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| <b>City Natl. Bank v Bleecker St. Records, Inc.</b>  |
| 2016 NY Slip Op 30790(U)   |
| April 25, 2016   |
| Supreme Court, New York County   |
| Docket Number: 652350/12   |
| Judge: Joan A. Madden  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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CITY NATIONAL BANK,

Plaintiff,

INDEX NO. 652350/12

-against-

BLEECKER STREET RECORDS, INC., BLEECKER  
STREET MUSIC, INC., MATTHEW WHITE and  
BARBARA WHITE,

Defendants.

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JOAN A. MADDEN, J.:

In this action for breach of a credit card agreement, a promissory note and guaranties, plaintiff City National Bank moves for an order pursuant to CPLR 3212 granting summary judgment against defendants Bleecker Street Records, Inc., Bleecker Street Music, Inc. and Matthew White.<sup>1</sup> At oral argument on the motion, defendants' counsel conceded liability of corporate defendants Bleecker Street Records, Inc. and Bleecker Street Music, Inc., on the promissory note and the credit card agreement, respectively. The only remaining issue is the liability of individual defendant Matthew White on the guaranties.

To establish a prima facie right to summary judgment on a claim to enforce a written guaranty, plaintiff must prove the existence of an absolute and unconditional guaranty, the underlying debt and the guarantor's failure to perform under the guaranty. See Cooperatieve Centrale Raiffeisen-Boerenleenbank, NA v. Navarro, 25 NY3d 485 (2015); Reliance Construction Ltd v. Kennelly, 70 AD3d 418, 419 (1<sup>st</sup> Dept), lv app dism 15 NY3d 848 (2010);

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<sup>1</sup>On July 25, 2103, plaintiff filed a stipulation of discontinuance as to defendant Barbara White.

Davimos v. Halle, 35 AD3d 270, 272 (1<sup>st</sup> Dept 2006); Kensington House Co v. Oram, 293 AD2d 304 (1<sup>st</sup> Dept 2002); City of New York v. Clarose Cinema Corp, 256 AD2d 69, 71 (1<sup>st</sup> Dept 1998). Once plaintiff satisfies that showing, the burden shifts to defendant guarantor to submit competent proof establishing a triable issue of material fact with respect to a bona fide defense. See Cooperatieve Centrale Raiffeisen-Boerenleenbank, NA v. Navarro, *supra*; Griffon V, LLC v. 11 East 36<sup>th</sup>, LLC, 90 AD3d 705 (2<sup>nd</sup> Dept 2011). “Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” Citibank, NA v. Uri Schwartz & Sons Diamonds Ltd, 97 AD3d 444 (1<sup>st</sup> Dept 2012) (quoting National Westminster Bank USA v. Sardi’s Inc, 174 AD2d 470 [1<sup>st</sup> Dept 1991]).

Here, plaintiff has met its burden of establishing entitlement to summary judgment against Matthew White for breach of the guaranties. In support of the motion, plaintiff submits an attorney’s affirmation; an Affidavit of Facts from its an Assistant Vice President and employee, Valerie Moore; the pleadings; plaintiff’s Notice to Admit; the court’s discovery orders; defendants’ Supplemental Responses to Combined Demands dated April 13, 2015; portions of defendant Matthew White’s deposition testimony; and numerous documents from plaintiff bank which are signed by Matthew White either individually or on behalf of the corporate defendants. The documents from plaintiff bank include defendant Bleecker Street Music’s Business Credit Card Application dated January 31, 2006; defendant Bleecker Street Records’ Promissory Note dated May 9, 2010 in the principal amount of \$12,500; subsequent Change in Terms Agreements that reduced the principal amount of the promissory note to \$7,500 and extended the maturity date of the note; a Continuing Guarantee, dated January 31, 2006, in which Matthew White

unconditionally guaranteed payment and performance of Bleecker Street Music's obligations under the business credit card agreement; two Commercial Guaranties dated March 10, 2010 and March 10, 2011, in which Matthew White guaranteed payment and performance of Bleecker Street Records' obligations under the March 10, 2010 and March 10, 2011 promissory notes, in the principal amounts of \$12,500 and \$7,500, respectively; plaintiff's monthly credit card statements addressed to Bleecker Street Music covering the period from September 2006 to June 2012; and plaintiffs' records as to the amounts paid and due under the promissory notes.

Based on the foregoing affidavit and documentary proof, plaintiff has made sufficient prima facie showing to be entitled to judgment as a matter of law by submitting proof of the underlying credit card agreement and promissory notes, the personal guaranties bearing White's signature of his companies' obligations under the credit card agreement and promissory notes, and defendants' failure to make payments in accordance with the terms of the credit card agreement, the promissory notes and the guaranties. See Poah One Acquisition Holdings V Ltd v. Armenta, 96 AD3d 560 (1<sup>st</sup> Dept 2012); HSBC Bank USA v. Goldberger, 105 AD3d 906 (2<sup>nd</sup> Dept 2013). Additionally, as noted above, the corporate defendants have conceded liability, so Bleecker Street Music, Inc. concedes it defaulted on its obligations under the credit card agreement and Bleecker Street Records, Inc. concedes it defaulted on its obligations under the promissory note.

In opposition, defendant White has failed to sustain his burden of establishing a material issue of fact with respect to a bona fide defense to his liability under the guaranties. White submits only an attorney's affirmation and selected portions of his deposition testimony, and

argues that his deposition testimony raises an issue of fact.<sup>2</sup> Contrary to White's argument, his deposition testimony does not create an issue of fact as to the authenticity of his signature on the guaranties, or any other bona fide defense to the guaranties. To the extent White testified that he did not sign, did not recognize and had no knowledge of the promissory note and the commercial credit card agreement, and suggested that the corporate credit card and power of attorney were used without his knowledge or authorization by "four personnel," that testimony is relevant to the corporate defendants' liability and is not relevant to White's personal liability under the guaranties. As the corporate defendants have conceded liability, such testimony is of no import. In any event, White's testimony that he did not have a credit card through plaintiff City National Bank and his suggestion that the corporate credit card was used without his knowledge and authorization, are belied by the credit card statements which on their face show that during the five-year period from 2006 to 2011, numerous airplane tickets for Matthew White were among the hundreds of items purchased with the card.<sup>3</sup>

With respect to issue of the authenticity of White's signature on the guaranties, plaintiff argues that White's failure to timely comply with three court orders directing him to provide legible copies of his passport, driver's license and check exemplars by a date certain should

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<sup>2</sup>White does not submit an affidavit in opposition to the instant motion. He did, however, submit an affidavit in opposition to plaintiff's prior motion for a default judgment, in which he stated that he had "no knowledge of the agreements for which Plaintiff based its claims," he "did not sign any of the agreements for which Plaintiff bases its claims," and he did not "give any other person authority to sign such agreements on my behalf or the Defendants Corporations' behalf."

<sup>3</sup>Matthew White's name appears on the statements in connection with the charges for his airplane tickets.

preclude White from contesting the authenticity of his signature on the documents at issue in this action. It is undisputed that White failed to timely produce the documents. The final order dated February 18, 2105, required production by March 5, 2015 and stated that if he failed to comply, he would be “precluded at trial from offering evidence that it is not his signature on the documents at issue.” It is undisputed that White produced copies of only his driver’s license and checks on or about April 13, 2015. While the court does not condone White’s failure to timely and fully comply with the order, since he substantially complied within a reasonable time after the date he was to produce the discovery, the court declines to preclude his challenge to authenticity of his signature.

Plaintiff further argues that since defendants did not respond to plaintiff’s notice to admit, the matters for which plaintiff sought an admission, i.e. White’s signature on certain annexed bank documents is a “true signature (not a forgery),” are deemed admitted pursuant to CPLR 3123. The documents covered by plaintiff’s notice to admit consist of several applications for White’s personal and corporate checking accounts; White’s power of attorney in favor of three individuals in connection with the personal checking account; and the Commercial Guaranty dated March 10, 2011 in which White guaranteed payment and performance of Bleecker Street Records’ obligations under the March 10, 2011 Promissory Note for \$7,5000. In opposition, White does not deny that he failed to respond to the notice to admit, but argues that his deposition testimony “contradicts the assumption of an unresponded Notice to Admit.”

“[T]he purpose of a notice to admit is to crystalize issues and to eliminate from trial those that are easily provable or not really in dispute.” Hodes v. City of New York, 165 AD2d 168, 170 (1<sup>st</sup> Dept 1991). “A notice to admit, pursuant to CPLR 3123(a), is to be used only for

disposing of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial.” Hawthorne Group v. RRE Ventures, 7 AD3d 320 (1<sup>st</sup> Dept 2004); see New Image Construction Inc v. TDR Enterprises Inc, 74 AD3d 680 (1<sup>st</sup> Dept 2010). In other words, a notice to admit is “designed to elicit admissions on matters which the requesting party ‘reasonably believes there can be no substantial dispute.’” National Union Fire Insurance Co v. Allen, 232 AD2d 80 (1<sup>st</sup> Dept 1997) (quoting CPLR 3123[a]).

Here, plaintiff improperly seeks admissions that go to the essence of the parties’ dispute as they concern the authenticity of White’s signature on several bank documents and he has denied his signature on some of those and other bank documents, including the March 10, 2011 Commercial Guaranty annexed to the Notice to Admit. Under these circumstances, the authenticity of the documents cannot be deemed admitted, despite defendants’ failure to respond.

Nevertheless, White’s opposition fails to raise an issue of fact as to the authenticity of his signature on the March 10, 2011 guaranty of the promissory note, as well as the guaranty of the corporate credit card. “Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature.” Banco Popular North America v. Victory Taxi Managment, Inc, 1 NY3d 381 (2004). Here, White’s conclusory and unsubstantiated denials of having signed the guaranties are insufficient to defeat plaintiff’s motion. See North Fork Bank Corp v. Graphic Forms Assocs, 36 AD3d 676 (2<sup>nd</sup> Dept 2007); JP Morgan Chase Bank v. Gamut-Mitchell, Inc, 27 AD3d 622 (2<sup>nd</sup> Dept 2006); Vamattam v. Thomas, 205 AD2d 615 (2<sup>nd</sup> Dept 1994).

Thus, in the absence of a triable issue of fact, plaintiff is entitled to judgment as a matter of law against defendant Matthew White for breach of his personal guaranty of Bleecker Street Record's credit card agreement, and breach of his personal guaranty of Bleecker Street Music's promissory notes. Also, on consent, plaintiff is entitled to judgment as a matter of law against defendants Bleecker Street Records, Inc. and Bleecker Street Music, Inc.

Finally, with respect to the issue of damages, plaintiff submits an affidavit from Assistant Vice President and employee Valerie Moore and supporting documents as to the amounts due and owing on the credit card agreement and the promissory notes. Defendants' opposition papers are silent as to issue of damages. Thus, plaintiff's uncontroverted proof establishes that City National Bank is entitled to a judgment against defendant Bleecker Street Records, Inc., in the amount of \$7,675.78 together with interest at the rate of 11.25% from May 15, 2012 for breach of the promissory notes; a judgment against defendant Bleecker Street Music, Inc. in the amount of \$17,676.99, together with interest at the rate of 15.96% from March 30, 2013, and a late charge of \$29.00 for breach of the credit card agreement; a judgment against defendant Matthew White in the amount of \$17,676.99, together with interest at the rate of 15.96% from March 30, 2013, and a late charge of \$29.00 for breach of his guaranty of Bleecker Street Music, Inc.'s credit card agreement; and a judgment in the amount of \$7,675.78 together with interest at the rate of 11.25% from May 15, 2012 on his guaranty of Bleecker Street Records, Inc.'s promissory notes.

Based on the express terms of the promissory notes, the credit card agreement and the guaranties, plaintiff is also entitled to an award of reasonable attorneys, and a hearing and assessment shall be held to determine the reasonable amount of such fees.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted; and it is further

ORDERED that plaintiff is entitled to a judgment against defendant Bleecker Street Records, Inc., in the amount of \$7,675.78 together with interest as calculated by the Clerk at the rate of \$11.25% from May 15, 2012; a judgment against defendant Bleecker Street Music, Inc. in the amount of \$17,676.99, together with interest as computed by the Clerk at the rate of 15.96% from March 30, 2013, and a late charge of \$29.00; a judgment against defendant Matthew White in the amount of \$7,675.78 together with interest as calculated by the Clerk at the rate of \$11.25% ; and a judgment against defendant Matthew White in the amount of \$17,676.99, together with interest as computed by the Clerk at the rate of 15.96% from March 30, 2013, and a late charge of \$29.00; all together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that The Clerk is directed to enter judgments accordingly; and it is further

ORDERED that plaintiff's claim for attorney's fees is severed and shall continue, and a hearing and assessment are directed to determine the reasonable amount of such fees; and it is further

ORDERED upon service of a copy of this decision and order with notice of entry on the Clerk of the Trial Support Office (Room 158), said Clerk shall thereupon place this action on the appropriate calendar for a hearing and assessment as to attorney's fees.

DATED: April 25, 2016

ENTER:

  
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HON. JOANA A. MADDEN  
J.S.C.