

**JPMorgan Chase Bank, N.A. v Strands Hair Studio,
LLC**

2009 NY Slip Op 33136(U)

December 17, 2009

Supreme Court, Nassau County

Docket Number: 015554/08

Judge: Daniel R. Palmieri

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SLC

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
**JPMORGAN CHASE BANK, N.A., as successor-by-
assignment from the Bank of New York,**

TRIAL TERM PART: 47

Plaintiff,

INDEX NO.:015554/08

-against-

**MOTION DATE:12-3-09
SUBMIT DATE:12-14-09
SEQ. NUMBER - 004**

**STRANDS HAIR STUDIO, LLC, and
SHARON A. PAYNE A/K/A
SHARON A. ROLLOCK-PAYNE,**

Defendants.

-----x
SHARON A. PAYNE,

Third-Party Plaintiff,

-against-

STEPHANIE ORR a/k/a STEPHANIE JONES,

Third-Party Defendant,

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 11-9-09.....1**
- Affirmation in Opposition, dated 11-23-09.....2**
- Affirmation in Opposition, dated 12-7-09.....3**
- Affirmation in Reply, dated 12-2-09.....4**
- Affirmation in Reply, dated 12-10-09.....5**

That branch of the motion by the third-party defendant Stephanie Orr a/k/a Stephanie

Jones (“Orr”) pursuant to CPLR 3212 for summary judgment dismissing the plaintiff’s action against defendant Strands Hair Studio, LLC (“Strands” or “LLC”) is denied. That branch of the motion by Orr pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint and for a declaration that the third party plaintiff Sharon A. Payne (“Payne”) was not entitled to the preliminary injunction issued by this Court by order dated March 9, 2009 and for an assessment of damages against the undertaking given pursuant to CPLR 6312(b) is denied.

The third-party action is hereby severed from the main action for purposes of discovery and trial, as indicated in this order.

This case arises from the relationship between two persons who at one time ran a beauty shop, operating as Strands Hair Studio. There was an apparent falling out between them, and Strands did not pay on a line of credit issued by plaintiff’s predecessor in interest; the plaintiff sued Strands on the balance owed and Payne as guarantor of Strand’s debt. Payne then impleaded Orr in a third-party action. This Court previously granted plaintiff’s unopposed motion for summary judgment against Payne and a default judgment against Strands. Orr now moves for summary judgment.

In support of that branch of the motion that is directed to the main action, Orr first raises the defense of lack of jurisdiction over Strands. Although she is correct that she is not bound by the default order previously made against Strands, and may assert in her answer any defense that may have been available to this direct defendant (CPLR 1008; Siegel, *New York Practice*, at 272-273 [4th Ed.]), the corollary is that she must plead any such affirmative defenses that might enure to her benefit, or would waive them to the extent mandated by law. *See, Jorgensen v Endicott Trust Co.*, 100 AD2d 647, 648 (3d Dept. 1984). Thus, she was

bound by the constraints of CPLR 3211(e). *See, Daly v Metropolitan Life Ins. Co.*, 4 Misc 3d 887 (Sup Ct. New York County 2004). The Strands' defenses she raises are want of jurisdiction and lack of standing.

CPLR 3211(e) requires, among other things, that a defense based upon want of personal jurisdiction is waived unless asserted in the responsive pleading or in a pre-answer motion to dismiss. If asserted in the pleading, it must be the subject of a motion to dismiss made within 60 days of service of that pleading, unless the passing of the period is excused based upon a showing of undue hardship. Here, no defense of want of personal jurisdiction with regard to the LLC was asserted in the third-party answer. Even if one could somehow credit the jurisdictional defense raised in that pleading as applying to Strands and not just to the third-party defendant herself, it was served December 2, 2008. No motion to dismiss was made until the present application was made on November 10, 2009, and undue hardship has not been claimed. Accordingly, the defense was waived. *Greenpoint Bank v Schiffer*, 266 AD2d 262 (2d Dept.1999).

The second basis for dismissal is addressed to the complaint in its entirety, for want of standing by the plaintiff to bring the action, which raises CPLR 3211(a)(3). This is based on the alleged failure of the plaintiff to prove that the particular loan upon which it sued the direct defendants was assigned to the plaintiff, notwithstanding a general assignment made as part of a purchase agreement between the Bank of America (which had originated the subject line of credit) and the plaintiff. This too was not pled in the third-party answer, and thus was waived. CPLR 3211(e); *FBB Asset Mgrs. v Freund*, 2 AD3d 573 (2d Dept. 2003); *Harte v Richmond County Sav. Bank*, 224 AD2d 585 (2d Dept. 1996); *Donovan v Rocklyn*

Fuel Oil Corp., 23 Misc 3d 1130 (A) (Sup Ct Nassau County 2009).

Even if it had not been waived, this ground would not have been sufficient under ordinary summary judgment standards. In order to establish lack of standing/capacity to sue, the movant was obligated to prove that the subject loan could not be sued upon by plaintiff because, as noted, it was not covered by the asset sale and assignment by Bank of America. Orr could not for that purpose point merely to gaps in the plaintiff's case, based upon what was submitted on a prior motion. *See, Vittorio v U-Haul Co.*, 52 AD3d 823 (2d Dept. 2008); *Pace v Intl. Bus. Machines Corp.*, 248 AD2d 690 (2d Dept. 1998). Orr did not produce the full purchase agreement or other proof demonstrating that the loan was not among those sold to the plaintiff. It is not enough to argue that the plaintiff did not prove that it was. Thus, under well-established law, the moving party has failed to make out her *prima facie* showing of entitlement to judgment as a matter of law, requiring denial of the motion without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

Accordingly, that branch of the motion that is for dismissal of the main action is denied.

Nor can the Court agree with the third-party defendant that summary judgment should be granted to her dismissing the third-party complaint. The third party complaint contains four causes of action. They sound in an accounting for the business of Strands, mandatory permanent injunction permitting full access to the books and records of Strands, a permanent injunction against Orr's interfering with Payne's participation in the business, and a damages claim for recoupment of personal funds paid by Payne to the plaintiff's predecessor in

interest on the loan. All are based on Payne's allegations that she and Orr were equal partners in the business, which was founded in 2005, that Strands had taken out the line of credit for that business, and that Payne had personally guaranteed the loan alone because Orr did not have good credit. Payne further alleges that she was excluded from the business beginning in 2007, that Orr diverted money from the business to her own use and has operated the business for her own benefit, and (key to the third-party action) has thereby prevented Strands from paying on the loan. Payne is personally liable for that loan, and that Payne was sued therefor by the plaintiff in the main action.

The third-party defendant contends: that the claims made against her by Payne are completely separate from the claims made against Payne by the plaintiff; that even assuming that Orr was a member of the LLC that she cannot be held liable pursuant to Limited Liability Company Law § 609; that any claim that she should be held accountable to pay on the personal guarantee is barred by the Statute of Frauds, as there is no writing in which she agreed to do so; and that the causes of action seek remedies without a viable wrong being asserted against Orr, because the guarantee benefitted the LLC, and not Orr. Finally, she asserts that all claims do not belong to Payne but rather to the LLC, requiring a derivative action on behalf of the LLC, and not Payne individually.

CPLR 1007 provides that "a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." Third-party complaints are limited to a situation where a person not a party "is or may be liable to defendant for all or part of the plaintiff's claim against him" and the liability "must be one rooted in indemnity or contribution." *BRC Elec. Corp. v. Cripps*, 67

AD2d 899 (2d Dept 1979). However, provided that the liability sought to be imposed on the third party defendant arises from or is conditioned on the liability asserted against the third-party plaintiff in the main action (*BBIG Realty Corp. v Ginsberg*, 111 AD2d 91 [1st Dept. 1985]), third party complaints are to be liberally construed to allow for resolution of such interrelated claims. *Cohen Agency v Perlman Agency*, 51 NY2d 358, 364 (1980); *Schenectady Steel Co. v Guardian Life Ins. Co. of America*, 300 AD2d 845, 856 (3d Dept. 2002); *Gair Co., Inc. v Cambridge Carpet, Inc.*, 160 AD2d 371 (1st Dept. 1990). Reading the third-party complaint liberally, Payne is seeking to insure that Strands can pay the loan, claiming that Orr has effectively controlled Stand's business and has blocked such payment thereby, to Payne's detriment, as she is the sole guarantor on the loan. The claims made against Orr thus arise from the debt Payne owes to the plaintiff. Although perhaps not classic in form, the claim against Orr thus satisfies CPLR 1007.

The Court therefore disagrees with the third-party defendant Orr that claims made by third-party plaintiff Payne are truly separate from those underlying the main action and cannot form the basis for a third-party action. Her reliance on Justice Warshawsky's decision in *Amorizzo v Conte* (21 Misc 3d 1111(A) [Sup Ct Nassau County 2008]) is misplaced. The third-party action dismissed in that case was one by the third-party plaintiff for defamation allegedly committed by public law enforcement officials. The Court found it unrelated to the class action suit brought against the third-party plaintiff for fraud, as this was predicated on his own alleged wrongdoing in his business dealings with members of the class. As explained above, the third-party complaint here does in fact depend upon and is related to the claim made by the plaintiff against the third-party plaintiff.

The contention that Payne must bring a derivative action and not a personal one is without merit, as Payne ultimately is seeking remedies on her own behalf related to the guarantee debt, and not to enforce or defend any right of the LLC. The fact that she is attempting to defend her own interests by seeking to force Orr to allow the LLC to function as Payne contends it should does not alter the fundamental nature and purpose of the third-party action, which is to insure that she does not have to shoulder the debt alone. The Statute of Frauds is likewise inapplicable here, because no claim is made that Orr personally is responsible for the debt owed to the plaintiff, but only that she is interfering with the ability of Strands to pay on the loan, and is therefore the cause of Payne's potential personal loss to the plaintiff under the guarantee. Accordingly, the Court concludes that the legal arguments advanced by Orr are insufficient to ground the motion.

As a factual matter, Orr claims in her affidavit, among other things, that "Payne ceased to be involved in the operation of any business at the Premises in 2007", and that she, Orr, presently owns a business at the premises "described in an expired lease executed by the LLC". She states that the LLC does not presently occupy any part of those premises, that she pays the rent, and that the equipment she uses is not owned by her or the LLC but is leased from a named third party. She also contends that when Payne and her two attorneys came into the premises pursuant to a prior order of this Court¹ she was subjected to humiliation and was "treated like a criminal" and that she is entitled to damages drawn from the \$5,000 undertaking given under that order.

¹ The prior order was a mandatory preliminary injunction permitting Payne access to the premises and books and records of the business (Order dated December 18, 2008).

Absent from that affidavit, however, is any proof undermining the central allegations of the third-party complaint, which is that Orr excluded Payne from the business (as opposed to her statement that Payne simply “ceased to be involved”), that money was diverted and that Orr ultimately continued to operate the business solely for her own benefit. The absence of contrary proof is especially obvious in view of this Court’s prior order granting Payne a preliminary mandatory injunction, in which it was noted that Payne’s proof included Orr’s signature on the store lease, her name in a New York Public records database as an owner of Strands, and that she had never denied being an owner of that business, all of which indicates that Orr held herself out as an owner and was, at least initially, in the premises in that capacity and operating the business.²

As Payne’s allegations about her exclusion and the diversion of monies are the factual underpinnings of the claims and the relief sought (which, as set forth above, is to force Orr to allow the business to function as originally intended so that the loan could be paid), the third-party defendant has failed to make a *prima facie* showing that she is entitled to dismissal of the third-party complaint as a matter of law. Accordingly, this branch of the motion must also be denied, without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*.

Finally, the Court notes that the parties to the third-party action have yet to engage in any formal discovery under local rules, and given the result of this motion the case must now


² This is not to say that what is contained in that prior order is the law of the case, which it is not. *See, Town of Concord v Duwe*, 4 NY3d 470 (2005). However, the Court is free to take notice of its prior findings, but without binding the parties – indeed, Orr was free to now contradict such findings, but as noted has not even attempted to do so.

be litigated as any other matter. Consequently, the third-party action is severed from the main action for purposes of discovery and trial, and counsel for the parties to the third-party action are hereby directed to appear for a Preliminary Conference in the basement of the courthouse, 100 Supreme Court Drive, Mineola, New York, on **Monday, January 11, 2010**, at 9:30 a.m. Failure to appear for this conference may subject the defaulting party to sanctions pursuant to the Uniform Rules, 22 NYCRR § 202.27.

The Court notes the request by counsel to the third-party defendant not to schedule any further proceedings until after the first week in January, 2010, and has accommodated him to that extent.

This shall constitute the Decision and Order of this Court.

DATED: December 17, 2009

ENTER

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
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