[* 1]

SHORT FORM ORDER

Index Number: 019507-2009

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

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

Original Motion Date: 11-09-2009
Motion Submit Date: 12-08-2009
Motion Sequence No's.: 001 MG

X

BANK OF AMERICA,

Plaintiff,

-against-

ANCHOR OFFSET PREP INC. d/b/a ANCHOR IMAGING, ANCHOR PRINT, MICHAEL SWIFT AND VINCENT NICHOLES,

Defendants.
X

Attorney for Plaintiff
Buchanan Ingersoll & Rooney PC
620 8th Avenue, 23rd Floor
New York, New York 10018-1669

Attorney for Defendants
Lamonica Herbst & Maniscalco, LLP
3305 Jerusalem Avenue
Wantagh, New York 11793

ORDERED, that the motion (motion sequence number 001) by plaintiff pursuant to CPLR §3212 for summary judgment is granted; and it is further

ORDERED, that a hearing on counsel fees is scheduled for March 15, 2010 at 9:30 a.m. before the undersigned; and it is further

ORDERED, that submission of Judgment shall abide the determination on counsel fees.

Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about May 22, 2009 and issue was joined by defendants' service of an Answer dated August 19, 2009. The submissions reflect that on or about January 23, 2006, plaintiff and defendant, Anchor Offset Prep Inc.,

d/b a Anchor Imaging, Anchor Print (the "corporate defendant" or "Anchor"), entered into a line of credit agreement captioned Note and Agreement (the "Agreement"). This Agreement extended credit to Anchor in the amount of $250,000.00 at an initial interest rate of 8.25% but adjustable quarterly to prime plus 1.00 percentage point. The Agreement required Anchor to make minimum monthly payments in the amount of 1/36 of the unpaid principal balance as of the end of the statement period plus interest, late charges (if any) and any unpaid prior minimum payments. The Agreement further provided for a default interest rate of 6% above the interest rate, late fees and counsel fees.

Defendants Vincent Nicholes ("Nicholes") and Michael Swift ("Swift"), executed separate, yet identical personal written guaranties which contained the following provisions as relevant to the case at bar:

> 1. The Guaranty. For valuable consideration, the undersigned ("Guarantor") hereby unconditionally guarantees and promises to pay promptly to Bank of America, N.A., its subsidiaries and affiliates (collectively "Bank"), or order, in lawful money of the United States, any and all indebtedness of Anchor Offset Prep Inc. dba Anchor Imaging ("Borrower") to Bank when due, whether at stated maturity, upon acceleration or otherwise, and at all times thereafter. The liability of the Guarantor under this Guaranty is not limited as to the principal amount of the indebtedness guaranteed and includes, without limitation, liability for all interest, fees, indemnities (including, without limitation, hazardous waste indemnities), and other costs and expenses relating to or arising out of the indebtedness and for all swap, option, or forward obligations now or hereafter owing from Borrower to Bank. The liability of Guarantor is continuing and relates to any indebtedness, including that arising under successive transactions which shall either continue the indebtedness or from time to time renew it after is has been satisfied. This Guaranty is cumulative and does not supersede any other outstanding guaranties and, and the liability of Guarantor under this Guaranty is exclusive of Guarantor's liability under any other guaranties signed by Guarantor. If multiple individuals or entities sign this Guaranty, their obligations under this Guaranty shall be joint and several.[1]
>
> 3. Obligations Independent. The obligations hereunder are independent of the obligations of Borrower or any other guarantor, and a separate action or actions may be brought and prosecuted against Guarantor whether action is brought against Borrower or any other guarantor or whether Borrower or any other guarantor be joined in any such action or actions. Anyone executing this Guaranty shall be bound by its terms without regard to execution by anyone else.
>
> 5. Guaranty to be Absolute. Guarantor agrees that until the indebtedness has been paid in full and any commitments of Bank or facilities provided by Bank with respect to the indebtedness have been terminated, Guarantor shall not be released by or because of the taking, or failure to take, any action that might in any manner or to any extent vary the risks of Guarantor under this Guaranty or that, but for this paragraph, might discharge or otherwise reduce, limit or modify Guarantor's obligations under this Guaranty. Guarantor waives and surrenders any defense to any liability under this Guaranty based upon any such action, including but not limited to any action of Bank described I nteh immediately preceding

[1] The remainder of this section has been omitted by the Court as it does not pertain to the issues in this case.

paragraph of this guaranty. It is the express intent of Guarantor that Guarantor's obligations under this Guaranty are and shall be absolute and unconditional.

9. Security. To secure all of Guarantor's obligations hereunder, Guarantor assigns and grants to Bank a security interest in all moneys, securities, and other property of Guarantor now or hereafter in the possession of Bank, all deposit accounts of Guarantor maintained with Bank, and all proceeds thereof. Upon default or breach of any of Guarantor's obligations to Bank, Bank may apply any deposit account to reduce the indebtedness, and may foreclosure any collateral as provided in the Uniform Commercial Code and in any security agreements between Bank and Guarantor.

19. Remedies. If Guarantor fails to fulfill its duty to pay all indebtedness guaranteed hereunder, Bank shall have all of the remedies of a creditor and, to the extent applicable, of a secured party, under all applicable law.

23. Costs and Expenses. Guarantor agrees to pay all reasonable attorneys' fees, including allocated costs of Bank's in-house counsel to the extent permitted by applicable law; and all other costs and expenses that may be incurred by Bank (a) in the enforcement of this Guaranty or (b) in the preservation, protection, or enforcement of any rights of Bank in any case commenced by or against Guarantor or Borrower under the Bankruptcy Code (Title 11, United States Code) or any similar or successor statute.

In support of the motion, plaintiff has submitted an affirmation of counsel, an affidavit by Michael Rowan ("Rowan"), vice president of plaintiff, establishing the default, a copy of the Agreement and guaranties, and the pleadings. According to Rowan, Anchor defaulted on its obligations under the Agreement by its failure to make monthly payments since on or about May of 2009. As a result, plaintiff asserts that pursuant to the Agreement, the entire balance of principal plus accrued interest became immediately due and payable and that the outstanding balance on the loan at the time of default was $243,000.00. Plaintiff states that the total amount due and owing is $246,787.86, which is comprised of $243,000.00 in principal, and $3,787.86 in accrued interest. Plaintiff states that since May 11, 2009, when defendants were in breach and notified thereof, statutory interest has been accruing at the rate of $60.85 per diem. Plaintiff also seeks counsel fees in the amount of $1,895.50 as of the date of the motion and submits an affirmation of counsel in support thereof.

Only defendant Swift has submitted opposition to the motion. Swift submits an affidavit in opposition and an affirmation of counsel. Swift argues that the guaranty is unenforceable against him because (1) he did not receive any consideration in exchange for the loan proceeds; (2) plaintiff should seek to recover from Nicholes because he received 100% of the benefit of the funds loaned to Anchor

and collected the accounts receivable in an amount that would be sufficient to satisfy plaintiff's claims; and (3) plaintiff failed to seize Anchor's accounts prior to the commencement of this action against defendants.

Specifically, Swift asserts that he was previously a "member" of Anchor but did not handle the financial obligations on behalf of the corporation. Rather, according to Swift, such responsibilities were delegated to Nicholes who received the loan proceeds and controlled how they were disbursed. He states that he left Anchor in or about July of 2008 and Nicholes was solely in charge of the business and at that time there were sufficient funds to satisfy the obligations to plaintiff. Therefore, Swift argues that it would be inequitable to hold him responsible for repayment of the fund. Additionally, Swift argues that plaintiff should have attempted to collect from Anchor prior to the enforcement of the guaranty against him. He states that if he is found responsible for the debt, he is entitled to a judgment against Nicholes in that amount. Finally, Swift argues that plaintiff should be compelled to look first to Anchor and Nicholes to satisfy the debt before he can be found liable.

In reply, plaintiff argues that it has met its prima facie burden by the submission of the Agreement, and the affidavit of default and defendant Swift has failed to raise a triable issue of fact. Plaintiff notes that Swift neither contests the amount due nor the existence of the Agreement and Guaranty. Plaintiff argues that Swift did receive consideration for the Guaranty, to wit, the loan of funds to Anchor, of which he was a member. Moreover, plaintiff argues that the plain language of the Agreement specifically permits it to pursue a judgment against Swift (and the other defendants) and is not required to seize funds from Anchor's account as a condition precedent to the commencement of this action. Similarly, plaintiff argues that it is not required to look first to Anchor and Nicholes before seeking judgment against Swift. Instead, even if Swift has a claim against the other defendants, such is not a defense to the motion for summary judgment. Based on the foregoing, plaintiff requests that the motion for summary judgment be granted in its entirety.

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). In an action to recover on a promissory note, plaintiff demonstrates a prima facie showing by establishing the existence of the note and the defendant's failure to make payments according to its terms. ***Pennsylvania Higher Education Assistance Agency v. Musheyev***, __A.D.3d __, 888 N.Y.S.2d 911 (2d Dept. 2009); ***Verela v. Citrus Lake Development, Inc.***, 53 A.D.3d 574, 862 N.Y.S.2d 96 (2d Dept. 2008). Defendants' submission of unsupported and conclusory allegations are insufficient to demonstrate a triable issue of fact. ***Hestnar v. Schetter***, 284 A.D.2d 499, 728 N.Y.S.2d 479 (2d Dept. 2001).

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 guaranty 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. 1996); ***Dunkin Donuts, supra.*** Conclusory assertions that no consideration were given at the time the note and guaranty were executed are insufficient to defeat a motion for summary judgment. ***Verela, supra; Hestnar, supra.***

In the case at bar, plaintiff has met its prima facie burden by submission of the Agreement and guaranties and affidavit establishing the default and amount due and owing. ***Agai v. Diontech Consulting, Inc.***, 64 A.D.3d 622, 882 N.Y.S.2d 503 (2d Dept. 2009); ***Cutter Bayview Cleaners, Inc., v. Spotless Shirts, Inc.***, 57A.D.3d 708, 870 N.Y.S.2d 395 (2d Dept. 2008). In opposition, defendants have failed to raise a triable issue of fact. The plain language of the guaranty provisions set forth above demonstrate plaintiff's entitlement to proceed against Swift (and the other defendants who have not opposed this motion) without first requiring it to seize the corporate defendant's bank account funds. The Court agrees with plaintiff that even assuming *arguendo* that Swift has a claim against his co-defendant Nicholes, such does not preclude summary judgment. The guaranty establishes defendants' unconditional obligation to pay the debt and establishes joint and several liability

against each defendant.

Based on the foregoing, the motion for summary judgment is granted against all defendants. The amount of counsel fees and disbursements as provided for in the promissory note shall be determined at a hearing on March 31, 2010 at 9:30 a.m. before the undersigned. ***Cutter Bayview Cleaners, supra.*** Submission of Judgment shall abide the determination of counsel fees.

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

Dated: January 21, 2010
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.