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SHORT FORM ORDER

SUPREME COURT - NEW YORK STATE - NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 8

VM PETRO, INC.,

Plaintiff, INDEX NO. 4837/09

XXX

-against- MOTION DATE: 02/25/11

SEQUENCE NO. 001

LINROSS SERVICE STATION, INC.,
GREGORY AIZEN, and MAXIM CHIFRINE,,

Defendants.

----------X

Notice of Motion, Affs. & Exs.....1
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Upon the foregoing papers, plaintiff's motion for summary judgment, pursuant to CPLR §3212, is granted in part as follows: Plaintiff is granted summary judgment in the amount of $70,489.45 as against defendant Linross Service Station, Inc. on its First, Second, and Third Causes of Action and as against defendants Aizen and Chifrine on its Fourth Cause of Action. Plaintiff's motion for summary judgment is denied with respect to its Fifth Cause of Action for lost profits and plaintiff's Fifth Cause of Action is hereby dismissed.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for recovery of monies allegedly due and owing to plaintiff as the result of unpaid and overdue invoices for the delivery of gasoline to the defendant Linross Service Station, Inc. (hereinafter "Linross"), which were delivered on credit pursuant to a Commercial Credit Agreement, a Credit Application, and a Distributor/Supply Agreement executed by plaintiff and defendant Linross. Plaintiff alleges that under the terms of the agreements, plaintiff,

a gasoline wholesaler, delivered gasoline "on credit" to Linross for resale to its customers. Plaintiff alleges that defendants defaulted on the payments due to it, in the total amount of $70,489.45, thereby breaching the terms of the agreements. Plaintiff also alleges that defendant Linross breached the terms of the Distributor/Supply Agreement by ceasing to purchase gasoline from plaintiff on or about January 17, 2009 and by purchasing gas from another supplier. Plaintiff alleges that the terms of the Distributor/Supply Agreement require that defendant Linross purchase all of its gasoline exclusively from plaintiff for the seven-year period beginning April 17, 2007. Plaintiff further contends that a breach of that agreement entitles plaintiff to "lost profits" resulting from the failure to purchase gasoline exclusively from plaintiff. Lastly, plaintiff argues that under the terms of the agreements, it is entitled to reasonable attorneys fees and interest.

In addition to the foregoing, individual defendants, Gregory Aizen and Maxim Chifrin, executed an unconditional personal guaranty, wherein they each guaranteed defendant Linross's payment obligations pursuant to the terms of the agreements. Accordingly, plaintiff argues that it is entitled to judgment against individual defendants Aizen and Chifrin.

Plaintiff has made a prima facie showing of entitlement to summary judgment on its First, Second, and Third Causes of Action against defendant Linross. It is well-settled that a party is entitled to summary judgment for breach of contract upon establishing proof of a contract, performance of the contract by one party, breach by the other party, and damages. (*WorldCom, Inc. v. Sandoval*, 182 Misc.2d 1021, 701 N.Y.S.2d 834 (Sup Ct. N.Y. Cty. 1999); *Rexnord Holdings, Inc. v. Biderman*, 21 F.3d 522 (2d Cir. 1994)). In order to prove a cause of action for an account stated, the plaintiff must prove that an account was rendered showing a balance and that the receiving party failed within a reasonable time to dispute the account. (*Morrison Cohen Singer & Weinstein, LLP v. Ackerman*, 280 A.D.2d 355, 720 N.Y.S.2d 486 (1st Dept. 2001)).

Additionally, with respect to plaintiff's Fourth Cause of Action against individual defendants Aizen and Chifrine, plaintiff has established a prima facie showing of entitlement to summary judgment by demonstrating proof of an underlying credit agreement, proof of a personal guaranty bearing the signatures of defendants Aizen and Chifrine, and a failure to make payments called for by the terms of the credit agreement and guaranty. (*North Fork Bank Corp. v. Graphic Forms Associates, Inc.*, 36 A.D.3d 676, 828 N.Y.S.2d 194 (2d Dept. 2007); *see also*,

Gateway State Bank v. Shangri-La Private Club for Women, Inc., 113 A.D.2d 791 (2d Dept. 1985); *see also, E.D.S. Security Systems, Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept. 1999); *see also, DMJR Enterprises v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 (2d Dept. 2000)).

The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition, defendants Linross and Gregory Aizen fail to demonstrate through admissible evidence that defendant Linross does not owe $70,489.45 to plaintiff for the gasoline deliveries. The affidavit of Gregory Aizen, submitted in opposition to plaintiff's motion, states only that "[w]e don't believe we owe this money, our records and Plaintiff's records are conflicting as to how much is owed to the Plaintiff." Defendants Linross and Aizen argue that defendant Chifrine was the co-owner of a gas station in Valley Stream at the same time that he was manager at Linross. As such, Chifrine had a business relationship with plaintiff through his own station and began ordering gasoline from plaintiff for Linross shortly after he began working as the operating manager of Linross. Defendants Linross and Aizen argue only that defendant Chifrine would use one deposit slip to make cash deposits directly into the plaintiff's account after collecting cash receipts from defendant Linross and from Chifrine's own Valley Stream Station. The affidavit of Gregory Aizen states only that defendants Linross and Aizen "dispute the accuracy and truthfulness of these [unspecified] documents" as defendant Chifrine "had ample and obvious motivation to use Linross money to pay down his own gas station's account balances." No further details or proof of same are offered. Defendants Linross and Aizen offer no evidence to support their bald assertion that monies may have been misappropriated by defendant Chifrine when paying for the gasoline delivered by plaintiff to Linross. (*See, S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.S.2d 338, 313 N.E.2d 776 (1974); *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 22 N.Y.2d 255, 257 N.E.2d 890 (1970) (bald conclusory assertions, even if believable, are not enough to defeat a motion for summary

judgment)). Defendants have failed to demonstrate that there is a triable issue of fact sufficient to defeat plaintiff's prima facie demonstration that $70,489.45 is due and owing to plaintiff for the delivery of gasoline in breach of the Commercial Credit Agreement, Credit Application, and Distributor/Supply Agreements.

Defendant Max Chifrine also submits opposition in which he argues that the personal guaranty that he executed is unenforceable due to a lack of consideration and that he did not intend to be personally bound for the debts of defendant Linross when he signed the guaranty. Defendant Chifrine attests that he was not a partner at Linross, but was only an employee. He attests that he never understood that by signing the guarantee, he would be liable for the debts and obligations of Linross. Defendant Chifrine admits signing the guarantee, but attests that he merely signed same because his boss requested that he do so.

It is well settled that a signer is responsible for reading a contract and having consented to its terms. (*See, BWI Guaranty Trust v. Banque Internationale a Luxembourg*, 567 N.Y.S.2d 731 (1st Dept. 1991)). Where a guarantee is clear and unambiguous on its face and, "by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (Citibank v. Plapinger, 55 N.Y.2d 90 (1985); (*See, Gilman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824 (1988)(holding that absent a showing of fraud, duress, or other wrongful act by a party to a contract, a signer of an agreement is deemed to be conclusively bound by its terms whether or not he or she read it)). In addition, defendant Chifrine's assertions that he did not intend to personally guarantee the obligations of plaintiff are insufficient to raise a triable issue of fact in opposition to the within motion. (*See, North Fork Bank Corp. v. Graphic Forms Associates, Inc.*, 36 A.D.3d 676, 828 N.Y.S.2d 194 (2d Dept. 2007)). Further, defendant Chifrine's contention that the guarantee is unsupported by consideration is also unfounded. It is well established that "where one party agrees with another party that, if such party for a consideration performs a certain act for a third person, he will guarantee payment of the consideration by such person, the act specified is impliedly requested by the guarantor to be performed and, when performed, constitutes a consideration for the guarantee." (*Columbus Trust Co. v. Campolo*, 110 A.D.2d 616 (2d Dept.1985), quoting, *Sun Oil v. Heller*, 248 N.Y. 28 (1928); *See also, Holt v. Feigenbau*, 52 N.Y.2d 291, 419 N.E.2d 332 (1981)(holding that consideration consists of either a benefit to the

promisor *or* a detriment to the promisee); *see also, Weiner v. McGraw-Hill, Inc.*, 57 A.D.2d 458, 443 N.E.2d 441 (1982)(holding that it is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him)).

Lastly, plaintiff has failed to demonstrate its entitlement to summary judgment on it Fifth Cause of Action for lost profits in accordance with the terms of the Distribution/Supply Agreement. While plaintiff contends that the Distribution/Supply Agreement requires that defendant Linross purchase all gas exclusively from plaintiff for a period of seven years, defendants Linross and Aizen contest that interpretation of the agreement and argue that the plain terms of the agreement do not call for same. The Distribution/Supply Agreement states only that "if this agreement shall be terminated as a result of Dealer's default, Dealer shall pay to Supplier damages in an amount equal to those profits which the Supplier would have realized has this agreement not been terminated by virtue of Dealer's default." The agreement does not expressly state that defendant Linross is required to purchase all gas exclusively from plaintiff for a period of seven years. As the agreement does not expressly require all gas to be purchased exclusively from plaintiff, plaintiff's Fifth Cause of Action for lost profits relating to the terms of the Distribution/Supply Agreement is dismissed. The intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. (*Slamow v. Delcol,* 174 A.D.2d 725, 726, 571 N.Y.S.2d 335 (2 Dept. 1991)). A court may not rewrite into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. (*Id.*; *See, Marine Assocs. v. New Suffolk Dev. Corp.,* 125 A.D.2d 649, 510 N.Y.S.2d 175 (2d Dept. 1986)).

Plaintiff has made a prima facie showing of entitlement to summary judgment on its First, Second, Third, and Fourth Causes of Action, and defendants have failed to raise a triable issue of fact sufficient to defeat same. Accordingly, a judgment in the amount of $70,489.45 is awarded to plaintiff against defendants Linross, Aizen, and Chifrine.

Dated: April 4, 2011

Anthony L. Parga, J.S.C.

ENTERED
APR 07 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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