Hess Corp. v Magnone

2010 NY Slip Op 30828(U)

April 7, 2010

Supreme Court, NY County

Docket Number: 115945/2009

Judge: Paul Wooten

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SCANNED ON 4/13/2010

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4-12-10

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

HESS CORPORATION,

Plaintiff,

- against-

MICHAEL J. MAGNONE,

Defendant.

INDEX NO. 115945/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by plaintiff for summary judgment in lieu of complaint, pursuant to CPLR 3213.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

FILED
APR 12 2010
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Hess Corporation ("plaintiff") brings this action against defendant Michael J. Magnone ("defendant"), to enforce an alleged personal guarantee of payment obligations owed to plaintiff's predecessor-in-interest under two contracts for the sale of fuel oil. Before the Court is plaintiff's motion for summary judgment in lieu of complaint, pursuant to CPLR 3213, requesting judgment against defendant in the sum of $490,560, plus accruing storage fees, pre-judgment interest, attorney's fees and costs. Defendant has responded in opposition to the motion, and plaintiff has filed a reply.

BACKGROUND

In support of its motion for summary judgment in lieu of complaint, plaintiff submits, *inter alia*, the affidavit of Theodore J. Korth, Esq.; a Personal Guarantee of Account ("the Guarantee"); two fuel oil fixed price supply contracts and related invoices; letters from plaintiff to defendant dated January 29, 2009 and August 20, 2009; a bankruptcy petition and related

affirmation by defendant; and an Assignment of Claims ("the Assignment"). In opposition to the motion, defendant submits his own affidavit and various public documents addressing market conditions for fuel oil pricing.

Defendant is the Chief Executive Officer of Brite Fuel Oil Corporation ("Brite"), a supplier of fuel oil to homeowners and businesses. Brite sought to purchase fuel oil from Stuyvesant Fuel Service Corp. ("Stuyvesant"), an oil supplier and plaintiff's predecessor-in-interest. Stuyvesant required the personal guarantee of a responsible party before it would extend credit to Brite.

According to the affidavit of plaintiff's in-house counsel, Theodore J. Kroth, Esq., on November 12, 1996, defendant executed the Guarantee, unconditionally guaranteeing the punctual payment of any and all obligations of Brite to Stuyvesant.[1] The Guarantee was made in consideration of the "terms of sale of petroleum products and the extension of credit" by Stuyvesant to Brite, and provided in pertinent part:

> "[Guarantor], for himself, his heirs, executors and administrators, hereby unconditionally guarantees the due and punctual payment of any and all obligations of [Brite] to [Stuyvesant] whatsoever and the due performance of any and all agreements with [Stuyvesant] by [Brite]. This guarantee is absolute, Continuing and unlimited and shall not be affected, impaired, or discharged by any renewals or extensions of time of payment or credit or partial payment or by the making of any agreement relating to the manner of payment or by any modification, release or other alteration of any obligations hereby guaranteed, to all of which the undersigned expressly consents."

The Guarantee also provided that the guarantor agreed to "pay upon demand any and all amounts due and in arrears." The guarantor waived notices of acceptance, shipment, default and of presentment and protest of any instrument, as well as of any other demands or notices, and any requirement that Stuyvesant proceed or exhaust its remedies against Brite

[1]Korth affirms that he has full knowledge of the subject matter of his affidavit.

before proceeding against the guarantor. In the event it was necessary for Stuyvesant to refer the matter to an attorney for collection, the guarantor would be liable for collection fees and expenses, up to 33% of the debt then due and owing. The Guarantee contained no language restricting its assignability. The Guarantee bore a signature that plaintiff alleges is defendant's signature.

On October 6, 2008, Brite entered into two fuel oil fixed price supply contracts, Contract Nos. 08-002-HPT and 08-003-HPT ("the Contracts"), with Stuyvesant, under each of which Brite obligated itself to purchase and lift (*i.e.* accept delivery at Stuyvesant's facility) 42,000 gallons of fuel oil, at a fixed price of $2.75 per gallon. The Contracts also provided that Brite would be charged $0.02 per gallon per month in storage fees for any carried volumes. Contract No. 08-002-HPT pertained to December 2008, and Contract No. 08-003-HPT to January 2009, February 2009 and March 2009.

Brite did not pay for the fuel oil it purchased under the Contracts nor take delivery of it. Plaintiff alleges that as of the July 31, 2009 invoice, Brite's obligation to pay for the fuel oil under the Contracts was $462,000, plus $18,480 in storage fees, for a total of $480,480 (exclusive of interest); and that Brite's continuing obligation for storage charges for August 1, 2009 through October 31, 2009, was an additional $10,080. Thus, plaintiff claims that Brite's unpaid obligation as of October 31, 2009, totaled $490,560.

On October 31, 2008, plaintiff and Stuyvesant executed an Asset Purchase Agreement, pursuant to which Stuyvesant assigned the Guarantee and the Contracts to plaintiff. Defendant was advised of the assignment by letter dated January 29, 2009.

Brite filed a voluntary petition for Chapter 11 bankruptcy on September 23, 2009. In connection with the petition, defendant submitted an affirmation and exhibit listing Stuyvesant as a creditor to which Brite owed $463,297.80.

On October 15, 2009, Stuyvesant executed the Assignment, assigning to plaintiff all of

its interests in any claims under Section 101(5) of the Bankruptcy Code that Stuyvesant held against Brite relating to the Contracts. In the Assignment, Stuyvesant reconfirmed its prior assignment to plaintiff of the Guarantee and the Contracts under the Asset Purchase Agreement.

Korth was advised by Stuyvesant that the Guarantee was never terminated by defendant. On August 20, 2009, plaintiff sent a letter to defendant and Brite demanding performance of the Contracts or the Guarantee. No payment was thereafter received, and plaintiff claims that defendant is thus liable to it in the amount of $490,560, plus accruing storage fees after October 31, 2009, pre-judgment interest at the statutory rate, and attorney's fees and costs.

In his affidavit in opposition to plaintiff's motion, defendant denies executing the Guarantee. He claims that the signature appearing on the Guarantee is not his, and that he does not recognize the Guarantee or recall ever having received it. He also denies ever agreeing to any assignment of the Guarantee.

Defendant raises the affirmative defenses of waiver, ratification, commercial impracticability and frustration of purpose, which he alleges entirely excuse Brite's performance under the Contracts. His defenses are largely premised upon a change in market conditions for the price of fuel oil, and he submits several public documents addressing market decreases in fuel oil prices.

DISCUSSION

Plaintiff contends that it is entitled to summary judgment in lieu of complaint under CPLR 3213, as a matter of law, because it has put forth evidence establishing the existence and terms of the Guarantee, the Contracts and the Assignment; the non-performance by defendant and Brite of their respective obligations; and the amount of damages. Plaintiff also asserts that this matter is suitable for determination under CPLR 3213, as the case involves an instrument for the

"payment of money only."

Defendant argues that resolution of this motion under CPLR 3213 is inappropriate because the Guarantee extends to the "performance of any and all agreements" with Stuyvesant, rather than to the payment of money only. Defendant also denies signing the Guarantee, and thus claims that there is a factual dispute as to whether he executed it. He further contends that the Guarantee was not properly assigned, since he did not agree to an assignment and there was no clause allowing an assignment. He additionally claims that even if the Guarantee is valid, Brite's performance under the Contracts is excused by the defenses of waiver, ratification, commercial impracticability and frustration of purpose. Defendant also challenges the damages claimed by plaintiff as excessive.

As a threshold matter, the Court finds this case appropriate for resolution under CPLR 3213, which provides: "When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." An unconditional guarantee of payment, as is presented here, is considered an instrument for the payment of money only within the meaning of CPLR 3213 (*see Bank of America, N.A. v Solow*, 59 AD3d 304, 304 [1st Dept 2009]; *Torres & Leonard, P.C. v Select Professional Realties, Ltd.*, 118 AD2d 467, 468 [1st Dept 1986]).

Here, the Guarantee, by its terms, absolutely and unconditionally guaranteed punctual payment of any and all of Brite's obligations to Stuyvesant. The monetary obligations were fixed and ascertainable, as evidenced in the terms of the sale of petroleum products and extension of credit between them. The Guarantee's extension to "performance of any and all agreements" does not alter the fact that the obligations pertained only to the payment of money (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968] ["[T]he note itself requires the defendants to make certain payments and nothing else. As such it is an instrument

for the payment of money only."], *aff'd* 29 NY2d 410 [1971]; *Corvetti v Hudson*, 252 AD2d 787, 788 [3d Dept 1998] ["The fact that the guarantee also extended to other obligations, some of which may have been contingent or unascertainable, did not alter the fact that [the guarantor's] obligations under the [subject] promissory note was fixed and ascertainable."]; *Torres*, 118 AD2d at 468 ["The application of the statute is not affected by the circumstance that the instrument in question was part of a larger transaction, such as the sale of business, as long as the instrument requires the defendant to make certain payments and nothing else."]; *cf. Times Square Assoc. v Grayson*, 39 AD2d 845, 845 [1st Dept 1972] [agreement guaranteed the full performance and observance of all covenants, conditions and agreements that were to be performed by tenant under a lease, and thus went "beyond merely guaranteeing payment of rent"]).

As to the merits of the motion, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth*

Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

A plaintiff establishes a prima facie claim on a guarantee by demonstrating (1) the existence of the guarantee; (2) a default on the underlying obligation secured by the guarantee; and (3) the defendant's failure to honor the guarantee (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]). In support of its motion, plaintiff submits the Guarantee, which it claims was executed by defendant. By its terms, the Guarantee unconditionally and absolutely guarantees payment of any and all of Brite's obligations to Stuyvesant. Plaintiff also submits Korth's affidavit indicating that both defendant and Brite failed to comply with their obligations under the Guarantee and the Contracts by nonpayment. In addition, the Assignment documents an assignment of Stuyvesant's rights under the Guarantee to plaintiff. This evidence is sufficient to establish plaintiff's prima facie entitlement to judgment as a matter of law on the guarantee (*see id.*; *Solow*, 59 AD3d at 48-49; *JP Morgan Chase Bank v Gamut-Mitchell, Inc.*, 27 AD3d 622, 622-23 [2d Dept 2006]).

The burden thus shifts to defendant to establish the existence of a triable issue of fact or a bona fide defense (*see SCP (Bermuda) Inc. v Bermudatel Ltd.*, 224 AD2d 214, 216 [1st Dept 1996]). Defendant has failed to meet this burden. Although defendant challenges the existence of the Guarantee by arguing that he did not sign it, he submits no documentation, *i.e.* handwriting experts or a signature sample, supporting a conclusion that the signature appearing on the Guarantee is a forgery. It is well established that a naked denial of execution of a guarantee is insufficient to raise an issue of fact (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 299 AD2d 223, 224 [1st Dept 2002] [summary judgment in lieu of complaint properly

granted since defendant's "naked denials that she had signed the subject guarantees were insufficient to raise any triable issue as to whether the signatures on the guarantees, purporting to be hers, had been forged"], *aff'd* 1 NY3d 381 [2004]; *Brown Bark I, L.P. v Imperial Dev. & Constr. Corp.*, 65 AD3d 510, 511-12 [2d Dept 2009] [although defendant claimed that her signature on guarantee was a forgery, "her bare, self-serving claim to that effect was insufficient to raise a triable issue of fact"]; *Gamut-Mitchell*, 27 AD3d at 623 [in response to prima facie case, defendant "merely came forward with a conclusory denial that she signed the guarantee, which was insufficient to raise a triable issue of fact"]; *cf. Cicale v Wachovia Bank N.A.*, 56 AD3d 392, 392-93 [1st Dept 2008] [issue of fact raised where plaintiff averred that her grandson had testified in another proceeding that he forged her name, and she also submitted documents containing her signature for purposes of comparing it with her alleged signature on mortgage documents]).

Defendant's argument that the Guarantee was not properly assigned also fails to raise an issue of fact. It is well-settled that a "guaranty is assignable unless there is an express provision in the document prohibiting assignment" (*WHCS Real Estate Ltd. v 1610 O.C.R. Operating Inc.*, 232 AD2d 548, 548 [2d Dept 1996], *citing Stillman v Northrup*, 109 NY 473, 480 [1888]; *see also Cardarelli v Scodek Constr. Corp.*, 304 AD2d 894, 895 [3d Dept 2003]). The Guarantee contains no restrictions prohibiting assignment, and Stuyvesant did not need defendant's permission to assign the Guarantee to defendant.

Nor has defendant raised a bona fide defense. The affirmative defenses alleged by defendant do not absolve him from liability as guarantor, as under the terms of the Guarantee, defendant absolutely and unconditionally guaranteed the payment of any and all obligations owned by Brite to Stuyvesant (*see European Am. Bank v Lofrese*, 182 AD2d 67, 73 [2d Dept 1992] [guarantee that "absolutely and unconditionally" guaranteed prompt payment of claims of every nature was a broad guarantee that waived any defenses and counterclaims]; *Raven*

Elevator Corp. v Finkelstein, 223 AD2d 378, 378 [1st Dept 1996]).

Moreover, the defenses raised by defendant, which are primarily premised upon changes in market conditions, are defenses for Brite to assert against Stuyvesant (*see National Financial Co. v Perez*, 244 AD2d 180, 180 [1st Dept 1997] ["personal guarantees execute by defendants were primarily obligations as to which defenses to the note were irrelevant"]). Notably, the Guarantee waives any requirement that Stuyvesant first proceed against Brite before attempting to enforce the Guarantee.

Since plaintiff has established prima facie entitlement to judgment as a matter of law, and defendant has failed to raise an issue of fact or to demonstrate a viable defense, plaintiff's motion for summary judgment in lieu of complaint is granted as to liability (*see Solow*, 59 AD at 304]. As the parties have proffered disparate views of the amount owed under the Guarantee, a hearing is required to establish the amount of damages. In addition, under the terms of the Guarantee, plaintiff is entitled to an award of attorneys fees and costs. Accordingly, this matter will be referred to a Special Referee for an Inquest to determine plaintiff's damages, including storage fees and pre-judgment interest; and reasonable attorney's fees and costs.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted as to liability only; and it is further,

ORDERED that this matter is set down for an inquest before a Special Referee to hear and determine all issues relating to damages, including storage fees and pre-judgment interest; attorney's fees and costs; and it is further,

ORDERED that not later than April 19, 2010, plaintiff shall serve a copy of this Order with Notice of Entry and Notice of Inquest on defendant's counsel. Upon payment of the appropriate fees and filing of a copy of this Order with proof of service with the Clerk of this Court not later

than April 30, 2010, the inquest shall be scheduled.

This constitutes the Decision and Order of the Court.

Dated: April 7, 2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT**

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