

**Park Ave. Bank v Straight Up Prods., Inc.**

2010 NY Slip Op 33630(U)

December 15, 2010

Supreme Court, Richmond County

Docket Number: 102011/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No. 102011/09  
Motion No.: 1**

**THE PARK AVENUE BANK**

*Plaintiff*

*against*

**STRAIGHT UP PRODUCTIONS, INC. and  
DAVID MCCALLEN,**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of the following motion

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>

Upon the foregoing cited papers, the Decision and Order on this Motion for Summary Judgment is as follows:

The motion made by the plaintiff, The Park Avenue Bank, for summary judgment against the defendants, Straight Up Productions, Inc. and David McCallen, is granted in so far as finding liability against Straight Up Productions, Inc. and David McCallen, with damages to be determined. ..

**Facts**

This is an action based upon alleged failure to pay a debt owed by Straight-Up Productions, Inc. (Straight-Up) and allegedly personally guaranteed by David McCallen (Mr. McCallen). The court takes judicial notice that Straight-Up is or was a Nevada corporation. Straight-Up is currently listed by the New York Department of State, Division of Corporations as a foreign corporation permitted to do business in this state. On May 17, 2007, an integrated Notice of Final Agreement was executed by Mr. McCallen as a corporate officer of Straight-Up. According to the plaintiff, this debt was individually guaranteed by Mr. McCallen, not just signed as a corporate officer. The Notice of Final Agreement states that written loan agreement

is the final agreement, there are no unwritten oral agreements, and the written loan agreement may not be contradicted by any oral agreements or understandings of the parties. The Final Agreement details the writings included in the loan agreement: a Business Loan Agreement; Customer Information Profiles of Straight Up and Mr. McCallen; a New York Commercial Guaranty; a New York UCC-1 filing form; a Disbursement Request and Authorization; Park Avenue Privacy Policies provided to Straight-Up and to Mr. McCallen; a Promissory Note; a New York Commercial Security Agreement; a Request for UCC Information to be provided by Straight-Up; and a Notice of Final Agreement. Mr. McCallen signed the final agreement twice. One signature is subscribed as “Authorized Signer for Straight up Productions” and a second signature is subscribed as “David McCallen, Individually.” The business loan agreement requires executed guaranties of the loans in favor to the lender, and executed on the lender’s forms, with specified amounts and particularized conditions. A “Commercial Guaranty” was also signed by Mr. McCallen. In this document, Mr. McCallen is denominated as the Guarantor and he has signed without a corporate title. In an unsigned Boarding Data Sheet, Mr. McCallen is listed as an Individual Guarantor with unlimited liability. Mr. McCallen is also stated to be a guarantor on a Park Avenue Privacy Policy. Where Mr. McCallen’s address is stated as the guarantor, it is at a different location from Straight-Up’s address.

It is stated by the plaintiff that payments on the loan were paid from December 1, 2007 through May 1, 2008, but not thereafter. The plaintiff seeks payment of the remaining principal, the interest due, and reasonable attorney fees from Straight-Up as the borrower and from Mr. McCallen as the guarantor.

In an affidavit, Mr. McCallen asserts that the plaintiff led him to believe that he was executing the loan guaranty as a corporate officer, not in an individual capacity, and that he would not be personally responsible for debt repayment. In the affidavit, he states he does not recall executing the undated commercial guaranty at the time of the Straight-Up loan agreement, and he believes it might have been executed by him at a later date. The Park Avenue Bank submits a supporting affidavit executed by Voula Petridis (Ms. Petridis), an employee of the

plaintiff. Mr. McCallen claims this latter affidavit is inconsistent with the documentary evidence. Mr. McCallen asserts insufficiencies in documentary evidence including a missing date on the Commercial Guaranty, and a failure to adequately distinguish Straight-Up as the debtor from Mr. McCallen as the guarantor, belie the validity of Ms. Petridis' affidavit.

### Discussion

Here, the plaintiff seeks summary judgment finding both Straight Up as debtor and Mr. McCallen as guarantor liable for money owed under a loan agreement. Under New York Civil Practice Law and Rules (CPLR) § 3212, a motion for summary judgment requires that “the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”<sup>1</sup> Notwithstanding facts presented by any party, “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”<sup>2</sup> When the Appellate Division, Second Department evaluates for summary judgment, all evidence must be examined in the light most favorable to the non-moving party;<sup>3</sup> and the non-movant must be given the benefit of every favorable inference.<sup>4</sup> “It is not the court’s function on a motion for summary judgment to assess credibility.”<sup>5</sup>

Straight- Up does not oppose the plaintiff’s motion for summary judgment. Here, the business loan agreement with Straight-Up specifically identifies Mr. McCallen as a guarantor for an unlimited amount. However, the business loan agreement is signed only by Mr. McCallen as an authorized signer for Straight-Up. A note denominating Mr. McCallen as a guarantor is a

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<sup>1</sup>CPLR § 3212 (b).

<sup>2</sup>*Id.*

<sup>3</sup>*Nicklas v. Tedlen Realty Corp.*, 305 AD 2d 385, 386 [2d Dept 2003].

<sup>4</sup>*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000]

<sup>5</sup>*Forrest v Jewish Guild for the Blind*, 3 NY 3d 295, 315 [2004]; *quoting Ferrante v American Lung Assn.*, 90 NY 2d 623, 631 [1997].

commercial loan guarantee. This is a personal loan guarantee signed by Mr. McCallen individually. Here, Mr. McCallen alleges that he was told he was not individually liable for the loan, but that he was signing each document only as an officer of Straight-Up. Unless there is clear and explicit indication that an agent of a disclosed principal wishes to be personally bound, the agent will not be personally liable for a breach of contract.<sup>6</sup> Mr. McCallen asserts that he signed a “Commercial Guaranty” and regards the title of the document as ambiguous. This guaranty identifies Mr. McCallen as the guarantor, and commits the guarantor absolutely and unconditionally to guarantee full and punctual payment of Straight-Up’s loan. Mr. McCallen is not endowed with a corporate position in signing this commercial guaranty, and Mr. McCallen is distinguished from the borrower, and titled as the guarantor. Mr. McCallen does not provide evidence of his understanding not to be personally bound by the document he signed. Further, Mr. McCallen does not explain why he thought he was signing a Notice of Final Agreement twice, once subscribed as an authorized signer for Straight-Up Productions, and a second time subscribed as David McCallen, Individually. The question of whether a contract is ambiguous is a matter of law to be decided by the court.<sup>7</sup> Here, there is no true ambiguity, Mr. McCallen personally guaranteed the commercial loan to Straight-Up.

Generally, when evaluating a motion for summary judgment, evidence presented by the non-moving party is assumed to be true.<sup>8</sup> Indeed, in an action based on duress in guaranteeing a loan, the Appellate Division, Second Department stated that a movant plaintiff’s affidavit was sufficient to raise a factual issue of duress.<sup>9</sup> A defendant’s affidavit moving for summary

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<sup>6</sup>*Weinreb v Stinchfield*, 19 AD 3d 482, 483 [2d Dept 2005]; *see also Savoy Record Co. v Cardinal Export Co.*, 15 NY 2d 1, 4 [1964].

<sup>7</sup>*W. W. W. Assoc. v Giancontieri*, 77 NY 2d 157, 162 [1990]; *and North Fork Bank & Trust Co. v Romet Corp.*, 192 AD 2d 591, 592 [2d Dept 1993].

<sup>8</sup>*Forrest v Jewish Guild for the Blind*, 3 NY 3d at 315.

<sup>9</sup>*Art Stone Theatrical Corp. v Technical Programming & Systems Support of Long Island, Inc.*, 157 AD 2d 689, 691 [2d Dept 1990].

judgment was regarded as sufficient.<sup>10</sup> However, here, the defendant is the non-moving party. Further, in a congruent action, a defendant guarantor seeking a defense to a motion for summary judgment was required to produce documentary evidence to support a conclusory allegation that plaintiff used improper means to procure a signature.<sup>11</sup> Therefore, a defendant's mere conclusory allegations of impropriety in obtaining a guaranty for a loan should require documentary support. In the presence of an unconditional personal loan guaranty, and even in the face of the Mr. McCallen's affidavit, summary judgment is granted to the plaintiff. "Absent some evidence of fraud or other wrongful conduct on the part of some other party to the contract, one who assents to a written contract is conclusively presumed to know its contents such that there can be no question of fact as to his understanding of its terms."<sup>12</sup> Here, there is no actual evidence of wrongdoing on the part of The Park Avenue Bank and Mr. McCallen is charged to know what he had signed.

Mr. McCallen states he does not recall executing the guaranty at the time of signing other loan documents and believes it may have been executed at a later time. A guaranty to answer for the debt or default of another shall be in writing and subscribed by the party to be charged or by a lawful agent.<sup>13</sup> Mr. McCallen does not claim the guaranty was not appurtenant to the loan made to Straight Up. Simultaneity of the dates of execution of a guaranty and the guaranteed loan, is not a required component of this type of writing. Here, even if the guarantee and the loan were not simultaneously signed, it would not be a defense. Mr. McCallen also states that a box labeled officer is checked. Actually, the box contains three asterixes which are defined immediately below as an omission cue to text length limitations. Mr. McCallen's other assertions are likewise

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<sup>10</sup>*GTF Marketing v Colonial Aluminum Sales, Inc.*, 66 NY 2d 965, 967-968 [1985].

<sup>11</sup>*Overseas Private Investment Corp. v Nam Koo Kim*, 69 AD 3d 1185, 1188 [3d Dept 2010].

<sup>12</sup>*Northville Industries Corp. v Ft. Neck Oil Terminals Corp.*, 100 AD 2d 865, 867 [2d Dept 1984]; *aff'd by Northville Industries Corp. v Ft. Neck Oil Terminals Corp.*, 64 NY 2d 930 [1985].

<sup>13</sup>New York General Obligations Law § 5-701 (a)(2).

vacuous. Therefore, both Straight-Up Productions, Inc and David McCallen personally are responsible for the debt in default.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment by the plaintiff, The Park Avenue Bank, is partly granted in so far as liability is found against the defendants Straight Up Productions, Inc. and David McCallen; and it is further

ORDERED, that the parties shall return for a pre-trial conference to DCM Part 3, at 130 Stuyvesant Place, Third Floor on **Wednesday, January 5, 2011 at 9:30 AM.**

ENTER,

DATED: December 15, 2010

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Joseph J. Maltese  
Justice of the Supreme Court