HSBC Bank USA v Chun
2012 NY Slip Op 33400(U)
March 26, 2012
Sup Ct, New York County
Docket Number: 651521/2010E
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL G. FEINMAN PART 12
Justice

HSBC BANK USA, NATIONAL

- v -

CHUN, ROCKFORD

INDEX NO. 651521/10E

MOTION DATE

MOTION SEQ. NO. 001

The papers considered on this motion (☐ and cross motion) are enumerated in the attached decision/order.

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this motion (☒ and cross motion) are decided in accordance with the annexed decision and order.

Dated: 3/26/2012

J.S.C.

1. Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED (MOTION) ☒ GRANTED IN PART (CROSS MOTION) ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER/JUDGMENT ☐ SUBMIT ORDER/JUDGMENT
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT
☐ REFERENCE
☐ PC/CC

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
----------X
HSBC BANK USA, NATIONAL ASSOCIATION,
Plaintiff,

Index No. 651521/2010E
Mot. Seq. No. 001

- against -

DECISION and ORDER

ROCKFORD CHUN,
Defendant.
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Appearances:

For the Plaintiff:
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Papers considered in review of this motion:	**E-Filing Document Numbers**
Notice of motion, memorandum of law, Chun affidavit, Gleason affirmation and annexed exhibits A - B	7 - 7-3
Notice of cross motion, Reel affirmation, Feeley affidavit and annexed exhibits A - E	11
Gleason affirmation in opposition to cross motion and annexed exhibits A - C, and memorandum of law in opposition to cross motion	9 - 9-2
Reel reply affirmation in further support of cross motion	10
Rosenthal supplemental affirmation and annexed exhibit	12
Chun supplement affidavit in opposition	13

PAUL G. FEINMAN, J.:

Defendant, Rockford Chun, moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (7) and (10). Plaintiff, HSBC Bank USA, National Association, opposes and cross-moves for summary judgment in its favor and dismissing defendant's cross claims. For the reasons provided below, the motion is denied and the cross motion is granted in part, and denied in part.

Background

This is an action by plaintiff to recover the balance due under a credit agreement that it allegedly entered into with non-party "Kang & Chun CPAs," a partnership made up of non-party Seok W. Kang and Chun, and guaranteed by Kang and Chun in their individual capacities. The

credit application appears to be signed by both Kang and Chun, as the sole partners of Kang & Chun CPAs, and as guarantors (Doc. 7-2, ex. A, Business Credit Application ["BCA"]). By letter dated February 21, 2005, addressed to Kang at Kang & Chun CPAs, plaintiff accepted the credit application and extended a Business Revolving Line of Credit in the amount of $100,000.00 (Doc. 7-2, ex. A, Feb. 21, 2005 letter). Thereafter, checks were drawn on the account in the full amount authorized by the February 21 letter.

The complaint, dated August 27, 2010, asserts two causes of action. The first, sounding in breach of contract, alleges "...the parties entered into a credit agreement under the terms of which defendant(s) were authorized to, and did, issue checks drawn upon plaintiff, and were obligated to reimburse plaintiff for the amounts thereof together with applicable interest" (Doc. 11, ex. A, Compl. at ¶ 3). It further alleges "[u]pon information and belief, defendant(s) defaulted in making the payments due therein and presently owe a balance of $102,541.34, together with an attorney's fee of $.00, [sic] ... less principal payments of $10,000.00, making a total of $92,541.34" (*id.* at ¶ 4). The second cause of action is for an account stated, claiming that "plaintiff rendered to defendant(s) monthly, full, just and true accounts of the indebtedness due and owing by defendant(s) as a result of the aforesaid transaction, which is the sum set forth above, and said statements were delivered to, received, accepted and retained by defendants(s) without objection ..." (*id.* at ¶ 5).

Defendant's answer and counterclaim, dated November 19, 2010, contained general denials of each allegation made in the complaint (Doc. 11, ex. A, Answer). The answer contains fourteen "affirmative defenses," many of which appear to have no possible application to the causes of action at issue. Defendant also asserts a counterclaim alleging that plaintiff's

commencement of this action was "frivolous" under 22 NYCRR 130-1.1. The counterclaim alleges, among other things, that plaintiff knew, or should have known, that defendant did not own or control, directly or indirectly, any account with plaintiff, and that plaintiff "carelessly and negligently" commenced this action without first investigating whether defendant himself had opened the account, purportedly in violation of plaintiff's obligations under federal law relating to "Suspicious Activity Reports," ("SARs") and Anti-Money Laundering ("AML") (*id.* at ¶¶ 25-33). Based on these allegations, defendant seeks damages an amount no less that $150,000.00, attorney's fees, and the costs and disbursements of this action.

Analysis

1. Defendant's Motion to Dismiss

In the context of a CPLR 3211 motion to dismiss, the pleadings are "to be afforded a liberal construction" and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal under CPLR 3211 (a) (1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88). In assessing a motion under CPLR 3211 (a) (7), the court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*id.*; citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). Thus, even where the complaint and supporting affidavit is inartfully drafted, the "criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*id.*; citing *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

Here, defendant argues that the complaint must be dismissed because plaintiff "failed to perform the diligence required by applicable [federal] law to "know its customer" thereby permitting Seok Woo Kang to sign an alleged credit agreement ... that states the business name of the applicant was 'Kang & Chun CPAs,' and not Chun" (Doc. 7-3, Defendant's memo. of law at 2). Next, defendant claims that plaintiff's failure to join Kang as a defendant in this action requires its dismissal pursuant to the authority granted by CPLR 1003. Finally, it contends that dismissal is required under CPLR 3211 (a) (1), (7) and (10), "because documents, together with the affidavit of Chun, show Chun did not execute the [Business Credit Agreement] or any other loan document with HSBC and did not issue checks drawn on HSBC" (*id.* at 2-3).

On the first point, plaintiff argues that the federal statutes cited by defendant does not impose a duty on plaintiff to file a SAR every time a partnership applies for and receives a credit extension, and even if plaintiff were required to file a SAR when the subject credit application was filed, "it is unable to disclose this information to the Court now to defend itself and seek payment from one of the partners of this transaction," and therefore "this is not an issue in this case" (Doc. 11, Reel affirm. at ¶ 7). On the second issue, plaintiff argues that it is not required to join Kang because this "would be in violation of federal law," as it claims that Kang filed a voluntary petition for bankruptcy in his individual capacity (*id.* at ¶ 5; Doc. 11, ex. E, Voluntary petition). It also contends that defendant, as a partner in Kang & Chun CPAs, has access to its records (Doc. 11, Reel affirm. at ¶ 5). Finally, plaintiff claims that whether defendant's signature was forged is not relevant, because under New York's Partnership Law § 26, Kang and defendant are jointly liable (*id.* at ¶ 6).

Dismissal is not warranted under CPLR 3211 (a) (10) for failure to include a "necessary

party," because both Kang and defendant agreed that their execution of the business credit agreement would "have the same legal effect as if he/she had executed the agreement ...," and "each person signing" the agreement "personally guarantie[d] all of the indebtedness incurred ..." (Doc. 11, ex. B, Business Credit Application at 3). Thus, joinder of Kang is not necessary because complete relief may be accorded between plaintiff and defendant (*see* CPLR 1001 [a]).

Defendant also is not entitled to dismissal under CPLR 3211 (a) (1). Defendant's "documentary evidence" consists only of his affidavit in which he claims that he did not sign the credit application and knew nothing about it until this action. This affidavit, which does nothing more than assert the inaccuracy of plaintiff's allegations and documentary evidence, "may not be considered in the context of a motion to dismiss for the purpose of determining whether there is evidentiary support for the complaint, and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 243 [1st Dept 2007]; citing *Rovello*, 40 NY2d at 633; *Leon*, 84 NY2d at 88).

Finally, dismissal is not warranted until CPLR 3211 (a) (7) for failure to state an actionable claim. The complaint, taken together with the business credit application, plaintiff's February 21, 2005 acceptance letter, and monthly billing statements, sufficiently state a cause of action against defendant for breach of contract, both as a partner of Kang & Chun CPAs, and as an individual guarantor. In this context, the court must presume the plaintiff's allegations to be true. Defendant cites no authority for dismissing an action as a matter of law based on a bank's alleged failure to comply with federal Anti-Money Laundering requirements. Accordingly, defendant's motion to dismiss is denied in its entirety.

2. Plaintiff's Cross Motion to Dismiss Counterclaims and for Summary Judgment

A movant seeking summary judgment has the initial burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant has made such a showing, the burden shifts to the opposing party who, to defeat the motion, must demonstrate the existence of a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, if the movant fails to meet its initial burden, the motion will be denied regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

As mentioned above, defendant's counterclaim alleges that plaintiff's commencement of this action is frivolous within the meaning of 22 NYCRR 130-1.1 because it knew, or should have known, that defendant did not own or control any account with plaintiff. The underlying premise for this counterclaim is that plaintiff, in extending the business line of credit at issue in this action, failed to comply with its obligations under the Annunzio-Wylie Act and related United States Treasury Department regulations which require financial institutions to verify the identity of individuals who open accounts. In essence, defendant is alleging that plaintiff negligently extended a line of credit to Kang & Chun CPAs by failing to comply with federal law and plaintiff's own implementing policies. However, the rules referenced by the defendant cannot form the basis for a negligence claim against plaintiff (*see Silverman Partners, LP v First Bank*, 687 F Supp 2d 269, 282 [ED NY 2010]).

Defendant argues that even though the line of credit application appears to be signed by defendant and Kang, as partners of Kang & Chun CPAs and as individual guarantors, plaintiff has the burden proving the existence of a written partnership agreement between himself and

Chun. He further claims that plaintiff cannot meet that burden because no such written agreement exists (Doc. 9, Gleason affirm. at ¶ 10). However, a written agreement is not a prerequisite to partnership. Furthermore, the Business Certificate for Partners, submitted by plaintiff in connection with this motion, shows that Kang and defendant did register a partnership under the name, "Kang & Chun," which operated out of the same business address listed on the business credit application and account statements (Doc. 12, Certificate). Because this certificate was only produced at oral argument, defendant was given leave to respond in a supplemental submission. Defendant's supplemental affidavit admits that he entered into a partnership in 1997 with Kang, as shown in the certificate, for the limited purpose of establishing a real estate management business (Doc. 13, Chun supp. affid. at ¶ 4). He further avers that the certificate identified the business as "Kang and Chun" to "distinguish and separate 'Kang and Chun' from the certified public accounting company [they] operated under the name of 'Kang & Chun, CPAs'" (*id.* at ¶ 5). However, he claims that "Kang and Chun proved unprofitable and after two years Kang and [defendant] ceased to manage properties through Kang and Chun," but they "never entered into a partnership for the purposes of conducting an accounting business ...[and he] did not intend, by signing the [c]ertificate, to indicate that Kang and Chun, CPAs was a partnership ..." (*id.* at ¶ 7). Finally, defendant expresses his belief that Kang had forged his signature in 2005 when he applied for the business line of credit with plaintiff (*id.* at ¶ 10).

Plaintiff has demonstrated its prima facie entitlement to summary judgment as a matter of law by submitting the business credit application, which appears on its face to have been executed by defendant as a "partner" in "Kang & Chun CPAs" and as a guarantor of all indebtedness incurred under any business line of credit made available pursuant to the business

credit application. In addition, plaintiff has submitted a letter showing that the business credit application was accepted, and account statements showing that as of June 14, 2009, the outstanding balance owed under the business revolving line of credit was $101,714.59. Furthermore, plaintiff's prima facie case is also supported by the "Business Certificate for Partners," which shows that a partnership with the name "Kang & Chun," with the same address that is found on the business credit application and account statements, was formed by at least December 31, 1997.

The burden thus shifts to defendant to raise a triable issue of fact precluding summary judgment. Although defendant claims that his signature must have been forged by Kang, "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Peyton v State of Newburgh*, 14 AD3d 51, 54 [1st Dept 2004]; quoting *Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). Because there is an absence of factual allegations supporting defendant's claim of forgery, and defendant has not demonstrated that his pre-litigation conduct was consistent with a denial of genuineness, defendant's affidavit alone is insufficient to raise an issue of fact necessitating a trial (*see Banco Popular N. Am.*, 1 NY3d at 384). Furthermore, defendant's affidavit fails to raise an issue of fact as to the existence of a partnership known as "Kang & Chun CPAs." Defendant admits that he has operated a certified public accounting company under the name "Kang & Chun, CPAs," even though he claims that it was not a partnership. He further concedes that he registered a partnership under the name, "Kang and Chun," but claims that he ceased managing properties through "Kang and Chun" after two years. None of these assertions are supported by any evidence.

Accordingly, plaintiff's motion to dismiss plaintiff's counterclaim and for summary judgment against defendant is granted solely on the issue of liability. An issue of fact remains as to the precise amount outstanding under the business revolving line of credit. Plaintiff has submitted an affidavit of its "Vice President," Kevin Feeley, who claims there was a balance due of $95,579.94 as of June 19, 2009, but plaintiff has received two additional payments since then totaling $10,000.00, reducing the balance to $85,579.94. However, not only does plaintiff not submit any records showing such payments, it gives no indication as to when the payments were made. The timing of these payments will affect the amount of interest due.

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied in its entirety; and it is further

ORDERED that plaintiff's motion to dismiss defendant's counterclaim is granted and plaintiff's motion for summary judgment is granted with regard to liability on the breach of contract cause of action; and it is further

ORDERED that an immediate trial of the issues of fact related to damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial on a Wednesday afternoon in May 2012.

This constitutes the decision and order of the court.

Dated: March 26, 2012
New York, New York

Paul G. Feinman
J.S.C.