

**Paston Group, LLC v Lifetime of Smiles Cosmetic  
Dentistry, P.C.**

2010 NY Slip Op 32743(U)

September 27, 2010

Supreme Court, Nassau County

Docket Number: 021544-09

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 21  
NASSAU COUNTY

**PASTON GROUP, LLC and SIMON  
PASTON & SONS, INC.,**

**Decision and Order**

**Plaintiffs,**

**MOTION SUBMITTED:  
August 16, 2010  
MOTION SEQUENCE:01  
INDEX NO. 021544-09**

**-against-**

**LIFETIME OF SMILES COSMETIC DENTISTRY,  
PC, NAVARRO & ROTHSTEIN, D.D.S. and  
NICHOLAS NAVARRO and JEFFREY ROTHSTEIN,  
Individually,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion	1
Affirmation in Opposition (Lifetime of Smiles)	2
Affirmation in Opposition (Jeffrey Rothstein)	3
Reply Affirmation	4

On November 8, 2005, Scott Paston and Steven Paston entered into an agreement ("Agreement") with Jeffrey Rothstein and Nicholas Navarro, who were partners in the dental practice Navarro & Rothstein, D.D.S. and Lifetime of Smiles Cosmetic Dentistry, PC in Woodbury, Long Island (Ex. "A" to Plaintiffs' Motion) (Lifetime of Smiles Cosmetic Dentistry, PC, Navarro & Rothstein, D.D.S., Nicholas Navarro, and Jeffrey Rothstein are collectively referred to as "Defendants"). The Agreement provided as follows:

This letter is to confirm that the Dental Practice of Lifetime of Smiles/Cosmetic Enhancement Center has taken out a loan of \$75,000 from Paston Group, LLC. The terms to be paid back in 14 equal monthly installments of \$6000 for a total of

\$84,000. The payments shall commence on February 1, 2006 and conclude with the final payment made on March 1, 2007.<sup>1</sup> It is further agreed by both Jeffrey Rothstein and Nicholas Navarro, that in the event the above named Dental Practice cannot repay the loan for any reason; they both mutually agree to provide a personal guarantee. In addition, Lifetime of Smiles agrees to provide Paston Group, LLC with 14 pre-dated checks at the signing of this Agreement. The checks shall be dated the 1<sup>st</sup> of the month for each month during the terms of the loan.

(Ex. "A" to Plaintiffs' Motion). The Agreement was signed by Scott C. Paston, on behalf of the Paston Group LLC, Steven J. Paston, Jeffrey Rothstein and Nicholas Navarro (Ex. "A" to Plaintiffs' Motion).<sup>2</sup> Notably, Scott Paston and Rothstein are brothers' in law (Paston Affidavit annexed to Plaintiffs' Motion at ¶ 2).

On November 10, 2005, a check in the amount of \$75,000 drawn from the account of Simon Paston & Sons was issued to Drs. Rothstein and Navarro (Ex. "B" to Plaintiffs' Motion). The first payment, due February 1, 2006, was made by check in the amount of \$6,000 but was returned for insufficient funds (Ex. "D" to Plaintiffs' Motion). Lifetime of Smiles/Navarro & Rothstein, D.D.S. then provided another check, drawn from a different account, in the amount of \$6,000 (Ex. "E" to Plaintiffs' Motion). This check was similarly returned for insufficient funds (Ex. "F" to Plaintiffs' Motion).

In March 2006 and May 2006, Plaintiffs received two checks in the amount of \$6,000 (Paston Affidavit annexed to Plaintiffs' Motion at ¶¶ 15, 16). Both of these checks were deposited and paid (Paston Affidavit annexed to Plaintiffs' Motion at ¶¶ 15, 16). Notably, these are the only two payments made and applied towards the loan.

According to Scott Paston, he held off on depositing the remaining pre-dated checks "as an accommodation to [his] brother-in-law" under the repeated promises that the loan would be paid back from other investors who would be investing in the dental practice (Paston Affidavit annexed to Plaintiffs' Motion at ¶ 17). In September 2009, after another unsuccessful attempt at depositing a pre-dated check, the Plaintiffs wrote a demand letter stating, in relevant part:

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<sup>1</sup> At the signing of the Agreement, the Defendants provided to the Plaintiffs 14 pre-dated checks which were dated the 1<sup>st</sup> of the month for each month during the term of the loan (Ex. "K" to Plaintiffs' Motion at ¶ 9).

<sup>2</sup> Scott Paston is the managing member of Paston Group, LLC, the successor in interest and d/b/a Paston & Sons, Inc. (Paston Affidavit annexed to Plaintiffs' Motion at ¶ 1). Paston Group, LLC and Simon Paston & Sons, Inc. are collectively referred to as "Plaintiffs").

Because of our family relationship we were far more patient and accommodating than we would have been in a different situation . . . [T]his debt is long overdue, despite our having made every effort to accommodate you. This letter shall put you on notice that we are demanding that you repay the complete loan plus additional accrued interest immediately, on or about September 22, 2009 or enter into an agreeable payment plan, or we will be left with no alternative but to commence a lawsuit. We are unaware of what your arrangement is regarding your split, but you both did sign personally to this loan.

Apparently, the dentists are no longer in business together (Paston Affidavit annexed to Plaintiffs' Motion at ¶ 19; Ex. "J" to Plaintiffs' Motion).

Having received no response to their demand letter, Plaintiffs commenced the instant action against the Defendants for the remainder due on the loan, in addition to interest and legal fees (Ex. "K" to Plaintiffs' Motion). Defendant Jeffrey Rothstein answered the complaint. In a separate pleading, Defendants Lifetime of Smiles Cosmetic Dentistry, P.C., Navarro & Rothstein, D.D.S., and Nicholas Navarro himself (collectively referred to as "Lifetime of Smiles") also answered the complaint and asserted, *inter alia*, the defenses of accord, modification and satisfaction.

Plaintiffs thereafter moved for summary judgment alleging that they made a *prima facie* showing of breach of guaranty as evidenced by the existence of the guaranty and the failure of the the guarantor (the Defendants) to make the necessary payments pursuant to that guaranty (Plaintiffs' Motion at ¶¶ 11-12).

In contrast, Lifetime of Smiles argues that there are issues of fact that render summary judgment inappropriate, including: Defendants Navarro & Rothstein, D.D.S. and Lifetime of Smiles Cosmetic Dentistry P.C., although being named as defendants in the caption, were not specifically named in the Agreement which is the subject of the litigation; the Plaintiff Simon Paston & Sons, Inc. is also not named in the Agreement<sup>3</sup>; and there has been no proof that the loan money was actually delivered (Affirmation in Opposition at ¶ 3). In addition, Lifetime of Smiles argues that the language within the Agreement is ambiguous insofar as "there is no personal guarantee and it was only agreed that a guaranty would be provided, the terms of which still needed to be negotiated; or it could be argued that what was given was a guaranty of collection which would not be operative until Plaintiffs could demonstrate that the **named**

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<sup>3</sup>While Simon Paston & Sons was not a party to the Agreement, the Agreement was nevertheless executed on Simon Paston & Sons, Inc. letterhead. Moreover, Scott Paston, who did sign the Agreement, is the managing member of Paston Group, LLC, which is a d/b/a of Simon Paston & Sons (Paston Affidavit annexed to Plaintiffs' Motion at ¶ 1).

[\* 4]

**Dental Practice cannot repay the loan.”** (Lifetime of Smiles Opposition at ¶ 6) (emphasis in original).

Defendant Rothstein similarly opposes the motion on the grounds that he did not receive any money as an individual nor did he personally guarantee the collection or repayment of the debt (Rothstein Opposition at ¶ 4). Specifically, Rothstein argues that the contract states:

Rothstein ‘would provide’ a guarantee in the event the Dental Practice ‘cannot’ repay the loan. It doesn’t state that he guarantees the repayment or collection of the loan. Therefore, unless and until Jeffrey Rothstein executes an instrument stating that he guarantees the loan, he cannot be held as the guarantor. Further, it has to be shown that the Dental Practice cannot repay the loan before Jeffrey Rothstein is even obligated to provide such a guarantee.

(Rothstein Opposition at ¶¶ 9-10).

For the reasons that follow, the Plaintiffs’ motion is denied.

#### **Analysis**

To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Davern v City of New York*, 287 AD2d 679 [2d Dept 2001]). More particularly, within the context of a guaranty, the creditor must prove the existence of a guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty (*North Fork Bank Corp. v Graphic Forms Assoc., Inc.*, 36 AD3d 676 [2d Dept 2007]; *Famolaro v Crest Offset, Inc.*, 24 AD3d 604 [2d Dept 2005]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71[1st Dept 1998]). The failure to make this showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2d Dept 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2d Dept 2004]). Given the ‘guaranty’ language used in the Agreement, this Court concludes that Plaintiffs have failed to set forth the unequivocal existence of a guaranty, a requisite element of the *prima facie* showing of entitlement to judgment as a matter of law for breach of guaranty.

Whether a contract is ambiguous is a question of law for the court (*see, JJFN Holdings, Inc. v Monarch Investment Properties, Inc.*, 289 AD2d 528 [2d Dept 2001]). When the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment (*see, DePasquale v Daniel Realty Assoc.*, 304 AD2d 613 [2d Dept 2003]). The relevant language in the Agreement at bar, to wit, that “in the

event the above named Dental Practice cannot repay the loan for any reason; [Rothstein and Navarro] both mutually agree to provide a personal guarantee” is susceptible to two reasonable interpretations and is, therefore, ambiguous as a matter of law. In this regard, the language can be interpreted as a guarantee by Rothstein and Navarro to repay the monies in the event the dental practice did not repay it. Another reasonable interpretation, however, is that Rothstein and Navarro agreed to provide a personal guarantee upon the happening of a future event, namely, the dental practice’s failure to repay the loan. Accordingly, the language of the guaranty set forth in the parties’ Agreement is sufficiently ambiguous such that extrinsic evidence as to the parties intent is required thereby rendering summary judgment inappropriate (*see, JJFN Holdings, Inc. v Monarch Investment Properties, Inc.*, 289 AD2d at 531, *supra*; *Kane Manufacturing Corp. v Partridge*, 144 AD2d 340 [2d Dept 1988] [summary judgment precluded where intent of parties must be ascertained from evidence outside the written words of the instrument]; *Kleet Lumber Co., Inc. v Quail Homes of Long Island*, 129 AD2d 564 [2d Dept 1987]).

In so concluding, the court notes that the contract at issue here is distinguishable from the contracts which were the subject of *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.* (65 AD3d 1135 [2d Dept 2009] [plaintiff made prima facie showing of entitlement to judgment as matter of law where defendant unconditionally guaranteed payment and subsequently failed to make requisite payments under the guaranty]), *North Fork Bank & Trust Co. v Thomason Industries Corp.* (194 AD2d 772 [2d Dept 1993] [Second Department held that the language within a guaranty was not ambiguous because it clearly stated that guarantors’ liabilities shall become “immediately due and payable” upon default]), *Federal Deposit Insurance Corp. v Jacobs* (185 AD2d 913 [2d Dept 1992] [plaintiffs’ motion papers, which included absolute and unconditional guarantee, was sufficient to establish Plaintiffs entitlement to summary judgment]), and *Crisafulli Bros., Inc. v Kilmartin* (100 AD2d 678, 679 [3d Dept 1984] [language of the guaranty expressly stated that the “payment is personally guaranteed”]), each of which demonstrated, in clear and unequivocal language, the guaranty of payment.

Moreover, in view of Lifetime of Smiles’ affirmative defenses raised in its answer, as well as the apparent confusion with respect to who are the proper parties in this action, summary judgment at this juncture would be both premature as well as improper. Accordingly, it is hereby ordered that Plaintiffs’ motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: September 27, 2010

**ENTERED**  
 SEP 30 2010  
 Hon. Vito M. DeStefano, J.S.C.  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE