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| <b>Business Resource &amp; Inv. Ctr., Inc., v Umukoro</b>                                                                                                                                                                                                        |
| 2017 NY Slip Op 30260(U)                                                                                                                                                                                                                                         |
| February 8, 2017                                                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 156038/2015                                                                                                                                                                                                                                       |
| Judge: Eileen A. Rakower                                                                                                                                                                                                                                         |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
Business Resource and Investment Center, Inc.,

Plaintiff,

Index No.  
156038/2015

**DECISION and  
ORDER**

- against -

Mot. Seq. #3

Sylva F. Umukoro,

Defendant.

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

Plaintiff, Business Resource and Investment Center, Inc. ("Plaintiff"), commenced this action on June 16, 2015. Defendant, Silva F. Umukoro ("Defendant" or "Umukoro"), interposed an answer on September 16, 2015.

This is an action to recover for default in payment on a loan. Plaintiff, Business Resource & Investment Service Center, Inc. ("Plaintiff"), alleges that it loaned the principal sum of \$250,000 to Citicare, Inc. ("Citicare") under the terms of a loan agreement (the "Loan Agreement") and promissory note (the "Note") entered on March 8, 2008. Plaintiff claims that as an inducement for Plaintiff to make the loan, Umukoro executed and delivered to Plaintiff his written personal Guaranty of Citicare's liability under the Loan Agreement. Plaintiff claims that Citicare defaulted on the Note by failing to pay the installment payment which became due and payable on December 1, 2013, and has not, at any time thereafter, made an installment payment. Plaintiff claims in this action that Umukoro is responsible for the amount due under the Note, along with interest, and late payments. Plaintiff's judgment of foreclosure and sale was entered on October 9, 2010. Plaintiff re-filed a notice of pendency on May 23, 2011.

Prior to Plaintiff's commencement of this action against Umukoro, in 2013. Citicare filed for bankruptcy. In his answer, Umukoro made affirmative assertions claiming that his "liability in this proceeding maybe reduced pending outcome of

the bankruptcy court proceeding” and requested “the court to delay judgment against defendant Silva F. Umukoro pending outcome the bankruptcy proceeding....”.

On October 15, 2015, Plaintiff moved for an Order, pursuant to CPLR §3212, granting summary judgment against Umukoro, and directing the Clerk to enter judgment in favor of Plaintiff for the principal sum of \$74,725.16, late fees of \$12,609.22 and prejudgment interest in the amount of \$15,439.97 through October 1, 2015, with interest to the entry of judgment. Umukoro did not oppose.

By Order and Decision dated March 11, 2016, the Court granted Plaintiff's motion for summary judgment, holding:

Here, Plaintiff has made a prima facie showing of entitlement to summary judgment through the affidavit of Smith and the annexed Loan Agreement, Note, and Personal Guaranty, which establish agreed upon terms, performance by Plaintiff, and default by Citicare and Umukoro. Umukoro, by failing to oppose, has not raised any triable issues of fact.

The Court entered judgment in favor of Plaintiff and against Umukoro in the amount of \$102,774.35, plus interest, and referred the issue of the amount of reasonable attorneys' fees and costs owed by Umukoro to Plaintiff to a Special Referee to hear and report with recommendations. On June 20, 2016, judgment was entered against Defendant.

On June 20, 2016, Special Referee Jeremy R. Feinberg held a hearing on the issue of attorneys' fees. Counsel for Plaintiff and Umukoro participated in the hearing.

Plaintiff has been represented in connection with the liability of Defendant on his guaranty of the indebtedness of Citicare, by the law firm of Underweiser & Underweiser, LLP. At the hearing before Mr. Feinberg, Jeffrey B. Underweiser, Esq., a partner in the Underweiser law firm, and Barry L. Mendelson, Esq., of counsel to the firm, testified that the services they rendered were reflected in the bills and that they were necessary for the proper representation of Plaintiff. As Mr. Underweiser testified, the bills were based on an hourly rate of \$350.00, an amount below the regular hourly rate charged by his firm for its services. Mr. Underweiser testified that the amount sought included services rendered in connection with the bankruptcy proceeding of Citicare, the Borrower of the loan. Plaintiff claimed that the attorney's fees incurred in connection with the Citicare bankruptcy were

necessary to determine Plaintiff's status in that proceeding and are recoverable under Umukoro's complete guaranty of the liability of Citicare to Plaintiff.

After hearing the testimony, Mr. Feinberg reported and recommendation that Umukoro owes Plaintiff \$22,705.50 in legal fees, together with the sum of \$1,610.41 in disbursements, for a total award of \$24,315.91. In his report, Mr. Feinberg notes that Umukoro "argues that no fees should be awarded because of the pendency of Citicare's bankruptcy proceeding" and "that the award of any relief is premature until the Citicare bankruptcy is resolved especially given the likelihood of recovery." Mr. Feinberg states, "In deciding this matter, I am limited by the scope of Justice Rakower's reference."

By Notice of Motion filed on November 2, 2016, Plaintiff moves for an Order confirming Mr. Feinberg's Report and Recommendation and awarding Plaintiff attorneys' fees and disbursements in the total amount of \$24,315.91.

Umukoro opposes Plaintiff's motion to confirm Mr. Feinberg's Report and Recommendation.

Umukoro also requests an Order pursuant to CPLR 2221, vacating the court's March 11, 2016 order which granted summary judgment in Plaintiff's favor and awarded judgment in Plaintiff's favor in the amount of \$102,774.35 plus interest. In the alternative, Umukoro requests that the March 11, 2016 order be amended to reduce the judgment to \$9,805.35 without interest, costs or disbursements or attorneys' fees. Furthermore, Umukoro requests that "[s]hould the Court decide to assess attorneys' fees, Umukoro requests the Court to confirm only so much of the Special Referee's Report and Recommendation that assesses legitimate fees before September 28, 2015 and reject those parts of the report that recommend fees incurred on or after September 28, 2015."

CPLR 2221(e) provides that a motion for leave to renew "shall be identified specifically as such," "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion."

Umukoro's motion to vacate the March 11, 2016 order which granted Plaintiff's motion for summary judgment is based upon "new information that was not available until October 21, 2016." Umukoro states:

Recently, on October 21, 2016, the Bankruptcy Court accepted Citicare Inc.'s Third Amended Chapter 11 Plan, which inter alia allows payment of \$93,969.00 in four installments over two years, to Plaintiff BRISC. This represents nearly \$30,000.00 over the principle loan balance plaintiff claims in both court proceedings. (See Third Amended Chapter 11 Plan, §3.05(iii) at p.35 attached as Exhibit A).

Under the Plan, the Court allowed Plaintiff \$93,000.00 in full and complete satisfaction of Citicare's obligation to Plaintiff. (See Exhibit A, §3.05(iii)). Plaintiff BRISC is designated in Class 3 and is considered impaired ONLY because it will be paid over time. (Id). Thus for these reasons, Defendant requests the Court in this case to vacate the Summary Judgment Order to relieve defendant of an obligation that is satisfied in the bankruptcy proceeding and to prevent unjust enrichment by Plaintiff.

With respect to the award rendered by Mr. Feinberg's Report and Recommendation, Umukoro argues that the Bankruptcy Court's recent approval of Citicare's Third Amended Chapter 11 Plan renders plaintiff's work prosecuting this Supreme Court litigation premature, excessive and a waste of court and client resources.

Plaintiff opposes Umukoro's request to vacate the Judgment entered on Plaintiff's unopposed motion for summary judgment and to reject the Report. Plaintiff argues that Umukoro's request and arguments should not be considered because they are not made pursuant to a notice of cross-motion. Plaintiff also argues that Umukoro's arguments are barred by the law of the case based on the Court's March 11, 2016 order granting Plaintiff summary judgment. Plaintiff also argues that Umukoro's arguments lack merit because Plaintiff fails to attach a copy of the Third Amended Chapter 11 Plan; the reorganization plan does not provide for a release of Umukoro from his guaranty; Plaintiff has not received any payment from the Citicare bankruptcy estate; and the allowance of Plaintiff's claim in the reorganization does not mean that Plaintiff will be made whole. Plaintiff also argues that Umukoro has shown no reason why the Special Referee's Report should not be confirmed.

Here, under the terms of the Personal Guaranty, "The Guarantor expressly waives the following: . . . (ii) any right to require suit against the Borrower or any other party prior to the enforcement of this Guaranty by the Lender." This includes the bankruptcy estate.

Wherefore, it is hereby

ORDERED that the Report and Recommendation issued by Special Referee Jeremy Feinberg is confirmed; and it is further

ORDERED that the Clerk enter judgment in favor of Plaintiff and against defendant, Silva Umukoro, in the amount of \$24,315.91, representing Plaintiff's attorneys' fees and disbursements, is granted; and it is further

ORDERED that defendant Silva Umukoro's cross motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 8, 2017

A handwritten signature in black ink, appearing to read 'Eileen A. Rakower', written over a horizontal line.

Eileen A. Rakower, J.S.C.