

**State Bank of India v ADA Inflight Catering Corp.**

2011 NY Slip Op 32663(U)

October 11, 2011

Supreme Court, New York County

Docket Number: 103664/10

Judge: Louis B. York

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

PRESENT: \_\_\_\_\_

**LOUIS B. YORK**  
J.S.C.

PART 2

Index Number : 103664/2010  
**STATE BANK OF INDIA**  
VS.  
**ADA INFLIGHT CATERING CORP.**  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

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

**FILED**

Upon the foregoing papers, it is ordered that this motion

OCT 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 10/11/11

*Luy*  
**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

-----x  
STATE BANK OF INDIA,

Plaintiff,

Index No.: 103664/10

-against-

DECISION

ADA INFLIGHT CATERING CORP., RITA  
J. GAGLANI, BHADRA R. SHAH, DARSHAN  
R. SHAH, and KAVITA J. GAGLANI,

**FILED**

**OCT 12 2011**

Defendants.

-----x  
**LOUIS B. YORK, J.:**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Plaintiff moves, pursuant to CPLR 3212, for summary judgment as against ADA Inflight Catering Corp. (ADA), Bhadra R. Shah (Bhadra), Darshan R. Shah (Darshan) and Kavita J. Gaglani (Gaglani) on all causes of action appearing in the first amended complaint, as well as on all of defendants' counterclaims interposed in their answer, in which defendants seek a permanent injunction and a declaratory judgment that they are not obligated to plaintiff.

**BACKGROUND**

Pursuant to a credit agreement entered into between plaintiff and ADA, dated September 10, 2007, plaintiff agreed to extend two loans for a total amount of \$500,000.00. The first loan, in the form of a line of credit, was for the amount of \$200,000.00. In consideration of this extension of credit, ADA

was required to repay the full amount that it drew on the earlier of (1) the date that plaintiff demanded payment, or (2) the termination date of the contract: September 10, 2008. In conjunction with this agreement, ADA executed a demand promissory note on September 10, 2007.

Pursuant to the terms of the demand promissory note, ADA was to pay interest on the unpaid principal the last day of every month, commencing on October 31, 2007, at a rate equal to 1.5% over the prime rate, until the entire balance was paid off. Further, any amount still outstanding on the due date, either by demand or termination of the agreement, would bear an interest rate of 3.5% above the prime rate until totally discharged. During the period of the loan, plaintiff states that the prime rate was 6.5%.

In addition to the foregoing line of credit, under the terms of the agreement, plaintiff also agreed to extend a term loan to ADA in a principal amount not to exceed \$300,000.00. In connection with this loan, ADA executed a term note, dated September 10, 2007. Pursuant to the terms of this loan, ADA was to repay the principal amount of \$300,000.00 in 20 equal quarterly installments of \$15,000.00, commencing on the first day following three months after the first disbursement date. In addition, ADA was to pay interest on the unpaid principal of this loan, commencing on October 1, 2007, at the rate of 1.5% above

the prime rate until the entire loan was repaid. Similar to the credit line terms, any amount of principal or interest remaining unpaid on the due date would bear an interest rate of 3.5% above the prime rate until paid in full.

Each of these two notes provides:

"The undersigned promises to pay all reasonable out-of-pocket costs and expenses (including without limitation reasonable counsel fees and expenses), in connection with the enforcement (whether through negotiations, legal proceedings or otherwise) of this note, whether or not a lawsuit is filed or commenced."

On or about the same date that the agreement and notes were executed, plaintiff alleges that it and ADA also entered into a security agreement, by which terms ADA granted a continuing lien and general security interest in all of ADA's right, title and interest in certain property, including, without limitation, accounts receivable, deposit accounts, inventory and equipment, documents of title and intangible property. It is noted that plaintiff has not provided a copy of this security agreement in its papers. Plaintiff also alleges that a UCC-1 was filed with the New Jersey Department of Treasury to perfect this security interest, but no copy of that financing statement has been provided to the court.

In addition, plaintiff has provided a security agreement entered into between plaintiff and Gaglani and Rita J. Gaglani (Rita), in which Gaglani and Rita grant plaintiff a security interest in their cooperative apartment located in New York City.

Defendants Bhadra, Darshan and Gaglani each signed a separate guaranty agreement, personally guaranteeing ADA's obligations to plaintiff. Pursuant to the terms of the guarantees, each guarantor agreed to be a

"primary obligor, and not merely a surety, the due [sic], punctual and complete payment of performance, whether at stated maturity, by acceleration or otherwise, of the Obligations of [ADA] to the Bank."

Further, the guarantees provide that the guaranty "is a guarantee of payment and performance and not of collection," and that plaintiff is not "required to exhaust any remedies against the Borrower prior to the effectiveness of the Guarantor's obligation to pay the full amount of the Obligations." These guarantees state that they are

"absolute and unconditional, shall not be subject to any counterclaim, setoff, deduction, diminution, abatement, recoupment, suspension, deferment, reduction or defense (other than payment in full of the Obligations or full and strict compliance by the Guarantor with his obligations hereunder) based upon any claim that the Guarantor or any other Person may have against the Bank or any other Person."

Further, the guarantors waive "any right to enforcement, assertion or exercise against [ADA]," and that plaintiff is not required to exhaust any remedies or mitigate damages resulting from any default by ADA.

Paragraph 14 of the guarantees states that the guarantor

"shall be liable to the Bank and shall pay to the Bank immediately on demand as part of its liability under

this Guaranty all costs and expenses of the Bank, including all reasonable fees and disbursement of the Bank's counsel incurred in the collection or enforcement or attempted collection or attempted enforcement of the Bank's rights under this Guaranty Agreement, whether within or apart from any legal action or proceeding."

Plaintiff has submitted a copy of its records reflecting all payments made on the credit line and loan, and asserts that ADA has not paid any principal or interest on either loan since July 9, 2009, nor has any of the guarantors made any payment to it on behalf of ADA. According to plaintiff, the amount of the unpaid balance on the loan is \$195,000.00, and the unpaid balance on the credit line is \$176,060.53.

On or about December 21, 2009, plaintiff's attorneys sent a letter by certified mail, return receipt requested, and by regular mail, to ADA, Bhadra, Darshan, Gaglani and Rita, advising them that they were in default. This letter also informed the recipients that plaintiff was accelerating the debt and demanding full payment. All of the defendants signed and returned the post office receipt cards, acknowledging receipt of the letter. Further, ADA acknowledged the debt in a letter, signed by Darshan on behalf of ADA, to plaintiff's counsel on January 4, 2010.

Plaintiff states that the amount of interest accrued on the loans, as of May 10, 2011, brings the total due to \$445,559.60.

By the time that the initial complaint was served in this action, ADA had filed a Chapter 11 Petition in the Bankruptcy Court, thereby placing an automatic stay on these proceedings.

On February 8, 2011, ADA's bankruptcy action was dismissed by the Bankruptcy Court with prejudice. Marlborough Aff, Ex. E. Thereafter, plaintiff filed its first amended complaint, asserting six causes of action: (1) breach of contract as against ADA; (2) declaratory judgment against ADA; (3) expenses and fees against ADA; (4) breach of the guarantees against each individual defendant, jointly and severally; (5) declaratory judgment against each of the individual defendants, jointly and severally; and (6) expenses and fees against the individual defendants, jointly and severally.

Pursuant to the security agreement executed by Rita and Gaglani, plaintiff has a security interest in their cooperative apartment located at 310 East 49<sup>th</sup> Street, Unit 9F, New York, New York. On September 14, 2010, plaintiff's attorneys sent a letter to all of the defendants enclosing a notice of sale for September 27, 2010 of the cooperative unit. The defendants filed a motion for a temporary restraining order and preliminary injunction to enjoin the sale of the cooperative unit. After oral argument on defendants' motion, the court issued the following decision with respect to Gaglani's argument against the sale:

"Upon the foregoing papers, it is ordered that this motion for a preliminary injunction is denied. The fact of the matter is that the movant acknowledged that the signatures on the Security Agreement and the guarantee were her signatures. If she didn't read what she signed that is no defense and the court determines that another separate—the credit agreement—did not negate the effect of her signatures on those

two documents."

The sale of the cooperative apartment was thereafter rescheduled for November 30, 2010, but the day before, on November 29, 2010, Rita filed a Chapter 13 petition in the Bankruptcy Court. A hearing on plaintiff's motion to lift the automatic stay was to take place in the Bankruptcy Court after the instant motion was filed.

In support of its motion, plaintiff has included excerpts from the deposition testimony of Darshan in which he admits owing the money to the bank, and the excerpts from the deposition testimony of Gaglani, in which she acknowledges her signature on the guaranty.

The only defendant who submitted opposition to the instant motion is Gaglani, who asserts that, in ruling on the preliminary injunction, the court failed to rule on Gaglani's first affirmative defense, that the guaranty was defective because it incorrectly identified her as an officer of ADA, and that the date of the signature on the guaranty is September 10, 2007, even though Gaglani states that she was not present at the signing. According to Gaglani, this raises factual questions which cannot be determined in a motion for summary judgment. Further, Gaglani asserts that she only signed a signature page and never saw the remainder of the document to which that signature page was attached. Among the counterclaims asserted by defendants is an

injunction on the sale of Gaglani's 50% of the shares in the cooperative apartment based on the alleged invalidity of the guaranty and security agreement.

In reply, Varma, plaintiff's chief executive officer, states that the arguments posited by Gaglani are the same arguments that were presented to this court with respect to defendants' motion for a preliminary injunction and that they have already been rejected by the court.

Plaintiff maintains that, when the documents were signed, it was unaware that Rita did not own 100% of the cooperative unit, and only became aware of Gaglani's interest when it received the share certificates for the apartment. Since the security agreement already identified the co-operative as collateral, plaintiff advised Rita that she would have to have Gaglani sign as well, and the agreement was sent to Gaglani in the United Kingdom, where she was at that time. On September 19, 2007, Rita and Gaglani's signatures were witnessed and notarized together in the United Kingdom.

Plaintiff argues that Gaglani's alleged misidentification as an officer of ADA is irrelevant to her obligations under the guaranty and security agreement. Moreover, the guaranty affirmatively states that it is continuing and irrevocable.

The court notes that, at the time of this decision, upon information and belief, there is a stay with respect to Rita and

plaintiff has not sought any relief as against her in this motion. Further, ADA has failed to serve an answer to plaintiff's first amended complaint.

#### DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of plaintiff's motion seeking summary judgment against ADA is granted on default.

That portion of plaintiff's motion seeking summary judgment against Bhadra and Darshan is granted without opposition.

That portion of plaintiffs' motion seeking summary judgment against Gaglani is also granted.

The arguments raised by Gaglani in her opposition were

previously presented to this court and found to be wanting. Hence, Gaglani has failed to provide any valid legal reasoning to persuade the court that plaintiff should not be granted summary judgment against her.

That portion of plaintiff's motion seeking summary judgment dismissing the counterclaims asserted against it by Bhadra, Darshan and Gaglani is granted.

As quoted above, the guaranty specifically waived the guarantors' rights to interpose any defenses or counterclaims and, consequently, such counterclaims are properly dismissed. *Citibank, N.A. v Plapinger*, 66 NY2d 90 (1985); *Bank of Suffolk County v Kite*, 49 NY2d 827 (1980); *Petra CRE CDO 2007-1, Ltd. v 160 Jamaica Owners, LLC*, 73 AD3d 883 (2d Dept 2010); *Chemical Bank v Allen*, 226 AD2d 137 (1<sup>st</sup> Dept 1996).

"All the guarantees ... say that they are absolute and unconditional and that the guarantor waives any defenses that the Borrower might have against the [bank]. Therefore, the guarantor defendants ... should not be allowed to assert [any defenses]."

*627 Acquisition Company, LLC v 627 Greenwich, LLC*, 85 AD3d 645, 647 (1<sup>st</sup> Dept 2011).

Lastly, the complaint asserted as against Rita is severed from this action due to the automatic stay imposed by the bankruptcy proceedings.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted against the following persons and the Clerk is directed to enter judgment in favor of plaintiff and against defendants ADA Inflight Catering Corp., Bhadra R. Shah, Darshan R. Shah and Kavita J. Gaglani, jointly and severally, in the amount of \$445,559.60, together with interest at the rate of 10% per annum from the date of May 10, 2011 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against defendants ADA Inflight Catering Corp., Bhadra R. Shah, Darshan R. Shah and Kavita J. Gaglani, jointly and severally, is referred to a Special Referee to Hear and Decide and ~~issue~~ *a* judgment thereon; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order serve a copy of this order with notice of entry, together with a completed information sheet,<sup>1</sup> upon the Special Referees' Clerk in the Motion Support Office

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<sup>1</sup>Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at [www.nycourts.gov/suptmanh](http://www.nycourts.gov/suptmanh) under the "References" section of the "Courthouse Procedures" link.

(Room 119M), who is directed to place this matter on the calendar of the Special Referees Part for the earliest convenient date; and it is further

ORDERED that the action is severed as to defendant Rita J. Gaglani; and it is further

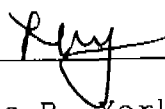
ORDERED that further proceedings in this action are stayed as to defendant Rita J. Gaglani, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of, or vacatur or the stay issued in the bankruptcy proceeding filed by Rita Gaglani, now pending before the United States Bankruptcy Court for the Southern District of New York; and it is further

ORDERED that movant is directed to file a copy of this order with notice of entry with the Trial Support Office (Room 158).

Dated: 12/11/11

ENTER:

  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**

OCT 12 2011