SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X

Michael Steifman and MHS Venture Management Corp.,

Plaintiff(s),

-against-

Aaron Ziegelman and Marjorie Ziegelman,

Defendant(s).

----------X

DCM Part 4

Present :

Hon. John A. Fusco

DECISION AND ORDER

Index # 102376/2011

Motion No. 962-003

The following papers numbered 1 to 4 were marked fully submitted on the 4th day of May, 2012.

Papers

Notice of Motion For Summary Judgment and Dismissal of Affirmative Defenses, by Plaintiffs Michael Steifman and MHS Venture Management Corporation, with Supporting Affidavit and Exhibits (dated March 26, 2012)..... 1

Affidavit in Opposition to Motion For Summary Judgment and Dismissal of Affirmative Defenses by Defendant Aaron Ziegelman, with Exhibits and Memorandum of Law (dated April 25, 2012)..... 2

Affidavit in Opposition to Motion For Summary Judgment and Dismissal of Affirmative Defenses by Defendant Marjorie Ziegelman, with Exhibits and Memorandum of Law (dated April 25, 2012)..... 3

Reply Affirmation by Richard Rosenzweig, Esq. In Support of Motion For Summary Judgment and Dismissal of Affirmative Defenses by Plaintiffs Michael Steifman and MHS Venture Management Corp., with Exhibit (dated May 2, 2012)..... 4

THE MOTION

Plaintiffs Michael Steifman and MHS Venture Management Corp. ("plaintiffs") move for summary judgment on each of the twenty causes of action brought against defendants Aaron Ziegelman and Marjorie Ziegelman for payment on the personal guarantees given to them by said defendants regarding the indebtedness arising out of certain real estate transactions. Plaintiffs also move to (1) strike the affirmative defense and counterclaims of defendant Aaron Ziegelman predicated upon allegations of criminal usury pertaining to one of these transactions, and (2) dismiss the affirmative defenses of defendant Marjorie Ziegelman, who claims *inter alia* that the signatures on the personal guarantees attributed to her are not genuine or were obtained by fraud or duress on the part of her co-defendant.

FACTUAL BACKGROUND

As alleged in the complaint, plaintiff Michael Steifman, the principal of plaintiff MHS Venture Management Corp. has, for many years, been investing or participating in mortgages on real property through defendant Aaron Ziegelman or one of his corporate incarnations. Invariably, plaintiffs' interest in the mortgages would be secured by a lien on the real property itself, as well as the *personal* guarantees of defendants Aaron Ziegelman and his wife, Marjorie Ziegelman . In the present action, plaintiffs are attempting to secure payment of the outstanding balances pertaining to 20 of those transactions from the defendants, the individual guarantors.

CONTENTIONS

Plaintiffs contend that in each of the transactions at issue, defendants provided them with full, unconditional written guarantees of repayment of the money invested by them, and that in

each of the enumerated transactions payment has become due and defendants have failed to honor their guarantees of payment in full. However, as to some of the transactions, partial payment is acknowledged.

Defendant Aaron Ziegelman admits that the guarantees were provided to plaintiffs, but claims that some of the purported "shortfall" is the result of plaintiffs having failed to credit him with all of the payments made. Further, he claims that on one of the transactions, the payment demanded of him constitutes criminal usury.

Defendant Marjorie Ziegelman claims first, as a procedural matter, that plaintiff's affidavit in support of the motion was not validly executed. In addition, she claims that she never willfully executed any of the guarantees; that some of the signatures on the guarantees are not hers, but were placed there by the fraudulent acts of her co-defendant husband; and that the balance were signed under duress exerted upon her by her defendant husband.

In reply, plaintiffs argue that the affidavit in support of the motion was properly executed, that the defendants have failed to make any valid arguments sufficient to relieve them of their obligation under the guarantees, and that any disagreement regarding the sums still owed relative to any guarantee is not a bar to summary judgment on the issue of liability. As to the single transaction identified by defendant Aaron Ziegelman wherein usury is claimed, plaintiffs argue that the money was an "investment" not a "loan" and therefore the usury statute is inapplicable. In any event, they contend that even if the usury statute was applicable, the permissible rate of interest was 25% per annum as the transaction was between corporations, not individuals.

THE FACTS

In the interest of avoiding a wealth of unnecessary detail, it is sufficient to note that in all but the one transaction in which usury has been alleged, plaintiffs agreed to enter into interest bearing participation agreements with defendant Aaron Ziegelman or one of his corporations to contribute varying sums of money toward loans on 19 separate parcels of realty located in New York, New Jersey, Connecticut, Pennsylvania and other states. In each instance, the sums advanced represent differing percentages of the total loan on the several properties, all of which are alleged to have matured. According to plaintiffs, payments were received over a period of time from defendant Aaron Ziegelman referable to certain of the loans in which they had participated, but in no single instance were they repaid the entire sum advanced *with the applicable interest*. According to plaintiffs, no payments were received relative to certain of the participation agreements, partial repayments of principal were made as to others, and in a few instances, plaintiff's entire principal was repaid. Plaintiffs further maintain that they never waived their right to receive interest on any of these transactions..

In response, defendant Aaron Ziegelman argues that plaintiffs accounting is flawed, and that they have improperly failed to credit him for all of the sums remitted. More particularly, with reference to several of the transactions, Aaron Ziegelman avers that plaintiffs were repaid their contribution in a series of periodic payments made between October 2011 and December 2011, the total of which is claimed to be $254,400. In addition, wire transfers and other payments of the entire amounts due were alleged to have been made on specified dates in satisfaction of certain of

the other indebtedness alleged in the complaint[1].

As to the purportedly usurious loan, plaintiffs maintain that they entered into a participation agreement by contributing $200,000 toward a total loan of $220,000 on property located at 759 Wyngate Drive West, Valley Stream, New York, that they subsequently advanced an additional $50,000 to defendant Aaron Ziegelman in November of 2010. All of the monies were supposed to have been repaid by June 10, 2011. The parties agree that defendants made 18 weekly payments of $2500 from December 2010 to March 2011 (for a total of $45,000), but contrary plaintiffs' claim, that each of these payments represented a combination of principal and interest; defendants maintain that they constituted the payment of interest only. By defendant's calculation, this would represent an annual rate of interest of some 52%, which defendants claim is usurious.

DISCUSSION

Summary Judgment

The proponent of a motion for summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law, advancing sufficient evidence to demonstrate the absence of any material issues of fact (see Silverman v. Perlbinder, 307 AD2d 230 [1st Dept 2003]). Thus, the proponent of the motion carries the initial burden of both proof and persuasion as to its right to judgment (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]).

Once that initial burden has been satisfied, however, the "burden of production", shifts to the opposing party, which must lay bare its proofs and adduce sufficient evidence to establish

[1] Recounted separately, the details of these various "participation agreements" would occupy several pages. However, they are set forth, in full, in an "Addendum" hereto.

the existence of a triable issue of fact. However, since the burden of persuasion always remains with the proponent of the motion, "if the evidence on the [presence of an] issue [of fact] is evenly balanced, the [moving] party ... must lose" (Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 US 267, 272 [1994]; cf. 300 E. 34th Street Co. v. Habeeb, 248 AD2d 50 [1st Dept 1997]). Traditionally, therefore, the court's function on a motion for summary judgment has been framed in terms of "issue finding" rather than "issue determination". (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Moreover, since summary judgment constitutes a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1978]). Logically, therefore, where the existence of an issue of fact is arguable or debatable, summary judgment must be denied (Stone v. Goodson, 8 NY2d 8, 12 [1960]; Sillman v. Twentieth Century Fox Film Corp., 3 NY2d at 404).

As a preliminary matter, defendant Marjorie Ziegelman argues that the affidavit submitted by the individual plaintiff was not validly executed and, therefore, is legally insufficient to make out a prima facie case for summary judgment. A review of that document shows that beneath the caption is the phrase "State of Israel", presumably indicating that it was signed there, and that the signature line bears an illegible original ink marking, under which is printed the name of the individual plaintiff and what appears to be a valid New York notary stamp. However, the jurat does not contain the usual phrase "sworn to before me". Instead it is inscribed simply with the words "sworn to" followed by a date, i.e., March 26, 2012. The most logical conclusion to be drawn therefrom is that the document was signed by the individual plaintiff in the State of Israel, and then sent to his attorneys in New York, where the notary stamp

was affixed, but the oath omitted.

CPLR 2309, which governs the use of oaths and affirmations, provides as follows:

> (c) Oaths and affirmations taken without the state. An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

Clearly, the affidavit of the individual plaintiff does not comport with the requirements of CPLR 2309(c). However, under certain circumstances, our courts have overlooked the failure of a party to accompany an out-of-state affidavit with a certificate authenticating the authority of the notary who took the oath (see Smith v. Allstate Ins. Co. 38 AD3d 522 [2d Dept 2007]; see also CPLR 2001), while the failure of an affidavit to contain a statement that it was sworn to before a notary public does not automatically preclude its consideration by a court (see e.g., Sparaco v. Sparaco, 309 AD2d 1029 [3d Dept 2003][lack of an authenticating certificate and recitation that the out-of-state affidavit was sworn to "before" a notary deemed excusable in the absence of prejudice]). A like result is warranted in this case.

In determining that the affidavit of the individual plaintiff may be considered on this motion, the Court notes that defendant Aaron Ziegelman does not contest the existence of the personal guarantees upon which plaintiffs have sued, and that other of the objections tendered by co-defendant Marjorie Ziegelman do not directly relate to any of the claims made by plaintiffs. Rather, her claims are directed solely to the conduct of her co-defendant husband. Therefore, no prejudice to either defendant has been shown. On the other hand, denying the motion predicated solely on the aforesaid technical defects would only result in the delay necessary to secure a properly executed affidavit from the individual plaintiff (see e.g. Nandy v.

Albany Med Ctr Hosp, 155 AD2d 833, 833 [3d Dept 1989][" Ideally, both pages of an out-of-State affidavit should be accompanied by a certificate authenticating the authority of the one who administered the oath. Rejecting the document, however, would only result in further delay because it can be given nunc pro tunc effect once properly acknowledged"]. Accordingly, this Court will not exalt form over substance, and will consider the affidavit submitted in support of the motion.

The Guarantees

General Obligations Law § 5-701 provides, in pertinent part, that :

> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> . . .
>
> 2. Is a special promise to answer for the debt, default or miscarriage of another person;

Hence, in order to be enforceable, "[a] special promise to answer for the debt, default or miscarriage of another person must be in writing, and subscribed by the party to be charged " (Schwartz v. Sayah ,72 AD3d 790, 791 [2d Dept 2010]; see, New York Produce Trade Assn, Inc. v. Mazzilli 49 AD2d 729 [1st Dept 1975]). Here, each of the guarantees is in writing and, except as to co-defendant Marjorie Ziegelman, its execution has not been questioned.

It is well settled that where, as here, a guarantee is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement (Manufacturers & Traders Trust Co. v Weiss, 169 AD2d 632, 633 [1st Dept 1991]; State Bank of India, New York

Branch v Patel, 167 AD2d 242, 243 [1st Dept 1990]). Likewise, a party who signs a written contract is presumed to know its contents, assent to its provisions and, absent a showing of fraud, duress or some other wrongful act on the other party to the contract, is conclusively bound by its terms. (Barclays Bank v. Sokol, 128 AD2d 492, 493 [2d Dept 1987]; Renee Knitwear Corp. v. ADT Sec Sys Northeast, 277 AD2d 215, 216 [2d Dept 2000]). As a result, it has been held that, in order to create a genuine issue of fact on any of these issues, a defendant is required to offer more than his or her own conclusory and unsubstantiated statement of irregularity (see State Bank of India, NY Branch v. Patel, 167 AD2d at 243; accord Nat.Westminster Bank USA v. Sardi's Inc. 174 AD2d 470 [1st Dept 1991]).

Also worthy of note is the principle that a guarantor is not relieved of his or her obligations where the written guarantee allows for changes in the terms of the guarantee and expressly waives notice to the guarantor of these changes (White Rose Food v Saleh, 292 AD2d 377, 378 [2d Dept 2002], affd. 99 NY2d 589; Bank of N.Y. v CMS Funding, 201 AD2d 602, 603 [2d Dept 1994]; Manufacturers & Traders Trust Co. v Thielman, 92 AD2d 742, 743 [4th Dept 1983]; see, Boulevard Mall, L.L.C. v. Knight, 300 AD2d 1017, 1019 [4th Dept 2002]).

At bar, with reference to 19 of the 20 transactions at issue, defendant Aaron Ziegelman does not dispute the execution of the personal guarantees in question, and limits his arguments to whether or not he has been properly credited with all of the payments that he claims were made to plaintiffs. Hence, he has effectively conceded liability. As a result, plaintiffs are entitled to partial summary judgment against him on each of these 19 causes of action.[2]

---

[2] As regards the 20th transaction, i.e., that involving the property located at 759 Wyngate Drive West, Valley Stream, New York, defendant Aaron Ziegelman also conceded execution but

As for the co-defendant Marjorie Ziegelman, she claims that an unspecified number of the signatures attributed to her are not genuine, and were affixed to the guarantees without her knowledge or consent. She further maintains that all her other (that is, genuine) signatures were procured through acts of fraud and/or duress perpetrated by her co-defendant husband. Thus, without even differentiating the genuine from the ersatz signatures, Marjorie Ziegelman would have this Court conclude that her conclusory, self-serving, and otherwise unsupported statements are insufficient to rebut plaintiffs prima facie showing of their right to judgment notwithstanding their submission of signed and notarized copies of the unequivocal guarantees signed with her name, and thereby raise a triable issue. The court finds her argument unconvincing. Hence, plaintiffs are entitled to partial summary judgment against Marjorie Ziegelman on the same 19 causes of action indicated above.

Finally, as to the purportedly usurious loan, plaintiffs allege that in consideration of their having advanced the sum of $200,000 toward a mortgage loan of $220,000 encumbering 759 Wyngate Drive West in Valley Stream, New York, defendants executed an agreement dated October 27, 2010, which unconditionally guaranteed repayment of their advance by June 10, 2011. However, they claim they thereafter advanced defendant Aaron Ziegelman an additional $50,000 "to be used for costs associated with other transactions". [3] In response, defendant Aaron Ziegelman does not dispute the terms of the guarantee, but claims that the obligation at issue was

---

claims in his first affirmative defense and both counterclaims that plaintiffs had engaged in usury. That issue will be dealt with separately.

[3] In his affidavit in support of the motion, plaintiff makes reference to this additional funding as part of the cause of action relating to 759 Wyngate Dr. However, the document he cites in support of this argument (Plaintiffs' Exhibit O attached to the complaint) does not refer to those premises, but rather to 87-18 126th Street, Queens, New York.

a "short term loan of $250,000", effectively disputing plaintiffs' recitation of a combination of an initial loan with a later advance. Nevertheless, both agree that weekly payments in the amount of $2500 were made to plaintiffs between December, 2010 and March, 2011, but while plaintiffs allege that each of these payments constituted a combination of both principal and interest; defendant Aaron Ziegelman maintains that these payments were of interest only, and has therefore calculated the annual rate of interest at 52%, thereby rendering this loan usurious. As a result of the parties disagreement regarding the particulars of this (or these) loan (or loans), triable issues of fact clearly exist which preclude summary judgment.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability on each of their causes of action except for cause of action number 19 in the complaint which is referable to the property located at 759 Wyngate Drive West, Valley Stream, New York, which is denied; and it is further

ORDERED, that upon the filing of the appropriate papers and the payment of any required fees, the causes of action on which judgment has been granted will be set down for trial on the issue of damages; and it is further

ORDERED that the remaining cause of action shall continue; and it is further

ORDERED that the Clerk enter judgment in accordance herewith; and it is further

ORDERED, that the parties appear before this court for a certification conference on the remaining cause of action on the 12th of September, 2012 in DCM Part 4 at 9:30 a.m.

E N T E R

Dated:July 27, 2012

_____

Hon. John A. Fusco, J.S.C.

[* 12]