

<b>Citibank, N.A. v Marden</b>
2010 NY Slip Op 34097(U)
March 16, 2010
Supreme Court, New York County
Docket Number: 110989/09
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

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CITIBANK, N.A.,

Plaintiff,

-against-

BERNARD A. MARDEN and CHARLOTTE M.  
MARDEN,

Defendants.

-----x  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 110989/09  
Motion Seq. No. 001

This is an action to recover for breach of a Credit Agreement and Promissory Note (first cause of action) and a Continuing Guaranty (second cause of action).

Defendants now move for an order: (i) pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the second cause of action; and (ii) pursuant to CPLR §§ 3012(d) and 3211(f), extending defendants' time to answer the first cause of action pending the disposition of this motion.

Background

There is no dispute that plaintiff Citibank, N.A. and defendant Bernard A. Marden, as Borrower, entered into a Demand Line of Credit Agreement dated January 17, 1996 and that Mr. Marden executed and delivered a Demand Promissory Note dated January 17, 1996 evidencing his obligation to repay, on demand, the Original

Loan. There is also no dispute that defendant Charlotte M. Marden executed a "Continuing Guaranty" also dated January 17, 1996.

The pre-printed form of the Continuing Guaranty provides, in relevant part, as follows:

IV. The undersigned hereby consents and agrees that you may at any time, or from time to time, in your discretion: (1) extend or change the time of payment, and/or the manner, place or terms of payment of all or any of the Obligations; (2) exchange, release and/or surrender all or any of the collateral security, or any part(s) thereof, by whomever deposited, which is now or may hereafter be held by you in connection with all or any of the Obligations; (3) sell and/or purchase all or any such collateral at public or private sale, or at any broker's board, and after deducting all costs and expenses of every kind for collection, sale or delivery, the net proceeds of any such sale(s) may be applied by you upon all or any of the Obligations, and (4) settle or compromise with the Borrower, and/or any other person(s) liable thereon, any and all of the Obligations, and/or subordinate the payment of same, or any part(s) thereof, to the payment of any other debts or claims, which may at any time(s) be due or owing to you and/or any other person(s) or corporations; all in such manner and upon such terms as you [i.e., Citibank] may deem proper, and without notice to or further assent from the undersigned, it being hereby agreed that the undersigned shall be and remain bound upon this guaranty, [emphasis supplied], irrespective of the existence, value or condition of any collateral, and notwithstanding any such change, exchange, settlement, compromise, surrender, release, sale, application, renewal or extension, and notwithstanding also that the Obligations may at any time(s) exceed the aggregate principal sum hereinabove prescribed.

An Addendum to the Continuing Guaranty dated January 17, 1996 specifically states that:

This Continuing Guaranty is executed and delivered in connection with the line of credit extended by the Bank to the undersigned and others described in the Demand Line of Credit Agreement dated the date hereof of the undersigned to the Bank ...

The Original Credit Agreement was amended a total of eleven times between 1996 and 2005. Each of the amendments was signed by Mrs. Marden in addition to Mr. Marden.

Mr. Marden and Citibank then entered into an Amended and Restated Demand Line of Credit Agreement dated November 25, 2005, by which Citibank continued the prior Loan to Mr. Marden and to others designated by Mr. Marden from time to time (the "Permitted Borrowers"), up to the maximum principal sum of \$55,000,000. In connection with this Credit Agreement, Mr. Marden also executed a Demand Promissory Note dated November 25, 2005 (the "Note").

Plaintiff claims that Mrs. Marden continues to guarantee the Advances under the Amended and Restated Credit Agreement, in accordance with the terms and provisions thereof and her 1996 Guaranty, as allegedly amended or ratified from time to time. Mrs. Marden, however, did not sign either the 2005 Amended Credit Agreement or a new Guaranty agreement.

By letter dated July 15, 2009, Citibank demanded the immediate repayment in full of the outstanding principal balance of the Note in the sum of \$11,537,804.18, together with all accrued and unpaid interest and other sums due, and advised defendants that interest would thereafter accrue at a fluctuating rate per annum equal to ABR III (as that term is defined in the Credit Agreement) plus 4.00%.

#### Discussion

Defendants argue that the second cause of action based on Mrs. Marden's purported Guaranty must be dismissed on the grounds that: (i) the Statute of Frauds (GOL § 5-701[a][2]) bars Citibank from holding Mrs. Marden liable as a Guarantor of the 2005 Credit Agreement; and (ii) Citibank discharged Mrs. Marden of her obligations as a Guarantor of the 1996 Credit Agreement by entering into the 2005 Amended Credit Agreement without her consent. See, *Lo-Ho LLC v Batista*, 62 AD3d 558 [1st Dep't 2009]; *Arlona Limited Partnership v The 8th of January Corp.*, 50 AD3d 933 [2nd Dep't 2008]; *Trustco Bank New York v Sage*, 238 AD2d 839 [3rd Dep't 1997]; *lv to app dismissed* 90 NY2d 935 (1997).

Defendants argue that the specific reference to the 1996 Credit Agreement, which is contained in the Addendum to the Continuing Guaranty, supersedes the language contained in the pre-

printed form agreeing to be bound without further assent to subsequent amendments and modifications.

In *Trade Bank & Trust Co. v Goldberg*, 38 AD2d 405, 406-407 (1st Dep't 1972), the Appellate Division, First Department held, in relevant part, as follows:

No citation of authority is required for the proposition that these two documents are to be construed together to determine the liability of the defendant. Nor is it open to question that where two documents are to be so construed -- one specifically prepared for the transaction in question and the other a general form -- the former takes precedence as to all provisions which are repugnant in the two documents (citations omitted).

See, also, *Teal v Place*, 85 AD2d 788 (3rd Dep't 1981).

Here, however, the language in the Addendum specifically prepared for the transaction is not inconsistent with or repugnant to the language contained in the pre-printed Continuing Guaranty. Moreover, defendants have not made any showing that the course of dealing between the parties in obtaining Mrs. Marden's consent with respect to prior amendments constitutes an agreement to alter the terms of the written Continuing Guaranty in order to impose such a requirement.

Accordingly, based on the papers submitted and the oral argument held on the record on January 26, 2010, this Court finds that Mrs. Marden's consent in the Continuing Guaranty to extensions and modifications of the underlying loan applies to the Amended Agreement entered into in 2005, and, therefore, satisfies the Statute of Frauds. See, *Davimos v Halle*, 60 AD3d 576 (1st Dep't 2009); *Banque Worms v Andre Cafe Ltd.*, 183 AD2d 494 (1<sup>st</sup> Dep't 1992); *Chase Manhattan Bank, N.A. v Kahn*, 66 AD2d 704 (1<sup>st</sup> Dep't 1978). Moreover, the Amended Credit Agreement specifically provides in section 6(h) that "[i]t is the intention of the parties that this Agreement and the Loan Documents hereunder not be construed as novations of the existing loan documents and notes, but as amendments and restatements thereof, and that ... each of the Continuing Guaranties continues to guaranty all Advances hereunder."

Defendants' motion to dismiss the second cause of action is, therefore, denied.

That part of defendants' motion seeking to extend defendants' time to answer the First Cause of Action pending the disposition of this motion is granted to the extent of directing the defendants to serve an Answer to the Complaint within 20 days of entry of this Order.

A preliminary conference shall be held in IA Part 39, 60  
Centre Street, Room 208 on April 28, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: March 16, 2010

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**