

**National City Bank v Rath**

2013 NY Slip Op 33484(U)

March 14, 2013

Supreme Court, New York County

Docket Number: 651700/10

Judge: Eileen Bransten

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN

PART 3

Justice

Index Number : 651700/2010  
NATIONAL CITY BANK  
vs  
RATH, COLIN  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. 651700/2010  
MOTION DATE 9/11/12  
MOTION SEQ. NO. 002

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: 3-14-13

  
**HON. EILEEN BRANSTEN** 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 THREE

-----X  
NATIONAL CITY BANK,

Plaintiff,

-against-

COLIN RATH,

Defendant.

-----X  
BRANSTEN, J.

Index No. 651700/10  
Motion Date: 09/11/12  
Motion Seq. No.: 002

In motion sequence number 002, PNC Bank, N.A. (“PNC”), as successor to plaintiff National City Bank (“National City”) moves for summary judgment against defendant Colin Rath (“Rath” or “Defendant”) in the sum of \$257,261.39 and moves to amend the caption to reflect the name of plaintiff as “PNC Bank, N.A. f/k/a National City Bank.” Defendant opposes.

**I. Background**

On June 19, 2007, Defendant entered into an Equity Reserve Agreement (the “Agreement”) with National City. (Affidavit of Donna Kindred (“Kindred Aff.”), Ex. A (Agreement).) Pursuant to the agreement, National City granted Defendant a \$250,000 line of credit and Defendant agreed to repay any monies advanced by National City with interest as set forth in the Agreement. *Id.*

On June 25, 2007, National City advanced \$250,000 to Defendant. *See id.* at Ex. B (account summary for Rath indicating that three sums totaling \$250,000 were advanced by

National City to Rath on June 25, 2007); *see also* Kindred Aff. ¶ 2(b) (averring that National City advanced \$250,000 to Rath on June 25, 2007).

On or about June 17, 2008, Defendant defaulted under the terms of the Agreement by failing to make the payments due thereunder. (Kindred Aff. ¶ 2(c) and Ex. B (account statements for Rath reflecting non-payment).) As of December 18, 2008, Defendant owed National City \$257,261.39 including interest and late fees due under the Agreement. (Kindred Aff. ¶ 2(d) and Ex. B (final two pages of exhibit).)

On November 6, 2009, National City merged with and into PNC. Kindred Aff., Ex. C. National City filed the complaint in this action on October 4, 2010 alleging breach of the Agreement. PNC now moves for summary judgment against Defendant for nonpayment of \$257,261.39. The parties appeared before this Court for oral argument on August 15, 2012.<sup>1</sup> The motion was marked submitted when the Court received the transcript of the argument on September 11, 2012.

## **II. Standard of Law**

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

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<sup>1</sup> At oral argument, the court expressed displeasure with PNC’s motion papers and its initial inclination to deny this motion based thereon. Specifically, the court found that PNC’s legal citations were incomplete. Although the court should not be required to chase after proper legal citations, the court has decided to look past this inadequacy and decide the motion on the merits.

absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Upon making such a showing, the burden of proof shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” or an acceptable reason for his failure to do so. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

### **III. Analysis**

The elements for cause of action for breach of contract are: the existence of a contract, performance by plaintiff, the breach by defendant, and resulting damages. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010).

PNC argues that it has made out its prima facie case on summary judgment for breach of contract by producing evidence that National City and Defendant entered into the Agreement, that National City advanced money to Defendant per the Agreement, that Defendant failed to make payments as required by the Agreement, and that PNC, as successor to National City, has been damaged as a result. (Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment (“PNC’s Memo”), pp. 2-3.)

In opposition, Defendant makes several arguments regarding the admissibility and evidentiary effect of the affidavit (the “Kindred Affidavit”) of PNC bank officer, Donna Kindred (“Kindred”).

First, Defendant argues that the court cannot rely on the Kindred Affidavit to prove the elements of PNC's claim because Kindred is an employee of PNC, not National City, and therefore does not have personal knowledge as to National City Bank's practices and procedures.

Next, Defendant contends that Kindred cannot authenticate National City's business records because, as an employee of PNC, she is unable to attest to National City's "ordinary course of business." (Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Memo"), p. 4.)

Finally, Defendant argues that the Kindred Affidavit is inadmissible because it was notarized in Pennsylvania and is unaccompanied by a Certificate of Conformity as required by New York State Real Property Law 299-a(1). *Id.* at pp. 8-10.

Defendant also maintains that PNC has not established that it merged with National City and thereby fails to prove that it owns the underlying debt in this action. *Id.* at pp. 5-6. The court addresses each of Defendant's arguments in turn.

**A. Validity of the Kindred Affidavit**

*i. Kindred's Personal Knowledge and Ability to Authenticate Records*

Defendant argues that Kindred lacks personal knowledge of the subject matter contained in her affidavit. (Defendant's Memo., pp. 5-6.) This argument fails because Kindred relied on documents in PNC's possession in forming her affidavit, namely the Agreement and National City's business records.

An affidavit based upon documentary evidence is sufficient to support a motion for summary judgment. *Barclay's Bank of New York, N.A. v. Smitty's Ranch, Inc.*, 122 A.D.2d 323, 324 (3d Dep't 1986); *see also Flushing Savs. Bank, FSB v. PJ Bricks, LLC*, 2012 N.Y. Misc. LEXIS 102, at \*3 (Sup. Ct. N.Y. Cty. 2012) (“an employee affidavit, based on documentary evidence maintained by a bank, is sufficient to support a motion for summary judgment[.]”). Because Kindred based her affidavit on documentary evidence maintained by PNC, it is here sufficient to support PNC’s motion for summary judgment.

Defendant’s argument that Kindred cannot authenticate the business records of National City because she is an employee of PNC, not National City, is similarly unavailing. *See Brown Bark I, L.P. v. Westside Home Improvements Inc.*, 2008 N.Y. Misc. LEXIS 8079 at \*15 (Sup. Ct. Kings Cty. 2008) (rejecting the argument that “one who is not an employee of the original creditor cannot authenticate documents of the original creditor”).

“It is well settled that a business entity may admit a business record through a person without personal knowledge of the document, its history or its specific contents where that person is sufficiently familiar with the corporate records to aver that the record is what it purports to be and that it came out of the entity’s files.” *Deleon v. Port Auth.*, 306 A.D.2d 146, 146 (1st Dep’t 2003); *see also First Interstate Credit Alliance, Inc. v. Sokol*, 179 A.D.2d 583, 584 (1st Dep’t 1992).

Kindred is a bank officer for PNC, and she attests that she is the custodian of records there. She further attests that she has reviewed the relevant documents and that the

documents are kept by PNC in the ordinary course of its business. (Kindred Aff. ¶ 1.) She has thus demonstrated that she is sufficiently familiar with the business records submitted to aver that they are what they purport to be and that they came out of PNC's files. Kindred thereby supports the validity and authenticity of these documents. *See Brown Bark I*, 2008 N.Y. Misc. LEXIS 8079, at \*16 (applying identical analysis).

ii. *Kindred Affidavit Notarized in Pennsylvania*

Defendant next contends that the Kindred Affidavit is inadmissible because it was executed in Pennsylvania and was not accompanied by a "certificate of conformity." Defendant argues that the affidavit violates CPLR § 2309 and Real Property Law § 299-a. (Defendant's Memo, pp. 8-10.) CPLR § 2309(c) states that:

An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate . . . as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

CPLR § 2309(c). Real Property Law § 311(5) clarifies that no further authentication is necessary for acknowledgments made without the state if a deed is acknowledged before any officer designated in Real Property Law § 299. Pursuant to Real Property Law § 299, where an acknowledgment is made before a notary public, no further authentication is necessary.

Contrary to Defendant's assertion, Real Property Law § 299-a only requires a certificate of conformity when the acknowledgment of proof required under § 299 is "taken in a manner prescribed by" a state other than New York. Because New York law only

requires an acknowledgment to be made before a notary public, and because the Kindred Affidavit was acknowledged before a notary public in the state of Pennsylvania, the affidavit conforms with the requirements of the State of New York. A certificate of conformity is therefore not required by the CPLR or the Real Property Law. Consequently, the affidavit is valid.

**B. PNC's Ownership of Defendant's Debt**

Defendant argues that PNC lacks standing to bring this action because it has not made a prima facie showing that it owns Defendant's debt. (Defendant's Memo, p. 5.) PNC maintains that, pursuant to Banking Law § 602, where there is a merger between two banks, a formal assignment is not necessary to transfer title to the Agreement at issue. (Reply Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment, p. 3.) PNC argues that the Kindred Affidavit, certification from PNC's Assistant Secretary and letter from the Administrator of National Banks each confirm the merger and therefore establish its standing to sue under the Agreement. *Id.*

Banking Law § 602, which governs the effect of a merger, provides that "the receiving corporation [PNC] shall be considered the same business and corporate entity as each corporation merged into it[.]" (Banking Law § 602(1).) Section 602 further provides that the receiver is vested with all the rights and powers of the merged corporations and is considered to have been named in any document taking effect before the merger. *Id.* at § 602(2) & (3). Further, no formal assignment is required to effect a transfer of assets of a merged

corporation to the receiving corporation. *Barclay's Bank of New York, N.A. v. Smitty's Ranch, Inc.*, 122 A.D.2d 323, 324 (3d Dep't 1986).

Accordingly, in order to demonstrate ownership of Defendant's debt, PNC need only establish by sufficient evidence that it merged with National City.

To establish that it merged with National City, PNC submits a certification of its Assistant Secretary so stating as well as the "official certification of the Comptroller of the Currency [of the Administrator of National Banks] to merge National City Bank . . . with and into PNC Bank[.]" Kindred Aff., Ex. C. Based on this evidence, the court finds that PNC has established that National City merged with and into PNC. Defendant has not submitted any evidence to the contrary. Consequently, the Court grants PNC's motion to amend the caption to reflect the plaintiff's name as "PNC Bank, N.A. f/k/a National City Bank."

**C. PNC Has Demonstrated its  
Entitlement To Summary Judgment**

PNC has met its prima facie burden of demonstrating its entitlement to judgment as a matter of law. As discussed above, PNC has tendered sufficient evidence to show that: (1) National City and Defendant executed the Agreement by which National City agreed to, and did, advance Defendant money and (2) Defendant agreed to repay all monies advanced. See Kindred Aff. ¶¶ 2(a)-(d) & Exs. A-B. PNC established that Defendant defaulted under the Agreement by failing to make payments due, and that, as of December 17, 2008,

Defendant owed PNC \$257,261.39.<sup>2</sup> See Kindred Aff. ¶¶ 2(c)-(d) & Ex. B. Finally, PNC has demonstrated that it merged with National City, and is therefore the rightful owner of Defendant's debt.

Defendant has failed to produce evidentiary proof in admissible form sufficient to require a trial of any material question of fact. *Zuckerman*, 49 NY2d at 562. In opposition to the motion, Defendant submits an Affidavit of Colin Rath which merely parrots the legal arguments made by its counsel regarding the validity of the Kindred Affidavit. Those arguments were rejected by this Court herein. Defendant has thus failed to meet its burden to prove the existence of a material issue of fact requiring a trial and Plaintiff's motion for summary judgment against Defendant in the sum of \$257,261.39 is granted.

### Order

Accordingly it is hereby

**ORDERED** that plaintiff's motion to amend the caption in this action is granted and that the action shall bear the following caption:

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<sup>2</sup> In its complaint, National City asked for judgment in the amount of \$271,976.12, the amount due as of May 4, 2010, in addition to its costs, disbursements and attorneys' fees incurred in connection with this action. On this motion, however, PNC submits bank records evidencing the amount owed as of December 17, 2008 and does not move for costs and fees. Accordingly, the court finds that Defendant has only established its entitlement to judgment in the amount of \$257,261.39.

-----x  
PNC BANK, N.A. f/k/a  
NATIONAL CITY BANK,

Plaintiff,

-against-

COLIN RATH,

Defendant.  
-----x

and it is further

**ORDERED** that counsel for plaintiff shall serve a copy of this order with notice of entry, upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-file Support Office (Room 119), who are directed to mark the court's records to reflect the amended caption; and it is further

**ORDERED** that plaintiff's motion for summary judgment against defendant is granted.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 14, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.