

**Wells Fargo Bank, N.A. v Hooper Home Constr.
Corp.**

2010 NY Slip Op 31549(U)

June 17, 2010

Sup Ct, NY County

Docket Number: 103795/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 103795/2008
WELLS FARGO BANK, N.A.
VS.
HOOPER HOME CONSTRUCTION
SEQUENCE NUMBER : 003
RENEWAL

INDEX NO. 103795/08
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits DATE
Notice of Cross-Motion
Answering Affidavits — Exhibits

PAPERS NUMBERED
1,2
3,4
5

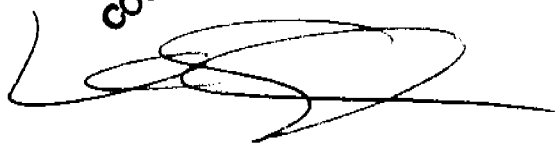
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE



Dated: June 17, 2010

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
WELLS FARGO BANK, N.A.,

Plaintiff,

Index No. 103795/08

-against-

HOOPER HOME CONSTRUCTION CORPORATION
and DALE R. HOOPER, INDIVIDUALLY,

Defendants.

-----X

SHULMAN, J.:

Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo" or "plaintiff") moves pursuant to CPLR 2221(a) to renew the denial of its cross-motion for summary judgment on its complaint as against defendant Dale R. Hooper ("Hooper" or "defendant"). Hooper opposes plaintiff's motion and cross-moves for summary judgment in his favor dismissing the complaint.

This action is based upon co-defendant Hooper Home Construction Corporation's ("HHCC") default under the terms of a Business Line Credit Agreement ("BLCA") entered into between HHCC and plaintiff. The sole issue to be determined is whether Hooper personally guaranteed the BLCA.

By prior decision and order dated July 20, 2009 (Exh. I to Motion), this court *inter alia*: 1) denied Hooper's prior motion for summary judgment dismissing the complaint; 2) granted Wells Fargo's cross-motion for summary judgment as against HHCC; 3) denied the portion of plaintiff's cross-motion which sought summary judgment as against Hooper; and 4) severed and continued this action solely against Hooper. This

court denied Wells Fargo's prior cross-motion as to Hooper on the grounds that the motion papers contained no legible copy of the guaranty's relevant language.

On renewal, plaintiff now includes a legible copy of the guaranty, the terms of which are contained in the BLCA application Hooper signed, for the court's analysis. Exhs. 1-3 to Motion. First, the front of the BLCA application, which contains Hooper's home address and telephone number, states above the signature line that: "I certify that I have read and agree with the Terms and Conditions on the reverse side, including the personal guaranty." The reverse side of the BLCA application is two paragraphs long and provides in relevant part that:

By signing the front of this *QuickApp*® application, I accept on behalf of the Business named on reverse ("Applicant") the terms and conditions of this offer, including the terms and conditions of the Customer Agreement that will be sent to the Applicant . . . I also accept in my individual capacity the terms of guaranty appearing below.

I also, in my individual capacity (even though I may place a title or other designation next to my signature), jointly and severally unconditionally guarantee and promise to pay to Bank all indebtedness of the Applicant at any time arising under or relating to this application and/or the Customer Agreement . . .

In the underlying motion and in opposition to this motion, Hooper argues that:

1) he signed the BLCA application as president of HHCC, including this title after his signature; 2) he did not sign the application in his individual capacity; 3) he never knew or expected Wells Fargo would attempt to hold him personally liable for a corporate debt; and 4) he signed only once, there being no second signature line pertaining to the guaranty. In this round of motion practice, Hooper adds that at the time he responded to plaintiff's solicitation, he orally confirmed with plaintiff's representative that there was no personal guaranty.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

On a motion for summary judgment to enforce written guaranties, the creditor is required to prove absolute and unconditional guaranties, the underlying debt and the guarantor's failure to perform under the guaranties. *City of New York v. Clarose Cinema Corp.*, 256 AD2d 69 (1st Dept. 1998). Here, Wells Fargo establishes the underlying debt by submitting copies of the documents evidencing the debt. Plaintiff also was previously granted summary judgment against HHCC. Further, it is undisputed that Hooper, who denies personal liability for the debt, has not paid same. Thus, the only disputed issue is whether plaintiff establishes the existence of an absolute and unconditional guaranty signed by Hooper. For the reasons that follow,

this court finds that Wells Fargo establishes this element and is entitled to summary judgment against Hooper on its prima facie case, which defendant has not sufficiently refuted.

In support of his argument with regard to the lack of two signature lines, defendant relies upon *Salzman Sign Co., Inc. v. Beck*, 10 NY2d 63, 67 (1961), which found that:

. . . where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual. There is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer.

Thus, the Salzman court concluded, a “statement in the contract purporting to bind the signing officer individually is not sufficient for Statute of Frauds purposes without some direct and explicit evidence of actual intent.” *Id.*

As plaintiff points out, *Salzman* is factually distinguishable from the case at bar. There, the contractual provision at issue consisted of a single sentence within the body of the contract which provided that an officer signing the contract on behalf of a corporation personally guaranteed the corporate debt. By contrast, the BLCA application here contains only two paragraphs, the second of which comprises the guaranty and is clearly and unequivocally worded. Moreover, the signature line alerts the signatory to the existence of the guaranty. Given the BLCA application’s short length, there is no “great danger” of a person signing as a corporate officer being bound individually by “a single sentence in a long contract”.

As to Hooper’s alleged understanding of the BLCA application and lack of intent to be bound personally, he was obligated “to exercise ordinary diligence to ascertain the

terms of the document he signed (citation omitted).” *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 AD2d 268, 272 (1st Dept. 2001). Thus, defendant’s claims that he never knew or expected that Wells Fargo would attempt to hold him personally liable for HHCC’s corporate debt and any alleged oral representations from plaintiff to the contrary are insufficient to defeat Wells Fargo’s entitlement to summary judgment. See *Chemical Bank v Masters*, 176 AD2d 591, 591-592 (1st Dept. 1991)(allegations made by the defendant with respect to the actions and statements of a bank employee at the time he signed guaranty provide no basis for finding a triable issue and failure or purported inability to read guaranty, absent evidence of coercion, provides no basis for relief since defendant was obligated to exercise ordinary diligence).

Finally, Hooper’s inclusion of his title with his signature does not serve to limit his personal liability. Not only does the guaranty expressly preclude such a result, but relevant case law also rejects this argument, finding the inclusion of an individual’s title to be merely descriptive. See *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 AD2d at 271, citing *Chemical Bank v Masters, supra*.

Accordingly, it is

ORDERED that defendant Dale R. Hooper’s cross-motion is denied in its entirety; and it is further

ORDERED that plaintiff’s motion for renewal is granted and upon granting same, summary judgment on the complaint is granted in plaintiff’s favor against defendant Dale R. Hooper, and the Clerk is directed to enter judgment in favor of plaintiff, Wells

Fargo Bank, N.A., and against defendant, Dale R. Hooper, in the amount of \$99,643.75, together with interest at the rate of 4% from December 26, 2006 through the date of entry of judgment, and in the additional amount of \$750.00 for attorneys' fees, with statutory interest as calculated by the Clerk from the date hereof, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing is the decision and order of this court. Copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
June 17, 2010



Hon. Martin Shulman, J.S.C.

FILED
JUN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE