

<b>State Bank of Long Is. v Tee Pee Indus. of Richmond Hill, Inc.</b>
2011 NY Slip Op 31851(U)
June 22, 2011
Supreme Court, Nassau County
Docket Number: 005778/2009
Judge: Ira B. Warshawsky
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SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,  
Justice.

TRIAL/PART 7

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STATE BANK OF LONG ISLAND

Plaintiff,

- against -

INDEX NO.: 005778/2009  
MOTION DATE: 05/18/2011  
MOTION SEQUENCE: 002

TEE PEE INDUSTRIES OF RICHMOND HILL, INC.,  
TEE PEE FENCE & RAILING CORP.,  
SCHAPEN REALTY INC., ESTATE OF THOMAS A.  
PENDERGAST, SR., THOMAS A. PENDERGAST JR.,  
LORRAINE S. PENDERGAST, and  
TIMOTHY PENDERGAST, INDIVIDUALLY,

Defendants.

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Papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed .....	1
Affirmation in Opposition of Desiree Fusco & Affidavit of Thomas A. Pendergast Jr.....	2
Affirmation in Support of John Manfredi, Esq, Affidavit of Stephen Mischo & Exhibit Annexed.....	3

PRELIMINARY STATEMENT

State Bank of Long Island, "plaintiff", seeks summary judgment, pursuant to CPLR §3212, against Tee Pee Industries of Richmond Hill, Inc., Tee Pee Fence & Railing Corp., Schapen Realty Inc., Estate of Thomas A. Pendergast, Sr., Thomas A. Pendergast Jr., Lorraine S. Pendergast, and Timothy Pendergast in his individual capacity, (collectively "defendants") alleging that they have defaulted upon various loans given to them between the dates of March 2, 1999 and March 28, 2008, in amounts ranging between \$19,379.24 to \$100,500. Plaintiff asserts that the loans were

defaulted on, almost in unison, by the defendants between March and May in 2008. Plaintiff gave notice to defendants of the defaults upon occurrence. Defendant responds by interposing six affirmative defenses.

### BACKGROUND

The circumstances surrounding this case are seen all too often in today's economy. The evidence has shown that members of the Pendergast family and their corporate aliases have borrowed and defaulted on over \$300,000 from various loans given to them by plaintiff over a nine year span.

This suit begins with a small business line of credit extended to Tee Pee Fence ("Fence") by plaintiff on March 2, 1999 of \$35,000.00, which was increased to \$100,000.00 in 2004.<sup>1</sup> Thomas Pendergast Sr. ("Thomas"), now deceased and represented by his estate, Lorraine S. Pendergast ("Lorraine"), and Schapen Realty Inc. ("Schapen") all signed on as guarantors.<sup>2</sup> Fence, Thomas, Lorraine, and Schapen failed to remit payments and thus defaulted on their obligations with \$100,500.00 outstanding on or about March 15, 2008. Plaintiff claims \$102,842.01 in damages and additionally seeks accrued interest at fifteen and a quarter percent (15.25%) from the default date and late charges.

On September 9, 2002, three years after extending the first line of credit (March 2, 1999), plaintiff extended a home equity line of credit for \$70,000 to Thomas and Lorraine.<sup>3</sup> They defaulted on April 15<sup>th</sup>, 2008 with \$60,874 outstanding. Subsequent payments reduced this amount and therefore, plaintiff claims \$57,867.32<sup>4</sup> in damages and additionally seeks accrued interest at ten percent (10%) per annum from the default date and late charges.

On February 1, 2006, Plaintiff extended one commercial check line agreement for \$10,000.00<sup>5</sup>, subsequently increased to \$20,000.00, to Tee Pee Industries ("Industries")

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<sup>1</sup> Exh. 11 to motion.

<sup>2</sup> Exh. 12 to motion.

<sup>3</sup> Exh. 14 to motion.

<sup>4</sup> Exh. "A" to Affirmation in Support.

<sup>5</sup> Exh. 7 to motion.

and another for \$15,000<sup>6</sup>, subsequently increased to \$25,000, to Fence. Thomas signed both agreements as guarantor.<sup>7</sup> Fence defaulted on the latter on March 15, 2008 with \$25,000.00 outstanding and Industries defaulted a month later on April 15, 2008 with \$19,379.24 outstanding. Plaintiff claims \$19,379.24 in damages on the agreement with Industries and \$25,969.77 on the agreement with Fence and additionally seeks accrued interest on both agreements at fifteen and a quarter percent (15.25%) per annum from the default date and late charges.

Finally, plaintiff accepted two promissory notes. The first was signed and delivered to plaintiff on January 28, 2008 by Thomas A. Pendergast, Jr. ("Thomas Jr."), Lorraine, and Timothy Pendergast ("Timothy") for \$50,000.00.<sup>8</sup> Exactly two months later, Thomas Jr. and Timothy signed another for \$51,633.37.<sup>9</sup> The signors defaulted on both loans on May 1, 2008. Plaintiff claims \$50,000.00 in damages for the first note against the signors and \$51,633.37 on the second note. Additionally, plaintiff seeks accrued interest of twelve and a quarter percent (12.25%) and fourteen percent (14%), respectively, and late charges.

#### DISCUSSION

To obtain summary judgment, under CPLR §3212(b), it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor.<sup>10</sup> The Court of Appeals has repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.<sup>11</sup>

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<sup>6</sup> Exh. 9 to motion.

<sup>7</sup> Exh. 8 and 10 to motion, respectively.

<sup>8</sup> Exh. 15

<sup>9</sup> Exh. 16

<sup>10</sup> *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].

<sup>11</sup> *Id.*

The evidence will be considered in a light most favorable to the opposing party.<sup>12</sup> The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party.<sup>13</sup> 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.<sup>14</sup>

The Appellate Division, Second Department has recently reiterated the long held rule that for a bank to demonstrate its prima facie entitlement to judgment as a matter of law on its complaint seeking to recover on a loan, and an individual guaranty thereof, it must only establish the existence of the loan and guaranty and the defendants' failure to make payments according to their terms.<sup>15</sup>

Here, the plaintiff has made a prima facie showing by producing a copy of each loan document, whether it was in the form of a credit line agreement or a promissory note, and proof of its guaranty. The plaintiff has also submitted transaction records, affidavits, and an affirmation as evidence showing the defendants' failure to repay and perform its unconditional obligations. Thus, because plaintiff has made a prima facie showing, defendants' only opportunity to defeat a summary judgment ruling is to establish, as stated above, by admissible evidence the existence of a triable issue of fact. In response, the defendants raise six affirmative defenses. The first defense is failure to state a cause of action. Plaintiff cites *Glenesk v. Guidance Realty Corp.*<sup>16</sup> to claim that the defense was improperly plead, however this case is no longer good law and was abrogated by *Butler v Catinella*, which rules that such an affirmative defense may be raised in an answer.<sup>17</sup> Nevertheless, plaintiff's claims do in fact state causes of action and were properly pled with specific relief requested, damages.

Defendants' second affirmative defense claims that the debts have been repaid. Under CPLR 3018 (b), alleged payment of an indebtedness must be set forth as an

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<sup>12</sup> *Weil v. Garfield*, 21 AD.2d 156 [3d Dept. 1964]

<sup>13</sup> *Tortorello v. Carlin*, 260 AD .2d 201 , 206 [1<sup>st</sup> Dept. 2003].

<sup>14</sup> *Zuckerman*, 49 NY2d at 562.

<sup>15</sup> *Signature Bank v Galit Properties, Inc.*, 80 AD3d 689 [2d Dept 2011].

<sup>16</sup> 36 AD2d 852, 853 [2d Dept 1971].

<sup>17</sup> 58 AD3d 145, 151 [2d Dept 2008].

affirmative defense, and the burden is thus on the defendant to plead and prove it.<sup>18</sup> However, CPLR 3212(f) states that should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion... The Court notes that one of the Defendants was deceased when this action was commenced, Thomas, and another of the Defendants, Lorraine, died during the pendency of this litigation. Thomas Jr.'s affidavit asserts that paperwork exists showing payment on the home equity line of credit, reducing the balance to \$25,000, but access to the paperwork is impossible at this time. However, no other claims of repayment were made or are credible as to the other loans. Therefore, Defendants' second affirmative defense claiming that the debts have been repaid is meritorious and warrants an immediate trial, pursuant to CPLR §3212(c), for an assessment of the amount of damages on the *home equity line of credit*. Defendants have not properly supported this defense as to plaintiff's other claims.

The third affirmative defense is moot in lieu of plaintiff amending its motion to replace Thomas Jr.'s liability on the small business line of credit with Thomas, whose signature is present on the guaranty.<sup>19</sup>

The fourth affirmative defense asserts that plaintiff's claims are barred by the statute of frauds. This defense lacks merit. All of the loan agreements were in writing and signed by the parties on the date of issue.

The fifth affirmative defense asserts that plaintiff's claims are barred, disallowed, or otherwise improper pursuant to SCPA Article 18. Affirmative defenses pled as conclusions of law that are not supported by any facts are insufficient and should be stricken.<sup>20</sup> As pled, this affirmative defense must be stricken. This is a broadly asserted conclusion of law. Defendants have not met their burden of establishing the existence of a triable issue of fact.

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<sup>18</sup> *CIT Group/Factoring Mfrs. Hanover, Inc. v Supermarkets Gen. Corp.*, 183 AD2d 454, 455 [1st Dept 1992] (citing *Lion Brewery of New York City v Loughran*, 223 AD 623, 626 [1st Dept 1928]).

<sup>19</sup> Affirmation in Support at page 1.

<sup>20</sup> *Armstrong v. Forgiore*, Index No. 002988-05 [Sup. Ct., Nassau Cty. 2008] citing *Petracca v. Petracca*, 305 A.D. 2d 566 [2 Dept. , 2003]; and *Bentivegna v. Meenan Oil Co.*, 126 A. 2d 506 [2 Dept., 1987].

Finally, the sixth and final affirmative defense challenging the jurisdiction of this Court lacks merit. Defendants entered into and defaulted on loan agreements with a principal place of business at Two Jericho Plaza, Wing C, Jericho NY 11753, in Nassau County. There is no question that Nassau County Court is the proper forum for this dispute.

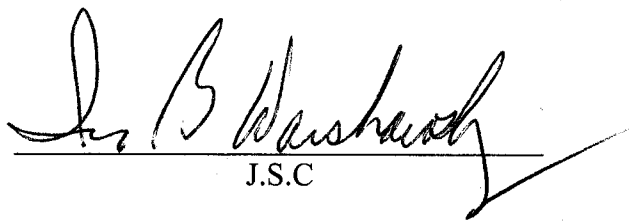
It is hereby ORDERED, pursuant to CPLR §3212 that plaintiff's motion for summary judgment on the first, second, third<sup>21</sup>, fifth, and sixth causes of actions is granted as set forth in the *verified complaint*; and further,

It is hereby ORDERED, pursuant to CPLR §3212(f) that plaintiff's motion for summary judgment on the fourth cause of action is granted as to liability and pursuant to CPLR §3212(c) this Court orders an immediate trial for an assessment of the amount of plaintiff's damages on the *home equity line of credit*. Said matter is referred to Court Attorney/Referee Thomas Dana to hear and report, and on consent of the parties, to hear and determine the amount due on the home equity line of credit. The parties shall contact Mr. Dana (516-571-1476) to arrange for a hearing date.

Plaintiff is directed to file a Note of Issue, within 30 days of the date hereof, for an assessment of damages claimed in the fourth cause of action.

This constitutes the Decision and Order of the Court.

Dated June 22, 2011

  
J.S.C

**ENTERED**  
JUN 28 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

<sup>21</sup> Only as amended in the Affirmation in Support at page 1.