SHORT FORM ORDER **Index Number: 24132-2009**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-30-2010
Motion Submit Date: 06-08-2010
Motion Sequence .: 001 MG
RRH Sept. 20, 2010

_____X

TD BANK, N.A.,

Plaintiff,

-against-

BRIAN H. MADDEN and ELIZABETH MADDEN,

Defendants.
_____X

Attorney for Plaintiff
Stephen J. Ginsberg, Esq.
Morritt Hock Hamroff & Horowitz, LLP
400 Garden City Plaza
Garden City, New York 11530

Attorney for Defendant
William Monaco, Esq.
Feldman, Kramer & Monaco, PC
330 Vanderbilt Motor Parkway
Hauppauge, New York 11788

ORDERED, that the plaintiff's motion (motion sequence number 001) for summary judgment is granted; and it is further

ORDERED, that a hearing on counsel fees is scheduled for September 20, 2010 at 9:30 a.m. Submission of judgment shall abide the determination of counsel fees.

Plaintiff commenced this action by the filing of a Summons and Verified Complaint on or about June 23, 2009. Plaintiff alleges six causes of action; the First Cause of Action seeks the principal sum of $750,000 together with all accrued interest thereon due under a promissory note ("Note") by the defendant Brian H. Madden; the Second Cause of Action seeks attorney fees and expenses incurred under the Note by Brian H. Madden; the Third Cause of Action seeks the principal sum of $750,000 together with all accrued interest thereon due under the Note by defendant Elizabeth Madden; the Fourth Cause of Action seeks attorney fees and expenses incurred under the Note by Elizabeth Madden; the Fifth Cause of Action seeks the principal sum of $336,605.86 together with all accrued interest thereon

due under the Amended Letter of Credit by Brian H. Madden; and the Sixth Cause of Action seeks attorney's fees and expenses incurred under the Guaranty executed by Brian H. Madden.

On or about July 22, 2009 defendants filed an Answer, asserting three affirmative defenses; lack of jurisdiction, deceptive or predatory lending practice, and defendant has faithfully discharged any and all duties owed to plaintiff and has paid any sums alleged to be due.

Plaintiff now moves for summary judgment pursuant to CPLR §3212.

Defendant opposes the motion.

Plaintiff is seeking payment allegedly owed to it under two separate agreements executed by plaintiff, or its successor by merger, and the defendants Brian H. Madden and Elizabeth Madden. The Note and the Liberty Letter of Credit are the two agreements and they are addressed hereunder, respectfully.

In or about February 2009, Brian H. Madden and Elizabeth Madden each executed and delivered to Commerce Bank, N.A. ("Commerce Bank") a Note in the principal amount of $750,000.00. The plaintiff, TD Bank, is the successor by merger to Commerce Bank. Pursuant to the Note, the defendants were obligated, jointly and severally, to pay Commerce Bank, such principal sum with interest and all other indebtedness due thereunder in full on or before the Maturity Date. The Note further provides that is it an obligation which is payable on demand. The Note provides in relevant part:

> MAKER ACKNOWLEDGES THAT THIS NOTE IS AN OBLIGATION WHICH IS PAYABLE ON DEMAND AND THAT NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN OR IN ANY OTHER INSTRUMENT, AGREEMENT OR OTHER DOCUMENT TO WHICH MAKER AND/OR BANK IS A PARTY, THE ENUMERATION IN ANY SUCH DOCUMENT OF SPECIFIC EVENTS OF DEFAULT, CONDITIONS AND/OR COVENANTS REALTING TO THE LOAN EVIDENCED BY THIS NOTE OR TO ANY OTHER OBLIGATION, SHALL NOT BE CONSTRUED TO QUALIFY, DEFINE OR OTHERWISE LIMIT IN ANY WAY BANK'S RIGHTS, POWER OR ABLITY, AT ANY TIME, TO MAKE DEMAND FOR PAYMENT OF THE PRINCIPAL OF THE PRINCIPAL OF AND INTEREST ON THIS NOTE, AND MAKER AGREES THAT THE OCCURRENCE OF ANY EVENT OG DEFAULT OR BREACH OF ANY CONDITION OR COVENANT IN

ANY SUCH DOCUMENT IS NOT THE ONLY BASIS FOR DEMAND TO BE MADE ON THIS NOTE.

On or about April 16, 2009, plaintiff made demands upon defendants for full and immediate payment of all outstanding principal sums and interest due under the Note. Plaintiff seeks, pursuant to Causes of Action One and Three, a total of $782,682.30, plus per diem interest of $130.21, owing jointly and severally, from defendants Brian H. Madden and Elizabeth Madden.

On or about June 4, 2008 Liberty Title Agency LLC ("Liberty"), which defendant Brian H. Madden was a managing member and signatory on the Letter, and plaintiff, TD Bank, entered into a certain Letter of Credit Agreement, Note, Reimbursement Agreement and Security Agreement, which thereafter was amended on or about September 16, 2008 to which the parties entered into an Amended and Restated Letter of Credit Agreement, Note, Reimbursement and Security Agreement (hereinafter, the "Liberty Letter of Credit"). Pursuant to the Liberty Letter of Credit, the plaintiff issued a standby letter of credit in the face amount of $436,000.00 for the benefit of Plaza Tower, LLC, which Letter of Credit served as a security deposit for Liberty's lease of certain office space in Uniondale, New York. In consideration for aforementioned Letter of Credit, on or about June 4, 2008, Liberty executed a Pledge Agreement granting plaintiff a security interest in or lien on an assignment of collateral including a cash collateral account in the principal amount of $286,000.00. On or about May 1, 2008 Brian H. Madden executed and delivered to plaintiff an Unlimited Guaranty, pursuant to which Brian H. Madden personally, absolutely, unconditionally and irrevocably, guaranteed to plaintiff the full and prompt payment of all sums presently due and owing to plaintiff from Liberty.

Liberty subsequently defaulted under the terms of its lease and the landlord, as beneficiary under the Liberty Letter of Credit, drew down on said Amended Letter of Credit on or about April 23, 2009, in the amount of $336,605.86. The cash collateral sum of $286,000.00 was applied against the outstanding balance due under the Liberty Letter of Credit leaving the sum due and owing of $50,605.86. On or about May 5, 2009 the landlord drew down on the Liberty Letter of Credit for an additional amount of $99,076.92, and on or about June 1, 2009 the landlord drew down on the Liberty Letter of Credit for a third time in the amount of $317.22. Plaintiff thereafter declared Liberty in default under the terms of the Letter of Credit by, inter alia, its failure to make payment when due and a change in condition or affairs, financial or otherwise, of Liberty and/or Brian H. Madden as guarantor, which in the opinion of the plaintiff has impaired its security or increased its risk. Pursuant to the Fifth alleged

Cause of Action, plaintiff seeks a total of $157,453.34, plus a per diem interest rate at $26.05, calculated by the principal sum of $150,000.00 ($50,605.86, $99,076.92, and $317.22 from the first, second, and third draws respectfully) together with interest in the sum of $7,453.34, no part of which has been paid by Brian H. Madden to the plaintiff.

Plaintiff now moves for summary judgment and argues that there are no disputed issues of fact. Plaintiff argues that the Note is an obligation that is payable on demand and accordingly, the plaintiff, on or about April 16, 2009, made demand upon the defendants for full and immediate payment of all outstanding principal sums and interest due under the Note, no part of which has been paid. Plaintiff maintains that defendants Brian H. Madden and Elizabeth Madden are in default under their obligations because both are signatories on the Note. Furthermore, plaintiff argues that Brian H. Madden is in default under the Liberty Letter of Credit for failure to make payment when due, as well as due to a change in the conditions or affairs, financial or otherwise, of Liberty and/or Brian H. Madden as guarantor, which in the opinion of TD Bank has impaired TD Bank's security or increased its risk. Plaintiff argues that Brian H. Madden is in default under the Liberty Letter of Credit, no part of which has been paid. Plaintiff alleges that the defendant's affirmative defenses are without merit, and therefore do not establish an issue of fact requiring trial. Plaintiff claims there is nothing about the Note and Liberty Letter of Credit, which constitute deceptive and predatory lending practice, noting the contract rate of interest of Prime Rate and a default rate of 3% over Prime Rate. Furthermore, plaintiff claims that defendants have refused to pay any of the outstanding sums due under the Note, and Brian H. Madden has not paid any sums due under his Unlimited Guaranty.

Defendants oppose the motion solely by an affirmation of counsel, and argue that there are issues of fact that preclude summary judgment. The defendants first argue that the Note, on its face, is an agreement between Commerce Bank, N.A. and the defendants Brian H. Madden and Elizabeth Madden, and because Commerce Bank, N.A. is not a named party to the suit and the plaintiff failed to make the appropriate legal connection between itself and Commerce Bank, N.A., the plaintiffs action under the Note cannot therefore be maintained. Defendants further argue in the alternative, that if the appropriate legal connection is established between Commerce Bank, N.A. and the plaintiff, defendant Elizabeth Madden is entitled to an offset in the amount of $286,000.00. Defendants maintain that the sums used as collateral under the Liberty Letter of Credit were sums owned by Elizabeth Madden and maintained

in an account in plaintiff's bank under said defendant's name. In so much as Elizabeth Madden has no obligations under the Liberty Letter of Credit, the defendant asserts that the sums taken by plaintiff from Elizabeth Madden's account can only be used to offset obligations for which Elizabeth Madden is responsible. Defendant argues the aforementioned issues of fact preclude summary judgment.

In reply, plaintiff argues that the defendant's affirmative defenses are barred by the specific terms of the Note and the Guaranty signed by Brian H. Madden, both of which specifically bar defendant's defenses, offsets, or counterclaims to their obligations to make payment under the Note and Guaranty. The Note states in relevant part:

> IN ANY ACTION, SUIT OR PROCEEDING IN RESPECT OF OR ARISING OUT OF THIS NOTE, BANK, MAKER AND EACH INDORSER WAIVE TRIAL BY JURY, AND MAKER AND EACH INDORSER ALSO WAIVE (I) THE RIGHT TO INTERPOSE ANY SETOFF OR COUNTERCLAIM OF ANY NATURE OR DESCRIPTION, (II) ANY OBJECTION BASED ON FORUM NON CONVENIENS OR VENUE; AND (III) ANY CLAIM FOR CONSEQUENTIAL, PUNITIVE OR SPECIAL DAMAGES.

Likewise, the Guaranty signed by Brian H. Madden states in relevant part:

> Guarantor waives: notice of acceptance hereof, presentment and protest of any instrument and notice thereof, notice of default and all other notices to which the Guarantor might otherwise be entitled; and any and all defenses, including without limitation, any and all defenses which the Borrower or any other party may have to the fullest extent permitted by law, any defense to this Guaranty based on impairment of collateral or on suretyship defenses of every type; and any right to exoneration or marshalling.

Therefore, the plaintiff argues that the express provisions contained in the Note and the Guaranty bar the defendants from asserting the affirmative defenses contained in the Answer.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberg v. Brick & Ballerstein, Inc., 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995)** (internal citations omitted). The burden then shifts to the party opposing

the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. **Zayas v. Half Hollow Hills Cent. School Dist., 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996)**. However, if the movant fails to meet its prima facie burden, the Court need not consider the sufficiency of the opposition papers. **McMahan v. McMahan, 66 A.D.3d 970, 886 N.Y.S.2d 825 (2d Dept. 2009).** "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." **Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co., 172 A.D.2d 658, 570 N.Y.S.2d 960 (2d Dept. 1991)**. A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." **Scott v. Long Island Power Auth., 294 A.S.2d 348, 741 N.Y.S.2d 708 (2d Dept. 2002).**

In an action to recover on a promissory note and written guaranty, the moving papers establish proof of the promissory note and guaranty, signed by the defendants, respectively, and the defendants' failure to make payments provided for therein. Plaintiff thus established its prima facie entitlement to summary judgment. **Levien v. Allen, 52 A.D.3d 578, 860 N.Y.S.2d 174 (2d Dept. 2008)**. Neither the answer of the defendants nor their opposing papers establish a question of fact with respect to any viable legal defense to the plaintiff's claims. **See, Lorenz Diversifield Corp. v. Falk, 44 A.D.3d 910, 844 N.Y.S.2d 370 (2d Dept. 2007)**. The defendants assert in their opposition that plaintiff has no standing to sue on the Note because it was executed as between Commerce Bank and the defendants. However, the plaintiff has submitted documentation establishing the merger between Commerce Bank and TD Bank and therefore the plaintiff is the successor by merger to Commerce Bank. Nothing is lost by merger of corporations and any right lawfully belonging to any of corporations merged together can be asserted by surviving corporation. **Business Corporation Law § 906(b)(2). See also, Home Sav. of America, F.A. v. Lacher, 159 A.D.2d 235, 552 N.Y.S.2d 214 (1st Dept. 1990).** (Affirming decision that denied summary judgment based on the fact that plaintiff could not submit a copy of merger agreement, or any official document, proving its rights under the promissory note.)

Furthermore, defendant Elizabeth Madden asserts that the collateral cash issued to the plaintiff for the Liberty Letter of Credit (the $286,000.00) were sums owned by Elizabeth Madden, and so much as she had no obligations under the Liberty Letter of Credit, those sums taken by plaintiff can only be used to offset obligations of Elizabeth Madden. In essence, defendant Elizabeth Madden claims she is

entitled to an offset for the $286,000.00 mentioned. The plaintiff maintains that Elizabeth Madden is not entitled to such offset because the account was held in the name of Liberty Title Agency, LLC and moreover, the authorized signatures on the account did not ever include Elizabeth Madden, therefore she had no interest or title ownership of the funds. Accordingly, the Court finds that the bank records and documents submitted on behalf of the plaintiff conclude that Elizabeth Madden is not entitled to an offset for the aforementioned amount. Defendants have failed to raise triable issue of fact relating to the Note. Plaintiff has established that the Note was an obligation payable on demand. Defendants have failed to meet this demand.

With regard to the Guaranty, generally the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract." **Dunkin' Donuts v. Liberatore, 138 A.D.2d 559, 526 N.Y.S.2d 141 (2d Dept. 1988). See also, Chrysler Credit Corp. v. Kosal, 132 A.D.2d 686, 518 N.Y.S.2d 162 (2d Dept. 1987)**. Where a guaranty clearly indicates that the signatory would "unconditionally guarantee" the performance of the corporation and is unambiguously identified as a "guaranty" it will be enforceable against the guarantor. **Suffolk Cement Products, Inc. v. Empire Concrete Enterprises, Inc., 234 A.D.2d 447, 650 N.Y.S.2d 801 (2d Dept. 1996); Dunkin' Donuts, supra.**

In the case at bar, as to the Liberty Letter of Credit, plaintiff has met its prima facie burden by submission of the Agreement and guaranty and affidavit establishing the default and amount due and owing. **Agai v. Diontech Consulting, Inc., 64 A.D.3d 622, 882 N.Y.S.2d 503 (2d Dept. 2009); Cutter Bayview Cleaners, Inc., v. Spotless Shirts, Inc., 57 A.D.3d 708, 870 N.Y.S.2d 395 (2d Dept. 2008).** In opposition, defendant, Brian H. Madden, has failed to raise triable issue of fact. The Unlimited Guaranty establishes Brian H. Madden's unconditional obligation to pay the debt owed under the Liberty Letter of Credit.

The affirmative defenses set forth by the defendants are found to be without merit. Defendant's submissions of unsupported and conclusory allegations are insufficient to demonstrate a triable issue of fact. **Hestnar v. Schetter, 284 A.D.2d 499, 728 N.Y.S.2d 479 (2d Dept. 2001).** Furthermore, bald conclusory assertions are insufficient to defeat a motion for summary judgment. **Orange County-Poughkeepsie Ltd Partnership v. Bonte, 37 A.D.3d 684, 830 N.Y.S.2d 571 (2d Dept. 2007)**. The Note and the Liberty Letter of Credit contain provisions establishing New York jurisdiction over any such

disputes arising thereof. Furthermore, there is no proof set forth by the defendants for the accusation that the plaintiff is engaging in deceptive and predatory lending practices. Lastly, defendants have provided no proof or documentation to support the claim that they have faithfully discharged any and all duties owed to plaintiff and that they have paid any sums owed to plaintiff.

Based on the foregoing, the motion for summary judgment is granted and the affirmative defenses contained in the Verified Answer are dismissed. A hearing for attorney fees is scheduled for September 20, 2010 at 9:30 a.m. Submission of judgment shall abide the determination of counsel fees.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: July 29, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

MG NONFINAL
RRH 9-20-2010 @ 9:30 a.m.