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**SHORT FORM ORDER**

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

**PRESENT:**
**HON. IRA B. WARSHAWSKY,**
**Justice.**
**TRIAL/IAS PART 7**

SIGNATURE BANK

*Plaintiff,*

INDEX NO.: 016790/2009
MOTION DATE: 4/29/2011
MOTION SEQUENCE: 002

-against-

LARO MAINTENANCE CORPORATION, LARO GOVERNMENT SERVICES, INC., LARO SERVICE SYSTEMS, INC., LARO WINDOW CLEANING CORP., LARO HOLDINGS, INC., ROBERT BERTUGLIA, JR., and PAIGE BERTUGLIA

*Defendants.*

The following papers read on this motion:

Notice of Plaintiff's Motion for Summary Judgment, Salvatore Trifiletti Affidavit, and Exhibits Annexed . . . . . 1
Plaintiff's Memorandum of Law in Support of its Motion . . . . . 2
Robert Bertuglia Affidavit in Opposition and Exhibits Annexed . . . . . 3
Defendants' Memorandum of Law in Opposition . . . . . 4
Salvatore Trifiletti Reply Affidavit and Exhibits Annexed . . . . . 5
Plaintiff's Reply Memorandum of Law . . . . . 6

**PRELIMINARY STATEMENT**

Plaintiff Signature Bank moves for summary judgment against Defendants Robert Bertuglia, Jr. and Paige Bertuglia. The court previously granted Signature Bank's motion for default judgment against non-appearing Defendants Laro Maintenance Corp., Laro Government services, Inc., Laro Service Systems, Inc, Laro Window Cleaning Corp., and Laro Holdings, Inc. by a Decision and Order dated May 24, 2011

## STANDARD

Summary judgment terminates a case before a trial, and it is therefore a drastic remedy that will not be granted if there is any doubt with regard to a genuine issue of material fact, since it is normally the jury's function to determine the facts. (*Sillman v. Twentieth Century-Fox Film Cor.*, 3 NY2d 395 [1957]). When summary judgment is determined on the proof, it is equivalent to a directed verdict: if contrary inferences can reasonably be drawn from the evidence, then genuine issues of material fact preclude summary judgment. (*Gerard v. Inglese*, 11 AD2d 381 [2d Dep't 1960].

It is not the court's function to weigh the credibility of contradictory proof on a motion for summary judgment. (*Ferrante v. American Lung Assoc.*, 90 NY2d 623 [1997]). Thus the evidence will be considered in the light most favorable to the opposing party. (*Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). However, where a party is otherwise entitled to a judgment as a matter of law, an opposing party may not simply manufacture a feigned issue of fact to defeat summary judgment. A material issue of fact "must be genuine, bona fide and substantial to require a trial." (*Leumi financial Corp. v. Richter*, 24 AD2d 855 [1st Dep't 1965] quoting *Richard v. Credit Suisse*, 242 NY 346 [1926]).

If a party has presented a prima facie case of entitlement to summary judgment, because no triable issues of material fact exist, the opposing party is obligated to come forward and bare his proof by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Summary judgment is therefore generally appropriate when any dispute involves only issues of law (*see, e.g., Surrey Strathmore Corp. v. Dollar Sav. Bank of New York*, 36 N.Y.2d 173 [1975], *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 [1974]), when the record objectively establishes that a party cannot support its allegations or has completely established them (*see, e.g., Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986], *Ferluckaj v. Goldman Sacks & Co.*, 12 NY3d 316 [2009]), or when any unresolved fact issue is immaterial or is manufactured

from patently incredible evidence (*see, e.g.,Bank of New York v. 125-127 Allen Street Assoc.*, 59 AD3d 220 [1st Dep't 2009]).

**DISCUSSION**

This action arises from Plaintiff's attempt to collect on a Credit Agreement, embracing a Term Loan, a Revolving Note, and certain Letters of Credit, from defendants Robert Bertuglia, Jr. and Paige Bertuglia as guarantors, since the Borrowers are now defunct corporations. The Amended Verified Complaint alleges sixteen causes of action. As stated above, this court previously granted default judgment against the non-appearing defunct corporate defendants. The First through Tenth Causes of Action were stated against these defendants.

The Eleventh through Sixteenth Causes of Action are stated against the defendants against which this motion is made. The Eleventh and Twelfth Causes of Action assert non-payment by Robert Bertuglia, Jr. in accordance with his obligations under a Guaranty Agreement with the Plaintiff. The Thirteenth Cause of Action is for attorney's fees due from Robert Bertuglia, Jr. under the same Guaranty Agreement. The Fourteenth and Fifteenth Causes of Action allege non-payment by Paige Bertuglia in accordance with obligations under a Guaranty Agreement with the Plaintiff. The Sixteenth Cause of Action seeks attorney's fees under the same Guaranty Agreement.

In order to establish a prima facie case for recovery on a promissory note and guaranty, the plaintiff must prove the existence of the underlying debt and the guaranty at issue and the failure to make payment thereunder. (*Hotel 71 Mezz Lender LLC v. Mitchell*, 63 AD3d 447 [1st Dept. 2009], *E.D.S. Security Sys., Inc. v. Allyn*, 262 AD2d 351 [2d Dept. 1999]). The plaintiff has submitted the Credit Agreement, Term Loan Agreement, Revolving Note Agreement, Letters of Credit, Robert Bertuglia's Guaranty Agreement, and Paige Bertuglia's Guaranty Agreement, and the sworn Affidavit of Salvatore Trifiletti. The plaintiff has not submitted any statement of account or similar documentary evidence of payments made and amounts due and owing. However, the defendants do not dispute at this time any amounts borrowed or presently due and owing. On the other hand, defendants Robert and Paige Bertuglia do strongly contest that there is any default under the Credit Agreement inasmuch as the Plaintiff consented to or even encouraged the corporate defendants' default through an agent of the Plaintiff.

The Plaintiff asserts that the Bertuglia defendants have waived their present argument that Plaintiff Signature Bank orchestrated the alleged default or non-payment under the Credit Agreement, because the Guaranty Agreements contained broad waiver clauses. (*Cf. Millerton Agway Cooperative, Inc. v. Briarcliff Farms, Inc.*, 17 NY2d 57 [1966], *Citibank, N.A. v. Allan R. Plapinger*, 66 NY2d 90 [1985]). Most cases cited by the Plaintiff regarded waiver clauses which did not waive defenses regarding payment (*see, e.g., Quest Commercial, LLC v. Rovner*, 35 AD3d 576 [2d Dept. 2006]), and thus the Bertuglia defendants' present argument regarding Plaintiff's consent or modification to payment terms or Plaintiff's otherwise engaging the alleged default, would arguably not be barred by such clauses. In any case, Plaintiff's argument is not a defense to the Guaranty Agreement itself, much less a counter-claim or set-off. Rather, the Bertuglia defendants contest issues that go to a basic fact question that the Plaintiff must resolve in order to establish a prima facie case, and that is the issue whether there has been a failure to pay in accordance with any payment terms agreed to between the Plaintiff and the Borrowers or Guarantors. (*See JP Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F.Supp.2d 24, 27 [SDNY 2002] [noting that "nothing in the doctrine of *Plapinger* precludes a defense of fraudulent inducement or concealment premised on fraudulent misrepresentations in the Bonds themselves"]).

Indeed, the principal cases cited by the plaintiff rely on *Citibank, NA v. Allan r. Plapinger* (66 NY2d 90 [1985]) which involved only a defense of fraudulent inducement as a direct challenge to the validity of a Guaranty Agreement. That case held that a guarantor who had signed an "unconditional" Guaranty Agreement could not later contend in court that the Guaranty was in fact entered into only on reliance upon some alleged oral representations and thus was not entered into unconditionally as was represented in the Guaranty. In contrast, the Bertuglia defendants' argument here does not in any way now assert that their expressly unconditional promise to guarantee the corporate defendants' obligations was not in fact unconditional or was premised on some oral representations. As already stated, the issues that the Bertuglia defendants raise go to questions regarding whether Plaintiff in fact changed the payment terms or otherwise orchestrated the default in disregard of the memorialized terms in the Credit Agreement.

The Bertuglia defendants' proffer of proof is not insubstantial. They contend that Signature Bank demanded that the corporate defendants employ a financial crisis manager, Stephen O'Donnell. They further contend that Stephen O'Donnell was an agent of Plaintiff Signature Bank, and he proceeded to cut off Robert Bertuglia from his authority to manage the corporate defendants and to demand payment of certain obligations. For example, Robert Bertuglia's sworn Affidavit presents various emails which reveal that Stephen O'Donnell excluded him from various meetings and eventually assumed all authority to conduct financial transfers on behalf of the corporate defendants. Tending to show that Stephen O'Donnell was an agent of Plaintiff Signature Bank, an email from Jonathan R. Zimbalist reveals that "Signature Bank does not want you to attend the meeting tomorrow," and said email forwarded another email by Sal Trifiletti, Manager of Special Assets for Signature Bank addressed to Stephen O'Donnell's email account as well as Jonathn Zimbalist's. These facts are sufficient to raise triable issues of fact regarding Plaintiff Signature Bank's knowledge and encouragement of any impending default under the Credit Agreement and whether there was a modification of terms, precedent breach of contract, or breach of the implied covenant of good faith and fair dealing with respect to Plaintiff's conduct toward the Bertuglia defendants.

Plaintiff's motion for summary judgment as against defendants Robert Bertuglia, Jr. and Paige Bertuglia is denied.

This constitutes the Decision and Order of the court.

DATED: June 21, 2011

J.S.C.