

Signature Bank v Russo
2011 NY Slip Op 30728(U)
March 28, 2011
Supreme Court, New York County
Docket Number: 115092/10
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

SIGNATURE BANK,

Plaintiff,

-v-

ROBERT P. RUSSO D/B/A ROBERT P. RUSSO CPA.,
Defendants.

INDEX NO. 115092/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1 + 1A

Answering Affidavits- Exhibits _____

2 + 2A

Replying Affidavits _____

FILED

CROSS-MOTION: _____ YES NO

MAR 29 2011

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 3/29/11

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

_____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

-----X
SIGNATURE BANK,

Plaintiff

INDEX NO.
115092/10

-against-

ROBERT P. RUSSO D/B/A ROBERT P. RUSSO
CPA,

Defendants.

-----X

FILED

MAR 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

FACTUAL BACKGROUND

This action arises from a loan transaction between defendant, Robert P. Russo d/b/a Robert P. Russo CPA and plaintiff, Signature Bank, a banking association. On or about December 5, 2005, the defendant borrowed the sum of \$50,000 from plaintiff pursuant to the terms of a Signature Bank Business Revolving Credit Account Agreement and General Security Agreement (collectively referred to as the "BRCA Agreement"). Plaintiff alleges that the defendant defaulted under the terms of the BRCA Agreement by failing to make payment when due on or about September 20, 2010 (the "Default Date") or at any time thereafter and as a result owes an outstanding principal balance of \$36,329.93 plus accrued interest and late fees, and reasonable attorneys' fees. Plaintiff now moves for summary

judgment, pursuant to CPLR §3212, against defendant for the principal amount of \$36,329.93 pursuant to a breach of the BRCA Agreement plus interest thereon and granting such other and further relief as the court may deem just and proper.

APPLICABLE LAW & DISCUSSION

The party moving for summary judgment has the initial burden of making a "prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence that there are no material issues of fact that need to be tried." *Santiago v. Filstein*, 35 A.D.3d 184, 185-186 (1st Dept. 2006). Once the moving party has demonstrated that it is entitled to summary judgment, the burden then shifts to the party opposing the motion to present sufficient evidence demonstrating that a factual issue exists requiring a trial of material questions of fact. *Zuckerman v. City of New York*, 49 N.Y. 2d 557, 560 (1980). If the moving party fails to make such a showing, their summary judgment motion will be denied. *Santiago*, 35 A.D.3d at 186. This case law is supported by CPLR 3212(b), which provides:

"A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has

no merit. The motion shall be granted if, upon all the papers and proof submitted, 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."

In the instant case, plaintiff in support of its motion contends that the terms of the BRCA Agreement and the guaranties are clear and unambiguous. "When presented with a clear and unambiguous contract, a court need not look beyond the four corners of the agreement, and must enforce the writing according to its terms." *Continental Ins. Co. v. 115-123 West 29th St.*, 275 A.D.2d 604, 605 (2000). In *Independence Community Bank v. Olympia Mortgage Corp.*, 2007 NY Slip Op 51896U, the court held that the terms of the loan agreement were clear and unambiguous because the terms "expressly and unequivocally provide that upon an event of default...all outstanding sums shall be immediately due and payable..." In the instant case, Paragraph 8(a) of the BRCA Agreement provides, *inter alia*, that if the defendant fails to "pay the principal of, or any installment on, the Loans when due, or failure to pay any interest on the Loans...within ten days after any such fee becomes due..." this will constitute an Event of Default. The defendant did not make the payment of the outstanding principal balance of \$36,329.93 when due on or about September 20, 2010 or any time thereafter nor has defendant paid any part of the interest or late charges that have accrued pursuant to the BRCA Agreement.

In his first affirmative defense, defendant denies that the amount claimed by plaintiff is due and owing. However, the defendant signed the BRCA Agreement, provided by plaintiff as Exhibit "C" which details the credit line extended to defendant, in the amount of \$50,000. Furthermore, the doctrine of "account stated" is applicable to the instant case. An account stated is either an express or implied promise by a debtor to pay the creditor a stated sum of money which the parties agree is the amount due. *Ally & Gargano, Inc. v. Comprehensive Accounting Corp.*, 615 F. Supp. 426, 429. "An account stated may be implied when a creditor sends a statement of an account to the debtor and the debtor, who has a duty to examine the statement to determine whether it is correct or not, keeps it for a reasonable time without objecting to the correctness of the account. If an account stated can be established the agreement is binding on both parties and must be enforced at law unless the debtor can show that some or all of the accounts stated are fraudulent or erroneous." *Id.* In the instant case, plaintiff has provided copies of monthly statements of account that were sent to defendant for statement periods between January 1, 2010 and December 31, 2010. Defendant alleges that he does not have an accounting of amounts due from the plaintiff, however the defendant was served with the plaintiff's Reply Affirmation which contains these statements. Additionally, defendant does

not allege that the accounts stated are fraudulent nor has he ever made any objections to the correctness of the account stated prior to the commencement of the instant action. He never disputed the validity of his financial obligations or the accuracy of the monthly invoices.

"An agreement may also be implied from the fact that the debtor makes a partial payment towards reducing the balance of the account." *Id.* The statements of account provided by plaintiff provide, amongst other things, the beginning and ending balance for each statement period, the amount due, and the date that the amount is due. These statements verify that the defendant was making monthly payments towards reducing the balance of the account until the due date of September 20, 2010, in which time, the statements indicate that defendant ceased making payments, therefore the agreement was also implied.

Plaintiff also contends that the guarantor breached the Continuing Guaranty wherein the guarantor agreed to make prompt payment of any and all indebtedness by and from the defendant to the plaintiff. The defendant's affirmative defense is that in its complaint plaintiff references a female guarantor who does not appear to be named by the plaintiff therefore it is unclear as to whom plaintiff is referring. In its motion, the plaintiff acknowledges that the reference used was a typographical error therefore it does not create an issue of fact.

In order to enforce a written guaranty, on a motion for summary judgment the creditor only has to prove the writing is "an unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *Independence Community Bank*, 2007 NY Slip Op 51896U at 4. The terms of the Continuing Guaranty are clear and unconditional. The guaranty provides:

"...the undersigned Robert P. Russo (hereinafter called "Guarantors")...shall be jointly and severally liable hereunder, hereby absolutely unconditionally guaranties to Bank the due and punctual payment when due...in accordance with the terms thereof, the full and prompt payment and performance by Borrower of all of Borrower's Indebtedness (as hereinafter defined) and obligations to Bank, whether now existing or hereafter arising from time to time, and promise to pay to Bank...all of Borrower's Indebtedness to Bank, and all costs and expenses, including attorneys fees and legal expenses, paid or incurred by Bank in endeavoring to collect the Indebtedness, or any part thereof, and in enforcing this Continuing Guaranty."

The guaranty further provides, in paragraph 11 thereof, that:

"Demand Payment. Guarantor agrees that upon the occurrence of any default in payment of the Indebtedness or any "default" or "event of default" shall occur...Guarantor, immediately following a demand for payment from Bank, shall pay Bank the full amount of the Indebtedness guaranteed hereunder."

The terms of the Continuing Guaranty are clear. The defendant does not dispute that he executed the Guaranty. This shows that the defendant is jointly and severally liable for the amount owed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$36,329.93, together with interest at the prime rate of interest plus 1.00% per annum from the date of September 20, 2010 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 3 / 28 / 11

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.

FILED

MAR 29 2011

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COUNTY CLERK'S OFFICE**