

Banco Popular N. Am. v A & A Brass Co. LLC

2012 NY Slip Op 33972(U)

July 13, 2012

Supreme Court, Queens County

Docket Number: 218/11

Judge: Allan B. Weiss

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

BANCO POPULAR NORTH AMERICA,

Plaintiff,

-against-

A AND A BRASS CO. LLC and
ALANA JACK, as guarantor,

Defendants.

Index No: 218/11

Motion Date: 7/11/12

Motion Cal. No.: 2

Motion Seq. No.: 1

The following papers numbered 1 to 5 read on this motion by plaintiff for summary judgment as against the defendant, A AND A BRASS CO. LLC.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 5
Answering Affidavits-Exhibits.....	
Replying Affidavits.....	

Upon the foregoing papers it is ordered that this motion is denied.

This is an action to recover \$73,971.34 the amounts allegedly due on a Small Business Line of Credit Account and/or Business Loan Agreement given to A And A Brass Co., LLC and personally guaranteed by co-defendant, ALANA JACK. Plaintiff now moves for summary judgment.

As the movant, the plaintiff bears the initial burden of establishing, prima facie, entitlement to judgment as a matter of law, offering sufficient evidence, in admissible form, to demonstrate the absence of any material issues of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The plaintiff has failed to establish, prima facie its entitlement to summary judgment either on its cause of action for breach of contract or an account stated.

In support of its motion, plaintiff submitted the affidavit of John Waldorf, the plaintiff's Loan Workout Officer, a copy of the Small Business Line of Credit Agreement, Commercial Security Agreement, Commercial Guarantee and Business Loan Agreement all executed by co-defendant, Alana Jack as Manager of the defendant/borrower, A And A Brass Co., LLC on November 30, 2007. While these documents may be sufficient to demonstrate the creation of a Line of Credit Account, the plaintiff failed to submit any documentary evidence to establish the amounts advanced to the corporate defendant on the line of credit, the payments it made, accounts presented to the defendant which it retained without objection. The only evidence plaintiff submitted were copies of the Loan agreement, Guarantee and Security Agreement executed by the co-defendant, as the alleged Manager of the corporate defendant. An essential element of a claim for an account stated is that the account be presented to the defendant and accepted by it (see Gurney, Becker & Bourne v. Benderson Dev. Co., 47 NY2d 995 [1979] citing Waldman v. Englishtown Sportswear, Ltd., 92 AD2d 833 [1983]). In the absence of any documentary evidence demonstrating that defendant made use of the line of credit, which was expressly denied in its answer, or an explanation as to how the total amount of debt was calculated, conclusory allegations by a person who lacks personal knowledge of the facts based upon documents which were not submitted to the court as to, among other things, the amount due are insufficient to sustain plaintiff's burden of proof (see HSBC Bank USA v. IPO, LLC, 290 AD2d 246 [2002]; see also RBS Citizens, N.A. v. Dynamic Biz, Inc., 80 AD3d 868 [2011]; Wamco XVII Ltd. v. Chestnut Estates Development Corp., 251 AD2d 888 [1998]).

Dated: July 13, 2012
D# 47

.....
J.S.C.