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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON Joan A. Madden PART 11

Justice

Index Number : 112199/2010

WILK, TANIA

VS.

JP MORGAN CHASE BANK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4-7-11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED

JUN 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 3, 2011

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 11

----------X

TANIA WILK,

Plaintiff,

Index # 112199/10

-against-

DECISION & ORDER

JP MORGAN CHASE BANK and
WOLFSON COMMUNICATIONS GROUP, LLC,

Defendants.

----------X

JOAN A. MADDEN, J.:

In this action alleging that defendant JP Morgan Chase Bank (Chase or the Bank) removed funds from plaintiff Tania Wilk's (Wilk) personal bank accounts without authorization, plaintiff moves, pursuant to CPLR 3212, for summary judgment on the complaint.

Defendant, Chase, cross-moves, pursuant to CPLR 3211 and 3212, for judgment dismissing the complaint.

A. Background

The facts of this case are not in dispute. In 2003, when Wilk was a minority shareholder and the chief financial officer (CFO) of defendant Wolfson Communications Group, Inc. (the Company), the Company applied for a line of credit from the Bank. Chase approved the Company's application for a line of credit in an amount up to $100,000 (Wilk Aff., Ex. B). Wilk states that Frank Natale (Natale) was the Bank officer who handled the application and managed the Bank's relationship with the Company after the line of credit was approved. Wilk also states that Natale was the individual she dealt with at the Bank. As part of the application, both Wilk and the Company's

majority shareholder Susan Wolfson (Wolfson) executed personal guarantees that were part of the credit application. The guarantee states, in pertinent part:

> This Guarantee shall continue in effect unless and until I give written notice to Chase terminating my future liability under this Guarantee, in which event I recognize that this Guarantee shall continue in effect with respect to any and all Obligations incurred prior to the time Chase receives such notice, including the amount of any undrawn revolving credit line or commitment to lend, whether or not conditional.
>
> * * * * *
>
> All notices must be received by certified mail, return receipt requested, addressed to: JP Chase Bank, Small Business Financial Services, Credit Originations, 950 Corbindale--4th Floor, Houston, TX 77024

(Wilk Aff., Ex. A, at 2).

After the Company's line of credit was approved, Chase funded the line of credit and, from time to time, the Company accessed the funds. On November 16, 2005, the balance due on the line of credit was $0, and there was no money due and owing.

On November 16, 2005, Wilk sent a certified mail/return-receipt-requested letter to Chase, addressed to Frank Natale, V.P., JP Morgan Chase, 1251 Avenue of the Americas, New York, NY 10020. The letter was received by the bank and signed for by Norma Gowen on November 18, 2005 (Wilk Aff., Ex. D). That letter, which referenced Wolfson Communications Group, LLC, Loan Number 0000804552352352-2, stated, in part, "[t]his letter shall constitute notice that, effective on the date of your receipt of this letter, I terminate my guaranty and will not be responsible thereunder for any further borrowings under the Line of Credit" (Wilk Aff, Ex. D).

On December 9, 2005, Wilk learned that the Company had drawn $10,000 on the line of credit and, on December 13, 2005, she sent a second certified/return-receipt-requested letter to the Bank, addressed to Frank Natale, V.P., Chase Bank, 1251 Avenue of the Americas, New York, New York 10020, which referenced loan number 0000804552352352-2, and stated:

> It has come to my attention that Wolfson Communications Group, LLC ("Wolfson") has activated the revolving line of credit (the "Line of Credit") that it holds with JP Morgan Chase (the "Bank") in the amount of $10,000. The transfer of funds took place on December 9, 2005. This letter is to confirm that I have sent the Bank notice of the termination of my guaranty of the Line of Credit to the Bank (copy of such notice enclosed). I therefore am not responsible for this borrowing or any other future borrowings

(Wilk Aff., Ex. E).

The Bank received that letter on December 14, 2005 (Wilk Aff., Ex. E). Wilk states that she ended her affiliation with the Company in late 2005 and formally ceased to be a member of the Company on December 31, 2005. Wilk did not hear from the Bank again regarding the line of credit or the personal guarantee until August 2010.

Wolfson filed a personal bankruptcy petition on July 31, 2010 and the Company was dissolved on July 27, 2010.

B. Removal of Funds

By letter dated August 2, 2010, Chase notified Wilk that there was a $3,101.81 past due amount on Wolfson Communications' loan number 00450510205927, which, according to the notices, had a current balance of $97,197.87 (Wilk Aff., Ex. F). By letter dated August 24, 2010, Wilk once again informed Chase that she had terminated her personal guarantee (Wilk Aff., Ex. G) but, on August 24, 2010, without prior notice,

Chase removed $26,183.43 from a joint personal checking account Wilk held, with her husband (joint account), at the Bank and on August 26, 2010, without prior notice, the Bank removed an additional $28,414 from the joint account. In addition, without prior notice, on August 25, 2010, Chase withdrew more than $12,000 from two personal checking accounts held by Wilk's minor daughters and on August 26, 2010, Chase unilaterally activated a Visa card related to the joint account and charged a $500.00 credit against it. In addition, the Bank admits that since funds were withdrawn from certain accounts, overdraft and insufficient funds charges may have been charged to some or all of the checking accounts (Saladrigas Aff., at 6).

In September 2010, Wilk commenced this action stating causes of action for: 1) theft and conversion; 2) unjust enrichment; 3) breach of fiduciary duty; 4) breach of contract; 5) violation of General business Law (GBL) § 349; 6) violation of GBL § 5-327 and 7) declaratory judgment.

C. Contentions

Wilk contends that summary judgment in her favor is warranted because she extinguished her obligations under the personal guarantee in 2005 by providing the bank with written notice of such termination and that the bank confirmed receipt of her termination letters; that her termination of the guarantee constituted an "event of default" under the terms of the credit agreement and that the Bank should not have lent money to the Company after the default. She also contends that, though duly demanded, the Bank has failed to provide any documentation to establish that the past due account for which she is allegedly liable is the same account for which she once gave a personal guarantee.

Moreover, she argues that the bank has failed to produce a complete copy of the original line of credit agreement.

In opposition to Wilk's motion for summary judgment and in support of the cross motion for judgment dismissing the complaint, the bank argues that Wilk failed to properly revoke her obligations under the guarantee because she did not provide notice to the address specified in the guarantee; that, pursuant to its terms, the guarantee is absolute, continuing and unconditional; notwithstanding the issue of the revocation of the guarantee, Wilk is obligated, under the terms of the guarantee, for the obligations incurred prior to the time Chase received notice of revocation, including the amount of any undrawn revolving credit line, and that Wilk's "event of default" argument is not a defense to this action because plaintiff waived the right to assert defenses under the guarantee.

D. Discussion

On summary judgment, the moving party "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to do so requires the denial of the motion regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

However, where the opposing affidavits demonstrate that facts necessary to oppose the motion may exist but are unavailable to the opposing party, the court may make such order as may be just (CPLR 3212 [f]). Where the facts on which the motion is based are exclusively within the knowledge and control of the moving party, summary

judgment should not be granted (*Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010]; *Esposito v Metropolitan Transp. Auth.*, 264 AD2d 370, 371 [1st Dept 1999]; *see also Chiambalero v Waldbaum's Supermarket*, 250 AD2d 360 [1st Dept 1998]).

In this case, Wilk has failed to establish her prima facie case that she is entitled to judgment as a matter of law because she is unable to demonstrate that the loan that is in default is not the loan that she guaranteed. The Bank states that loan in default is the loan that Wilk guaranteed and it has produced a printout purporting to show that the loan numbers are different only because the original loan number was "converted" (Saladrigas Aff., Ex. J) However, the circumstances regarding the conversion have not been explained.

Here, the original loan agreement and the information regarding the conversion of the loan are exclusively within the knowledge and control of the Bank and so the grant of summary judgment and/or the dismissal of this action would be premature because "facts essential to justify opposition may exist but cannot be then stated" (CPLR 3212 [f]) . Importantly, the Bank has not submitted an affidavit from an employee with knowledge or submitted to a deposition regarding the circumstances surrounding the "conversion" of the loan number from 0008045523522 to 00450510205927, including, but not limited to, information about when and why the conversion occurred and whether loan number 00450510205927 is a new or modified loan. The Bank printout, included as exhibit J to the Saladrigas affidavit, is insufficient because it fails to provide any detail concerning the timing and circumstances of the loan conversion, i.e.,who changed the account number and when and why it was done. It also fails establish that the debt on the Wolfson 2010 line of credit bears any relation to the line of credit agreement established

in 2003, or whether that 2010 debt is based on a modified or newly guaranteed loan. Because the information regarding the conversion of the loan is in the Bank's exclusive possession and control (CPLR 3212 [f]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 506 [1993]), summary judgment is inappropriate at this juncture.

In addition, Chase has failed to produce a complete copy of the Business Revolving Credit Agreement (Agreement) that Wilk purportedly signed and it has failed to come forward with an explanation for not having a complete, or original copy of that Agreement.

Accordingly, it is

ORDERED that plaintiff Tania Wilk's motion for summary judgment on the complaint is denied; and, it is further

ORDERED that defendant JP Morgan Chase Bank's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on June 30, 2011 at 9:30 am.

DATED: ~~May , 2011~~
June 3, 2011

FILED

JUN 08 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

[* 9]