

Millennium BCPBank, N.A. v Direct Trading Corp.
2011 NY Slip Op 33348(U)
August 2, 2011
Supreme Court, Queens County
Docket Number: 13575/10
Judge: Allan B. Weiss
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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

MILLENNIUM BCPBANK, N.A.,

Plaintiff,

-against-

DIRECT TRADING CORP., CONSTANTINOS
NIOULIKOS and ANDRONICOS PETROU
a/k/a ANDRONIKOS PETROU,

Defendants.

HON. ALLAN B. WEISS

Index No: 13575/10

Motion Date: 5/25/11

Motion Cal. No.: 19

Motion Seq. No.: 1

In this action to recover the amounts due and owing under a Business Line of Credit and two term loans given to Direct Trading Corp. and the personal guarantees executed by Constantinos Nioulivos (hereinafter Nioulivos) and Andronicos Petrou a/k/a Andronicos Petrou (hereinafter Petrou), plaintiff moves for an Order substituting BCP Holdings (USA) Inc., as Successor by merger to Millennium BCPBank, N.A. and amending the caption to reflect the substitution, for summary judgment as against the defendant, Andronicos Petrou a/k/a Andronicos Petrou (hereinafter Petrou) and for a default judgment as against the defendants, Direct Trading Corp. (hereinafter Direct Trading) and Constantinos Nioulivos (hereinafter Nioulivos). Defendant, Petrou cross-moves for an Order dismissing the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction.

The defendant's cross-motion is denied. The defendant Perou's defense of lack of personal jurisdiction was deemed

waived by operation of law by failing to move for judgment on this defense within 60 days after service of the amended answer (see CPLR 3211 [e]; Dimond v. Verdon, 5 AD3d 718 [2004]).

In support of its motion plaintiff submitted the affidavit of Anura Unger Vice President of BCP Holdings (USA) Inc. successor by merger to Millenium BCPBank, N.A. and copies of the Loan and Security Agreement and the Revolving Term Note executed Nioulikos, President and by Petrou, Vice President of Direct Trading on July 11, 2006, pursuant to which plaintiff granted Direct Trading a Business Revolving Line of Credit in the amount of \$250,000.00, the individual personal Unlimited Guarantees guaranteeing the indebtedness of Direct Trading executed by Nioulikos and Petrou in their individual capacity; copies of the Extension Agreement and Compliance Agreement executed on June 6, 2007 by Nioulikos and Petrou on behalf of Direct Trading and copies of the individual personal Guarantees executed by Nioulikos and Petrou in their individual capacity; copies of the Loan Agreement, Revolving Term Note and Term Note executed on June 29, 2007 by Nioulikos as President and by Petrou as Vice President and as Secretary of Direct Trading enhancing the Business Line of Credit to \$350,000.00 and granting Direct Trading a Term Loan for \$150,000.00 and copies of the accompanying individual personal Unlimited Guarantees executed by Nioulikos and Petrou in their individual capacity; and copies of the Business Loan Agreement dated November 24, 2008 and executed by Nioulikos as President and by Petrou as Vice President

granting Direct Trading a loan in the amount of \$200,000.00 and copies of the individual Commercial Guarantees executed by Nioulikos and Petrou in their individual capacity guaranteeing repayment of the loan.

The plaintiff established, *prima facie*, its entitlement to a default judgment as against the defendants, Direct Trading and Nioulikos and entitlement to summary judgment as against the defendant, Petrou, as a matter of law by submitting the above enumerated loan documents the notes and personal guarantees and the affidavit of Anura Unger which established the existence of the debt and the defendant's Direct Trading's non-payment in accordance with the terms of the notes and the personal liability of the codefendants, Nioulikos and Petrou thereon.

Initially, the defendant, Petrou, concedes and withdraws his first affirmative defense and counter claim based upon the alleged violation of the Fair Debt Collection Act (15 USC §1692[g]) is inapplicable to this loan inasmuch as it is not a consumer debt as the term is defined in the statute.

In opposition the defendant, Petrou, submitted the affirmation of his attorney and his affidavit asserting that the affidavit of Ms. Unger cannot be considered because it was taken out of state and was not acknowledged in accordance with CPLR 2309(c); that Petrou did not execute the personal guarantees in his individual capacity and never intended to become personally liable for the debts of Direct Trading, and that the lack of notarization or acknowledgment of the signatures on the

guarantees raises issues of fact as to their validity. The defendant's arguments are without merit and insufficient to raise a triable issue of fact.

Insofar as the affidavit of Ms. Unger lacks a Certificate of Conformity, this is a mere irregularity and not a fatal defect (see Smith v. Allstate Ins. Co., 38 AD3d 522 [2007]) which has been provided in plaintiff's reply can be, given *nunc pro tunc* effect (see Matapos Technology Ltd. v. Compania Andina de Comercio Ltda, 68 AD3d 672, 673 [2009]; see also Siegel, Practice Commentaries, McKinney's Cons. Laws. of N.Y., Book 7B, CPLR C2309:3).

The defendant's claim that he did not execute the guarantees in his individual capacity and that he never intended to hold himself personally liable for the obligations of Direct Trading. Contrary to the defendant's claim the written guarantees are clear and unambiguous and speak for themselves (see General Phoenix v. Cabot, 300 NY 87, 92-93 [1949]). The defendant's intentions are irrelevant.

Insofar as defendant claims that there exist issues as to the validity of the guarantees inasmuch his signature is not notarized, this too is without merit. General Obligations Law § 5-701(a)(2) which requires that a personal guarantee be in writing does not require any particular form or content or that a signature be notarized or acknowledged.

The remainder of the defendant's affirmative defenses consisting of conclusions of law without factual averments or

evidentiary support are insufficient to create a triable issue of fact or to constitute defenses suffice to defeat plaintiff's entitlement to summary judgment and are dismissed.

Accordingly, the plaintiff's motion for summary judgment as against the defendant, Andronicos Petrou a/k/a Andronikos Petrou (hereinafter Petrou) is granted. The plaintiff's motion for a default judgment as against the defendants, Direct Trading Corp. and Constantinos Nioulikos is granted without opposition.

The branch of the plaintiff's motion to substitute BCP Holdings (USA) INC., as Successor by merger to Millennium BCPBank, N.A. and amending the caption to reflect the substitution is granted without opposition.

The caption of the action as amended shall be as follows:

BCP Holdings (USA) INC., as successor
by merger to MILLENNIUM BCPBANK, N.A.,

Index No: 13575/10

Plaintiff,

-against-

DIRECT RADING CORP., CONSTANTINOS
NIOULIKOS and ANDRONICOS PETROU
a/k/a ANDRONIKOS PETROU,

Defendants.

Settle Order/Judgment

Dated: August 2, 2011
D# 45

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J. S. C.