

**Bank of America, N.A. v King Quality Siding &
Windows, Inc.**

2012 NY Slip Op 30232(U)

January 12, 2012

Sup Ct, Suffolk County

Docket Number: 27230/10

Judge: Joseph C. Pastoressa

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001-MG
#002-MD

_____ x
BANK OF AMERICA, N.A.,

ATTYS FOR PLAINTIFF(S):
BUCHANAN, INGERSOLL & ROONEY, P.C.
50 FOUNTAIN PLAZA, STE. 1230
BUFFALO, NY 14202

Plaintiff(s),

ATTYS FOR DEFENDANT(S):
SCOTT LOCKWOOD, ESQ.
1476 DEER PARK AVENUE, STE. 3
N. BABYLON, NY 11703

-against-

KING QUALITY SIDING & WINDOWS, INC.,
KING QUALITY CONSTRUCTION, INC., AS
SUCCESSOR-IN-INTEREST OR ALTER EGO
TO KING QUALITY SIDING & WINDOWS, 1615
SYCAMORE AVENUE CORP., JEFF BRETT,
NATALIE BRETT, AND BETH CARTHEW,

Defendant(s),

_____ x

<u>Pages Numbered</u>	
Notice of Motion/Order to Show Cause/	
Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>1, 2, 3, 4</u>
Opposing Affidavits (Affirmations)	_____
Reply Affidavits (Affirmations)	<u>5</u>
Affidavit (Affirmation)	_____
Other Papers	_____

Upon the foregoing papers, the plaintiff moves for an order granting summary judgment against: defendant King Quality Siding & Windows, Inc. [hereinafter "King Siding"] for breach of contract; defendants 1615 Sycamore Avenue Corp., Jeff Brett, Natalie Brett, and Beth Carthew [collectively hereinafter "Guarantors"] for breach of a guarantee; and defendant King Siding for replevin. Additionally, plaintiff seeks summary judgment against King Siding Quality Construction, Inc. [hereinafter "King Construction"] for breach of contract and replevin on the theories that King Siding fraudulently conveyed collateral to King Construction and that King Siding has de facto merged into King Construction; and the defendants cross-move for summary judgment dismissing the plaintiff's complaint and for an order of preclusion and/or striking the pleadings for the alleged failure to provide discovery.

The plaintiff, Bank of America, N.A. [hereinafter "Bank of America"] executed a line of credit with defendant King Siding in the amount of \$100,000 on March 6, 2008. The terms of the agreement, provided the borrower, King Siding, to pay back the outstanding principle amount in addition to interest and other charges by March 6, 2009 ("Expiration Date"). King Siding provided as collateral to Bank of America equipment and fixtures, inventory, and receivables securing the line

OA

of credit. A guarantee agreement dated March 6, 2008, signed by Jeff Brett, Natalie Brett, Beth Carthew, and 1615 Sycamore Avenue Corp. was entered into guaranteeing payment in the event of a default by King Siding under the line of credit agreement. Bank of America sent King Siding a demand letter on December 9, 2009 and a reservation of rights letter dated January 29, 2010 in an effort to accelerate King Siding's obligation to repay. The defendants' answer contained a discovery demand dated August 23, 2010.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (see, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v N.Y.U. Medical Center, 64 NY2d 851). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form, and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v Liberty Bus Co., 79 AD2d 1014). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065).

The plaintiff has established its prima facie case to entitlement to judgment as a matter of law on its first cause of action against defendant King Siding for a breach of the line of credit agreement and against the guarantors for a breach of the guaranty each dated March 6, 2008. To establish a prima facie case, the moving party must "submit proof of the existence of the [agreement], the guaranties, and the failure to make payment in accordance with their terms" (Superior Fid. Assur. v Schwartz, 69 AD3d 924, 925; see also, Signature Bank v Galit Props, Inc., 80 AD3d 689; Northport Car Wash, Inc. v Northport Car Care, LLC, 52 AD3d 794, 859; Verala v Citrus Lake Dev., Inc., 53 AD3d 574). Here, the plaintiff submitted the affidavit of Bank of America officer, Ronald W. Kumiega, which states that the plaintiff and King Siding executed "a Loan Agreement dated March 6, 2008, establishing a \$100,000 line of credit with Bank of America." Furthermore, the Kumiega affidavit states that "[a]s security for King Siding's repayment of all amounts owing under the Loan Agreement, 1615 Sycamore Avenue Corp., Jeff Brett, Natalie Brett, and Beth Carthew each executed and delivered a Continuing and Unconditional Guaranty to Bank of America dated March 6, 2008". The plaintiff submitted a copy of the line of credit agreement showing the signature of Beth Carthew executed as president on behalf of King Siding. Moreover, the plaintiff submitted the continuing and unconditional guaranty showing the signatures of Jeff Brett, Natalie Brett, Beth Carthew, and 1615 Sycamore Avenue Corp. as guarantors. The affidavit of Mr. Kumiega further avers that the expiration date under the line of credit was not extended from the original date under the terms of the loan agreement and that despite due demand, King Siding failed to pay as well as the defendant guarantors.

The plaintiff has established its prima facie case to entitlement to judgment as a matter of law on its second cause of action for replevin against defendant King Siding. "In an action for the recovery of chattels, pursuant to CPLR § 7101, the sole issue is which party has the superior possessory right to the chattels" (Siemens Fin. Serv., Inc. v Premier P.E.T. of Long Island, LLC,

2010 NY Slip Op 30387U, 6-8). Courts have found a superior possessory right in favor of a plaintiff seeking the recovery of chattel when (1) the plaintiff has a perfected security interest in the collateral; (2) defendants are in default of the relevant agreement and guarantee; and (3) the agreement provides that in the event of a default by defendant, that plaintiff may elect the remedy of replevin. *Id.* at 8-9. Here, the plaintiff (1) demonstrated its perfected security interest in the collateral of defendant King Siding by providing the UCC Financing Statement; (2) demonstrated that defendant King Siding has defaulted on its obligation to repay the loan in full by the expiration date; and (3) demonstrated that its security interest in the collateral is related to defendants King Siding's default on the loan agreement.

The defendants in opposition failed to raise a triable issue of fact with respect to the first and second causes of action. Contrary to the defendant Jeff Brett's affidavit in opposition claiming that plaintiff's two monthly invoices for payment under the line of credit sent to defendants subsequent to the plaintiff's December 9, 2009 demand letter and Notice of Default, Acceleration and Reservation of Rights letter dated January 29, 2010 ("the reservation of rights letter") plus partial payments create triable issues of fact, the reservation of rights letter specifically declares defendants in default, accelerating the obligation due, and states that any partial payments accepted will have no affect on the default (see, P.T. Bank Central v Ho Ho Ho Realty, Co., 273 AD2d 212; VMLIC VP, LLC v Mellace, 19 AD3d 684; Southold Sav. Bank v Catino, 118 AD2d 555). Moreover, the plaintiff's inadvertent sending of monthly invoices to the defendants does not cure the defendants default under the line of credit agreement (see, Miller Woods Dev. Corp. v HSBC Bank USA, 300 AD2d 1015). Furthermore, the defendants concede in the Jeff Brett affidavit that a balance remains due and owing on the line of credit agreement and provided the relevant invoices evidencing that a balance was due and owing past the expiration date. The defendants' answer to the plaintiff's allegations in the complaint were mere general denials, which are insufficient to raise any triable issues (see, Dubon v Platt, 23 AD2d 660). The defendant's affirmative defenses consist of conclusory and unsubstantiated allegations which fail to raise a triable issue of fact regarding these two causes of action. Accordingly, the plaintiff's motion for summary judgment on the first cause of action against the defendants King Siding and the guarantors, jointly and severally, together with interest from October 4, 2010 plus costs and disbursements and on the second cause of action for replevin is granted. The portion of the second cause of action for replevin against King Construction is denied for the reasons enumerated below.

The plaintiff failed to establish its prima facie case against King Construction on its third and fourth causes of action for fraudulent conveyance and for successor- in- interest liability and de facto merger liability respectively. Plaintiff's third cause of action seeks an order granting summary judgment against defendant King Construction on the grounds that King Siding fraudulently conveyed collateral to King Construction and the fourth cause of action avers that King Siding has de facto merged into King Construction, therefore, entitling successor-in-interest liability against King Construction.

"By the terms of Debtor and Creditor Law Article 10, a conveyance is deemed fraudulent as to creditors not only where it is made with actual intent 'to hinder, delay or defraud' creditors (Debtor and Creditor Law 276), but also where the fraud is constructive, i.e., the conveyance is made without fair consideration by a person (1) who is insolvent or will thereby be rendered insolvent (Debtor and Creditor Law §273), or (2) against whom an action is pending or a judgment has been docketed for money damages (Debtor and Creditor Law §273-a), or (3) who is engaged in a business for which his capital is unreasonably small (Debtor and Creditor Law §274), or (4) who believes he will incur debts beyond his ability to pay (Debtor and Creditor Law §275)" (Marine Midland Bank v Midland, 120 AD2d 122, 124-125). "The existence of actual intent, as distinguished from intent

presumed in law (see, Debtor and Creditor Law §276), is generally a question of fact which precludes summary judgment” (Framers Prod. Credit Assn. of Middletown v Taub, 121 AD2d 681, 682). Moreover, “the question of what constitutes fair consideration is generally one of fact, to be determined under the circumstances of the particular case” (Framers Prod. Credit Assn. of Middletown v Taub, supra; Fischer v Sadov Realty Corp., 34 AD3d 632, 633). In addition, the general rule is that the purchaser of a corporation’s assets normally does not assume liability of the predecessor (AT&S Transp., LLC v Odyssey Logistics & Tech. Corp., 22 AD3d 750, 753). This doctrine is applicable in breach of contract actions (Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc., 2010 NY Slip Op 8080, 2; see also, Kretzmer v Firesafe Prods. Corp., 24 AD3d at 158; Fitzgerald v Fahnestock & Co., 286 AD2d 573). There are four exceptions to the rule: “1) the purchasing corporation expressly or impliedly assumed the predecessor’s tort liability; 2) there was a consolidation or merger of seller and purchaser; 3) the purchasing corporation was a mere continuation of the selling corporation; or 4) the transaction was entered into fraudulently to escape such obligations” (AT&S Transp. LLC v Odyssey Logistics & Techbology, 22 AD3d at 752). “A corporation may have successor liability if ... there was a consolidation or merger of seller and purchaser” (Jelvakov v AHL Processing Equip. Co., 3 AD3d 519, 520; see also, Schumacher v Richards Shear Co., 59 NY2d 239; Drexler v Highlift, Inc., 277 AD2d 196). Here, the plaintiff has failed to establish a prima facie entitlement to judgment as a matter of law that defendant King Construction purchased assets from defendant King Siding with actual intent to hinder, delay or defraud the plaintiff (see, Debtor and Creditor Law §276) or that the alleged conveyance was without fair consideration and that it was done to avoid a judgment or pending litigation (see, Debtor and Creditor Law §273-a) or done by a person about to engage in a transaction for which the property remaining in his or her hands after the conveyance is unreasonably small (Debtor and Creditor Law §274). Moreover, the plaintiff failed to meet his burden as a matter of law for setting aside the alleged conveyance (Debtor and Creditor Law 278). Plaintiff submits a cursory and unsubstantiated affidavit in support claiming the following: that King Construction’s website no longer makes any reference to King Siding; King Construction operates its business from the same location as King Siding; both corporations are in the same business of selling siding and window products; and the same people operate both corporations. The plaintiff’s admissible evidence failed to tender sufficient evidence to eliminate triable issues of fact such as: whether King Siding transferred its assets to King Construction for less than fair consideration; when such alleged transfer took place; what assets were transferred, if any; who are the principals of both corporations; whether King Siding is still in business; and whether such alleged transfer was done with intent to hinder its creditors. Accordingly, triable issues of fact remain on third and fourth causes of action for fraudulent conveyance and successor in interest and de facto merger liability against defendant King Construction and therefore the plaintiff’s motion for summary judgment on the third and fourth causes of action is denied.

The defendants cross-motion seeking an order dismissing the plaintiff’s complaint and discovery sanctions against plaintiff pursuant to CPLR §3126 is denied.

The defendants failed to show entitlement to judgment as a matter of law dismissing the plaintiff’s complaint. The defendants admissible evidence consisting of a cursory affidavit of Jeff Brett failed to allege let alone show sufficient admissible evidence to eliminate any material issues of fact regarding the plaintiff’s complaint. Accordingly, the defendants motion for summary judgment is denied.

Turning to the defendants portion of their motion seeking an order striking the plaintiff’s complaint or an order of preclusion. The moving party is not entitled to dismissal of the complaint under CPLR §3126 without first moving to compel the discovery sought, and providing affirmation

that the moving party made some good faith basis to resolve the discovery dispute (see, 22 NYCRR 202.7; see also Amaya v Estrada, 2011 NY Slip Op 30074U, 9; Matter of Blauman Spindler v Blauman, 68 AD3d 1105, 1107; Cestaro v Mun Yun Roger Chin, 20 AD3d 500, 501; Diel v Rosenfeld, 12 AD3d 558, 558-59). The defendants, in their answer, requested a number of materials pertaining to the cause of action on the breach of the loan agreement. Certain materials, like the loan agreement itself, have been timely supplied by the plaintiff. However, the defendants, in their answer, also requested a number of additional materials such as title reports, Hud-1 statements, and a mortgage, that seemingly pertained to an unrelated cause of action on real property. The plaintiff, in its affirmation in support of the motion granting summary judgment, pointed out that these materials were irrelevant to the cause of action for breach of the loan agreement. Here, the defendants have made no showing of good faith that an effort was made to resolve the dispute. Even if the defendants had availed themselves of 22 NYCRR 202.7 and CPLR 3124, the general rule is that a court will not strike pleadings under CPLR 3126 unless the offending party willfully and contumaciously failed to comply with orders directing disclosure (see, Castillo v Star Leasing Co., 2011 NY Slip Op. 3198; Moray v City of Yonkers, 76 AD3d 618; Simpson v City of New York, 10 AD3d 601, 602; Diel v Rosenfeld, 12 AD3d 558, 559). In the case at bar, there is no evidence that plaintiffs have willfully or contumaciously failed to comply with defendants' discovery requests. Based on the foregoing, the defendants' portion of their motion for discovery sanctions pursuant to CPRL 3126 is denied.

The plaintiff's third, fourth, and fifth causes of action are severed and continued.

Settle judgment on notice.

This shall constitute the decision and order of the court.



DATED: January 12, 2012

HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION ____ NON-FINAL DISPOSITION X