JPMorgan Chase Bank, N.A. v M. Mosbacher Diamond Corp.

2010 NY Slip Op 31110(U)

April 26, 2010

Supreme Court, Nassau County

Docket Number: 010794/09

Judge: Daniel R. Palmieri

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[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 45

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

-against-

M. MOSBACHER DIAMOND CORP., and MOSHE MOSBACHER a/k/a MOISHE MOSBACHER a/k/a MOSHE MOSBACHER,

Defendants.

INDEX NO.: 010794/09

MOTION DATE:2-19-10
SUBMIT DATE:4-12-10
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 1-11-10......................................1
Affirmation in Opposition, dated 3-15-10......................2
Reply Affirmation, dated 4-9-10....................................3

This motion by the plaintiff pursuant to CPLR 3212 for summary judgment on its complaint, to strike all affirmative defenses and dismiss the defendants' counterclaim is granted to the extent that the first, second and third affirmative defenses are stricken and the counterclaim is dismissed. The motion is denied as to the fourth affirmative defense.

This is an action by the plaintiff ("Bank") to collect on an obligation under a Business Revolving Credit Account loan agreement ("BRCA" or "agreement"). It is undisputed that the corporate defendant ("Company"), by its president, Moshe Mosbacher, entered into the BRCA under a writing executed August 31, 1998, which was both the application for the BRCA and the agreement itself. It is also undisputed that a default in payment occurred in

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January of 2009.

However, the individual defendant Mosbacher asserts that he is not personally liable under a personal guarantee found in the agreement. Further, the circumstances of the default form the bases for a separate defense to this motion by both the corporate and individual defendants, and for a counterclaim. In essence, Mosbacher argues that the Bank wrongly withheld credit which the Company needed to clear a tax lien, which had been placed on the very credit account it had with the Bank under the BRCA. By so doing, he contends, the Bank itself caused the default in payment and destroyed the Company. The Bank counters that it had every right to withhold credit, because the placement of the tax lien constituted a default under the agreement.

The standards applicable to summary judgment motions are well-settled. Generally speaking, the movant must establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). However, standing alone an attorney's affirmation that is not based upon personal knowledge is of no probative value or of evidentiary significance. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 (2005); *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455(2d Dept. 2006). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, the burden then shifts to the non-moving

party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v City of New York,* 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

In performing its review of the record, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987).

For purposes of the instant motion, the key provisions of the agreement presented by the plaintiff are the obligation of the plaintiff to provide credit upon demand by the Company, the definition of a default, the terms of the personal guaranty and a waiver

provision regarding defenses and counterclaims. In relevant part, they provide as follows:

> 3..... Bank is not obligated to honor a request for a Loan on an account which is deemed delinquent or after the occurrence of an Event of Default.
> 7. The occurrence of any of the following events or conditions is an "Event of Default":...(j) a lien is placed against the assets of Company by a creditor other than Bank.... If any Event of Default occurs, then Bank's obligation to make Loans shall immediately terminate, and the Loans together with accrued interest thereon shall be immediately due and payable...
>
> [Guarantee]
> If this application is approved, I/we individually and jointly, absolutely and unconditionally guarantee to the The Chase Manhattan Bank... the prompt payment of each and every obligation an liability of every nature and description of the Applicant to the Bank, whether now existing or arising in the future... I waive... any defense which could be asserted by the Applicant, the undersigned or other guarantor.

The foregoing guarantee paragraph was contained in a box, in which there was no signature line.

It also should be noted that under paragraph 3 the BRCA provides that the Company and guarantor are liable for "costs, expenses and reasonable attorneys' fees if and when this Agreement is placed in the hands of an attorney for collection or enforcement."

Finally, the BRCA provided at paragraph 18 that the borrower waived "The right to interpose any defense based upon any statute of limitations or any claim of delay by Bank and any set-off or counterclaim of any nature or description."

The application was signed by Mosbacher, in two places. The first was in a box identified as "CORPORATE RESOLUTION". The signature line was under a statement that the Board of Directors of the corporate borrower had approved a resolution that if the application were approved, it would be obligated to fulfill the terms and conditions of the agreement. In a separate box, just below the other, was another signature line under a heading stating is was an "APPLICANT ACKNOWLEDGMENT". Among other things,

the following is found above the signature line: "I/We also individually agree to the terms of the guarantee which appear in the Personal Guarantee section (above).[1] There are two signature lines in this boxed section, but both have directly under them the same identification, "Owner/Principal Signature". As noted, it is undisputed that Mosbacher signed in both places.

The foregoing, and the affidavit of Suzanne Heffleman, an Assistant Vice President of the plaintiff, attesting to the default in payment constitute *prima facie* proof that it is entitled to judgment as a matter of law with regard to the first three affirmative defenses pled and any counterclaim. In response, the defendants have failed to raise an issue of fact sufficient to stave off this motion regarding these defenses and the fourth defense and counterclaim to the extent it asserts a counterclaim.

The plaintiff has demonstrated, *prima facie,* that these three defenses are without merit. The first defense, alleging want of personal jurisdiction, was waived, as the defendant failed to move for dismissal on this ground within 60 days of serving the pleading with that defense. CPLR 3211(e). The second alleges that Mosbacher is not liable under the personal guarantee, but the documentary evidence clearly shows that he is. The third alleges that the guarantee violates the Statute of Frauds and the General Obligations Law (no specific sections are pled), but on its face it is a writing subscribed by the party to be charged, clearly obligating the individual defendant to answer for the debt of the corporate defendant.

In response, the defendants have failed to raise an issue of fact as to any of the

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[1] The copies of the agreement provided to the Court contain what appear to be facsimile transmission information which partially obscures the heading in the boxed section containing the guarantee promise. However, a section of what appears to be the word "PERSONAL" can be seen.

foregoing. There is no response with regard to the first affirmative defense. With regard to the second and third, which apply to the guarantee, no statutory defense is offered, and the Court thus will not address it further.

In interpreting the agreement, and more specifically the guarantee, the Court finds its terms to be unambiguous, and thus need not consider anything other than the agreement itself. *See generally, Willsey v Gjuraj,* 65 AD3d 1228 (2d Dept. 2009). It rejects Mosbacher's contention that he did not sign that portion of the agreement that contained the guarantee as being without force. The absence of any signature line within the box containing the guarantee language, and the presence of such signature lines elsewhere, indicates that there was no intention to have anyone sign within that box, and thus arguing that he did not sign there simply raises a straw man.

Rather, the signature lines binding him to the guarantee were found in the acknowledgment, in which the individual, as opposed to the corporation, was referenced as making the guarantee. Further, each of those two lines were identified as being placed there for the owner/principal, clearly for cases where there was more than one guarantor. This renders specious the argument that he signed only as president, and thus it is meaningless as an acknowledgment of a personal guarantee because the corporation cannot guarantee its own debt. Accordingly, the first, second and third affirmative defenses are stricken. The counterclaim is also stricken under the unchallenged language of paragraph 18. *See, North Fork Bank v Computerized Quality Separation Corp.,* 62 AD3d 973 (2d Dept. 2009).

However, the Court reaches a different conclusions with regard to the fourth affirmative defense/counterclaim to the extent it constitutes an affirmative defense.

This defense sounds in negligent misrepresentation, and is based on the claim that the

corporate defendant was forced out of business after the plaintiff failed to restore the line of credit "after promising to do so after the tax lien was resolved." This defense raises factors beyond the simple fact of the default in payment, which alone is addressed by the plaintiff's affiant, Heffleman. The statements of the plaintiff's attorney concerning the circumstances surrounding the tax lien and the decision by Bank personnel to withhold credit is not stated to have been made on personal knowledge, and is thus without probative force. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, *supra*; *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, *supra*. The Court therefore finds that with respect to this claim the plaintiff has failed to make out its *prima facie* case, which requires that the motion be denied to that extent.

Dismissal of this defense would have been denied in any event. In essence, the recitation of the events by Mosbacher surrounding the Company's default raises an issue of fact as to a breach of the implied covenant of good faith and fair dealing, which is read into every contract. *See, Van Balkenburgh Nooger & Neville v Hayden Publ. Co.*, 30 NY2d 34 (1972).

While the Court agrees with the plaintiff that there is an insufficient basis for a claim of misrepresentation/fraud because there is no showing that the alleged misrepresentations caused Mosbacher to change his position for the worse, that is, detrimental reliance (*see, e.g., Nam Tai Electronics, Inc. v UBS Paine Webber, Inc.*, 46 AD3d 486 [1 st Dept. 2007]),[2] courts may deny a motion for summary judgment based on an unpleaded claim if the facts allow for it and there is no prejudice to the other party. *See, Nassau Trust Co. v Montrose Concrete*

[2] Mosbacher complains that they made assurances that the problem of the lien would be resolved, but he does not state that he took or failed to take any action as result.

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Prods. Corp., 56 NY2d 175, 183 (1982); *Sheils v County of Fulton,* 14 AD3d 919, 921 (3d Dept. 2005); *Taylor v Blaylock & Partners, LP,* 240 AD2d 289 (1st Dept. 1997).

In this case, the facts recited by the Mosbacher warrant such a result. In his affidavit, which for purposes of this motion the Court must accept as true (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, *supra*) – especially as there is no factual rebuttal from the Bank – he states in pertinent part as follows:

> "On December 16, 2008 the New York State Department of Taxation and Finance through an error... [placed a] levy on the corporate account... my accountant immediately resolved the matter with the Tax Department, who on December 18, 2008 wrote a letter to the plaintiff informing it that upon the remittance of $15,000 the lien and levy upon the account would be released... the NYS Tax Department had informed me that after my accountant provides them with copies of my returns that showed I did not owe any money, they would reimburse me the $15,000...
>
> I went to my local branch of the Bank with a notarized letter instructing them to send the $15,000 to the NYS Tax Department... This money was to come from the my account which the Bank had frozen... I was told day by day to call different departments in the Bank... On December 24, 2008 [a Bank representative] said to me, 'How can you authorize the Bank to send $15,000 when you no longer have any money in the account?' Now she has a letter releasing the lien in payment of $15,000, her answer was you have no money and there is no lien release...
>
> After the Christmas holidays I persisted and sometime around January 20, 2009 the Bank finally sent the $15,000 to the NYS Tax Department... [prior to these events] My record with the Bank was perfect... I had even paid over $40,000 to the Bank during November and December 2008... During this time, from December 16, 2008 to date, I could not meet my obligations and could not conduct business without a bank account and the revolving credit line... I am in the wholesale diamond industry. That business in built on trust. If a company cannot meet its obligations, it can no longer obtain credit. When the Bank had cut me off from my money and from my revolving credit line, it destroyed my business. The situation was never resolved and the revolving credit never restored... I have been out of business since December 16, 2008..."

The foregoing, if proved at trial, may lead a finder of fact to conclude that a breach of the implied covenant of good faith and fair dealing had occurred. "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Avertine Invest. Mgmt., Inc. v Canadian Imperial Bank of Commerce,* 265 AD2d 513, 514 (2d Dept. 1999); *see also, Components Direct, Inc. v European Am. Bank and Trust Co.,* 175 AD2d 227 (2d Dept. 1991).

While the placement of the lien was an Event of Default and gave the Bank the right to terminate credit under the agreement, the defendants acted immediately and provided the Bank with a means to resolve the lien by the simple issuance of payment from the very account it had frozen. Its possession of the letter from the Tax Department stating that the lien would be released upon payment indicated that the Bank likely would not run afoul of that Department if it allowed the payment to be made. Further, as of December 16, 2008, when credit was cut off, there had been no payment default by the defendants, and the payment history of the Company had been unblemished.

Again according to Mosbacher, by refusing access to the account so that timely payment to the Tax Department could be made, the Bank erected a barrier to resolution of the lien, and thus interfered with the defendants' ability to conduct business. This in turn prevented them from meeting the very loan obligations sued upon here – obligations which the defendants had been able to meet beforehand. Further, this was not a mere delay by the Bank (a claim based on which arguably was waived under the agreement), but constituted an affirmative decision not to allow access to the funds. The Court thus finds that an issue of

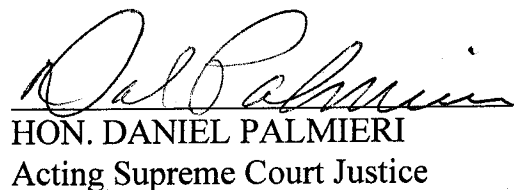
fact exists as to the good faith and fair dealing of the Bank in its handling of the tax lien, and bars summary judgment with respect to the fourth defense. *See, Advanced Safety Systems NY v Manufacturers and Traders Trust Co.,* 188 AD2d 1009, 1011 (4th Dept. 1992) ["Although permitted by the express terms of the agreements, M&T's actions made it impossible for ASSI, an on-going concern, to comply with its demand."]

Accordingly, the motion is granted, except with respect to the fourth defense under the theory of breach of the covenant of good faith and fair dealing. The Court notes that the defendants' attorney had requested oral argument, but the issues identified in the request were raised in the papers and have been addressed in this decision.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 26, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
APR 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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