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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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DEARBORN INVESTMENTS, INC. Index No. 650051/13

Plaintiff,

-against-

JACOB JAMRON, BOCA PHARMACY GROUP
and 870 SOUTHERN DRUG CORP. d/b/a
BOCA PHARMACY GROUP,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff Dearborn Investments, Inc. ("Dearborn") moves for summary judgment on its complaint against defendants. Defendants oppose the motion and cross move for summary judgment dismissing the complaint as against defendants Boca Pharmacy Group (Boca) and 870 Southern Drug Corp., d/b/a Boca Pharmacy Group (870 Southern).

Background

This is an action to recover monies allegedly due on a promissory note ("Note") executed in Dearborn's favor by defendant Jacob Jamron ("Jamron"), on December 19, 2011 in the principal amount of $75,000. The Note provided that it was to repaid in "11 monthly installments, consisting of $3,000 per installment on the 31st of each month, commencing December 19, 2011 and will continue through October 31, 2012....The balance of $42,000 shall be paid on or before November 30, 2012...[and that] in the event of payment default under this promissory note, the entire amount shall become due and payable.[1] "In addition, under the Note,

[1] The Note further provides that "[i]n return Dearborn Investments, LLC accepts and agrees to release its entire shareholding in Send A Package, LLC and any rights and

Jamron, "agree[d] that until the principal amount under this promissory note is paid, this note will be secured by Boca Pharmacy Group." Jamron made the 11 payments of $3,000 under the Note, for a total of $33,000, but failed to pay balance of $42,000 by November 30, 2012. In December 2012, Dearborn made demands for payment on Jamron, but payment was not received. Dearborn commenced this action on January 7, 2013, and defendants answered the complaint

Dearborn now moves for summary judgment based on the Note, and the affidavit Jacklyn A. Karceski, one its members in charge of it financial records, who states that Jamron was in default based on his failure to pay the $42,000 by November 30, 2012. Dearborn also relies on the failure of defendants to respond to Dearborn's Notice to Admit dated April 16, 2013, which stated, inter alia, that Jamron executed the Note.

Defendants oppose the motion, and cross moves for summary judgment in favor of Boca and 870 Southern, arguing that these defendants were not parties to the Note. In addition, defendants submit Jamron's affidavit in which he states that Boca Pharmacy Group is a non-existent entity and that he is the President of 870 Southern is a separate entity, which owns and operates a pharmacy known as Kingsboro Pharmacy Group. He states that "neither 870 Southern nor Kingsboro Pharmacy Group does business as Boca Pharmacy Group, as alleged by [Dearborn]." Jamron Aff. ¶ 7. Notably, Jamron does not deny he is liable under the Note. Furthermore, defendants assert that although the Note states that its payment is "secured by Boca" such language is insufficient to render Boca liable as guarantor of the Note.

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privileges therein to Jacob Jamron on or before November 30, 2012, once final payment has been met." In his affidavit, Jamron states that the Note was made in connection with a transaction for the return of Dearborn's investment in Send A Package, LLC, which owns and operates a business of sending care packages to family and friends located in the New York State prison system. Jamron states that he is a member and Vice President of Send A Package, LLC.

In reply, Dearborn points out that defendants have failed to provide a basis for denying summary judgment as against Jamron. As for 870 Southern, defendants point out that at least one of the payments under the Note were made from an account in the name of Southern. As for Boca, Dearborn argues that based on the statement in the Note that it would be secured by Boca, plaintiffs are estopped from arguing that Boca is a non-existent entity[2].

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, with respect to Jamron, Dearborn has established a prima facie entitlement to judgment as a matter of law by submitting the Note executed by Jamron and by demonstrating through an affidavit of Dearborn's member that Jamron has failed to pay the full amount under the Note despite demand for payment. See Takeuchi v. Silberman, 41 AD3d 336, 336-337 (1st Dept 2007); Gateway State Bank v. Shangri-La Private Club for Women, Inc., 113 AD2d 791 (2d Dept 1985), aff'd, 67 NY2d 627 (1986). Accordingly, the burden shifts to Jamron to demonstrate, by admissible evidence, the existence of a triable issue of fact. Id. Here, Jamron

[2] Dearborn argues that defendants' opposition was not timely served in violation of the stipulation between the parties. However, the court will exercise its discretion and consider the opposition.

has not met this burden, or even argued that he is not liable under the Note. Accordingly, Dearborn is entitled to summary judgment as against him the amount of $42,000, plus interest.[3]

The court reaches a different conclusion with respect to Boca and 870 Southern. As for Boca, putting aside whether or not it is a viable entity, the language in the Note stating that it is "secured" by Boca is insufficient to give rise to its liability as a guarantor of the Note. To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5–701(a)(2). The intent to guarantee the obligation must be clear and explicit. PNC Capital Recovery v. Mechanical Parking Systems, Inc., 283 A.D.2d 268 (1st Dept., 2001), app. dism., 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. Salzman Sign Co. v. Beck, 10 N.Y.2d 63 (1961); Harrison Court Assocs. v. 220 Westchester Ave. Assocs., 203 A.D.2d 244 (2d Dept.1994). Here, in the absence of a separate signature by Jamron stating that he is signing in his capacity as an officer of Boca, the Note is insufficient to establish that Boca is a guarantor. As for 870 Southern, the guarantee did not mention this entity and the payment of some of the installments by this entity would not provide a basis for its liability

Conclusion

In view of the above, it is

ORDERED that Dearborn's motion for summary judgment is granted as against defendant Jacob Jamron only, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Citibank, N.A. and against defendant Ralph Ferrara in the amount of $42,000, together with interest from date of January 1, 2013, as calculated by the Clerk, and it is further

[3]While Dearborn seeks attorneys' fees, there is no basis for awarding them, as the Note does not provide for their recovery.

ORDERED that complaint against defendants Boca Pharmacy Group and 870 Southern Drug Corp. d/b/a Boca Pharmacy Group is granted, and the Clerk is directed to enter judgment dismissing the complaint as against these defendants.

DATED: April 10 , 2014

J.S.C. HON. JOAN A. MADDEN
J.S.C.