

<b>HSBC Bank USA v 170th St. Auto Mech. Shop Inc.</b>
2016 NY Slip Op 30246(U)
January 8, 2016
Supreme Court, Bronx County
Docket Number: 303988/2011
Judge: Julia I. Rodriguez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

-----X **Index No. 303988/2011**

HSBC Bank USA, National Association  
Successor By Merger to HSBC Bank USA,  
Plaintiff,

-against-

**DECISION and ORDER**

170<sup>th</sup> St. Auto Mechanic Shop Inc. and  
Jose Blain,

Present:

Defendants.

Hon. Julia I. Rodriguez  
Supreme Court Justice

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's motion for summary judgment and the cross-motion of Defendant 170<sup>th</sup> St. Auto Mechanic Shop Inc. for summary judgment.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Notice of Cross Motion, Affirmation in support of Cross-Motion and in opposition to Motion & Exhibits	2
Reply Affirmation & Exhibits	3

---

This action for breach of contract and unjust enrichment arises from a default under a business line of credit and a business credit card. On June 12, 1997, Juan Astacio and Defendant Jose Blain purchased all of the outstanding shares in Defendant 170<sup>th</sup> St. Auto Mechanic Shop Inc. (170<sup>th</sup> St.). At all relevant times, Astacio and Blain each held a 50% interest in 170<sup>th</sup> St. In November of 2003, Blain obtained a business line of credit and a business credit card from Plaintiff HSBC in the name of 170<sup>th</sup> St. ("the Loan"). Blain guaranteed the Loan in his individual capacity. On or about February 22, 2011, HSBC sent a "Demand Notice" addressed to "Mr. Jose I. Blain, Mr. Juan R. Astacio, 170<sup>th</sup> St. Auto Mechanic Shop, Inc., 25 West 170<sup>th</sup> Street, Bronx, New York 10452" and "Mr. Jose I. Blain, 4761 Richardson Avenue, Bronx, New York 10470-1022." In that notice, HSBC stated that 170<sup>th</sup> St. was in default of the business line of credit and that, as a result, HSBC had accelerated the amount due thereunder.

HSBC now moves, as relevant here,<sup>1</sup> for an order granting it summary judgment against 170<sup>th</sup> St. for all amounts it claims are owed under the Loan. 170<sup>th</sup> St. cross-moves for summary judgment against HSBC, for an order dismissing the complaint as against it, on the ground that Blain had neither actual nor apparent authority to bind 170<sup>th</sup> St. to the Loan.

In support of its motion and in opposition to the cross-motion, HSBC submitted, *inter alia*, the affidavit and attached exhibits of Michael J. Vitale, an Assistant Vice President of HSBC. In his affidavit, Vitale states that “170<sup>th</sup> Street executed a certain business line of credit” and was “issued a MasterCard BusinessCard credit card” and breached the terms of both by “failing and/or refusing to make payments in accordance with their terms.” Vitale also states that “[o]n or about February 22, 2011, HSBC sent a demand letter to 170<sup>th</sup> Street and Blain” and that “170<sup>th</sup> Street and Blain did not make payment in response to HSBC’s demand letter.” Vitale attached to his affidavit, among other things, an HSBC form “Certified Copy of Corporate Banking Resolutions” signed by Jose I. Blain as both President and Secretary of 170<sup>th</sup> St. Vitale also attached a copy of a commercial loan direct debit authorization, signed by Blain as President of 170<sup>th</sup> St., which, he claims, authorized HSBC to automatically withdraw monthly payments from 170<sup>th</sup> St.’s “deposit account.” According to Vitale, “170<sup>th</sup> Street made regular payments to HSBC on the Line of Credit from 2003 to 2010 and two additional payments in 2011” and that there “is no record of 170<sup>th</sup> Street ever protesting any withdrawals or payments.” Vitale attached a “payment summary . . . systematically created and retained by HSBC . . . related to defendants’ account.” Vitale also attached MasterCard BusinessCard monthly statements, from 2/22/10 to 2/21/12, addressed to “Jose Blain, 170<sup>th</sup> St. Auto Mech, 4761 Richardson Ave, Bronx, NY 10470-1022” to his affidavit.

In his affirmation, HSBC’s counsel asserts that “Blain, as president of 170<sup>th</sup> St., had actual authority to bind the corporation and to incur indebtedness to HSBC” and that even if 170<sup>th</sup> St. “could establish a defect in [the Line of Credit Agreement], it still would not be able to

---

<sup>1</sup>In a short form order dated November 10, 2014, the Hon. John A. Barone granted those portions of plaintiff’s motion which sought a default judgment against Blain and to amend the complaint.

overcome its actual knowledge of the loan and the resulting direct withdrawal of payments from its own commercial bank account.”

In opposition to HSBC’s motion and in support of its cross-motion, 170<sup>th</sup> St. submitted, *inter alia*, the affidavit of Juan Astacio wherein he states that he was the secretary, treasurer and a director of 170<sup>th</sup> St. and that “[f]rom the time the shares in 170<sup>th</sup> St. were purchased up to and including the time this lawsuit was filed, Blain did not have the authority to obtain a loan for 170<sup>th</sup> St. without [Astacio’s] consent, and likewise, [Astacio] did not have the authority to obtain a loan for 170<sup>th</sup> St. without Blain’s consent.” Astacio also states that Blain did not have the authority to obtain a credit card in the name of 170<sup>th</sup> St. without his consent and vice versa. According to Astacio, the first time he found out that Blain had “obtained the unauthorized Loan and Mastercard from plaintiff” was when he received the Demand Notice sent by HSBC. Astacio claims that Blain never received his consent either verbally or in writing to obtain “the Loan or MasterCard,” that the banking resolution attached to Vitale’s affidavit is “completely fraudulent” and that “[t]here was no board of directors meeting held on 11/19/03 to approve the Loan as stated in the document.” Nor did Blain “have the authority as stated in the plaintiff’s form corporate banking resolution.” Astacio further states that the credit card statements and bank statements attached to Vitale’s affidavit in support of plaintiff’s motion for summary judgment “were mailed to Blain’s personal address” and “[a]s such, plaintiff’s argument in the motion that 170<sup>th</sup> St. ratified the loan because it had notice through the payments and monthly statements is without merit.” According to Astacio, “[t]he account was being used by Blain as his personal account with his personal address” and “170<sup>th</sup> St.’s commercial bank account has been with Banco Popular for more than 15 years, not with HSBC.” Astacio also claims that “[t]he proceeds from the Loan and the Mastercard were never used to pay any of the expenses for 170<sup>th</sup> St., but were instead used to pay Blain’s own personal expenses.” On February 8, 2012, Astacio brought a derivative action against Blain on behalf of 170<sup>th</sup> St. in Bronx Supreme Court alleging that Blain had fraudulently obtained the Loan and converted the funds for his own personal use, that Blain converted additional funds from 170<sup>th</sup> St. through the use of “fraudulent credit card processing” and that Blain opened another business with some of the converted

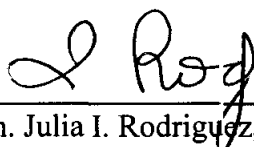
funds. Astacio asserts that plaintiff "should not be able to obtain a judgment against 170<sup>th</sup> St., because the bank failed to undertake even the most basic of due diligence to verify that Blain had the authority to obtain the Loan and Mastercard" but that "[i]t is Blain that should be responsible any [sic] debt owed to the plaintiff for fraudulently obtaining the Loan and Mastercard and using the proceeds for his personal use."

\* \* \* \* \*

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1<sup>st</sup> Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

Based upon the discrepancies between the affidavits of Vitale and Astacio together with the documentary evidence submitted by the parties, at a minimum, issues of fact exist as to whether Blain had actual or apparent authority to bind 170<sup>th</sup> St. to the Loan, whether HSBC made a sufficient effort to discover the actual scope of Blain's authority, and whether 170<sup>th</sup> St. received or accepted the benefit of the Loan or that it was applied to 170<sup>th</sup> St. *See Fleet Bank v. Consola, Riccitelli, Squadere Post No. 17 Inc.*, 268 A.D.2d 627, 701 N.Y.S.2d 182 (1<sup>st</sup> Dept. 2000); *Chelsea Natl. Bank v. Lincoln Plaza Towers Assoc.*, 93 A.D.2d 215, 461 N.Y.S.2d 328 (1<sup>st</sup> Dept. 1983). Accordingly, the motion and cross-motion are **denied**.

Dated: Bronx, New York  
January 8, 2016

  
\_\_\_\_\_  
Hon. Julia I. Rodriguez, J.S.C.