

Baystate Pool Supplies, Inc. v Pal Pool Servs., Inc.

2009 NY Slip Op 33247(U)

May 14, 2009

Sup Ct, Suffolk County

Docket Number: 25396-2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 01-23-2009
 Motion Submit Date: 04-15-2009
 Motion Sequence No's.: 001 MD

_____ X
BAYSTATE POOL SUPPLIES, INC.,

Attorney for Plaintiff
 Darrell J. Conway, PC
 179 Little East Neck Road
 Babylon, New York 11704

Plaintiff,

Attorney for Defendant
 Sarisohn Law Partners, LLP
 350 Veterans Memorial Highway
 Commack, New York 11725

-against-

**PAL POOL SERVICES INC., SCOTT
 WECHSLER and DAWN M.
 WECHSLER**

Defendants.

_____ X

ORDERED, that the motion (motion sequence number 001) by defendants, Scott Wechsler and Dawn M. Wechsler to dismiss the Complaint as against them and for ancillary relief is denied; and it is further

ORDERED, that a compliance conference is scheduled for June 24, 2009 at 9:30 a.m. before the undersigned.

Plaintiff, Baystate Pool Supplies, Inc., ("Baystate"), commenced this action against defendant to recover for goods sold and delivered and an account stated arising out of a line of credit granted to defendant Pal Pool Service, Inc. ("Pal Pool") pursuant to a credit application. It appears that the credit application was executed in or about March of 2000, as evidenced by an imprint contained on the bottom of the application which is annexed to the motion papers. In conjunction with the credit application, defendant Scott Wechsler executed a Guarantee of Payment which states:

The undersigned Guarantor(s) who are individual(s) and are not the Purchaser(s) on the reverse side hereof,

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in consideration of BAYSTATE POOL SUPPLIES INC. selling merchandise and extending credit to Purchasers hereby *unconditionally guarantee to BAYSTATE POOL SUPPLIES INC., its successors and assigns, the prompt payment of any and all indebtedness owed by Purchasers, on the reverse side hereof, which now or hereafter become due and owing from said Purchaser.* Liability of the undersigned shall not be affected or prejudiced by additional acceptance of a note or evidence of indebtedness, the extension of time, payment arrangement or other indulgence granted to Purchaser, or by agreement affecting said indebtedness, and the undersigned hereby agrees and waives notice of all the aforesaid. The filing of a suit or exhaustion of collection or legal remedies against said Purchaser shall not be a condition precedent to the enforcement of this Guarantee, and the undersigned hereby expressly waives demand, presentment for payment, protest, or notice of protest or diligence. In the event of any default by Purchaser, Guarantor(s) will pay interest on the unpaid reasonable costs and expenses incurred by BAYSTATE POOL SUPPLIES INC. in collecting or endeavoring to collect any attorney fees. This Guarantee shall continue until revoked by Guarantor(s) by notice in writing sent to BAYSTATE POOL SUPPLIES INC. by registered or certified mail, but such revocation shall be effective until such notice has been so received, and further such revocation shall not be applicable or effective to any indebtedness already in existence.

(Emphasis in original). The submissions further reflect that on or about March 11, 2005, plaintiff and Scott Wechsler executed a letter captioned "PROMISSORY LETTER OF INTENT" in which it was stated in part:

As per our discussion in regards to your outstanding balance with Baystate Pools, you have agreed the balance owed for invoices alone comes to a total of \$188,138.49, as of March 10, 2005. You agree the charges are correct and legitimate. You personally guaranty the repayment of \$150,000 of this debt to Baystate Pools at this time.

Based on the foregoing, plaintiff asserts causes of action against Scott Wechsler to recover pursuant to the terms of the guarantee(s) and for costs.

Additionally, plaintiff asserts causes of action against both Scott Wechsler and his wife, Dawn M. Wechsler seeking to set aside a certain transfer of real property, alleging same was a fraudulent conveyance (purportedly in violation of Debtor and Creditor Law §273, although not delineated in the Complaint). Specifically, plaintiff alleges that in or about March 29, 2007, Scott Wechsler transferred a residence located at 16 Weatherstone Way, Smithtown (the "subject premises") to Dawn Wechsler for no consideration, while he was indebted to plaintiff. Plaintiff seeks to have the transfer set aside. In a separate cause of action, plaintiff alleges that the transfer of the subject premises was made with the intent to defraud creditors and also asks that it be set aside. Finally, plaintiff seeks costs and disbursements against Scott and Dawn Wechsler.

Defendants Scott and Dawn Wechsler move, pursuant to CPLR §3212, for an Order granting summary judgment and dismissing the causes of action asserted against them individually, striking their names from the caption and directing the Suffolk County Clerk to cancel the Notice of Pendency filed

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against the subject premises. Initially, Scott Wechsler challenges the validity of the personal guarantee and argues that the limit of his liability, if any, is only \$50,000.00 based on the stated line of credit amount. He states that he did not agree to personal liability in excess of that amount, as demanded by the Complaint. With regard to the letter of intent, he states that he signed this document in his corporate capacity only and did not intend for it to impose upon him personal liability. Moreover, he asserts that said document is merely an unenforceable “agreement to agree”.

Defendants also both allege that the causes of action alleging that the transfer of the subject premises should be set aside as a fraudulent conveyance are without merit. Defendants assert that at the time the subject premises was transferred, Scott Wechsler was not indebted to plaintiff. Rather, the subject premises was transferred on or about March 29, 2007, and the earliest statement evidencing a debt to plaintiff was in June of 2007 and this action was not commenced until July of 2008. Scott Wechsler argues that since he is only the guarantor, his liability was secondary to that of Pal Pool who was not in debt to plaintiff at the time of the conveyance. Thus, defendants argue that there is no basis to conclude that the transfer of the subject premises was fraudulent.

Dawn Wechsler also submits an affidavit in support of the motion to dismiss wherein she advises that the transfer of the subject premises was effectuated as part of estate planning, co-defendant was not rendered insolvent by the transfer and was not indebted to plaintiff at the time of the transfer. Based on the foregoing, defendants seek dismissal of the Complaint.

Plaintiff opposes the motion and submits copies of the pleadings, line of credit, guarantee, promissory letter of intent, invoices and an affidavit from Robert Stanton (“Stanton”), credit manager for plaintiff. Stanton states that since the year 2000 plaintiff has extended credit to Pal Pool based upon the unconditional guarantee by Scott Wechsler and would not have granted any credit if he had not signed the guarantee. He further states that in 2005, he requested that Scott Wechsler execute an additional letter of intent because Pal Pool’s debt was increasing and that in the letter of intent Scott Wechsler acknowledged both the debt and the existing guarantee. Further, Stanton states that contrary to defendants’ allegations, at the time of the transfer of the subject premises, Pal Pool and Scott Wechsler were indebted to plaintiff in a sum in excess of \$160,000.00. Stanton notes that notwithstanding the allegation that the transfer was executed as part of estate planning, no other documents have been submitted supporting such claim.

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Plaintiff further argues that defendants are wholly ignoring the plain language of the guarantee which unconditionally obligates Scott Wechsler to pay the debt of Pal Pool, regardless of the amount of the line of credit extended to Pal Pool. Moreover, plaintiff argues that defendants' argument regarding any limit on the personal guarantee is further diminished since the letter of intent set forth a personal guarantee of \$150,000.00. Based on all of the foregoing, plaintiff requests that the motion for summary judgment be denied in its entirety.

In reply, defendants reiterate that at the time of the transfer of the subject premises Pal Pool was not in default under its agreement with plaintiff and thus, the liability of Scott Wechsler had not accrued and therefore, there was no debtor/creditor relationship sufficient to form a basis to impose liability. Thus, the transfer of the subject premises did not constitute actual or constructive fraud. Additionally, since the transfer was not fraudulent, according to defendants, the Notice of Pendency must also be canceled.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). However, if the proponent of the motion for summary judgment fails to demonstrate its entitlement to judgment as a matter of law, the Court need not even consider the sufficiency of the opposing papers. *Oleg Barshay, DC, P.C. v. State Farm Ins. Co.*, 14 Misc.3d 74, 831 N.Y.S.2d 821 (Sup. Ct. App. Term N.Y. 2006) (internal citations omitted).

Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract." *Dunkin' Donuts v. Liberatore*, 138 A.D.2d 559, 526 N.Y.S.2d 141 (2d Dept. 1988). *See also, Chrysler Credit Corp. v. Kosal*, 132 A.D.2d 686, 518 N.Y.S.2d 162 (2d Dept. 1987). Where a guarantee clearly indicates that the signatory would "unconditionally guarantee" the performance of the corporation and is unambiguously identified as a "guaranty" it will be enforceable against the guarantor. *Suffolk Cement Products, Inc., v. Empire Concrete Enterprises, Inc.*, 234 A.D.2d 447, 650 N.Y.S.2d 801 (2d Dept.

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1996); ***Dunkin Donuts, supra***. Such broad guarantees are not limited by the fact that the corporation only sought a minimum credit line. ***Colonial Plumbing Corp. v. Gallagher***, 217 A.D.2d 764, 629 N.Y.S.2d 128 (3d Dept. 1995).

In the case at bar, defendants have not met their *prima facie* burden of demonstrating entitlement to summary judgment dismissing the causes of action against Scott Wechsler for recovery on the personal guarantee. The plain, unambiguous language of the guarantee broadly obligates him to satisfy the debts of Pal Pools and there is no claim of fraud, duress or other wrongful act in the execution of the guarantee. Moreover, his claim regarding limiting the liability to only \$50,000.00 is without merit based upon the terms of the guarantee. Therefore, the motion to dismiss the causes of action for recovery on the personal guarantee is denied. In light of the fact that defendants have not met their *prima facie* burden, the Court need not consider the sufficiency of the opposition papers.

Turning to the claims seeking to set aside the alleged fraudulent transfer, Debtor and Creditor Law §273 provides that “Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without a fair consideration.” Additionally, §276 states that “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

Here, defendants’ arguments in support of their motion for summary judgment are fatally flawed upon a reading of the above quoted statutes. Assuming Pal Pools was not indebted to plaintiff at the time of the transfer of the subject premises (which plaintiff does not concede), defendants assert that no liability could thus attach to defendants because there was no debt. However, the plain language of this statute, particularly §276, was intended to prevent fraud on both current and future creditors, including conveyances which occurred prior to the time the obligation to plaintiff arose. ***Jr & J Holding Co., v. Rabinowitz***, 201 A.D.2d 535, 607 N.Y.S.2d 724 (2d Dept. 1994). Clearly, as discussed above, the guarantee obligated Scott Wechsler to plaintiff to satisfy the ongoing debts of Pal Pools and such obligation predated the transfer of the subject premises. Therefore, defendants have failed to demonstrate the absence of a material issue of fact warranting summary judgment in their favor.

Based on the foregoing, the motion for summary judgment is dismissed in its entirety.

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The Court notes that the filing of a Notice of Pendency under CPLR Article 65 is proper in this action. *See, e.g., Resnick v. Doukas*, 261 A.D.2d 375, 689 N.Y.S.2d 228 (2d Dept. 1999).

Counsel are reminded that a compliance conference is scheduled for June 24, 2009 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: May 14, 2009
Riverhead, New York

EMILY PINES

EMILY PINES
J. S. C.