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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

VALLEY NATIONAL BANK, as successor to THE PARK AVENUE BANK

- v -

STEPHEN L. GURIBA, et al

INDEX NO. 102457/10

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, M1 moving papers
Answering Affidavits — Exhibits	2, M2 opp
Replying Affidavits	3 replay

Cross-Motion: ☐ Yes ☒ No

Plaintiff's motion is granted to the extent set forth in the accompanying decision/order dated 8-7-12.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
reassignment to a new IAS Part
8-7-12
Marcy Friedman

FILED
AUG 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-7-12

Marcy S. Friedman
MARCY S. FRIEDMAN, 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

x

VALLEY NATIONAL BANK, as successor to THE PARK AVENUE BANK,

Plaintiff,

- against -

STEPHEN L. GURBA and EVELYN R. GURBA, and BULOVA TECHNOLOGIES GROUP, INC.,

Defendant(s).

x

Index No.: 102457/10

DECISION/ORDER

This is an action to recover on a loan of $1.5 million made by Park Avenue Bank to defendants Stephen Gurba and Evelyn Gurba. Defendant Bulova Technologies Group, Inc. (Bulova), by its CEO Stephen Gurba, gave Park Avenue Bank a security interest in various Bulova assets in connection with the loan. Park Avenue Bank's successor, Valley National Bank (Valley National), moves to amend the caption and for summary judgment as to liability.

As a threshold matter, defendants acknowledge that Valley National acquired the assets of Park Avenue Bank, including the subject loan, pursuant to a Purchase and Assumption Agreement between Valley National Bank and the Federal Deposit Insurance Corporation as receiver of the failed Park Avenue Bank. (Transcript of Feb. 9, 2012 Oral Argument of Motion at 3.) Section 3.1 of this Agreement supports defendants' acknowledgment of Valley National's acquisition of the loan. The branch of Valley National's motion for substitution as plaintiff, although misdenominated a motion to amend the caption, will therefore be granted.

As to the merits, Valley National makes a prima facie showing, based on the affidavit of Voula Petridis, a Vice President, that the Gurba defendants defaulted under the promissory note, executed on June 11, 2009, by failing to make the monthly payment due on October 1, 2009, and that Park Avenue Bank subsequently accelerated the principal due under the note.

Defendants assert numerous defenses which the court finds to be without merit. First, the court rejects defendants' apparent contention that Park Avenue Bank improperly rejected a payment by Bulova of arrears due under the note, based on its allegedly improper objections to a resolution (Ex. K to Opp.) of Bulova's Board of Directors authorizing Bulova to make the payment. Defendants have failed to meet their burden on this defense, as they have alleged in wholly conclusory fashion that the resolution was adequate and have not addressed any of its asserted deficiencies including, for example, failure to apportion the payment between the subject loan and a different loan (the USSEC loan) to Bulova or a related entity. To the extent that defendants claim that Park Avenue Bank unreasonably demanded that the resolution include a waiver of any liability of the Bank to Bulova and related entities (S. Gurba Dep. at 72 [Ex. B to Opp.]), they cite no authority that the Bank was legally barred, after the default on the loan had occurred, from negotiating the terms of reinstatement.

Defendants further contend that the loan was modified, as they received only approximately $800,000 rather than $1.5 million, because Park Avenue Bank demanded that they apply the proceeds of the loan to various items, including an overdraft of Bulova at the Bank. (S. Gurba Dep. at 50.) Plaintiff argues that the loan was not modified, that the entire $1.5 million was advanced to defendants at the closing, and that Mr. Gurba signed a "disbursement direction" (Ex. D to Opp.), providing for application of the proceeds to defendants' other debts to Park

Avenue Bank. (See P.'s Reply Aff., ¶ 41.) Mr. Gurba gave testimony that on the day of the closing, Park Avenue Bank's Matt Salmon "made note that basically the difference between a million and a half dollars and 806,000 needed to go to – towards clearing up overdrafts of Bulova at the bank as well as fees, as well as payments to our payroll service, who was also a client of Park Avenue Bank." (S. Gurba Dep. at 50.) Mr. Gurba did not assert that the obligations to which the loan proceeds were applied were not due, or that the Gurbas did not receive any personal benefit from this application of the proceeds. Nor do defendants point to any provision in any of the loan documents that the $1.5 million loan was made for other purposes than those to which the proceeds were applied. On the contrary, Park Avenue Bank's Loan Presentation, dated June 8, 2009 (Ex. F to Opp.), which was approved by its Chief Lending Officer and Executive Vice President, Edward Beyer, and its CEO and President, Charles Antonucci, states in the section entitled "Purpose": "To be used for working capital needs of a business investment (Bulova Technologies Combat Systems)." It also expressly contemplates, however, that the proceeds will be used to pay negative balances of a Bulova entity. The section entitled "Account Maintenance" thus states: "BTG [Bulova Technologies Group] has opened four DDAs with negative balances of $1.1MM, already guarantied [sic] by Mr. Gurba. It is noted that $900M will be transferred into the account as a partial clean up until additional receivable from the US Government is expected to be deposited in the coming weeks." Moreover, the promissory note expressly provides that "[n]o modification, release, or waiver of this Note shall be deemed to be made by the Bank unless in writing signed by the Bank. . . ." (Promissory Note, ¶ 31.) Defendants have not produced any evidence of a written modification. The court accordingly holds that defendants fail to raise a triable issue of fact as to whether the loan was modified.

Defendants further claim that they were fraudulently induced to personally enter into the loan by the misrepresentation of Park Avenue Bank that the loan would be a temporary bridge until the Bank could extend a $6.5 million line of credit to Bulova. They also claim that Park Avenue Bank could not have extended a line of credit in this amount because as of June 10, 2009, the day before the loan closed, federal regulators had reduced its credit authority.

In order to prevail on a claim of fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996]; Perrotti v Becker, Glynn, Melamed & ;Muffly, 82 AD3d 495, 498 [1st Dept 2011].)

Mr. Gurba testified that Charles Antonucci committed to a 9 million dollar line of credit for Bulova (subsequently reduced to $6.5 million dollars), subject to the Bank's "need[] to finalize due diligence." (S. Gurba Dep. at 33; Ds.' Memo. of Law in Opp. at 5.) There is also evidence that the Bank knew, prior to the closing of the loan, that federal regulators had reduced its credit authority, and that a line of credit could not be extended in anywhere near the amount sought by defendants. (See Park Avenue Bank emails, dated June 10, '09 [confirming that credit authority on unsecured line of credit had been reduced to $500,000] [Ex E. to Opp.]; Petridis Dep. at 91-92 [confirming reduction in mid-June to $1 million dollars of credit authority on secured line of credit].) Further, the record includes evidence that supports defendants' claim that the parties intended that the personal loan to the Gurbas would be replaced with a line of credit to Bulova. The "Purpose" section of Park Avenue Bank's June 8, 2009 Loan Presentation states, as

discussed above, that the loan will be used for working capital of a Bulova entity. It then continues: "It is noted that this facility will be replaced with a line of credit to the investment company secured by real property and all assets of the company upon completion of due diligence."

Defendant Stephen Gurba did not dispute that the extension of the line of credit was conditioned on completion of due diligence. He also acknowledged that "it was taking quite a bit of time to get [the loan] done with due diligence and things that had to be done, and they [Park Avenue Bank] were allowing us . . . to write checks, and they were covering the checks." (S. Gurba Dep. at 22.) He testified that Park Avenue Bank's CEO, Charlie Antonucci, and Matt Salmon, a senior loan officer, "came to us and said, look, it's taking longer to get this due diligence complete, because we took some TARP funds, and we have the Feds studying our books, and we can't release this 9 million dollar loan to Bulova yet, but we have to clean up the overdrafts in the account, and so you guys take the loans personally, because we can do that." (Id. at 31.) Mr. Gurba further claimed that Antonucci and Salmon represented: "We can give you guys personal loans of a million and a half dollars, and then we'll take those loans out when we finalize the 9 million dollar loan." (Id. at 31-32.)

Defendants present persuasive evidence that Park Avenue Bank misrepresented its ability and intent to extend the requested line of credit to a Bulova entity. However, as a sophisticated business person, Mr. Gurba cannot establish that he reasonably relied, in entering into the personal loan, on an agreement to extend a line of credit that was conditioned on further due diligence and that was to be made by a Bank that he was aware was under investigation by federal regulators. (See generally Coutts Bank (Switzerland) Ltd. v Anatian, 261 AD2d 307 [1st

Dept 1999]; Glenfed Fin. Corp., Commercial Fin. Division v Aeronautics & Astronautics Servs., Inc., 181 AD2d 575 [1st Dept 1992], lv dismissed 80 NY2d 893; Perrotti, 82 AD3d at 498 [noting plaintiff's status as "sophisticated investor," in assessing reasonableness of his reliance on defendants' representations].)

In view of this holding, the court does not reach the issues of whether defendants' fraudulent inducement claim is barred by the doctrine articulated in D'Oench, Duhme & Co. v Federal Dep. Ins. Corp. (315 US 447 [1942]) and whether defendants' claim falls within an exception to the doctrine. The court notes parenthetically that the memoranda of law on this motion inadequately address the complex and extensive body of law which exists on the continuing viability of the D'Oench doctrine and on whether, and under what circumstances, it applies to banks that acquire the assets of a failed bank from the FDIC.[1]

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fn 1 The D'Oench decision held that a "secret agreement" that a note to a bank will not enforced may not be asserted as a defense to an action by the FDIC to enforce the note, where the FDIC acquires the assets of the bank. (315 US at 460-461.) The doctrine was developed to facilitate a federal policy "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." (See id. at 457.) The D'Oench doctrine was codified in 12 USC § 1823(e), as amended by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which provides, in pertinent part: "1) No agreement which tends to diminish or defeat the interest of the Corporation [the FDIC] in any asset acquired by it under this section . . . , either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation" unless such agreement meets the writing requirements set forth in the statute.

In view of the Supreme Court's subsequent decision in O'Melveny & Myers v Federal Dep. Ins. Corp. (512 US 79 [1994]), a sharp split has developed among the Circuits as to whether the D'Oench doctrine is preempted by FIRREA. (Compare e.g. Murphy v Federal Dep. Ins. Corp., 208 F3d 959, 967-969 [11th Cir 2000], cert granted sub nom. Murphy v Beck 530 US 1306, cert dismissed sub nom. Murphy v Beck, 531 US 1107 [2001] [finding no preemption, the court reasoning that in O'Melveny, the FDIC had requested that the Court create a new federal common law rule, but that in enacting FIRREA, Congress intended not to displace the D'Oench doctrine but rather to continue the 40 year co-existence of the statute and the doctrine] with DiVall Insured Income Fund Ltd. Partnership v Boatmen's First Natl. Bank of Kansas City, 69 F3d 1398, 1402 [8th Cir 1996] [finding preemption, the court reasoning, based on O'Melveny, that FIRREA established a comprehensive regulatory framework that courts may not supplement with a federal common law rule, and that state law applies to matters left unaddressed by the statute].) A substantial body of authority also exists as to whether, and in what circumstances, banks that acquire the assets of a failed bank from the FDIC are entitled to invoke the D'Oench doctrine or to rely

The court has considered defendants' remaining defenses as to liability and finds them to be without merit.

Defendants also argue that Park Avenue Bank and later Valley National failed to mitigate their damages in that they did nothing to sell the 4 million shares of stock that were pledged as collateral for the Gurbas' loan. Defendants argue that a holder of collateral is obligated to dispose of it in a commercially reasonable manner. (Ds.' Memo. of Law in Opp. at 20.) Plaintiff argues that the Gurba's Pledge Agreement, section 9, permits but does not require the Bank to dispose of the collateral. It further argues that UCC §§ 9-610 (a) and (b) permit the secured party, after default, to dispose of the collateral and require the disposition to be commercially reasonable, but do not specify the time within which the secured party must dispose of the collateral. (P.'s Reply, ¶¶ 17-21.) The court does not reach this issue on this inadequately briefed motion. Nor need the court do so, as plaintiff seeks summary judgment only as to liability, and the mitigation claim affects not the Gurba defendants' liability but only the amount of damages plaintiff may collect. (Bank of China v Chan, 937 F2d 780, 787 [2d Cir 1991] [applying New York law].) The mitigation issue may therefore be addressed at the damages trial.

It is accordingly hereby ORDERED that plaintiff's motion is granted to the following extent:

(1) Valley National Bank is substituted as plaintiff in place and stead of the Park Avenue Bank, and the caption shall be amended accordingly. Plaintiff shall serve a copy of this order, with notice of entry, on the Clerk of the Court and the Clerk of the Trial Support Office (Room

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on various procedural provisions of FIRREA. (See e.g. Aurora Loan Servs. LLC v Sadek, 809 F Supp 2d 235, 242 [SD NY 2011]; Caires v JP Morgan Chase Bank, 745 F Supp 2d 40 [D Conn 2010].) The parties' memoranda do not discuss the courts' reasoning in these cases and many others.

158), who are directed to amend their records to reflect the change in the caption herein; and

(2) Plaintiff Valley National Bank is awarded partial summary judgment as to liability against defendants Stephen Gurba and Evelyn Gurba; and an assessment of damages is directed. A copy of this order with notice of entry shall be served by movant upon the Clerk of the Trial Support Office who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the aforesaid assessment.

This constitutes the decision and order of the court.

Dated: New York, New York
August 7, 2012

MARCY FRIEDMAN, J.S.C.