SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JPMORGAN CHASE BANK N.A.,

Plaintiff,

- against -

B-Z FASHION INC., JOSEPH HAGHIGHAT and JACOB MENASHE,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 21847/08
Motion Seq. No.: 01
Motion Date: 12/18/09

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Motion by plaintiff JPMorgan Chase Bank, N.A. ("Chase") for an order, pursuant to CPLR 3212, granting it summary judgment against defendants Joseph Haghighat ("Haghighat") and Jacob Menashe ("Menashe") is granted on the issue of liability.

Plaintiff commenced this action to recover amounts due and owing pursuant to a Business Revolving Credit Account Agreement ("BRCA"), Business Revolving Credit Agreement Personal Guarantee ("BRCA Personal Guarantee"), Business Installment Loan ("BIL") and Business Installment Loan Personal Guarantee ("BIL Personal Guarantee").

On or about September 3, 2004, B-Z Fashion Inc. ("B-Z") executed and delivered to

plaintiff the BRCA wherein and whereby it promised to pay to the order of plaintiff, the principal sum of up to $50,000.00, with interest thereon, on the unpaid principal balance of the BRCA at a default rate per annum equal to Prime Rate plus 3.25%.

On or about September 3, 2004, defendants Haghighat and Menashe executed and delivered to plaintiff the BRCA Personal Guarantee which states in pertinent part, as follows:

> "I/we individually and jointly, absolutely and unconditionally guarantee to JPMorgan Chase Bank (referred to as "Chase") and its assigns the prompt payment of each and every obligation and liability of every nature and description of the Applicant to Chase, whether now existing or arising in the future ("Obligations"). I agree that all Obligations will become immediately due without notice or demand from Chase if the Applicant at any time breaches any term or condition of the Obligations, Note or Account Agreement(s) for which the Applicant has applied. This Guarantee will continue even if Chase is unable, for whatever reason, to obtain payment from the Applicant or other guarantor, or if any of the obligations have been released or such obligations are renewed or time for payment is modified (including increases) or extended."

On or about August 23, 2005, defendant B-Z executed and delivered to plaintiff, for value received, the BIL, wherein and whereby it promised to pay to the order of plaintiff, the principal sum of up to $50,000.00 with interest thereon, on the unpaid principal balance at a fixed rate per annum equal to 8.6%.

On or about August 23, 2005, defendant Haghighat executed and delivered to plaintiff the BIL Personal Guarantee which states in pertinent part, as follows:

> "I/we individually and jointly, absolutely and unconditionally guarantee to JPMorgan Chase Bank (referred to as "Chase") and its assigns the prompt payment of each and every obligation and liability of every nature and description of the Applicant to Chase, whether now existing or arising in the future ("Obligations"). I agree that all Obligations will become immediately due without

> notice or demand from Chase if the Applicant at any time breaches any term or condition of the Obligations, Note or Account Agreement(s) for which the Applicant has applied. This Guarantee will continue even if Chase is unable, for whatever reason, to obtain payment from the applicant or other guarantor, or if any of the obligations have been released or such obligations are renewed or time for payment is modified (including increases) or extended."

Plaintiff moves for summary judgment against defendants Haghighat and Menashe based upon their failure to make payment under the terms of the BRCA, BRCA Personal Guarantee, BIL and BIL Personal Guarantee. In support thereof, plaintiff relies upon the affidavit of Tommy Lutjen, Assistant Vice President of Chase.

Specifically, plaintiff asserts that defendant B-Z defaulted under the BRCA by failing to pay each and every installment due under the BRCA since May 15, 2008 and each and every month thereafter. As of May 15, 2008, B-Z failed to pay $49,745.73 in principal due on the BRCA together with interest thereon. Defendants Haghighat and Menashe defaulted under the BRCA Personal Guarantee by failing to pay each and every installment due under the BRCA since May 15, 2008 and each and every month thereafter.

Defendant B-Z defaulted under the BIL by failing to pay each and every installment due under the BIL since May 21, 2008 and each and every month thereafter. As of May 21, 2008, B-Z failed to pay $25,076.86 in principal due on the BIL together with interest thereon at the BIL Interest Rate and late charges at the rate of 5% as set forth in the BIL. Defendant Haghighat defaulted under the BIL Personal Guarantee by failing to pay each and every installment due under the BIL since May 21, 2008 and each and every month thereafter.

Plaintiff satisfied its initial burden of establishing its entitlement to judgment as a matter

of law by submitting proof of the existence of the underlying obligation, the guarantees executed by defendants, the unconditional terms of repayment and defendants' failure to make payment in accordance with their terms. *See Famolaro v. Crest Offset, Inc.*, 24 A.D.3d 604, 807 N.Y.S.2d 387 (2d Dept. 2005). *See also Superior Fidelity Assurance, Ltd. v. Schwartz,* 69 A.D.3d 924, 893 N.Y.S.2d 256 (2d Dept. 2010); *Verela v. Citrus Lake Development, Inc.,* 53 A.D.3d 574, 862 N.Y.S.2d 96 (2d Dept. 2008). The burden then shifts to defendants Haghighat and Menashe to demonstrate by admissible evidence the existence of a triable issue of fact with respect to a *bona fide* defense. *See Famolaro v. Crest Offset, Inc, supra; MDJR Enterprises, Inc. v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 (2d Dept. 2000); *Quest Commercial, LLC v. Rovner*, 35 A.D.3d 576, 825 N.Y.S.2d 766 (2d Dept. 2006).

In opposition, defendants Haghighat and Menashe claim that plaintiff did not give them notice of their default or an opportunity to cure their default. Defendants Haghighat and Menashe further assert that summary judgment should be denied as they acted as "accommodation makers" as defined under UCC § 3-415.

Initially, the Court notes that defendants Haghighat and Menashe do not deny signing the BRCA Personal Guarantee or the BIL Personal Guarantee. Nor do they dispute their default under the BRCA Personal Guarantee or BIL Personal Guarantee.

As to the defendants Haghighat and Menashe's contention regarding lack of notice, the plain language of the BIL, BRCA and the guarantees preclude defendants Haghighat and Menashe from raising the defense of lack of notice and opportunity to cure default.

The BIL provides that "[i]f any Event of Default occurs, then Bank may *** declare all principal, interest and other amounts which are or become owing under this Note or any other of the Loan Documents ("the Obligations") to immediately due and payable, without notice of

acceleration or of intention to accelerate, presentment, demand or protest or notice of any kind, all of which are hereby expressly waived."

The BRCA provides that "[i]f any Event of Default occurs, then Bank's obligations to make Loans shall immediately terminate, and the Loans together with accrued interest thereon shall be immediately due and payable without notice of intent to accelerate, notice of acceleration or any other notice, presentment, demand, protest or notice of any kind, all of which are hereby expressly waived."

Additionally, pursuant to the terms of the BRCA, defendants Haghighat and Menashe 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." *See North Fork Bank v. Computerized Quality Separation Corp.*, 62 A.D.3d 973, 879 N.Y.S.2d 575 (2d Dept. 2009); *Fleet Bank v. Petri Mechanical Co., Inc.*, 244 A.D.2d 523, 664 N.Y.S.2d 462 (2d Dept. 1997). *See also King v. Wells Fargo Business Credit, Inc.*, 48 A.D.3d 643, 852 N.Y.S.2d 349 (2d Dept. 2008).

Defendants Haghighat and Menashe's reliance on *Superior Fidelity Assurance, Ltd. v. Schwartz,* 69 A.D.3d 924, 893 N.Y.S.2d 256 (2d Dept. 2010) is misplaced. In *Superior Fidelity Assurance, Ltd. v. Schwartz*, the agreement expressly provided for notice to be given whereas here, defendants Haghighat and Menashe waived their right to receive notice of default and acceleration.

Defendants Haghighat and Menashe's unsupported and conclusory allegations that they acted as "accommodation makers" are insufficient to deny plaintiff's motion. The documentary evidence establishes that defendants Haghighat and Menashe are guarantees of the BRCA and BIL.

Nonetheless, even assuming *arguendo* that defendants Haghighat and Menashe were "accommodation makers" pursuant to UCC § 3-415, defendants Haghighat and Menashe have not demonstrated how their alleged status as "accommodation makers" raises an issue of fact sufficient to defeat the motion. It has been held that "[o]ne who signs an instrument in any capacity for the purpose of lending his name to another party to it is an accommodation party (UCC § 3-415(1)*** and [t]he status of the accommodation party under Uniform Commercial Code is that of a surety while he is primarily liable on the paper or secondarily liable."*Artistic Greetings, Inc. v. Sholom Greeting Card Co.*, 36 A.D.2d 68, 318 N.Y.S.2d 623 (3d Dept. 1971). Moreover, it is well settled that "[t]he signer of a written agreement is conclusively bound by its terms unless there is a showing, absent here, of fraud, duress or some other wrongful act." S*ee Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, 487 N.Y.S.2d 105 (2d Dept. 1985). A person is presumed to have read what he signs. *See Lejkowski v. Petrou*, 178 A.D.2d 465, 576 N.Y.S.2d 816 (2d Dept. 1991). Further, a party will not be excused from an agreement by a failure or even a claimed inability to read it and there is no claim that defendants knew or should have known of a misunderstanding on the part of the signer. *Huang v. Cheng*, 182 A.D.2d 600, 583 N.Y.S.2d 370 (1st Dept. 1992). Thus, the law presumes that one who is capable of reading something has read the document which she/he executed, and is conclusively bound by the terms thereof. *Marine Midland Bank, N.A. v. Embassy East, Inc.*, 160 A.D.2d 420, 553 N.Y.S.2d 767 (1st Dept. 1990). *See also Sofio v. Hughes*, 162 A.D.2d 518, 556 N.Y.S.2d 717 (2d Dept. 1990).

In conclusion, plaintiff has established its entitlement to judgment against defendants Haghighat and Menashe for the amounts due and owing pursuant to the BRCA, BIL, BRCA Personal Guarantee and BIL Personal Guarantee and defendants Haghighat and Menashe have

failed to raise an issue of fact or viable defense to the action. *See Famolaro v. Crest Offset, Inc., supra; Bankers Trust of Rockland County v. Keesler*, 49 A.D.2d 918, 373 N.Y.S.2d 637 (2d Dept. 1975]. A hearing on the issue of damages is necessary, however.

In view of the foregoing, the issue of damages and reasonable attorneys' fees together with costs and expenses is referred for a hearing to the Calendar Control Part on the 28th of June, 2010 at 9:30 a.m, assignment, in the discretion of the Justice presiding, to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee.

Movant is directed to file a Note of Issue no later than ten (10) days prior to such date accompanied by a copy of this Order. A copy of the Note of Issue and this Order shall be served on the Clerk of the Calendar Control Part when the Note of Issue is filed.

If the reference is assigned to a Judicial Hearing Officer or a Court Attorney/Referee, it shall be to hear and report unless the parties agree otherwise. In that connection counsel's attention is directed to the transcript requirements of 22 NYCRR §202.44. The cost of such transcript shall be borne equally by the parties with the right of the prevailing party to seek to recover the expense as a disbursement.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
April 29, 2010