

Signature Bank v Ressler Mitchell Group, Inc.

2012 NY Slip Op 31832(U)

July 2, 2012

Supreme Court, New York County

Docket Number: 103824/11

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 103824/2011
SIGNATURE BANK
VS.
RESSLER MITCHELL GROUP, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

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

FILED

JUL 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 2, 2012

[Signature]

J.S.C.
HON. JOAN A. MADDEN

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
SIGNATURE BANK,

Plaintiff,

INDEX NO. 103824/11

-against-

RESSLER MITCHELL GROUP, INC. d/b/a RESSLER
MITCHELL GROUP INC. d/b/a THE RESSLER
MITCHELL GROUP, INC., MONIKA RESSLER a/k/a
MONIKA M. RESSLER and PETER RESSLER a/k/a
PETER D. RESSLER a/k/a PETER RESSLER SR.,

FILED

JUL 12 2012

Defendants.

-----X
JOAN A. MADDEN, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

In this action to recover on a business line of credit agreement and two personal guaranties, plaintiff bank moves for an order pursuant to CPLR 3212 granting summary judgment against defendant guarantors Monika Ressler a/k/a Monika M. Ressler (hereinafter "Monika Ressler") and Peter Ressler a/k/a Peter D. Ressler a/k/a Peter Ressler Sr. (hereinafter "Peter Ressler"). Plaintiff also moves for an order pursuant to CPLR 3215 granting a default judgment against defendant borrower Ressler Mitchell Group, Inc. d/b/a Ressler Mitchell Group Inc. d/b/a The Ressler Mitchell Group, Inc. (hereinafter "Ressler Mitchell"), based on said defendant's failure to appear and answer.

Individual defendants Monika Ressler and Peter Ressler oppose the motion.¹ Corporate defendant Ressler Mitchell has defaulted on the motion, and has not sought affirmative relief by

¹While defendants Monika Ressler and Peter Ressler answered pro se and their opposition papers do not include the name of an attorney, a law firm appeared for them at oral argument and the court permitted the submission of an attorney's affirmation in opposition.

cross-moving to vacate its default or to serve a late answer.

“On a motion for summary judgment to enforce a written guaranty, all the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” City of New York v. Clarose Cinema Corp, 256 AD2d 69, 71 (1st Dept 1998); accord Davimos v. Halle, 35 AD3d 270, 272 (1st Dept 2006). Defendant guarantor may defeat the motion by raising a triable issue of material fact with respect to a bona fide defense. See JP Morgan Chase Bank v. Bauer, 92 AD3d 641, 642 (2nd Dept 2012); Wolf v. Citibank, N.A., 34 AD3d 574, 575 (2nd Dept 2006); Bank Leumi Trust Co v. Rattet & Liebman, 182 AD2d 541 (1st Dept 1992); Banesto Banking Corp. v. Teitler, 172 AD2d 469 (1st Dept 1991).

Plaintiff’s motion is granted only to the extent of liability. Based on the affidavit from plaintiff’s Manager of Small Business Loans, Martine Lamarre, and the supporting documents, plaintiff has made a prima facie showing that on April 24, 2007, it entered into a Business Revolving Line of Credit Account Agreement (the “Agreement”) with defendant Ressler Mitchell, giving Ressler Mitchell a \$50,000 line of credit. Plaintiff’s Manager Lamarre states that pursuant to the Agreement, Ressler Mitchell borrowed \$50,000, and subsequently defaulted when it failed to make the payment due on or about February 2011. Lamarre further states that no part of the outstanding principal balance of \$46,936.86 has been paid, as well as “no part of the interest and late fees accrued.”

Lamarre also states that in connection with the Agreement, individual defendants Monika Ressler and Peter Ressler each executed a “Continuing Guaranty (Individual)” dated April 23, 2007. The guaranties provide that the guarantors, Peter Ressler and Monika Ressler, agree to be

“jointly and severally liable” and to “absolutely and unconditionally guarant[y] to Bank [plaintiff Signature Bank] the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, the full and prompt payment and performance by Borrower [Ressler Mitchell Group Inc.] all of Borrower’s Indebtedness.”

Plaintiff submits a copy of the Agreement signed by both Monika Ressler and Peter Ressler in their capacities as officers of the corporate borrower; plaintiff also submits copies of the guaranties signed by Monika Ressler and Peter Ressler, “Individually.” Based on these documents and the affidavit of non-payment, plaintiff is entitled to partial summary judgment as to liability against the defendant guarantors who have answered and appeared in this action, Monika Ressler and Peter Ressler. See Davimos v. Halle, supra; City of New York v. Clarose Cinema Corp, supra. Plaintiff is likewise entitled to a default judgment as to liability against the corporate borrower Mitchell Ressler.

Plaintiff fails to make a sufficient prima facie showing as to the amount of damages to which it is entitled. While plaintiff’s moving and reply affidavits state that the “principal sum of \$46,936.86” is due and owing since February 20, 2011, the documentary proof submitted by plaintiff does not support such amount. On March 3, 2011, plaintiff’s attorney wrote to defendants demanding payment of \$47,084.42 as the “amount of claim.” Likewise, plaintiff’s computer printout which purportedly “outlines” the payments made and the balances owed from August 2010 through January 2011, lists an “ending balance” of \$47,474.87 as of January 31, 2011.² Neither plaintiff’s motion nor reply papers explain the discrepancies between the varying

²The only loan history records submitted by plaintiff are for the period from August 2010 to January 2011, when plaintiff asserts it automatically deducted the loan payments from the corporate defendant’s checking account, as authorized under the Agreement. Plaintiff submitted

amounts, and specifically how it arrived at the lesser amount of \$46,936.86, sought in both the complaint and the instant motion. Plaintiff also seeks interest on the \$46,936.86 amount, calculated from February 20, 2011 through the entry of judgment, at the "Prime Rate of Interest plus 2.00%," plus "additional late fees." Plaintiff's computer printout, however, appears to indicate that interest has already been added each month to the balance owed, so it is unclear whether plaintiff is entitled to additional interest on those sums or late fees.

Turning to the opposition papers, defendants Monika Ressler and Peter Ressler submit a joint affidavit which fails to raise a material issue of fact as to their liability under the guaranties. While defendants object to the sufficiency of plaintiff's motion papers, they do not deny that they executed the Agreement and the guaranties, and simply state in a bare and conclusory fashion that "no default of the promissory note ever existed." Defendants have waived any objections as to "improper service." See CPLR 3211(e); Aretakis v. Tarantino, 300 AD2d 160 (1st Dept 2002). The affidavit of service, however, clearly indicates that the process server made three separate attempts to serve defendants at their residence before affixing the papers to their door. Defendants' allegations that plaintiff made "unauthorized deductions" from the corporate defendant's bank account and an "unauthorized freezing of defendants' account without a court order," conflict with the unambiguous terms of the Agreement which expressly authorize such actions.³ To the extent defendants dispute the amount due and owing, they will have an

those records with its reply papers, which responded to defendants' allegation that plaintiff made "unauthorized deductions" from the corporation's bank account.

³Paragraph 3(e) of the Agreement states as follows: "The Borrower hereby authorizes and directs the Bank to charge any account of the Borrower maintained at any office of the Bank for the amount of the principal, interest or any fees due hereunder when the same becomes due and payable under the terms of this Agreement." Paragraph 8 of the Agreement states that "the

opportunity to raise those issues at the trial on damages.

Based on the foregoing, the court concludes that in view of defendants' uncontroverted default on the Agreement and the guaranties, and in the absence of a triable issue of material fact as to a viable defense, plaintiff is entitled to partial summary judgment as to liability against defendant guarantors Monika Ressler and Peter Ressler, and the issue as to the amount of damages shall be determined at trial. See JP Morgan Chase Bank, N.A. v. Bauer, *supra*; HSBC Bank USA, N.A. v. Laniado, 72 AD3d 645 (2nd Dept 2010); Davimos v. Halle, *supra*; JPMorgan Chase Bank v. Gamut-Mitchell, Inc., 27 AD3d 622 (2nd Dept 2006). Plaintiff is also entitled to a default judgment against defendant borrower Ressler Mitchell, and an inquest and assessment of damages against said defendant shall be held at the time of the trial of this action. Furthermore, since the Agreement and the guaranties contain attorney's fees clauses, plaintiff is entitled to an award of reasonable attorney's fees, the amount of which shall be determined at trial.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants Monika Ressler and Peter Ressler is granted only to the extent of liability, and the issue of damages, including the amount of reasonable attorney's fees, shall be determined at trial; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant Ressler Mitchell is granted only to the extent of liability, and an inquest and assessment of damages

Bank's obligation to make Loans shall immediately terminate, and the Loans, together with any accrued interest shall be immediately due and payable." According to plaintiff, the "practical reality" of this provision "is that the revolving credit line 'freezes' and the defendants were no longer able to take out 'loans,'" so the "account 'freeze' is a direct result of defendants' default."

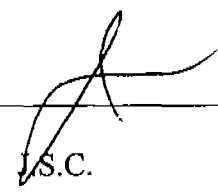
against said defendant, including reasonable attorney's fees, shall be conducted at the time of the trial of this action; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on July 26, 2012 at 9:30 am, Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: July 2, 2012
~~June~~ 2012

ENTER:



J.S.C.

FILED

JUL 12 2012

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