

RBS Citizens, N.A. v Barnett

2010 NY Slip Op 31971(U)

July 16, 2010

Sup Ct, Nassau County

Docket Number: 010167-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X

RBS CITIZENS, N.A.,

Plaintiff,

- against

STEWART BARNETT,

Defendant.

-----X

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 010167-09
Motion Seq. Nos: 1 & 2
Submission Date: 5/7/10**

The following papers have been read on these motions:

- Notice of Motion, Affidavits in Support (2) and Exhibits.....X**
- Plaintiff's Memorandum of Law.....X**
- Notice of Cross Motion, Rule 19-A Statement, Affidavit in
Opposition/Support, Affirmation in Opposition/Support and Exhibits...X**
- Plaintiff's Reply Affidavit in Support.....X**
- Defendant's Reply Affidavit.....X**

This matter is before the Court for decision on 1) the motion filed by Plaintiff RBS Citizens, N.A. on April 9, 2010, and 2) the motion filed by Defendant Stewart Barnett on April 16, 2010, both of which were submitted on May 7, 2010. The Court directs that this motion shall be the subject of a Conference in Aid of Disposition on August 18, 2010 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Plaintiff RBS Citizens Bank, N.A. ("Citizens" or "Plaintiff") moves for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment in the principal sum of \$174,738.59, plus legal fees, late charges and statutory interest. Defendant Stewart Barnett

("Barnett" or "Defendant") opposes Plaintiff's motion.

Defendant Barnett moves for an Order, pursuant to CPLR § 3212, granting Defendant summary judgment dismissing the complaint ("Complaint"). Plaintiff opposes Defendant's application.

B. The Parties' History

The Complaint (Ex. A to Muth Aff. in Supp.) alleges as follows:

Plaintiff is a national banking association that is licensed to transact business in New York. Defendant resides in Nassau County, New York. On June 27, 2008, Iron Horse Bicycle Company, LLC ("Debtor") executed a Revolving Demand Note ("Note") and Loan Agreement ("Agreement") in the principal amount of \$200,000.00 (collectively Ex. A to Compl.). Defendant executed a June 27, 2008 Unlimited Guaranty ("Guaranty") of the Commercial Line Note (Ex. B to Compl.). The Note, Agreement and Guaranty are referred to collectively as the "Loan Documents." The Debtor is in a pending bankruptcy proceeding, and Plaintiff does not seek affirmative relief as to Debtor.

The Loan Documents required Barnett to make monthly payments of principal, accrued interest and other fees and charges posted to the account. In the event of default, the Loan Documents permit Plaintiff to seek reimbursement of collection costs and attorney's fees. Defendant defaulted by, *inter alia*, failing to make required payments pursuant to the Loan Documents. By letter dated May 26, 2009 (Ex. C to Compl.), Plaintiff declared the Note in default.

The Complaint contains a single cause of action alleging Defendant's breach of contract based on his failure to make payments required by the Loan Documents. The Complaint alleges that, as of April 14, 2009, Plaintiff has been damaged by Defendant's default in the sum of \$176,471.91 comprised of 1) \$174,738.59 in principal, 2) \$1,669.58 in interest, and 3) \$63.74 in late charges, exclusive of legal fees, late charges and statutory interest. Plaintiff seeks judgment in the sum of \$176,471.91, plus legal fees, late fees and additional interest accruing after April 14, 2009.

In his Verified Answer ("Answer") (Ex. B to Muth Aff. in Supp.), Defendant, *inter alia*, 1) admits the allegation that he entered into contracts with Plaintiff; and 2) denies the allegations

that a) Plaintiff duly performed all conditions of the Loan Documents on its part; b) Defendant breached the Loan Documents by failing to make required payments; and c) Plaintiff has been damaged by Defendant's default in the sum of \$176,471.91, exclusive of legal fee, late charges and statutory interest. Defendant also asserts three (3) affirmative defenses: 1) there is a lack of personal jurisdiction; 2) the Guaranty is invalid due to a failure of consideration; and 3) the Guaranty is invalid due to Plaintiff having fraudulently induced Defendant to execute same.

Plaintiff submits an Affidavit in Support of Timothy N. Toth ("Toth") dated July 29, 2009 in which he affirms as follows:

Toth is the Vice President of Citizens, a national banking association. As the relationship manager for the account that is the subject of this action, Toth has personal knowledge of Citizens' records and practices pertaining to this account.

Toth affirms the truth of the allegations in the Complaint regarding 1) Debtor's execution of the Loan Documents, 2) Defendant's execution of the Guaranty, 3) the requirements of the Loan Documents, 4) Defendant's default, and 5) Plaintiff's damages.

Plaintiff's counsel submits an Affidavit in Support dated April 5, 2010 that addresses Plaintiff's motion for summary judgment based on Defendant's alleged default pursuant to the Loan Documents, as well as Plaintiff's application for counsel fees pursuant to the Loan Documents. Plaintiff's counsel affirms that this matter was previously handled by another attorney in his firm, who has since left the firm, and that Plaintiff's counsel is now responsible for this matter.

Paragraph 2 of Page 3 of the Note states as follows:

The Borrower and each endorser and guarantor of this Note agree to pay, upon demand, costs of collection of all amounts under this Note including, without limitation, principal and interest, or in connection with the enforcement of, or realization on, any security for this Note, including, without limitation, to the extent permitted by applicable law, reasonable attorneys' fees and expenses. Upon demand for payment of any amounts hereunder, interest shall accrue at a rate per annum equal to the aggregate of 5.0% plus the rate provided for herein. If any payment due under this Note is unpaid for 10 days or more, the Borrower shall pay, in addition to any other sums due under this Note (and without limiting the Bank's other remedies on account thereof), a late charge equal to the greater of \$35.00 or 5.0% of such unpaid amount...In addition the Borrower shall pay the Bank's customary fee if any payment made on account of this Note is dishonored.

Plaintiff's counsel affirms that Defendant was the Managing Member of Debtor, which operated out of premises located in Holbrook, New York. Defendant personally guaranteed the loan that is the subject of the Loan Documents. The Note and Agreement are signed by Defendant in his capacity as Managing Member of Debtor. The Guarantee is signed by Defendant individually.

In March of 2009, Debtor was "pushed into an involuntary bankruptcy by three bicycle manufacturers asserting unpaid claims exceeding \$5 million" (Muth Aff. at ¶ 8). The bankruptcy matter was converted to a Chapter 11 proceeding, and is ongoing.

Plaintiff's counsel characterizes Defendant's affirmative defenses as "preposterous" (Muth Aff. at ¶ 10). Plaintiff's counsel submits that the money that Debtor borrowed from Plaintiff benefitted Debtor, a company that Defendant managed and by whom Defendant was employed. Plaintiff's counsel characterizes the Guarantee as "an ordinary, run-of-the mill guaranty asked of a corporate officer when a lender is extending a loan with no other security to a borrower" (Muth Aff. at ¶ 13) and asks the Court to reject Defendant's claim that he was tricked or defrauded into executing the Guaranty.

In his Affidavit in Opposition/Support dated April 14, 2010, Defendant affirms as follows:

While Defendant was employed at Debtor company, which included performing work for Debtor's affiliate World Wide Cycle Supply Inc. ("World Wide"), Debtor bought foreign currency exchange forward contracts ("FX") through Plaintiff as a means of hedging and locking in exchange rates for accounts receivable and purchases of inventory. The FX contracts required Debtor to purchase foreign currencies at a specified price on a specified date, and the profits or losses would be determined on the specified date, based on the fluctuations of the various exchange rates in the interim. Defendant affirms that this process was akin to purchasing securities on margin. As the FX contracts came due, they were rolled over until they expired, and any net losses or gains on the transactions would be due to Plaintiff, or to the company, depending on the particular circumstances.

Defendant provides a printout from the New York State Department of State, Division of Corporations regarding World Wide (Ex. A to Barnett Aff.), which reflects that Defendant was

the Chairman or Chief Executive Officer of World Wide. Defendant affirms that he does not recall whether the FX arrangement with Plaintiff was through World Wide or Debtor.

On or about June of 2008, immediately after losses accrued on certain FX contracts, two representatives of Plaintiff asked Defendant to meet with them to sign certain documents. Defendant believed, based on the statements of these representatives, that 1) the documents related to financing that Plaintiff would be extending on a revolving basis; and 2) the signing of the documents was a formality, and Defendant would not have any exposure. Defendant affirms that he never intended to provide a personal guaranty for losses that had already accrued in connection with the FX transactions, and that if he had understood that he would be providing such a guaranty, he would not have agreed to sign it. Defendant submits that it would have been illogical for him to agree to guarantee FX contracts that had already generated losses. Defendant suggests that Plaintiff, confronted with losses on the FX contracts, “was looking to cover themselves for having failed to obtain a Guaranty previously” (Barnett Aff. at ¶ 5).

Defendant provides a copy of a Citizens Foreign Exchange Transactions Agreement with World Wide (“FX Agreement”) dated June 27, 2008 (Ex. B to Barnett Aff.). Pursuant to paragraph one of the FX Agreement, Plaintiff and World Wide agreed:

[World Wide] and if more than one, on a joint and several basis, desires from time to time to enter into transactions for the purchase of one currency in exchange for the sale of another currency (each such transaction, an “FX Transaction”) and the Bank may agree to enter into FX Transactions at the direction of [World Wide], subject to the terms and conditions set forth herein. Neither [World Wide] nor [Plaintiff] shall have any obligation to enter into FX Transactions.

The FX Agreement is signed by a representative of Plaintiff but is not signed by a representative of World Wide. Defendant affirms that, although the FX Agreement is dated June 27, 2008, all of the transactions contemplated by that Agreement had already taken place. Defendant avers, further, that Plaintiff presented the FX Agreement to him, along with the Loan Documents and Guaranty, but “it appears that I did not sign it” (Barnett Aff. at ¶ 6). In a footnote, Defendant makes reference to Schedule A of the Agreement, which sets forth the parties authorized to deal with Plaintiff and reflects that it was delivered as of May 1, 2008, not on June 27, 2008, the date of the Agreement itself. Defendant suggests that this is evidence that Plaintiff

back-dated the authorization in Schedule A to cover losses that had accrued several weeks earlier.

Defendant submits that 1) while Plaintiff alleges that it advanced monies to Debtor contemporaneously with the execution of the Loan Documents, Plaintiff has provided no proof of advances being made on or about that day; and 2) the language in the Note and Loan Agreement demonstrates that the Loan Documents were not intended to relate to any indebtedness in the form of losses on FX contracts. Defendant makes specific reference to language in the Note and Agreement reflecting that the proceeds of the Note, and the loan money, were not to be used to purchase margin stock or margin securities. Defendant submits that Plaintiff has not presented evidence in support of Toth's assertion that a loan was made contemporaneously with the execution of the Guaranty on June 27, 2008

Defendant also provides a copy of a letter (Ex. C to Barnett Aff.) from Plaintiff's Vice President to Defendant, who handled the FX account, reflecting that the FX losses as of June 16, 2008 were \$180,747.59. Defendant submits that this correspondence supports Defendant's assertion that the indebtedness that forms the basis of Plaintiff's instant action predated the June 27, 2008 date of execution of the Loan Documents. Defendant suggests that Plaintiff prepared the Loan Documents in an effort to establish, falsely, that they pertained to financing unrelated to the FX contracts that were already closed.

After Debtor went into bankruptcy in 2009 and Defendant had left the Debtor, Plaintiff contacted Defendant about the open balances. Defendant affirms that it was at that point that he realized that he had been induced to provide the Guaranty, not for new financing, but rather for the indebtedness already owing on the FX losses.

Defendant also disputes Plaintiff's assertion that it properly served Defendant with the Complaint. Defendant affirms that there is no one at his home with the name Anne Barnett, a name referred to in Plaintiff's Affidavit of Service as the person of suitable age and discretion (Ex. C to P's motion). Defendant avers that his wife does not fit the description of the Anne Barnett referred to in the Affidavit of Service.

In his Reply Affidavit dated April 22, 2010, Toth affirms as follows:

Defendant, who was the Managing member of Debtor, simultaneously executed the

Guaranty with Debtor's execution of the June 27, 2008 Note. Toth submits that the fact that Defendant was guaranteeing a loan made so that Plaintiff would forbear immediate collection of debt that Debtor already incurred does not void the guarantee for lack of consideration.

Toth provides additional details regarding the relationship between Debtor and Plaintiff: Debtor was a large bicycle wholesaler that used Plaintiff for its foreign exchange needs from 2003 to 2008, trading primarily in Canadian dollars. They engaged in numerous trades for millions of dollars until December of 2007, at which time Debtor had insufficient funds to cover their positions. Plaintiff covered Debtor's losses. After Debtor repaid Plaintiff, Plaintiff cautioned Debtor that these losses were unacceptable and would result in termination of Debtor's exchange line. Debtor assured Plaintiff that there would not be a repeat of the situation.

In June of 2008, two of Debtor's contracts matured, causing losses of approximately \$305,000. Plaintiff "immediately unwound some other contracts with positive results, reducing the exposure to approximately \$250,000" (Toth Reply Aff. at ¶ 9). Debtor made payments, reducing the balance to \$105,749. One remaining contract, scheduled to come due in July, increased the loss by another \$70,000, resulting in a total loss of \$175,000.

Plaintiff canceled Debtor's foreign exchange line, and Debtor executed the Note to repay Plaintiff. Defendant, as Managing member of Debtor, signed the Note and Agreement and, "as an integral element to the arrangement" (Toth Reply Aff. at ¶ 10), guaranteed the loan. Toth submits that Defendant was fully aware of the loan's purpose.

In his Reply Affidavit dated May 4, 2010, Defendant affirms as follows:

Defendant submits that, upon receiving Defendant's cross motion, Plaintiff realized that it needed to refute Defendant's claim that Plaintiff is improperly relying on past consideration, specifically losses incurred on the FX contracts, as consideration for the execution of the Loan Documents. Thus, Defendant argues, Plaintiff now maintains that it agreed to forbear collection of the previously incurred FX indebtedness as the consideration.

Defendant affirms that he does not recall Plaintiff making any promise to forbear collection of that prior indebtedness in exchange for the Loan Documents. Defendant notes, further, that the Note is a "Demand Note," which Plaintiff could have called in at any time after its execution, and submits that this fact belies Plaintiff's claim that it agreed to forbear prior debt.

Finally, Defendant submits that Plaintiff's failure to refute Defendant's claim that it was World Wide, not Debtor, that incurred the underlying FX indebtedness suggests that there is an issue of fact rendering summary judgment inappropriate.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to summary judgment by producing the Loan Documents and demonstrating Defendant's default thereon by failing to make the payments as promised in the Guaranty.

Plaintiff further contends that, 1) because Defendant's general denials fail to raise an issue of fact, they are insufficient to defeat Plaintiff's right to summary judgment; 2) Toth's Affidavit establishes that the Guaranty was supported by consideration by demonstrating that Plaintiff made a loan contemporaneously with Defendant's execution of the Guaranty on June 27, 2008, in reliance on the existence and continuing validity of the Guaranty; and 3) Defendant has failed to allege the elements of a defense of fraudulent inducement.

Plaintiff also submits that the Court should reject Defendant's claims that there were conversations between Plaintiff and Defendant that modified the terms of the Guaranty, in light of paragraph 19 of the Guaranty which states that Guarantor agrees:

that this Guaranty incorporates all discussions and negotiations between the Bank and the Guarantor concerning the guaranty and indemnification provided by the undersigned hereby, and that no discussions or negotiations shall limit, modify, or otherwise affect the provisions hereof, there are no preconditions to the effectiveness of this Guaranty and that no provision hereof may be altered, amended, waived, canceled or modified, except by a written instrument executed and acknowledged by the Bank's duly authorized officer[.]

Defendant submits that Plaintiff has not demonstrated its right to summary judgment, and Defendant has demonstrated his right to summary judgment dismissing the Complaint in light of the facts that 1) Plaintiff has not established that it extended monies to debtor contemporaneously with or subsequently to the execution of the Loan Documents, including the Guaranty; 2) as there was only past consideration for the execution of the Loan Documents, the obligations at issue are unenforceable; and 3) Plaintiff has not demonstrated that the indebtedness in question arises from obligations of Debtor, rather than World Wide, the latter of which is not covered by the Guaranty.

RULING OF THE COURT

This motion will be the subject of a Conference in Aid of Disposition on August 18, 2010 at 9:30 a.m. (**Berliner v. Berliner**, 294 A.D.2d 524 (2d Dept. 2002)). Accordingly, it is

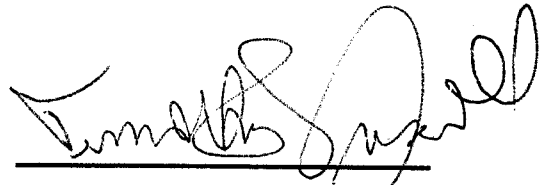
ORDERED that counsel for the parties are directed to appear before this Court in Part 22, located at 100 Supreme Court Drive, Mineola, New York, 11501 on August 18, 2010 at 9:30 a.m. for a conference in aid of disposition as decided herein.

This constitutes the decision and order of this Court.

ENTER

DATED: Mineola, NY

July 16, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUL 20 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE