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| Sterling Natl. Bank v Brill |
| 2017 NY Slip Op 32966(U) |
| March 30, 2017 |
| Supreme Court, Rockland County |
| Docket Number: 33570/2015 |
| Judge: Craig Stephen Brown |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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STERLING NATIONAL BANK f/k/a
PROVIDENT BANK,

DECISION AND ORDER

Plaintiff,
-against-

Index No. 33570/2015

ALAN B. BRILL, P.C., ALAN B. BRILL,
and SHELLEY BRILL

Defendants.

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HON. CRAIG STEPHEN BROWN, A.J.S.C

UPON the Amended Order to Show Cause, dated October 27, 2016, based on the application of John L. Buckheit, Esq., of Buckheit & Whelan, P.C., attorney for defendants, the Affirmation of Cory A. Poolman, Esq., of McCabe & Mack, L.L.P., attorney for plaintiff, dated November 9, 2016, the Reply Affidavit of John L. Buckheit, Esq., dated November 29, 2016, oral arguments made in open court on March 3, 2017 by John Buckheit, Esq., in support of the application and by Cory A. Poolman, Esq., in opposition, the Decision and Order of Hon. Victor J. Alfieri, Jr., A.J.S.C., dated September 23, 2016, and upon all the papers and proceedings previously held herein, defendant's application is decided as follows:

Defendants move to Renew and Reargue the Decision and Order of Hon. Victor J. Alfieri, Jr., dated September 23, 2016, which, *inter. alia.*, granted plaintiff's motion for summary judgment.

The procedural history underlying this lawsuit is not in dispute. On July 29, 2015, plaintiff commenced this action against defendants, ALAN B. BRILL, P.C., ALAN B. BRILL and SHELLEY BRILL¹ alleging that said defendants signed certain documents wherein they promised to re-pay plaintiff a sum of money and failed to do so. The complaint included four causes of action against

¹The causes of action against defendant, SHELLEY BRILL, were discontinued.

defendant, ALAN B. BRILL, alleging that he was obligated to re-pay plaintiff by virtue of a Commercial Guarantee (hereinafter referred to as "personal guarantee") he signed. Defendants filed an Answer denying the allegations set forth in the complaint.

On January 26, 2016, plaintiff filed a motion for summary judgment, contending that there were no triable issues of fact with respect to the existence of an underlying credit agreement signed by defendant, ALAN B. BRILL, as president of ALAN B. BRILL, P.C., a personal guarantee signed by defendant, ALAN B. BRILL, and a breach of the credit agreement. Defendants submitted opposition to plaintiff's summary judgment motion and a cross-motion to compel discovery. Defendants' opposition papers included an Affidavit of defendant, ALAN B. BRILL, wherein he expressly denied that he executed the personal guarantee. No other evidence was submitted to support or substantiate Mr. Brill's denial that he signed the personal guarantee.

In a Decision and Order by Hon. Victor J. Alfieri, Jr., dated September 23, 2016, the Court held that plaintiff established its entitlement to summary judgment by submitted proof of the underlying credit agreement, a personal guarantee bearing the signature of defendant, ALAN B. BRILL, and the defendants' failure to make payments in accordance with the terms of the credit agreement and guarantee. The decision specifically addressed defendant, ALAN B. BRILL's opposition to the motion and determined that defendant, ALAN B. BRILL's conclusory denials that he signed the personal guarantee were insufficient to raise a triable issue of fact, citing *JP Morgan Chase Bank v Gamut-Mitchell, Inc.* (27 AD2d 622) and *Banco Popular N. Am. v Victory Taxi Mgt.* (1 NY3d 381).

In *JP Morgan v Chase*, supra, the Appellate Division, Second Department, held that the defendant's conclusory denial that she signed the personal guarantee was insufficient to raise a triable issue of fact in opposition to a motion for summary judgment. In *Banco Popular N. Am. v Victory Taxi Mgt.*, supra., the Court of Appeals held that defendant's claim that the signature on the guarantee was

forged, which claim was supported by an unsworn expert opinion that defendant was not the signor, was insufficient to raise a triable issue of fact. The Court stated “A defendant can defeat a CPLR 3213 motion by offering *evidentiary* proof sufficient to raise a genuine triable issue of fact” (See, *Banco Popular N. Am. v Victory Taxi Mgt.*, supra., at page 383, emphasis added, see also, *JP Morgan Chase Bank v Bauer*, 92 AD2d 641).

To succeed in a Motion to Renew and Reargue, the movant must establish that the Court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision (See, CPLR 2221, *Castelle v. Roter*, 258 AD2d 550). Here, defendant contends that Judge Alfieri failed to consider the Appellate Division’s decision in *TD Bank, NA v Piccolo Mondo 21st Century, Inc.* (98 AD3d 499).

In *TD Bank, NA v Piccolo Mondo 21st Century, Inc.*, defendant, in opposition to the bank’s motion for summary judgment, submitted copies of her driver’s license and passport which, she contended, bore signatures which differed from her signature on the personal guarantee. Under these circumstances, the Appellate Division reviewed the submitted documents and held that a triable issue of fact existed whether defendant signed the personal guarantee.

Contrary to defendants’ contention, the facts of this case differ from those in *TD Bank, NA v Piccolo Mondo 21st Century, Inc.*, supra. In this case, defendant, in his opposition papers, did not submit any signed document to show that his signature on said documents differed from his signature on the personal guarantee.²

The absence of a notary public’s signature on the personal guarantee does not create a triable issue of fact particularly where, as here, the loan agreement itself was not notarized. A notary public’s

²In his motion to renew, defendant submitted, for the first time, copies of his driver’s license and passport. However, he did not set forth reasonable justification for the failure to present such documents on the prior motion (See, CPLR 2221[e][3]).

signature merely creates a presumption that a document was signed by its signor (See, *Seaboard Sur. Co. v Earthline Corp.*, 262 AD2d 253). Moreover, this Court has reviewed the signatures that appear on the loan documents signed by defendant, ALAN B. BRILL, as president of ALAN B. BRILL, P.C. and the signature on the personal guarantee and finds that they are substantially similar.

It should be noted that, although not addressed in Judge Alfieri’s Decision and Order or in the papers previously submitted by the parties, the record includes documentary evidence that defendant, ALAN B. BRILL, as president of Alan B. Brill, P.C., executed a corporate loan agreement wherein he acknowledged that he was the unlimited guarantor. The Business Loan Agreement³ of Alan B. Brill, P.C., dated January 5, 2007, which bears the signature of “Alan B. Brill, Owner of Alan B. Brill, P.C.”, states as follow:

Affirmative Covenants. Borrower covenants and agrees with Lender that, so long as this agreement remains in effect. Borrower will . . . (page 1, paragraph 5)

Guarantee: Prior to disbursement of any Loan proceeds, furnish executed guarantees of the Loans in favor of Lender, executed by the guarantor named below, or Lender’s forms, and in the amount and under the conditions set forth in those guaranties.

| <u>Name of Guarantor</u> | <u>Amount</u> |
|--------------------------|------------------------------------|
| Alan B. Brill | Unlimited (Page 2, paragraph 1) |

The existence of this clause in the Business Loan Agreement clearly contradicts defendant, ALAN B. BRILL’s, sworn Affidavit in Opposition to Motion for Summary Judgment, dated March 31, 2016, wherein he stated “. . . nor would I have accepted this loan if it was recourse against me personally.”

Based on the foregoing, defendant’s motion to renew and reargue is denied. The Court has

³The Business Loan Agreement dated January 5, 2007 was included as an exhibit in plaintiff’s motion for summary judgment and also included in defendant’s Exhibit B in defendant’s motion to renew and reargue.

reviewed the Decision and Order of Hon. Victor J. Alfieri, Jr., dated September 23, 2016, and finds that it did not overlook or misapprehend the facts and/or the law nor did it mistakenly arrived at its decision.

The aforesaid constitutes the Decision and Order of the Court

Dated: March 30, 2017
New City, New York



HON. CRAIG STEPHEN BROWN
Acting Justice of the Supreme Court

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