

<b>Donenfeld v QTRAX, Inc.</b>
2017 NY Slip Op 30776(U)
April 14, 2017
Supreme Court, New York County
Docket Number: 656067/2016
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

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NANCY L. DONENFELD and THELMA L. DONENFELD,  
as Trustee of the NANCY L. DONENFELD TRUST,

**DECISION/ORDER**  
**Index No. 656067/2016**

Plaintiffs,

-against-

QTRAX, INC., QTRAX ASIA PTE. LTD., QTRAX GLOBAL  
HOLDINGS LTD. and QTRAX GREATER CHINA. LTD.,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiffs Nancy L. Donenfeld and Thelma Donenfeld, as Trustee of the Nancy L. Donenfeld Trust, commenced the instant action seeking recovery pursuant to defendants' guarantees of a settlement agreement. Plaintiffs now move for an Order pursuant to CPLR § 3212 granting them summary judgment against defendants and dismissing defendants' affirmative defenses and counterclaim and for sanctions against defendants pursuant to 22 NYCRR § 130-1.1. Defendants also request sanctions against plaintiffs pursuant to 22 NYCRR § 130-1.1. For the reasons set forth below, plaintiffs' motion is granted except as to the portion of plaintiffs' motion for sanctions pursuant to 22 NYCRR § 130-1.1, which is denied. Defendants' request for sanctions pursuant to 22 NYCRR § 130-1.1 is also denied.

The relevant facts are as follows. In or around March 2007, plaintiffs commenced an action in the Supreme Court, New York County against non-parties Allan Klepfisz and Brilliant Technologies Corporation (the "prior action"). Plaintiffs obtained a judgment against Brilliant Technologies Corporation ("Brilliant") in the prior action in 2011. On or about March 3, 2016, plaintiffs, Klepfisz and Brilliant entered into a settlement agreement for the prior action (the "settlement agreement"). Defendants entered

into separate guarantees of Klepfisz's and Brilliant's obligations under the settlement agreement on the same date (the "guarantees"). These guarantees, which are identical in all respects other than the names of the parties thereto, provide that the guarantors "irrevocably, absolutely and unconditionally guarantee the full and prompt payment of the Event of Default Payment" in the settlement agreement. Further, the guarantees provide that the guarantors "waive[] all defenses, affirmative defenses and counterclaims of any nature whatsoever."

Plaintiffs, Klepfisz and Brilliant entered into several modifications of the settlement agreement altering the payment schedule so as to make the schedule more lenient. However, although Klepfisz Brilliant made several payments under the settlement agreement between May 2016 and August 2016, they failed to make all required payments under the settlement agreement and defendants subsequently failed to make the required payments under the guarantees. Thus, plaintiffs commenced the instant action on or about November 18, 2016, asserting a cause of action for breach of contract and demanding damages in the amount of \$3,092,864.35, which is the default payment amount pursuant to the settlement agreement, less the payments that were made. In their answer, defendants assert a counterclaim for economic duress and three affirmative defenses: a defense "founded on documentary evidence;" payment, waiver, estoppel and laches; and unclean hands.

The portion of plaintiffs' motion for summary judgment against defendants is granted. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, plaintiffs have made a *prima facie* showing of their entitlement to summary judgment by establishing that defendants unconditionally guaranteed Klepfisz's and Brilliant's obligations under the settlement agreement and subsequently failed to perform. Specifically, plaintiffs have submitted the settlement agreement, the guarantees and the affirmation of plaintiffs' counsel stating that Klepfisz and Brilliant defaulted in payment under the settlement agreement and that defendants subsequently defaulted in payment under the guarantees.

In opposition, defendants have failed to raise a triable issue of fact. Defendants' only argument in opposition is that the guarantees are unenforceable because they were signed under economic duress, which is also the basis of defendants' sole counterclaim. However, this argument is unavailing as defendants expressly waived all such defenses and counterclaims in the guarantees. An express waiver of defenses and counterclaims in a guaranty is generally enforceable. See *Hotel 71 Mezz Lender LLC v. Mitchell*, 63 A.D.3d 447, 447 (1<sup>st</sup> Dept 2009) (holding that the defendant's affirmative defenses of frustration of performance, breach of the covenant of good faith and fair dealing and fraudulent inducement were barred by the guaranty's express waiver "of any and all defenses to enforcement of the guaranty"); *Banco Do Estado De Sao Paulo, S.A. v. Mendes Jr. Intern. Co.*, 249 A.D.2d 137, 138 (1<sup>st</sup> Dept 1998) (holding that the defendants were barred from asserting any affirmative defenses, including fraudulent inducement and duress, by the provision that the guaranty was enforceable "irrespective of...any other circumstances which might constitute a defense"), citing *Bank of India v. Sanghvi*, 224 A.D.2d 347 (1<sup>st</sup> Dept 1996). In the present case, the court finds that defendants' express waiver of "all defenses, affirmative defenses and counterclaims of any nature whatsoever" in the guarantees clearly bars defendants' claim of economic duress.

Moreover, even assuming *arguendo* that defendants' claim that the guarantees are unenforceable because they were signed under economic duress was not barred by the aforementioned express waiver, the court would still find that defendants have waived any claim of economic duress as they have not acted promptly to repudiate the guarantees based on the alleged duress. "The theory of economic duress 'permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of

its free will.” *Bank Leumi Trust Co. of N.Y. v. D’Evori Intl.*, 163 A.D.2d 26, 30 (1<sup>st</sup> Dept 1990). However, a party must act promptly to repudiate a contract procured by duress “or he will be deemed to have elected to affirm it.” *Id.* (holding that the defendant could not amend its answer to include an affirmative defense and counterclaim of economic duress in part because the defendant did not act to repudiate the contract based on the alleged duress for six months after entering the contract). *See also Leader v. Dinkler Mgt. Corp.*, 26 A.D.2d 683, 683 (2<sup>d</sup> Dept 1966) (holding that the “plaintiff’s delay in asserting the claim of duress constituted a waiver of the claim of economic duress” where the action asserting a claim of duress was commenced approximately six months after the parties entered into their settlement agreement).

In the present case, the court finds that defendants have waived any claim of economic duress by failing to act promptly to repudiate the guarantees on that basis. Defendants’ asserted their counterclaim of economic duress for the first time in their answer on or about February 6, 2017, which was nearly a year after defendants’ execution of the guarantees on or about March 3, 2016.

As the court has determined that defendants expressly waived any claim of economic duress in the guarantees and have moreover waived any claim of economic duress by failing to act promptly to repudiate the guarantees, the portion of plaintiffs’ motion for summary judgment dismissing defendants’ counterclaim for economic duress is granted. Further, the portion of plaintiffs’ motion for summary judgment dismissing defendants’ affirmative defenses is granted as plaintiffs have established as a matter of law that defendants expressly waived “all defenses, affirmative defenses and counterclaims of any nature whatsoever” in the guarantees. Moreover, defendants have failed to oppose this portion of plaintiffs’ motion.

However, the portion of plaintiffs’ motion for sanctions against defendants pursuant to 22 NYCRR § 130-1.1 is denied as plaintiffs have failed to establish a basis for such relief. Further, defendants’ request for sanctions against plaintiffs is also denied as defendants have failed to establish a basis for such relief.

Based on the foregoing, plaintiffs’ motion for summary judgment is granted except as to the portion of plaintiffs’ motion for sanctions pursuant to 22 NYCRR § 130-1.1, which is denied. Defendants’ request for sanctions pursuant to 22 NYCRR § 130-1.1 is also denied. Accordingly, the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$3,092,864.35,

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with interest thereon at the statutory rate from September 23, 2016, together with costs and disbursements.

This constitutes the decision and order of the court.

DATE: 4/14/17

CK  
KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN  
J.S.C.