

**PNC Equipment Fin., LLC v Skin Deep Ctr. for  
Cosmetic Enhancement, LLC**

2013 NY Slip Op 31567(U)

July 11, 2013

Supreme Court, Suffolk County

Docket Number: 11-8293

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 3-7-13  
ADJ. DATE 3-14-13  
Mot. Seq. # 003 - MG

-----X  
PNC EQUIPMENT FINANCE, LLC, a Delaware  
Limited Liability Company,  
  
Plaintiff,  
  
- against -  
  
SKIN DEEP CENTER FOR COSMETIC  
ENHANCEMENT, LLC, and DARREN  
O'ROURKE,  
  
Defendants.  
-----X

PERETORE & PERETORE, P.C.  
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Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 7 - 10; Replying Affidavits and supporting papers 11 - 14; Other Plaintiff's memorandum of law; ~~and after hearing counsel in support and opposed to the motion~~ it is,

**ORDERED** that the motion by plaintiff PNC Equipment Finance, LLC, for leave to renew its prior motion for summary judgment, which was denied by order of this Court dated October 15, 2012, is granted; and it is further

**ORDERED** that upon renewal, PNC is granted summary judgment on the first and second causes of action contained in its complaint to recover jointly and severally from defendants Skin Deep Center for Cosmetic Enhancement, LLC, and Darren O'Rourke damages in the sum of \$78,133 together with interest of six (6 %) percent thereon from August 1, 2010, plus costs, disbursements and reasonable attorneys' fees; and it is further

**ORDERED** that plaintiff and defendant are directed to appear before the Court for an inquest to take place at 9:30 a.m. on September 17, 2013, at Part 6 of this Court, at the Courthouse located at One Court Street, Riverhead, New York, to determine the reasonable legal fees incurred by plaintiff in connection with the collection of the debt.

This is an action by plaintiff PNC Equipment Finance, LLC (“PNC”) to recover damages related to the alleged breach of a lease agreement by its successor, PNCEF, LLC, d/b/a PNC Equipment Finance LLC, f/k/a National City Commercial Capital Company, whereby it leased cosmetic enhancement equipment to defendant Skin Deep Center for Cosmetic Enhancement, LLC (“Skin Deep”). The lease agreement contained an unconditional commercial guarantee, and allegedly was personally guaranteed by Skin Deep’s principal, defendant Darren O’Rourke. Commencing August 1, 2010, Skin Deep allegedly failed to make required payments under the lease. By way of its complaint, PNC asserts, inter alia, causes of action for breach of the lease agreement and personal guaranty, conversion, and unjust enrichment. The complaint further alleges that PNC is due damages in the sum of \$78,133, plus accruing costs, attorneys’ fees, late fees, and interest calculated at 6 % per annum.

By order dated February 25, 2012, this court granted a motion by PNC for an order permitting it to seize the leased equipment pursuant to Article 71 of the CPLR. Subsequently, PNC moved for summary judgment on its complaint seeking an award of damages and an order permitting it to seize the leased equipment. However, PNC failed to include a copy of the pleadings with its moving papers and the court denied the motion without prejudice to renew upon submission of said pleadings. PNC now moves to renew its motion for summary judgment. In support of the motion PNC submits, inter alia, the papers previously submitted in support of its motion, copies of the underlying pleadings, attorney fees invoices, as well as an affidavit by one of its employees describing Skin Deep’s default on the subject lease agreement. Attached as exhibit’s to the affidavit of Bobby Miller are copies of certificates filed with the Secretary of State of Indiana noting that National City Commercial Capital Company, LLC (“National City”), changed its name to PNCEF, LLC, and an article of merger stating PNCEF, LLC merged into PNC Equipment Finance, LLC. Copies of Skin Deep’s statement of account and letters demanding payment on the outstanding balances for said account have also been attached.

Skin Deep opposes the motion on the grounds it is untimely, and that PNC failed to establish a proper foundation for the admissibility of the attached documents, since it submitted no proof that Bobby Miller possessed any personal knowledge of National City’s business practices or the maintenance of its business records.

Initially, the Court notes that the branch of PNC’s motion seeking an order permitting it to seize the equipment secured by the lease is denied as academic, as such relief was already granted by order of this court dated February 25, 2012.

As for the branch of PNC’s motion seeking, inter alia, summary judgment on its claims and an award of damages, PNC submitted an affidavit by its Lawsuit Coordinator, Bobby Miller, stating that he has personal knowledge of all the records relating to Skin Deep’s account and its default on the subject lease. The affidavit states that Skin Deep entered an agreement with PNC’s corporate predecessor, National City Commercial Capital Company, LLC, for the lease of the cosmetic equipment on December 12, 2007, that a UCC financing statement securing National’s security interest in such equipment was filed on January 8, 2008, and that Skin Deep’s principal, Darren O’Rourke,

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executed unconditional personal guarantees in connection with the lease on December 12, 2007 and October 29, 2009. The affidavit further states that Skin Deep defaulted on the lease on August 1, 2010, that it is liable for the sum of \$83,113, representing the unpaid balance, late fees, and accrued interest between August 1, 2010 through August 12, 2011, and that Skin Deep will be further liable for reasonable attorney's fees incurred in connection with collection of the debt, as well as interest accumulating on such debt at a rate of 6 % per annum.

Paragraph 4 of the lease agreement states, in pertinent part, as follows:

Upon you signing below, your promises herein will be irrevocable and unconditional in all respects and payments shall begin immediately and shall be due continuously hereafter. . . THIS IS A NONCANCELLABLE IRREVOCABLE AGREEMENT. THIS AGREEMENT CANNOT BE CANCELED BY YOU.

Paragraph 5 of the agreement, entitled, "Sign the guaranty" further provides:

As additional inducement for us to enter into the Agreement, the undersigned ("You") unconditionally, jointly and severally, personally guarantee that the customer will make all payments and meet all obligations required under this Agreement and any supplements fully and promptly. You agree that we may make other arrangements including compromise or settlement with the customer and you will waive all defenses and notice of those changes and will remain responsible for the payment and obligations of this Agreement. . . If the customer defaults, you will immediately pay in accordance with the default provision of the Agreement all sums due under the terms of the Agreement and will perform all other obligations of the Agreement.

Additionally, the "DEFAULT AND REMEDIES" provision of the agreement states the following:

If you do not pay any lease payment or other sum due . . . you will be in default. If any payment is late you agree to pay a late fee of 15% of the payment which is late or if less, the maximum charge allowed by law. If you are ever in default, at our option, we can terminate or cancel this Agreement and require that you (1) pay the unpaid balance of the agreement (discounted at 6%). . . If we refer this Agreement to an attorney for collection, you agree to pay our reasonable attorney's fees and actual court costs. You agree this is a finance lease under Article 2A of the UCC and your rights and remedies are governed exclusively by this agreement and you waive any and all other rights and remedies.

The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g. J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and

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unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]). Generally, the signer of a written instrument is "conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract" (*Dunkin' Donuts v Liberatore*, 138 AD2d 559, 559, 526 NYS2d 141 [2d Dept 1988]; *see Chrysler Credit Corp. v Kosal*, 132 AD2d 686, 518 NYS2d 162 [2d Dept 1987]). Moreover, where a guaranty clearly indicates that the signatory would "unconditionally guarantee" the performance of the corporation and is unambiguously identified as a "guaranty" it will be enforceable against the guarantor (*see Suffolk Cement Products, Inc. v Empire Concrete Enterprises, Inc.*, 234 AD2d 447, 650 NYS2d 801 [2d Dept 1996]; *Dunkin' Donuts v Liberatore, supra*).

Here, PNC met its prima facie burden on the motion by submitting copies of the lease agreement, PNC's ownership of the debt and the equipment secured thereby, and proof of non-payment by either Skin Deep or its guarantor, defendant Darren O'Rourke (*see AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402, 918 NYS2d 30 [1st Dept 2011]; *Commerce Commercial Leasing, LLC v PIO Enters., Inc.*, 78 AD3d 1105, 913 NYS2d 248 [2d Dept 2010]; *Unistar Leasing v Lipkin*, 12 AD3d 1166, 784 NYS2d 423 [4th Dept 2004]; *Advanta Leasing Services v Laurel Way Spur Petroleum Corp.*, 11 AD3d 571, 782 NYS2d 677 [2d Dept 2004]). PNC also demonstrated, prima facie, defendant Darren O'Rourke personally guaranteed the debt by submitting a copy of the promissory note which contains a provision requiring that he unconditionally guarantee the corporate debts, as well as all costs incurred in connection with the collection of the debt (*see HSBC Bank USA, Natl. Assn. v Goldberger*, 105 AD3d 906, 963 NYS2d 324 [2d Dept 2013]; *HSBC Bank USA, N.A. v Laniado*, 72 AD3d 645, 897 NYS2d 514 [2d Dept 2010]; *North Fork Bank v ABC Merchant Servs., Inc.*, 49 AD3d 701, 853 NYS2d 633 [2d Dept 2008]).


In opposition, Skin Deep failed to raise a triable issue warranting denial of the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Contrary to Skin Deep's assertion regarding the untimeliness of the instant motion, the Court properly exercised its discretion in granting PNC leave to renew the motion upon submission of the missing pleadings (CPLR 3212 (f); *see AGFA Photo USA Corp. v Chromazone, Inc.*, *supra* at 403, 918 NYS2d 30). Furthermore, PNC laid a proper foundation for the admissibility of National City's business records since the affidavit of its employee indicates that he has personal knowledge of the record keeping practices of National City's successor-in-interest, and the records it maintained which relate to Skin Deep's default on the subject lease agreement (*see e.g. Yellow Book of N.Y., L.P. v Cataldo*, 81 AD3d 638, 917 NYS2d 215 [2d Dept 2011]; *see also People v Kennedy*, 68 NY2d 569, 510 NYS2d 853 [1986]).

Accordingly, PNC is granted summary judgment on the first and second causes of action contained in its complaint entitling it to recover jointly and severally from defendants Skin Deep Center for Cosmetic Enhancement, LLC, and Darren O'Rourke, damages in the sum of \$78,133

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together with interest of six (6 %) percent thereon from August 1, 2010, plus costs, disbursements and reasonable attorneys' fees. Inasmuch as the lease agreement provides that defendants will be responsible for the reasonable legal fees incurred by plaintiff in connection with the collection of the debt, the parties are directed to appear before the Court at 9:30 a.m. on September 17, 2013 to determine such costs.

Dated: 7/11/13

  
\_\_\_\_\_  
A.J.S.C.

       FINAL DISPOSITION   X   NON-FINAL DISPOSITION