

JPMorgan Chase Bank, N.A. v Builders of Style Corp.

2011 NY Slip Op 31038(U)

March 4, 2011

Supreme Court, Nassau County

Docket Number: 12902/10

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

INDEX NO.: 12902/10

MOTION SEQ. NO.: 001

- against -

MOTION DATE: 12/6/10

**BUILDERS OF STYLE CORP. and PAMELA
C. WATSON,**

Defendants.

The following papers read on this motion (numbered 1):

Notice of Motion.....1

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

This is an action in which plaintiff JPMORGAN CHASE BANK, N.A. ("JPMORGAN"), seeks to recover an amount allegedly due from defendants BUILDERS OF STYLE CORP. ("BUILDERS"), and PAMELA C. WATSON ("WATSON") arising out of a Business Revolving Credit Account Agreement (the "BRCA") and a personal guarantee. The BRCA provides defendants with a line of credit up to \$75,000. JPMORGAN moves for summary judgment pursuant to **CPLR §3212** against both BUILDERS and WATSON. JPMORGAN also seeks to recover interest, late charges, costs, expenses and attorneys' fees.

In support of its motion, JPMORGAN submits an affidavit of service, sworn to on July 8, 2010, attesting to service of the summons and verified complaint upon BUILDERS by service on the Secretary of State pursuant to **CPLR §311(a)(1)** and **Business Corporation Law ("BCL") §306** on that day. In addition, JPMORGAN submits an affidavit of service, sworn to on July 12, 2010, attesting to service of the

summons and verified complaint upon WATSON by service on 'Brad Sanders, Co-Occupant' a person of suitable age and discretion pursuant to **CPLR §308(2)** on July 9, 2010 at 421 DeGraw Street, Suite 1N, Brooklyn, NY 11217 'defendant's place of residence within the state.' The process server described Sanders, the individual served, as follows: "Sex: **Male** Color of Skin/race: **Black** Color of Hair: **Bald** Age: **26-40** Height: **5'3"-5'9"** Weight **150-180.**" The Court has concerns based on the face of the Affidavit regarding whether the person served is adequately identified and whether the premises was defendant's place of residence, as noted. However, defendants did not raise the issue of improper service in their answer, dated July 28, 2010 [Motion Exh. D], nor move to dismiss on that ground within 60 days thereafter. Accordingly, any challenge to personal jurisdiction has been waived. **CPLR 3211(e)**. Although not artfully drafted, the Court will treat said answer to be an answer on behalf of both defendants.

The Court thus turns to the question of whether JPMORGAN has established, *prima facie*, its entitlement to judgment as a matter of law. [**CPLR §3212; Winegrad v. New York University Medical Center**, 64 NY2d 851]. JPMORGAN has submitted evidence to demonstrate the existence of the debt and the amount due; namely: (i) a copy of a form of BRCA referring to BUILDERS but with no signature by a BUILDERS's representative [Motion Exh. E]; (ii) a Credit Summary setting forth terms of the BRCA [Motion Exh. E]; (iii) a copy of a Business Credit Application (the "Application"), which includes an Authorizing Resolution (the "Resolution") and a 'Personal Guarantee and Collateral Agreement (the "Guarantee"), signed by WATSON on April 30, 2004 [Motion Exh. F]; (iv) a copy of a Transaction History purportedly evidencing the payment history of BUILDERS' account covering the period of May 4, 2004 through August 4, 2010, showing a principal balance due of \$40,033.04 [Motion Exh. G]; (v) an affidavit of Shari Bumgardner, an Assistant Vice President of JPMORGAN, sworn to on September 23, 2010 (the "Bumgardner Affidavit") attesting that defendants have failed to pay under the BRCA and Guarantee since February 4, 2010, leaving an outstanding principal balance as of September 17, 2010 of \$40,033.04 together with \$2,215.34 in past due interest; (vi) an Affirmation in Support of JPMORGAN's counsel; and (vii) an Affirmation in Support of Attorneys' Fees [Motion Exh. H].

JPMORGAN has submitted the above as evidence that BUILDERS applied for the BRCA in April 2004, that WATSON entered into a personal guarantee, and that defendants accepted and used the line of credit and defaulted under the BRCA by failing to pay installments due thereunder since February 2010.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see, *Zuckerman v City of New York*, 49 NY2d

[* 3]

557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404).” *Winegrad v New York Univ. Med. Ctr.*, *supra* at 853.

In the case at bar, the Court notes that the only evidence that BUILDERS agreed to be bound by the terms of the BRCA, is the signature made on behalf of BUILDERS that appears on the Application in the Resolution. In said Resolution, WATSON, as President of BUILDERS, certifies that the corporation is authorized to complete the Application and provides further that BUILDERS shall be bound by a ‘Note’ and ‘Account Agreement’ “which it shall thereafter receive.” The Court has no evidence that the Agreement was sent to BUILDERS nor is there any other evidence linking WATSON’s signature on behalf of BUILDERS appearing on the Application to the particular account in question.

A more substantive defect, is the failure by BUILDERS to submit admissible evidence demonstrating use of the account by defendants. There is no evidence in the Bumgardner Affidavit or otherwise, of the use of the account other than a computerized print-out entitled ‘Transaction Summary’ for ‘customer’ BUILDERS. However, the document itself is not authenticated nor is there authentication of the source of information contained therein. Further, JPMORGAN fails to submit any other evidence, demonstrating use of the account and acceptance of the line of credit, such as copies of checks written by defendants referable to the Application and Agreement. The proffered Agreement itself [Motion Exh. E] is a general form of agreement – undated, unsigned, and containing no information that links it to the particular account in question except for the name of BUILDERS typewritten on the bottom, the insertion of a prime rate plus 4.500% interest rate and a \$750 first year and annual fee and providing for monthly installments of 1/36 of the outstanding loans. Further, the Court notes that the Bumgardner Affidavit states that defendants raised several affirmative defenses in their answer, when only one affirmative defense was raised.

With respect to JPMorgan’s action against WATSON on the guarantee, the Application is the only document where WATSON’s signature appears in a section entitled ‘Personal Guarantee and Collateral Agreement’ [Motion Exh. G].

The Court does not find that any of the defects outlined above, is fatal in itself. When viewed together, however, closer scrutiny reveals that such defects reflect an unreliable application which raise doubt as to JPMORGAN’s entitlement to judgment at this time.

On the basis of the foregoing, it is

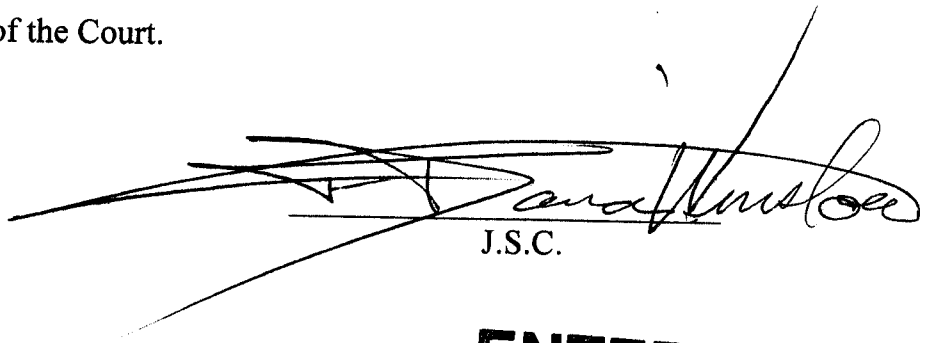
[* 4]
ORDERED, that the motion by plaintiff JPMORGAN CHASE BANK, N.A. for summary judgment against defendants BUILDERS OF STYLE CORP. and PAMELA C. WATSON pursuant to CPLR §3212 is **denied**.

Plaintiff JPMORGAN shall serve defendants BUILDERS pursuant to CPLR §311(a)(1) and WATSON pursuant to CPLR §308(1) or 308(2), with a copy of this Order with notice of entry, and if pursuant to (2), the affidavit of service shall identify the person of suitable age and discretion and his or her relationship to the person being served. Plaintiff shall submit proof of such service in any subsequent submission.

This constitutes the Order of the Court.

Dated: 3/4

, 2011


J.S.C.

ENTERED
APR 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE