

JPMorgan Chase Bank, N.A. v American Bath & Tile Corp.

2010 NY Slip Op 32262(U)

August 2, 2010

Supreme Court, Nassau County

Docket Number: 20722/09

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

INDEX NO.: 20722/09

MOTION SEQ. NO.: 001

- against -

MOTION DATE: 5/3/10

**AMERICAN BATH & TILE CORP, HOWARD
LEVY and MARTHA LEVY a/k/a MARTHA
DELGIUDICE,**

Defendants.

The following papers read on this motion (numbered 1):

Notice of Motion.....1

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This is an action in which plaintiff JPMORGAN CHASE BANK, N.A. ("JPMORGAN"), seeks to recover an amount allegedly due from defendants AMERICAN BATH & TILE CORP. ("AMERICAN BATH"), and HOWARD LEVY ("HOWARD") and MARTHA LEVY a/k/a MARTHA DELGIUDICE ("MARTHA") arising out of a Business Revolving Credit Account Agreement (the "BRCA") [Motion Exh. A to Exh. A] and a personal guarantee by MARTHA and HOWARD. JPMORGAN moves for a default judgment against AMERICAN BATH pursuant to **CPLR §3215** based upon AMERICAN BATH's failure to answer or appear in this action and for summary judgment pursuant to **CPLR §3212** against HOWARD and MARTHA. JPMORGAN also seeks to recover costs, expenses and attorneys' fees.

Defendants HOWARD and MARTHA, appearing *pro se*, served an Answer on or about November 25, 2009. The Court notes that the Answer, however, is valid only as to

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the individual defendants and, to the extent that said Answer attempts to answer on behalf of AMERICAN BATH, it must be disregarded. **CPLR §321(a)**. In their Answer HOWARD and MARTHA claim that the “loan was taken out for Corp. Did not know we (Howard & Martha) were personally obligated to pay for Corp. bills. Made all efforts to pay while Corp. was having financial problems. Made efforts to come to some payment plan that the corp could make. Was denied by Chase.” As a counterclaim, HOWARD and MARTHA assert that “Martha Levy was no longer part of Corp. when she took some other job because of financial difficulties on Aug. 2004.”

The Court finds that JPMORGAN has presented sufficient evidence of proper service of the summons and complaint against all defendants. In support of JPMORGAN’s motion for default judgment pursuant to **CPLR §3215** against AMERICAN BATH, JPMORGAN submits an affidavit of service, sworn to on October 16, 2009, attesting to service of the summons and verified complaint upon AMERICAN BATH by service on the Secretary of State pursuant to **CPLR §311(a)(1)** and **Business Corporation Law (“BCL”) §306** on that day. JPMORGAN has also submitted proof that additional service of the summons was made upon AMERICAN BATH by mail pursuant to **CPLR §3215(g)(4)**. In support of JPMORGAN’s motion for summary judgment pursuant to **CPLR §3212** against HOWARD and MARTHA, JPMORGAN submits an affidavit of service, sworn to on October 20, 2009, attesting to service of the summons and verified complaint upon HOWARD by personal service pursuant to **CPLR §308(1)** on October 15, 2009. With respect to MARTHA, JPMORGAN submits an affidavit of service, sworn to on October 20, 2009, attesting to service of the summons and verified complaint on October 15, 2009, upon MARTHA by service on HOWARD, husband, “a person of suitable age and discretion” pursuant to **CPLR §308(2)** at 51 Waverly Avenue, Smithtown, NY 11787, MARTHA’s “actual place of residence/actual place of business.” The process server described HOWARD, the individual served, as follows: “Sex: **Male** Color of Skin/race: **Caucasian** Color of Hair: **Gray** Age: **60** Height: **5'7"** Weight **160.**” The Court notes that the additional mailing of the summons to MARTHA was made more than twenty days after service. However, MARTHA did not raise the issue of improper service in her answer nor move to dismiss on that ground within 60 days thereafter. Accordingly, any challenge to personal jurisdiction has been waived. **CPLR 3211(e)**.

The Court thus turns to the question of whether JPMORGAN has established, *prima facie*, its entitlement to judgment as a matter of law, which is necessary for a default judgment [**CPLR §3215; Joosten v. Gale**, 129 AD2d 531] as well as summary judgment [**CPLR §3212; Winegrad v. New York University Medical Center**, 64 NY2d 851]. JPMORGAN has submitted evidence to demonstrate the existence of the debt and the amount due; namely: (i) a copy of the BRCA [Motion Exh. A to Exh. A] and the

Business Credit Application (the “Application”), including a personal guarantee and collateral agreement (the “Guarantee”), signed by both of the individual defendants HOWARD and MARTHA on May 23, 2007 [Motion Exh. G]; (ii) copy of a ‘Converted History Summary’ (“Summary”) purportedly evidencing the payment history of AMERICAN BATH’s account covering the period of May 27, 2003 through June 24, 2009, showing a final principal balance due of \$22,856.45 [Motion Exh. H]; (iii) affidavit of Tammy Lutjen, sworn to on January 28, 2010 (the “Lutjen Affidavit”) attesting that defendants have failed to pay under the BRCA and Guarantee since December 20, 2008, leaving an outstanding balance of \$22,856.45 together with \$1,691.22 in past due interest; (iv) a Credit History setting forth the terms of the line of credit; (v) an Affirmation in Support of JPMORGAN’s counsel; and (vi) an Affirmation in Support of Attorneys’ Fees [Motion Exh. I]. The Court notes that the Lutjen Affidavit is notarized by an out of state notary and is not accompanied by a Certificate of Conformity, which is required for an affidavit signed and notarized outside of New York State. *See CPLR §2309(c)*. The Court finds, however, that JPMORGAN’s failure to provide a Certificate of Conformity in compliance with *CPLR 2309(c)* is not a fatal defect. *See Falah v. Stop & Shop Companies, Inc.*, 41 AD3d 638; *Smith v. Allstate Insurance Co.*, 38 AD3d 522; *Sparaco v. Sparaco*, 309 AD2d 1029.

JPMORGAN has submitted the above as testamentary evidence that AMERICAN applied for the BRCA in May 2003, that HOWARD and MARTHA entered into a personal guarantee, and that defendants accepted and used the line of credit and defaulted under the BRCA by failing to pay installments due thereunder beginning since December 2008.

The documentary evidence substantiating these assertions, however, is not unassailable. With respect to JPMORGAN’s motion for a default judgment against AMERICAN BATH, of concern to the Court, is the insufficiency of JPMORGAN’s proof with respect to the merits of its claim. “*CPLR §3215* does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action.” *Joosten v. Gale*, 129 AD2d 531. The Court recognizes that the standard of proof set forth in *Joosten* is not stringent. Generally, all that is required is some first-hand confirmation of the facts. *Id.*, at 535.

In the case at bar, the Court notes that the only evidence that AMERICAN BATH agreed to be bound by the terms of the BRCA, is the signature made on behalf of AMERICAN BATH which appears on the Application in an authorizing resolution (the “Resolution”). In said Resolution, MARTHA, as Vice President and Secretary of AMERICAN BATH, certifies that the corporation is authorized to complete the

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Application and provides further that AMERICAN BATH shall be bound by a 'Note' and 'Account Agreement' "which it shall thereafter receive." The Court has no evidence that the Agreement was sent to AMERICAN BATH nor is there any other evidence linking MARTHA's signature on behalf of AMERICAN BATH appearing on the Application to the particular account in question.

A more substantive defect, is the failure by JPMORGAN to submit admissible evidence demonstrating use of the account by defendants. First, the statements in the Lutjen Affidavit are not made by someone with personal knowledge of the particular account in question. Second, there is no evidence in the Lutjen Affidavit or otherwise, of the use of the account other than a computerized print-out entitled 'Converted History Summary' listing the 'Tran' amount[s] and 'post balance[s]' for the period May 27, 2003 through June 24, 2009. However, the document itself is not authenticated nor is there authentication of the source of information contained therein. Further, JPMORGAN fails to submit any other evidence, demonstrating use of the account and acceptance of the line of credit, such as copies of checks written by defendants referable to the Application and Agreement.

With respect to JPMORGAN's motion for summary judgment against HOWARD and MARTHA, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649; *Greenberg v Manlon Realty*, 43 AD2d 968, 969)." ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853.

In this case, JPMORGAN has failed to establish entitlement to judgment as a matter of law. First, the Application is the only document where HOWARD and MARTHA's signatures appear in a section entitled 'Personal Guarantee and Collateral Agreement' [Motion Exh. G]. The proffered Agreement itself [Motion Exh. A to Exh. A] is a general form of agreement – undated, unsigned, and containing no information that links it to the particular account in question except for the name of AMERICAN BATH typewritten on the bottom and the insertion of a 3.000% interest rate, a \$250 annual fee and a term of 36 months. The only evidence linking the Agreement to the Application signed by HOWARD and MARTHA, is the statement that "By signing the application for a Credit Line and using the checks provided by [JPMORGAN], each Company named below has agreed to be bound by this BUSINESS REVOLVING CREDIT ACCOUNT AGREEMENT...between Company and [JPMORGAN]."

The Court does not find that any of the defects outlined above, is fatal in itself. When viewed together, however, closer scrutiny reveals that such defects reflect an unreliable application which raise doubt as to JPMORGAN's entitlement to judgment at this time.

On the basis of the foregoing, it is

ORDERED, that the motion by plaintiff JPMORGAN CHASE BANK, N.A. for default judgment against defendant AMERICAN BATH & TILE CORP. pursuant to CPLR §3215 is **denied**; and it is further

ORDERED, that the motion by plaintiff JPMORGAN CHASE BANK, N.A. for summary judgment against HOWARD LEVY and MARTHA LEVY a/k/a MARTHA DELGIUDICE pursuant to CPLR §3215 is **denied**.

Plaintiff JPMORGAN shall serve defendant AMERICAN BATH & TILE CORP. pursuant to CPLR §311(a)(1) and HOWARD LEVY and MARTHA LEVY a/k/a MARTHA DELGIUDICE pursuant to CPLR §308(1) or 308(2), with a copy of this Order with notice of entry, and if pursuant to (2), the affidavit of service shall identify the person of suitable age and discretion and his or her relationship to the person being served. Plaintiff shall submit proof of such service in any subsequent submission.

This constitutes the Order of the Court.

Dated:

8/2

, 2010

[Handwritten Signature]
J.S.C.

ENTERED
AUG 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE