

**Signature Bank v Ramapo Lighting & Elec. Supplies,
Inc.**

2013 NY Slip Op 31358(U)

June 24, 2013

Supreme Court, New York County

Docket Number: 650101/2011

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: J.S.C.
Justice

PART 3

Index Number : 650101/2011
SIGNATURE BANK,
vs.
RAMAPO LIGHTING & ELECTRIC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 650101/2011
MOTION DATE 4/2/13
MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

| | |
|--|-----------------|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). <u>1</u> |
| Answering Affidavits — Exhibits _____ | No(s). <u>2</u> |
| Replying Affidavits _____ | No(s). <u>3</u> |

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6-24-13

Eileen Branstetter
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X

SIGNATURE BANK,

Plaintiff,

-against-

Index No. 650101/11
Motion Seq. No. 003
Motion Date: 4/2/13

RAMAPO LIGHTING & ELECTRIC SUPPLIES,
INC., ABRAHAM SCHWARTZ and HERSHEL
FISHER,

Defendants.

-----X

EILEEN BRANSTEN, J.:

Plaintiff Signature Bank (“Signature” or the “Bank”) moves, pursuant to CPLR 3212, for summary judgment on its Amended Complaint, to dismiss all affirmative defenses and counterclaims, and to refer the action to a referee to determine the amount of reasonable costs and attorneys’ fees due to Plaintiff. Defendants oppose the motion on various grounds. For the reasons that follow, Plaintiff’s motion is granted.

I. Background

This action was commenced by Signature to recover amounts due under a promissory note executed by Defendant Ramapo Lighting & Electric Supplies, Inc. (“Ramapo Lighting”), the repayment of which was personally guaranteed by co-Defendants Abraham Schwartz (“Schwartz”) and Hershel Fisher (“Fisher”). Ramapo

Lighting is a business that was owned by Fisher, and was later sold to Schwartz, who is Fisher's uncle.

Fisher initially executed a continuing guaranty on February 26, 2007, in which he unconditionally guaranteed payment when due of any indebtedness of Ramapo Lighting to the Bank. (Affidavit of Anthony Daperis ("Daperis Aff."), Ex. I.) At that time, Fisher was the 100% owner of Ramapo Lighting. Ramapo Lighting executed notes and renewal notes in favor of the Bank on February 22, 2007, May 2, 2007, May 20, 2008, October 9, 2008, June 8, 2009, June 24, 2010 and October 7, 2010.

Plaintiff's first claim seeks to recovery amounts due under the note and related loan agreement dated October 7, 2010. Both Fisher and Schwartz signed guaranties in conjunction with the October 7, 2010 note and loan agreement. Ramapo Lighting failed to pay the monthly installment that became due on December 1, 2010, and has failed to pay any subsequent installments. Signature declared the entire unpaid principal amount of the note, plus all accrued interest, to be immediately due and payable. Thus, in addition to its first claim seeking recovery from Ramapo Lighting, the Bank, through the third claim of the Amended Complaint, seeks to recover the amounts due under the guaranties executed by Fisher and Schwartz.

Ramapo Lighting also maintained a checking account with Signature. The Bank paid checks issued by Ramapo Lighting, at the latter's request, which resulted in the

account being overdrawn in the amount of \$24,678.77, as of January 28, 2011. (Daperis Aff., Ex. G.) The account has remained overdrawn since that time. *Id.* Through its second claim, the Bank seeks repayment of that amount, with interest at the rate of 9% from January 28, 2011.

In count four of the Amended Complaint, Signature seeks recovery of reasonable costs and attorneys' fees incurred in connection with collecting on the note and guaranties, as provided in the agreements.

A. *Ramapo and Schwartz's Arguments*

Ramapo Lighting and Schwartz are represented by the same counsel, and submitted a joint answer and counterclaims. The counterclaims are based on the fact that a November 2009 extension of the line of credit agreement was executed by Fisher, even though at that time Fisher was not an officer or employee of Ramapo Lighting, and Schwartz had allegedly purchased all shares in Ramapo Lighting from Fisher. Schwartz contends that at the time he purchased the shares from Fisher, he had no knowledge of the outstanding obligations, and would not have purchased the shares from Fisher had he known. (Daperis Aff., Ex. B ¶¶ 4-8.) The Bank submits documents which show that notes had been executed and renewed in favor of the Bank, by its principal and officer, Fisher, on February 22, 2007, May 2, 2007, May 20, 2008, October 9, 2008, June 8, 2009,

and June 24, 2010, prior to the most recent one that is the predicate for the first cause of action. *Id.*, Ex. J.

Signature maintains that there was no November 2009 extension of the note. Even if there had been, the Bank is relying on the superceding October 7, 2010 note which was executed by Schwartz as the new president of Ramapo Lighting. In any event, the Bank submits a corporate resolution of Ramapo Lighting, signed on October 14, 2009, which identified Fisher as president, secretary and 100% shareholder of Ramapo Lighting. *Id.*, Ex. K at 2.

The Bank also points to documents to support its allegation that, when the June 8, 2009 note and loan agreement had matured, and the Bank prepared a renewal note and loan agreement, Fisher emailed the Bank requesting the Bank to remove his name from the loan documents and replace it with Schwartz's, as the new president of Ramapo Lighting. The Bank's representative who was in charge of this account, Anthony Daperis, responded saying that Fisher was still the president and responsible for the loan, insofar as the Bank was concerned, nor did the ownership change, from the Bank's perspective, since the Bank was not informed of any change, and such sale of the company would be in violation of the terms of the existing loan agreement. The documents later submitted to the Bank showed that Fisher started to transfer his shares in Ramapo Lighting to Schwartz on June 10, 2009, and the sale was not completed until

March 1, 2010. (Daperis Aff., Ex. N.) Signature points out that no new funds were advanced to Ramapo Lighting since that time.

With respect to the October 7, 2010 note and loan agreement, Schwartz contends that he was coerced or fraudulently induced into signing the agreements because the Bank denied him access to Ramapo Lighting's bank accounts unless he would sign the documents. Schwartz claims that he did not read the documents prior to executing them because the Bank said that if he did not sign, he would not have access to the company accounts. Schwartz retracted that claim (Daperis Aff., Ex. U ¶ 27 n.2), but his attorney stated that the Bank said that it would permit Fisher to have continued access to the accounts if Schwartz did not sign the documents, and that he would amend the answer to reflect the correction. To date, there has been no such correction.

In opposition to this motion, Schwartz asserts that the Bank failed to take the necessary steps to secure the corporate bank account from Fisher, allowing Fisher full access after Schwartz became the sole shareholder. He alleges that Fisher used this access to transfer thousands of dollars from Ramapo Lighting to various entities, without authorization. Schwartz maintains that the Bank continued to allow Fisher access despite knowing about the corporate changes, going back to October 2009. Schwartz contends that the Bank wrongfully permitted Fisher to sign a promissory note on behalf of Ramapo Lighting on June 25, 2010, and referred to Fisher as president even though the Bank knew

that Fisher was not the president and had no authority to bind Ramapo Lighting. In response, the Bank points to a corporate resolution that appointed Fisher as president of Ramapo Lighting for a term of one week so that he could execute the June 24, 2010 renewal note on behalf of Ramapo Lighting. (Daperis Aff., Ex. M.) Schwartz also maintains that the signature on the October 12, 2010 guaranty is his, but is forged. (Affidavit of Abraham Schwartz (“Schwartz Aff.”) ¶ 29.) He then states that on October 13, 2010, he went to the Bank and was presented with a line letter agreement allegedly signed by Fisher as guarantor. He then signed it allegedly in reliance on his having a co-guarantor. However, he states that he later found out that Fisher’s signature was forged. He asserts that he did not visit the Bank on consecutive days, and was there only on October 13, 2010, and did not sign the guaranty dated October 12, 2010.

Schwartz maintains that had it not been for the Bank allowing Fisher authorization to access Ramapo Lighting’s accounts, Ramapo Lighting could have made the payments requested and avoided default.

B. *Fisher’s Arguments*

Fisher raises various affirmative defenses in his answer. He asserts that he became disabled in February 2009 as a result of mental disabilities, and that the guaranty that he executed in October 2010 is unenforceable because he was incompetent at that time,

and/or because it was signed under coercion and duress when he was disabled. Fisher contends that the continuing guaranty that he executed in February 2007 should also not be enforced because of the Bank's subsequent actions. Fisher also contends that the guaranty is not enforceable because he is no longer an owner of Ramapo Lighting, and that the Bank said it would relieve him of any obligation when it received documents establishing the change of ownership. He further maintains that the amount of the outstanding obligation is erroneous. He does not offer any evidence of the correct amount of the obligation.

Fisher alleges that his signature as a guarantor on the loan agreement dated October 13, 2010 was a forgery. He does not dispute that he signed the 2007 agreement.

Fisher alleges that the fact that the Bank altered other documents demonstrates that the Bank has acted improperly, in such away as to render the guaranty unenforceable. The documents and changes are with respect to corporate resolution and application of Ramapo Lighting that did not list Fisher and/or Schwartz in accordance with the positions they held, according to the Bank's records. The documents were submitted with respect to a change in the business banking account, not with respect to the note, loan agreement, or guaranty.

II. Discussion

A. *Plaintiff's Motion for Summary Judgment on the Amended Complaint*

1. Ramapo Lighting

Signature produced evidence that Ramapo Lighting borrowed money and failed to repay the loan when due, upon demand. Thus, it has made a prima facie showing of entitlement to summary judgment. *Citibank, N.A. v. Furlong*, 81 A.D.2d 803 (1st Dep't 1981).

Ramapo Lighting does not deny having borrowed the money, or having failed to repay it. It asserts that it would have been able to repay the loan if the Bank had not permitted Fisher access to the corporate accounts after he was no longer an owner, officer or employee of the company. However, other than Schwartz's self-serving statements, there is no evidence that Fisher had unauthorized access, or that he dissipated the funds of the corporation. In opposition to a motion for summary judgment, the opponent must lay bare its proofs. *Johnson v. Phillips*, 261 A.D.2d 269, 270 (1st Dep't 1999). Conclusory assertions are insufficient to raise a triable issue of fact. *Sound Communications, Inc. v. Rack & Roll, Inc.*, 88 A.D.3d 523, 524 (1st Dep't 2011).

Here, Ramapo Lighting has not produced any copies of communications with the Bank withdrawing Fisher's authority as a signor on the account, nor has it produced any bank statements that demonstrate that funds were improperly removed from its account.

Further, if, in fact, it was concerned about Fisher having unauthorized access, it could have closed the account and opened another one on which Fisher would not be a signatory. Ramapo Lighting's failure to produce any evidence in support of its position requires granting summary judgment to Signature on the first and second causes of action against Ramapo Lighting.

2. Schwartz

Schwartz asserts that his signature on the guaranty is forged. However, he does not offer any evidence of such forgery. Further, this assertion was raised for the first time in opposition to this motion, long after the purported forgery took place, and long after the Bank made formal written demand for payment under his guaranty. In their answer to the complaint, Ramapo Lighting and Schwartz did not deny that Schwartz executed the guaranty. (Daperis Aff., Ex. B ¶ 22.) Additionally, his signature was witnessed and notarized. (Daperis Aff., Ex. H at 7-8.) Under such circumstances, Schwartz must present "clear and convincing evidence" of forgery in order to raise an issue of fact. *Son Fong Lum v. Antonelli*, 102 A.D.2d 258, 260-261 (2d Dep't 1984), *aff'd* 64 N.Y.2d 1158 (1985). He has not produced anything other than his self-serving conclusory assertions. Such allegations are insufficient to raise a question of fact. *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 383-384 (2004).

Schwartz has failed to raise a triable issue of fact regarding the validity of his signature. He does not raise any other defense to counter the Bank's prima facie showing of entitlement to judgment. Consequently, Signature is granted summary judgment as against him on both the third and fourth causes of action.

3. Fisher

Fisher contends that he is mentally incapacitated, and offers statements from his physician as evidence. However, Exhibit C of Fisher's affidavit, upon which he relies, merely contains a statement by his attorney that one of his doctors is expected to testify that Fisher "suffers from chronic fatigue, insomnia and short term memory loss which precludes his ability to maintain gainful employment" and the other that Fisher "is a disabled patient diagnosed with chronic fatigue, insomnia and short term memory loss." (Affidavit of Hershel Fisher ("Fisher Aff."), Ex. C ¶ 3(A).) Neither of these opinions, even if they were evidence as opposed to the attorney's statement, would suffice to demonstrate that Fisher was mentally incapacitated, or that he was at the time he signed the guaranties.

Regarding the Bank's knowledge of his purported mental disability, Fisher maintains that the Bank was informed of such disability because he revealed it in his personal financial statement. However, that statement merely states that he received

disability income. It says nothing about the nature of the disability, nor does it in any way advise the Bank that the disability is one which would interfere with Fisher's competency to sign a guaranty. (Fisher Aff. Ex. A at 2.) So too with respect to Fisher's email to Daperis, dated October 15, 2010, in which he said "I am disabled mantel [sic] and fiscal [sic]. . . ." *Id.*, Ex. B. The deposition of Rosemary Rodriguez, an employee of Signature, also does not support Fisher's position that the Bank knew of his alleged mental incapacity. While Rodriguez testified that she believed that he was sick, there is no indication that she was aware of any mental incapacity. (Schwartz Aff. Ex. C at 17: 7-22) (Deposition of Rosemary Rodriguez).

Thus, Fisher has failed to present evidence as to any mental incapacity that would void the guaranty that he executed in October 2010, or that the Bank was aware of any such alleged incapacity.

Fisher contends that his signature was forged on the guaranty line of the October 2010 credit agreement. He produces a report from a handwriting expert to support his position. The memorandum of law does not address this issue, except to mention the alleged forgery in passing.

Under many circumstances, the report of a handwriting expert would suffice to raise a question of fact that would require a trial. *But see Krill v. Aziz*, 186 A.D.2d 81, 82 (1st Dep't 1992). Here, however, the line of credit agreement is not the guaranty on

which the Bank is seeking to recover. The Bank seeks enforcement of the long form “Continuing Guaranty” agreement that Fisher admits that he executed. Thus, Fisher’s claim that his name was forged on the line of credit agreement is irrelevant to the complaint.

Fisher contends that the Bank’s alleged material misconduct in materially changing bank documents, accepting a forged document, and misrepresenting to Fisher that the loan documents would be changed after the Bank received proof of a change of ownership, releases Fisher from any obligation.

Fisher maintains that the Bank misrepresented to him that he would be removed from the loan documents after the Bank received proof that he was no longer an owner of Ramapo Lighting. However, Fisher’s evidence does not support his claim. Rather, the Bank refused to acknowledge a change of ownership and corporate officers without documentary support. The Bank said that it would amend its papers to reflect that Schwartz was the owner and president of Ramapo Lighting after receiving documentation. It did not say it would relieve Fisher of his obligations. Further, the guaranties themselves, both in 2007 and 2010, state that they are continuing. The Bank was under no obligation to remove Fisher as a guarantor from loans that were already taken. Since the loan was given to Ramapo Lighting before Fisher expressed any desire to be removed from the guaranty, his obligation was continuing. His only potential

defense would be with respect to any money that was loaned subsequent to his seeking to be removed as a guarantor. Since there was no such subsequent loan, Fisher has not sustained any injury even if his emails could be construed as seeking to terminate his continuing obligation.

Even if Fisher were not held liable under the 2010 guaranty, the guaranty of 2007 is a continuing guaranty, and Fisher would still be responsible for Ramapo Lighting's loan. Fisher acknowledges that he executed the 2007 guaranty, but claims that his obligations are relieved as a result of the Bank's willful misconduct. Fisher also states that, at the time of the 2007 guaranty, Ramapo Lighting's outstanding obligation to the Bank was \$250,000.

Fisher's assertions regarding the Bank's alleged willful misconduct refer to the Bank's purported misrepresentations in 2010, and its refusal to terminate his guaranty. However, Fisher has not made any assertions, much less brought evidence, that there were any additional loans made to Ramapo Lighting after Fisher sought to terminate his guaranty or any purported willful misconduct by the Bank. Thus, as stated above, even if his emails can be construed as requests to terminate, it does not alter his responsibility for the loan amounts that the Bank is currently seeking. That obligation was formed before Fisher had sold his interest, and before he sought any kind of separation from Ramapo Lighting with respect to the Bank. Therefore, any purported willful misconduct of the

Bank occurred after the loans were made, and had no impact on Fisher's responsibilities toward the Bank to repay them.

B. *Plaintiff's Motion for Summary Judgment on Ramapo Lighting and Schwartz's Counterclaims*

In addition to seeking summary judgment on its claims, Signature likewise seeks summary judgment on the three counterclaims interposed by Ramapo Lighting and Schwartz in their joint Answer.

Ramapo Lighting and Schwartz's first counterclaim is based upon the Bank allegedly preventing Schwartz from accessing Ramapo Lighting's accounts. Schwartz has acknowledged that he was not so prevented. Therefore, the first counterclaim is dismissed.

The second counterclaim alleges that, by entering into the 2009 agreement to extend a line of credit to Ramapo Lighting, the Bank caused Schwartz to purchase shares in Ramapo Lighting, which he would not have purchased had he been made aware of the Bank's wrongful conduct. The counterclaim does not specify what wrongful conduct caused Schwartz to purchase the shares. The counterclaim asserts, however, that Schwartz purchased the shares before the 2009 agreement, so it is unclear, at best, how that agreement could have caused Schwartz to purchase shares that he asserts that he had

previously purchased. In any event, even if Schwartz had not yet purchased all of the shares (which appears to be the case based upon other evidence before the court), defendants do not offer any evidence that the Bank was obligated to inform Schwartz of any transactions that it had with Ramapo Lighting or with Fisher. Rather, it was Schwartz's obligation to do his due diligence and determine what outstanding obligations Ramapo Lighting had to the Bank.

To the extent that defendants base this counterclaim upon Fisher's purported lack of authority to enter into an agreement, as discussed above, the Bank was in receipt of a corporate resolution of Ramapo Lighting from October 2009 which gave Fisher such authority. Consequently, the Bank has demonstrated that it rightfully believed that Fisher had authority to enter into the agreement, and defendants have failed to demonstrate that he did not, or that the Bank engaged in wrongful conduct. Therefore, the second counterclaim is also dismissed.

The third counterclaim alleges that the Bank misrepresented the documents that Schwartz signed in October 2010, thereby fraudulently inducing Schwartz into signing a personal guarantee. Schwartz maintains that he was told that the documents were intended to reactivate Ramapo Lighting's bank accounts.

It is well settled that a person is charged with reading and understanding a document before signing it. *Hutchinson Burger, Inc. v Hutch Rest. Assoc., L.P.*, 100

A.D.3d 531, 532 (1st Dep't 2012). Here, Schwartz cannot recover any alleged damages based upon his failure to read documents that he signed. Further, it is clear from the emails in the record that Schwartz knew that the Bank wanted him to sign a guaranty, and that he discussed it with his attorney. Thus, the third counterclaim is also dismissed.

III. **Conclusion**

Accordingly, it is hereby

ORDERED that Plaintiff Signature Bank's motion for summary judgment is granted and the Clerk is directed to enter judgment as follows:

(1) on the first cause of action, in favor of Plaintiff and against Defendant Ramapo Lighting & Electric Supplies, Inc., in the amount of \$858,948.25 together with interest at the rate of 5.25% per annum from November 1, 2010 to November 30, 2010, and at the rate of 9.25% per annum from December 1, 2010 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk;

(2) on the second cause of action, in favor of Plaintiff and against Defendant Ramapo Lighting & Electric Supplies, Inc., in the amount of \$24,678.77 with interest at the rate of 9% per annum from January 28, 2011 until the date of the

decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; (3) on the third cause of action, against Defendants Abraham Schwartz and Hershel Fisher in the amount of \$858,948.25, together with interest at the rate of 5.25% per annum from the date of November 1, 2010 to November 30, 2010, and at the rate of 9.25% per annum from the date of December 1, 2010 until the date of the decision of this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that plaintiff Signature Bank's motion for summary judgment dismissing the counterclaims of defendant Abraham Schwartz and Ramapo Lighting & Electric Supplies, Inc., is granted and the counterclaims are dismissed; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the issue of reasonable attorneys' fees incurred by Plaintiff in this action as well as the amount of costs and disbursements; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with

the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the


assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the issue of costs, disbursements and attorneys' fees shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon.

Dated: New York, New York
June 24, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.