

Solco Plumbing Supply, Inc. v Hart
2012 NY Slip Op 33787(U)
September 28, 2012
Supreme Court, Nassau County
Docket Number: 4788/12
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 17**
SOLCO PLUMBING SUPPLY, INC.,

Plaintiff(s),

-against-

**INDEX # 4788/12
Motion Seq. 1, 2
Motion Date 6.13.12
Submit Date 8.1.12**

GARY HART,

XXX

Defendant(s).

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1, 3
Answering Affidavit	2, 4
Reply Affidavit.....	4,5

Defendant, Gary Hart, moves pursuant to CPLR §§3211(a)(1) and (7), for an order dismissing the plaintiff's complaint (Sequence #001).

Plaintiff, Solco Plumbing Supply, Inc. [hereinafter Solco], cross moves for an order granting summary judgment on the complaint (Sequence #002).

On September 11, 1996, the defendant, Gary Hart, signed a "Credit Application and Agreement" [hereinafter the Agreement] in his capacity as Vice President of Gotham Plumbing

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& Sprinkler Corp.[hereinafter Gotham] (*see* Kreppein Affirmation in Support at ¶5; *see also* Exhs. A,B). Pursuant to the terms thereof, defendant Hart, together with Thomas Gilligan, personally guaranteed Gotham's indebtedness to Solco in relation to plumbing supplies the latter provided to the former (*Id.* at Exhs. A, B).¹ The terms of this Agreement provided the following:

“To induce [Solco] to sell and/or continue to sell and deliver goods on credit to [Gotham], and in consideration thereof, the undersigned, being financially interested in [Gotham], hereby, jointly and severally, unconditionally, guarantee payment when due of all indebtedness of [Gotham] including any amount currently due to Solco as such indebtedness may exist from time to time together with interest and/or finance charges.

This guarantee shall be effective and binding despite any terms or conditions of payment or extensions thereof which may be granted by Solco to [Gotham], notice of which is waived by the undersigned. Notice of default of payment by [Gotham], is likewise waived by the undersigned. Should Solco seek to enforce this guarantee, the undersigned, jointly and severally, agree to reimburse Solco for any expenses, of collection, including reasonable counsel fees, costs and disbursements.”

Several years later on December 21, 2005, Hart executed an Agreement of Sale [hereinafter the Sales Agreement], whereby he transferred his 49% interest in Gotham to Gilligan, in exchange for which Gilligan assumed all of the corporation's debt (*id.* at Exh. D; *see also* Hart Affidavit at ¶3). This Sales Agreement also memorialized Gilligan's assumption of “100% ownership of the shares and assets of the business known as Gotham” (*id.*).

On or about April 16, 2012, Solco commenced the underlying action alleging that between August 18, 2009 and September 10, 2010, it provided plumbing materials and

¹ The Court notes that at the time the guarantee was executed, Thomas Gilligan was the President of Gotham. Since that time, Mr. Gilligan has declared bankruptcy (*see* Kreppein Affirmation in Support at Exhs. B,C; *see also* Kreppein Reply and Affirmation in Opposition at ¶7).

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accessories to Gotham for which there remains an outstanding balance of \$188,348.35 (*see* Kreppin Affirmation in Support at Exh. A at ¶¶8,9,10). Solco demands payment for this unpaid balance directly from defendant Hart based upon the personal guarantee executed thereby in 1996 (*id.*). The applications respectively interposed by the parties thereafter ensued and are determined as set forth hereinafter.

In support of defendant Hart's dismissal application, counsel argues the personal guarantee which Solco seeks to enforce is void as a matter of law for failing to recite the material terms relevant to the financial obligation being guaranteed (*id.* at ¶¶2,13,14,15,19,22). Counsel additionally argues that as the defendant sold his interest in Gotham in 2005, he is no longer an individual "financially interested" therein and any obligations which arose under the Agreement automatically terminated at that time (*id.* at ¶23).

The defendant's application is opposed by Solco, which also cross moves for an order granting summary judgment on the complaint. In opposing the application, counsel for Solco argues, *inter alia*, that given the absence of documentary evidence establishing defendant Hart revoked his personal guarantee, he remains financially obligated in accordance therewith (*id.* at ¶¶29,49,50). Counsel further posits that as defendant Hart failed to notify Solco of his departure from Gotham, his obligations under the Agreement were never extinguished (*id.* at ¶¶32,36,37,56). Finally counsel asserts that the phrase "being financially interested" in Gotham is merely descriptive language identifying Hart's relationship thereto and was not intended to limit the defendant's financial liability to Solco (*id.* at ¶¶45,46,48).

As an initial matter, and with particular respect to Solco's cross motion for summary judgment, the Court notes that "[a] motion for summary judgment may not be made before issue

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is joined and the requirement is strictly adhered to” (*Gaskin V Harris*, 2012 WL 3971280 [2d Dept 2012] quoting *City of Rochester v Chiarella*, 65 NY2d 92 [1985] at 101 [internal citations omitted]). Here, as an answer has yet to be served, this court cannot grant such relief (*Id.*).

With respect to the application interposed by defendant Hart, as noted above, said defendant moves for dismissal of Solco’s complaint in accordance with CPLR §§3211(a)(1) and (7). CPLR §3211(a)(1) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence.” An application predicated upon this section of law will be granted only upon a showing that the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010] quoting *Fortis Financial Services, LLC. v Fimat Futures USA*, 290 AD2d 383 [1st Dept 2002]). As to that which constitutes a document within the purview of the statute, “documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’” (*Fontanetta v Doe, supra* at 84-85).

Alternatively, on an application interposed pursuant to CPLR §3211(a)(7), the complaint is to be liberally construed and the plaintiff afforded every favorable inference which may be drawn therefrom (*Leon v Martinez*, 84 NY2d 83 [1994]). The facts as alleged are to be accepted as true, although bare legal conclusions, in addition to factual assertions which are squarely contradicted by the record, are not entitled to any such consideration (*Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]; *Mayer v Sanders*, 264 AD2d 827 [2d Dept 1999]). In entertaining

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such an application, the function of the motion court is only to determine whether the facts, as alleged, fall within a cognizable legal theory (*id.*).

As articulated in the complaint, Solco specifically seeks to recover the outstanding balance for plumbing supplies sold and delivered to Gotham between August 18, 2009 and September 10, 2010, in connection to which defendant Hart purportedly guaranteed payment. In order to sustain such a cause of action, Solco must demonstrate that it sold and delivered goods to the defendant during the period in issue, that these goods were accepted by the defendant, but for which he withheld payment (*Boise Cascade Office Products Corp. v Gilman & Ciocia, Inc.*, 30 AD3d 454 [2d Dept 2006]). In the instant matter, the aforementioned Sales Agreement, the authenticity of which is not in dispute, clearly establishes that after December 21, 2005, defendant Hart no longer had any interest in Gotham. Thus, the goods for which Solco demands payment, could neither have been sold nor delivered to defendant Hart (*id.*; *Doria v Masucci, supra*; *Mayer v Sanders, supra*; CPLR §§3211[a][1],[7]).

Additionally, with respect to the guarantee, while plaintiff's counsel posits that the phrase "being financially interested" was inserted solely with the intent of identifying Hart's relationship to Gotham, the Court of Appeals has held that "[a] guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99NY2d 589 [2003] at 591). The Court further held that "[a] guarantor's obligation cannot be altered without its consent; if the original note is modified without its consent, a guarantor is relieved of its obligation" (*Id.*). In the matter *sub judice*, the defendant executed the subject Agreement 16 years ago while Vice President of Gotham. Here, in seeking to hold Hart liable for debt incurred solely by Gotham several years after Hart relinquished all proprietary interest therein, Solco is attempting to modify the terms of the

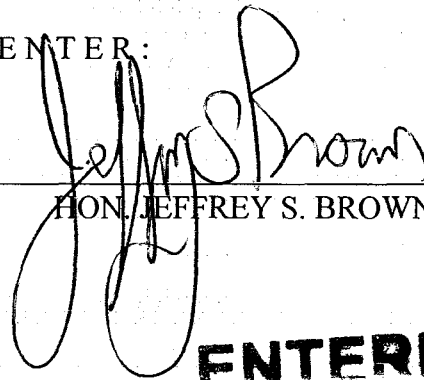
Agreement in the absence of Hart's consent (*id.*). Such a modification is impermissible and in contravention of controlling appellate authority (*id.*).

Based upon the foregoing, the application interposed by defendant, Gary Hart, for an order dismissing the plaintiff's complaint pursuant to CPLR §§3211(a)(1) and (7), is hereby **GRANTED** (Sequence #001) and the cross motion interposed by the plaintiff, for an order granting summary judgment on the complaint, is hereby **DENIED** (Sequence #002).

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 28, 2012

ENTER:



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ENTERED
OCT 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE