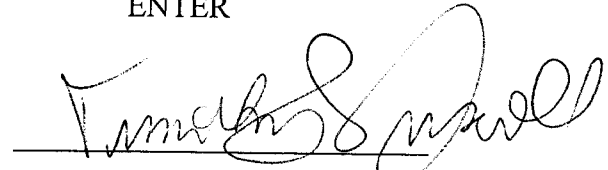
ORDERED, that the motion of Plaintiff Brown Bark for summary judgment is denied.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
October 6, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.



ENTERED
OCT 08 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE