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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU**

**PR E S E N T : HON. JEFFREY S. BROWN**
**JUSTICE**

----------X **TRIAL/IAS PART 21**

JPMORGAN CHASE BANK, N.A., as successor-by-assignment from The Bank of New York,

Plaintiff,

- *against* -

S.C.A. RESTAURANT CORP., and LUIGI QUARTA,

Defendants.

**Index No. 11051/10**
**Mot. Seq. #** 1
**Mot. Date** 12/10/10
**Submit Date** 1/14/11

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit ..... 2
Reply Affidavit..... 3

Plaintiff JPMorgan Chase Bank, N.A.(Chase) moves for an order granting it summary judgment against the defendants S.C.A. Restaurant Corp.(S.C.A.) and Luigi Quarta.(Quarta) and for an order dismissing the counter-claims interposed by the defendants.

On or about December 6, 2004, S.C.A., a corporate entity, executed and delivered to the Bank of New York (now Chase by assignment) a Business Credit Link Agreement in the amount of $50,000.00. Concurrently, defendant Quarta executed and delivered to the Bank of New York (now Chase by assignment) an absolute, personal, unconditional and continuing guarantee of the obligations of S.C.A. under the Business Credit Link Agreement.

In support of this application, plaintiff's officer states that defendants failed to make payments as required under the terms of the Business Credit Link Agreement and the personal guarantee. No payment has been made since March 25, 2010. All the amounts due under the agreement have been accelerated by the plaintiff pursuant to the terms of the agreement, leaving a total unpaid principal balance of $27,973.02 together with past due interest in the amount of

$103.32 from February 25, 2010 through March 24, 2010 and $1,300.32 from March 25, 2010 through October 26, 2010.

Plaintiff is also asking for counsel fees since the agreement provides that defendant S.C.A. pay reasonable attorney's fees relating to the enforcement of the aforesaid Business Credit Link Agreement.

Defendant Quarta executes an affidavit in opposition to the instant motion. Quarta states that during the time in question, defendants had an attorney and CPA named Richard Gluszak. Mr. Quarta states that without the knowledge of either of the defendants, "Mr. Gluszak forged instruments, checks, documents and in any case accessed the credit line of S.C.A. Restaurant Corp. at the Chase Bank." Mr. Quarta states that he is well known at the bank branch and upon information and belief, the employees also know Mr. Gluszak. He contends that the bank personnel permitted Mr. Gluszak to forge these checks through their own negligence.

Defendants previously obtained a judgment against Richard Gluszak (Shellace, Referee July 21, 2009) in the amount of $527,392.15 as a result of the alleged forgeries. Defendant states that it never received the benefit of these monies. That the third-party misappropriated the money from plaintiff.

In reply, plaintiff points out that although there is a judgment obtained against Mr. Gluszak, there is no documentary evidence demonstrating that this judgment is related to the issues before this court.

> To obtain summary judgment it is necessary that the movant establish his cause of action or defense "'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd [b]). Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form (e.g., *Phillips v Kantor & Co.*, 31 NY2d 307; *Indig v Finkelstein,* 23 NY2d 728; also CPLR 3212, subd [f])." We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" *(Zuckerman v City of New York*

*49 NY2d 557, Alvord v Swift & Muller Constr. Co.,* 46 NY2d 276, 281-282; *Fried v Bower & Gardner,* 46 NY2d 765, 767; *Platzman v American Totalisator Co.,* 45 NY2d 910, 912; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.,* 32 NY2d 285, 290)."

In this instant application, plaintiff has met its burden by making a prima facie showing of entitlement as a matter of law by tendering evidentiary proof in admissible form. The burden now shifts to the party opposing the motion summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact. Defendant argues that summary judgment should be denied due to the fact there is a contract between the defendant-borrowers and the plaintiff-lender. They do not deny an obligation to pay back money if they were the borrower. However, they argue that plaintiff is liable since it was plaintiff's negligence and "incompetency and failure to act reasonably" which allowed a third party to access the credit line and misappropriate $49,000.00 from this credit line.

According to the documentary evidence attached by the plaintiff, checks were negotiated and posted as follows: 1) $25,000.00 - December 14, 2004; 2) $20,000.00 - December 16, 2005; 3) $ 4,000.00 - January 25, 2006.

Commencing on or about January 25, 2005 payments were made. Said payments continued into the calendar year 2010 mostly posted to interest. Payments towards principal were made commencing on or about February 24, 2009.

Factually, defendants failed to provide any evidentiary proof in admissible form that there is any contractual or special relationship that would demonstrate that the plaintiff bank has any obligation to monitor this credit line. Nor is there any demonstration that the plaintiff had knowledge of any alleged misappropriation. Such allegations in plaintiff's affidavit in opposition are simply surmise or conjecture and are insufficient to defeat a motion for summary judgment. Defendants' cause of action for negligence against the plaintiff bank is properly dismissed since to hold that banks owe a duty to their borrower under these facts to monitor financial activities would be to unreasonably expand banks' orbit of duty (see gen. *Century Business Credit Corp. v. North Fork Bank,* 246 AD2d 395). It should be noted that a bank has no duty to monitor fiduciary accounts maintained at its branches, to safeguard the funds from fiduciary misappropriations, unless the bank had actual knowledge that the diversion of the trust funds is to occur or is ongoing (see *Matter of Knox,* 64 NY2d 434; *Home Savings of America, FSB v Amoros,* 233 AD2d 35). Facts sufficient to cause a reasonably prudent person to suspect that the trust funds are being misappropriated will trigger a duty of inquiry on the part of a depository bank, and a bank's failure to conduct a reasonable inquiry when the obligation to do so arises, will result in the bank being charged with such knowledge as inquiry would disclose (*Home Savings of America v Amoros, supra*). No such facts are proffered by the defendant here. Further, there is no admissible evidence which demonstrates that plaintiff permitted any non-designated person to access this account. There is no factual specificity that would raise any issue of fact. As a result, defendant's failed to sustain their burden. Therefore, the

counterclaims are dismissed and summary judgment in favor of the plaintiff is **GRANTED**.

**ORDERED**, that this matter shall be set down for an inquest to assess the amount of reasonable counsel fees as provided for in the Business Credit Line Agreement, subject to the approval of the Justice there presiding and provided a note of issue has been filed at least ten (10) days prior thereto, in the Calendar Control Part on the **March 24, 2011 at 9:30 a.m.** This directive with respect to a hearing is subject to the right of the Justice presiding in the Calendar Control Part to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate; and it is further

**ORDERED**, that the plaintiff shall serve a copy of this order upon the defendants, by certified mail, return receipt requested and by regular mail; and it is further

**ORDERED**, that a copy of this order shall be served on the Calendar Clerk along with the note of issue. The failure to file a note of issue as directed or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

Upon conclusion of the hearing, submit Judgment on notice for $27,973.02 plus $103.32 for past due interest from February 25, 2010 through March 24, 2010 and $1,300.32 for past due interest from March 25, 2010 through October 26, 2010 and the default rate of Prime plus 4.5% from March 25, 2010 through the date of entry of judgment together with late charges thereon and leaving space for the insertion of a counsel fee award.

This constitutes the decision and order of this Court.

Dated: January 24, 2011

ENTER:

HON. JEFFREY S. BROWN
J. S. C.

ENTERED
FEB 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO:
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