

**Keybank N.A. v National Voluntary Orgs. Active in
Disaster Inc.**

2015 NY Slip Op 31206(U)

July 8, 2015

Supreme Court, New York County

Docket Number: 650248/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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KEYBANK NATIONAL ASSOCIATION,
successor by merger to Key Equipment
Finance Inc.,

Plaintiff,

- v -

NATIONAL VOLUNTARY
ORGANIZATIONS ACTIVE IN
DISASTER INC.,

Defendants.

-----X
NATIONAL VOLUNTARY ORGANIZATIONS
ACTIVE IN DISASTER INC.,

Third-Party Plaintiff,

- v -

FURNITURESPEAK INC.,

Third-Party Defendant.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
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**DECISION
and ORDER**

Mot. Seq. #001

Third-Party Index
No.

Plaintiff, KeyBank National Association (“KeyBank” or “Plaintiff”), brings this action for breach of an alleged agreement (the “Agreement”) to advance money to defendant, National Voluntary Organizations Active in Disaster, Inc. (“NVOAD” or “Defendant”), for the purchase of office furniture from third-party defendant, FurnitureSpeak, Inc. (“FurnitureSpeak”), an office furniture vendor. Plaintiff claims

that Defendant failed to make monthly payments as required under the Agreement, and that the principal amount of \$42,625.44 remains due and owing thereunder.

Plaintiff commenced this action on January 28, 2015, by summons and complaint. Defendant interposed an answer to Plaintiff's complaint on March 12, 2015, denying material allegations and asserting various affirmative defenses and a counterclaim.

Plaintiff now moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing Defendant's counterclaim, striking Defendant's jury demand, and striking Defendant's seventeenth affirmative defense.

Defendant opposes.

Turning first to Plaintiff's motion to dismiss Defendant's counterclaim, CPLR § 3211 provides, in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

(CPLR §§ 3211[a][7]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]).

The "legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors." (*Bank Leumi Trust Co. v. Block 3102 Corp.*, 180 AD2d 588, 589 [1st Dep't 1992]). Absent a special relationship, a bank does not owe a borrower a duty of care to ascertain the "true identities" of the other parties to the transaction, (*Banque Nationale de Paris v. 1567 Broadway Ownership Assocs.*, 214 A.D.2d 359, 360 [1st Dep't 1995]), or to confirm representations made on behalf of a borrower corporation by a person claiming to act with the corporation's authority. (*See id.; Tenenbaum v. Gibbs*, 27 A.D.3d 722, 723 [2d Dep't 2006]).

A president or other general officer of a corporation has apparent authority to act within the general scope of his office. (*Odell v. 704 Broadway Condo.*, 284 A.D.2d 52, 56-57 [1st Dep't 2001]). Such acts are binding on the corporation against one who does not know of any limitation or the president's true authority. (*Odell*, 284 A.D.2d at 57). An agreement entered into within the exercise of a corporate officer's apparent authority may bind the corporation without regard to the officer's lack of actual authority. (*Goldston v. Bandwidth Tech. Corp.*, 52 A.D.3d 360, 363 [1st Dep't 2008]).

Defendant's counterclaim asserts that, on or about February 21, 2014, Defendant's officer, Daniel Stoecker ("Stoecker"), entered negotiations with FurnitureSpeak, "for the purchase of various items of office furnishings together with an agreement for financing the purchase price for the furnishings with Key Equipment Finance [(“KEF”), Plaintiff's predecessor in interest].” (Counterclaim ¶ 4). Defendant's counterclaim further asserts, “[a]t the time of the negotiations, Mr. Stoecker had no spending authority from the Board of Directors of VOAD, nor was he authorized to make these purchases or contract these financing arrangements on behalf of VOAD” and that, “[a]t no time during the negotiations with FurnitureSpeak or [KEF] was Daniel Stoecker authorized to represent, warrant or covenant that he had power to speak on behalf of or execute these agreements for VOAD.” (*Id.* ¶¶ 5-6).

Defendant's counterclaim alleges:

[KEF] took no steps to determine the correctness or validity of any representation or promise made by Mr. Stoecker. Rather than check into the authority of the signatory to the documents, Keybank wrongfully accepted the documents related to the transaction with the unauthorized signature and without any corporate resolution.

(*Id.* ¶ 7). Defendants' counterclaim further alleges that, “[h]ad such routine reasonable commercial standards of due diligence been exercised, [KEF] would have discovered, prior to accepting assignment of the subject documents, that no such authorization had ever been issued by VOAD, and that Mr. Stoecker had no authority to bind the organization and the transactions on which this suit is based would never have taken place.” (*Id.* ¶ 11).

Defendant's counterclaim asserts:

[T]he financing agreement on which this suit is based cannot properly be enforced against VOAD because the organization is not bound by the contract. Daniel Stoecker, who purported to be acting on behalf of VOAD in signing the contract, did not have spending authority, approved budget spending, or the approval of the Board of Directors of VOAD to commit the organization to any such agreements.

(Counterclaim ¶ 19).

Here, even accepting Defendant's allegations as true and drawing all inferences in favor of the non-moving party, Defendant's counterclaim fails to plead a distinct cause of action against Plaintiff. Defendant's counterclaim does not allege a special relationship between Plaintiff, or Plaintiff's predecessor in interest, and Defendant. Nor does Defendant's counterclaim contain any factual allegations suggesting that the Agreement was other than an ordinary arm's length debtor/creditor transaction.

The Agreement, which is annexed to Plaintiff's complaint, is executed by Stoecker as "President/CEO" of Defendant. (Compl., Exh. A). Despite Defendant's arguments, the four corners of Defendant's counterclaim simply fail to plead that Plaintiff, or Plaintiff's predecessor in interest, knew that Stoecker was not authorized to enter into the Agreement on Defendant's behalf. In addition, even accepting Defendant's allegations as true, Defendant's counterclaim does not contain any factual allegations from which to infer that Stoecker lacked apparent authority to enter into the Agreement. Accordingly, even viewing Defendant's counterclaim in the light most favorable to Defendant, the four corners of Defendant's counterclaim fail to plead a distinct cause of action as against Plaintiff.

As for Plaintiff's motion to dismiss Defendant's seventeenth affirmative defense, under CPLR § 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." (CPLR § 3211[b]). The proper inquiry on a motion to strike defenses is whether the party actually has a defense, not whether it is properly stated or artfully pleaded. (*Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965, 966 [2d Dep't 1988]). The pleader is entitled to the benefit of every reasonable intendment of the defenses and, if there is any doubt as to the availability of a defense, it should not be dismissed. (*Duboff v. Board of Higher Educ.*, 34 A.D.2d 824, 824 [2d Dep't 1970]). Statements of legal

conclusion, even if inconsistent, are permissible. (*River House Realty Co. v Lico Contr.*, 172 A.D.2d 426, 426 [1st Dep't 1991]; *Klapper v. Shapiro*, 154 Misc. 2d 459, 461-62 [Sup. Ct. N.Y. Cnty. 1992]).

Defendant's seventeenth affirmative defense states: "There is no privity between the plaintiff and defendant. The Agreement on which the claim is based was not authorized or approved by Defendant under its corporate procedures and thus does not bind the company." (Ans. p. 7). Here, even accepting Defendant's allegations as true and drawing all inferences in favor of the non-moving party, Defendant's seventeenth affirmative defense does not state a defense to the Agreement as against Plaintiff. (*Federal Ins. Co. v. Diamond Kamvakis & Co.*, 144 A.D.2d 42, 45 [1st Dep't 1989] [finding that, "[a]pparent authority may exist in the absence of authority in fact, and, if established, may bind one to a third party with whom the purported agent had contracted even if . . . the third party is unable to carry the burden of proving that the agent actually had authority"]).

Finally, with respect to Plaintiff's motion to strike Defendant's jury demand, contract provisions waiving a party's right to a jury trial are "valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party." (*Fordham University v. Manufacturers Hanover Trust Co.*, 145 A.D.2d 332, 333 [1st Dep't 1988]). Here, the Agreement expressly provides: "LENDER AND BORROWER EXPRESSLY WAIVE ALL RIGHT AND CLAIM TO A TRIAL BY JURY." (Compl. Exh. A). Insofar as Defendant fails to raise an adequate challenge to the validity of the Agreement, the contractual jury waiver provision contained in the Agreement is considered valid and enforceable with respect to Plaintiff's first-party action arising from the Agreement.

Wherefore, it is hereby

ORDERED that Plaintiff's motion is granted; and it is further

ORDERED that Defendant's counterclaim and Defendant's seventeenth affirmative defense are dismissed and the jury demand in the first-party action is hereby struck and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 8 2015

JUL 08 2015


HON. EILEEN A. RAKOWER