

Citibank, N.A. v Integrated Strategic Resources, LLC
2018 NY Slip Op 31796(U)
July 23, 2018
Supreme Court, New York County
Docket Number: 656828/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CITIBANK, N.A.,

Plaintiff,

-against-

INTEGRATED STRATEGIC RESOURCES, LLC and
JULIE A. KROLOFF,

Defendant.

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FRANK P. NERVO, J:

Plaintiff moves for summary judgment on its first, second, third and fifth causes of action based on its breach of an agreement signed by defendant borrower, Integrated Strategic Resources, LLC (Integrated), by its failure to pay the amounts due under an amended promissory note dated September 5, 2014, in the principal amount of \$500,000, and against Julie A. Kroloff's (Kroloff), failure to pay that amount under her personal guaranty. The original \$500,000 note is dated August 13, 2013. Plaintiff seeks accrued interest under the note, together with attorney's fees. Plaintiff also seeks to strike defendants' various affirmative defenses.

The payment date for the amended note was extended at various times to a final date of December 31, 2016.

Plaintiff's first cause of action against the borrower is titled breach of note. It alleges that the note is an unconditional instrument for the payment of money only that is now due and payable but is unpaid. The second cause of action against the borrower is for an account stated. The third cause of action against the borrower is for unjust enrichment. The fifth cause of action is against the guarantor is for breach of the guaranty contract. The fourth cause of action, which is not the subject of this action, is to foreclose on a security agreement.

The note states that the principal amount is \$500,000. However, each cause of action demands judgment in the amount of \$473, 460.69, plus accrued interest and attorney fees.

The affirmative defenses plaintiff wishes to dismiss are failure to state a cause of action, the claim is barred by the express terms of the contract, the claim is barred by plaintiff's failure to perform, unjust enrichment, plaintiff's breach of the covenant of good faith and fair dealings, barred by failure to comply with the statutory provisions and regulations of the Uniform Commercial Code, the claim is barred by plaintiff's fraud, misrepresentation and duress, the claim is barred by estoppel, waiver, release ratification, discharge and laches, the claim is barred by plaintiff's consent to defendant's actions, the claim for account stated is duplicative

of the claim for breach of the note, the claim is barred by the parole evidence rule, plaintiff has not suffered any damages and finally, plaintiff has failed to mitigate damages.

Plaintiff, in support of the motion, submits copies of the notes and agreement in question, as well as the affidavit of Michael Caggiano, one of plaintiff's vice-presidents. The affidavit, contrary to defendant's argument is based on personal knowledge of the facts. Caggiano reviewed plaintiff's records of the transaction, including the records showing the amounts borrowed and any payments made. The affidavit refers to a demand letter plaintiff's attorney sent to defendant's attorney on January 6, 2017. Plaintiff attaches a copy of the demand to its papers.

Caggiano states that the principal amount owed is \$473,460.96. He also lists contract interest as of February 5, 2018 in the amount of \$24,735.84, default interest of \$45,809.93 and late fees of \$9,460. His affidavit also claims entitlement to default interest through the entry of judgment, plus reasonable attorney's fees and costs and expenses for which the contract provides.

Defendant and her attorney submit an affidavit and memorandum of law, respectively, in opposition to the motion.

The attorney asserts that a loan from plaintiff to defendant was paid and that the motion fails to indicate which loan is in question on this motion. However, in his reply affidavit, Caggiano shows that the loan the attorney refers to was for a \$511,500 term loan that defendant paid in full. Plaintiff submits a pay-off letter showing that the balance of that loan was only \$284,597.02. This demonstrates that it was the term loan that was paid. Moreover, defendant's affidavit shows her knowledge of which loan is in question, as she asserts that Integrated attempted to make some payments on the obligation in question but that plaintiff prevented it from doing this. By her own words, Kroloff shows that the loan in question was not satisfied. Therefore, the attorney's allegation that defendants paid the loan in question is without any factual basis.

Kroloff, in her affidavit, acknowledges executing a guarantee for both loans but states that she was not aware of her liability as a guarantor. She states that she did not know that she was waiving all defenses in the event of the borrower's default. She attributes her lack of knowledge to the fact that she did not receive a copy of the guarantee until the loan closing date and that her lawyer was not present at the closing. She states that her lawyer did not review the terms and conditions of the guaranty "because I was told that Citibank would not negotiate them." She does not state who at Citibank told her this.

Kroloff's attorney, in his memorandum of law, argues that the guaranty is not unconditional and that the waiver provisions of the guaranty do not preclude Kroloff's affirmative defenses.

He argues that those “well -plead affirmative defenses” raise questions of fact that bar summary judgment.

Plaintiff has met its burden of establishing its right to summary judgment by submitting evidence in admissible form that eliminates all triable issues of fact. Having done this, the burden shifted to defendants to provide admissible evidence that shows the existence of triable issues of fact. Defendants failed to meet that burden.

The evidence plaintiff submits shows the existence of the debt and Kroloff’s unconditional guarantee. Contrary to defendants’ argument, Caggiano demonstrated that his knowledge is based on plaintiff’s records. While defendants attempt to attack Caggiano’s knowledge of the facts, this attack is nothing more than an attack based on credibility that may not ordinarily be used to defeat a summary judgment motion. The court’s function is to determine whether a factual issue exists and does not weigh credibility, unless untruths are clearly apparent. (*French v. Cliff’s Place* 125 AD2d 292) There are no clearly apparent untruths in Caggiano’s affidavit. Thus, Caggiano’s affidavit is legally sufficient to support plaintiff’s entitlement to judgment.

In addition to Caggiano’s affidavit, Kroloff’s own affidavit provides an additional basis for finding that plaintiff is entitled to summary judgment. In addition to showing that she knew which loan is the subject of this motion, as noted above, Kroloff’s affidavit demonstrates that the loan she guaranteed remains unpaid. She does not deny that she failed to pay the amount owed pursuant to her guaranty; rather, her affidavit contains an admission that she did not satisfy the obligation, as she merely asserts that she tried to pay the amount due, albeit without factual basis, but that plaintiff thwarted her efforts. She therefore concedes that she remains indebted to plaintiff.

Defendants’ attorney’s allegation of payment is insufficient to defeat the motion. This allegation is an unsworn statement in a memorandum of law made by an individual who has no personal knowledge of the facts. (*Lyndaker v. Sherwin Williams, Inc.*, 140 AD2d 979)

Kroloff’s alleged failure to understand the guaranty agreement is a legally and factually insufficient basis for denying the motion. She signed the document as an individual. In doing so, she must have understood that she was assuming a personal obligation. She may not complain that she did not understand the agreement because her attorney chose not to be present at the closing. She was under an obligation to exercise ordinary care in reading the document to ascertain its terms. (*Chemical Bank v. Masters*, 176 AD 2d 591,592). Her signature appears under the statement in bold capital letters saying that she has read the all terms of the agreement. She does not allege that she was coerced into signing the agreement. (*Chemical Bank v. Masters, id.*) She does not allege that the closing could not be adjourned to a later date in order to study it further or to show it to her attorney. At most, she is alleging inadequate representation by an attorney. While that attorney’s inaction may be the subject of a legal action or a peer review proceeding, it may not serve as a basis for defeating this motion.

Kroloff's conclusory allegation that the guaranty does not specifically refer to the loan in question is similarly insufficient to defeat the motion. She does not provide any basis for her implication that the guaranty may have referred to some other obligation.

The attorney's memorandum of law does not present any legal arguments that bar summary judgment. He asserts that plaintiff's documentary proof does not establish entitlement to judgment. He argues that summary judgment must be denied because there has been no discovery on "defenses pertaining to suretyship or impairment of collateral used to secure the loans [sic] at issue." He asserts that plaintiff concedes that the waiver provisions of the guaranty precludes Kroloff but not Integrated from raising defenses and then argues that the waiver provisions allow both defendants to raise the waiver issue. He argues that plaintiff's failure to mitigate damages and its laches bar judgment as a matter of law. He alleges that the motion is premature, as defendants have not been given the opportunity to conduct discovery on the affirmative defenses.

The attorney provides no competent evidence showing facts that support the affirmative defenses. He fails to show how plaintiff could have mitigated its damages. He does not demonstrate that plaintiff is guilty of laches or that defendants were prejudiced by any alleged delay on plaintiff's part. He fails to show what facts discovery may reveal that would defeat plaintiff's entitlement to judgment. He fails to show how plaintiff could have been unjustly enriched, how any provision of the Uniform Commercial Code was breached or how defendants were the victims of fraud and duress. He does not demonstrate how plaintiff acted in bad faith. He does not show how there could have been any impairment of collateral or any suretyship defenses that would bar judgment as a matter of law. He does not demonstrate that discovery would reveal information relevant to such alleged defenses. At most, he is merely articulating a hope that discovery may lead to evidence that could defeat the motion. (see *Tone v. Studen*, 148 AD3d 1205, 1206)

The court finds that plaintiff has established its entitlement to summary judgement on its first and fifth causes of action, the causes of action for the borrower's breach of the note and Kroloff's failure to pay under the guarantee. However, on its own motion, the court dismisses the second and third causes of action as duplicative of the first and fifth causes of action. The court also dismisses the fourth cause of action as academic.

The court grants the branch of the motion to dismiss the affirmative defenses with the exception of the defense that the cause of action for account stated is duplicative of the first cause of action. That part of the motion is denied as academic in light of the court's dismissal of that cause of action.

While the court is granting summary judgement in the principal amount of \$ 473,460.65, the amounts, if any, for contract interest, default interest and attorney fees cannot be determined on these papers; rather, a trial on the amounts to which plaintiff may be entitled is necessary.

As only one judgement may be issued in a case, entry of judgement on the total amount due will be directed after the inquest.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its first and fifth causes of action is granted and plaintiff shall be entitled to a judgment in the principal amount of \$473,460.96 on those causes of action; and it is further

ORDERED that on the court's own motion, plaintiff's remaining causes of action are dismissed; and it is further

ORDERED that defendants' affirmative defenses with the exception of the tenth affirmative defense, and that branch of the motion is denied as academic in light of the court's dismissal of the first and fifth causes of action; and it is further

ORDERED that an assessment of damages against defendants Integrated Strategic Resources LLC and Julie A. Kroloff is directed to determine the amounts, if any, for attorney fees, contract and default interest to the date of the inquest and late fees; and it is further

ORDERED that a copy of this order with notice of entry shall be served by the movant on both defendants within twenty days of its entry by the Clerk; and it is further

ORDERED that a copy of this order with notice of entry, together with proof of service of a copy of it as directed in the immediately preceding paragraph, shall be served by movant on the Clerk of the Trial Support Office who is directed, on the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for an assessment of damages as directed above; and it is further

ORDERED that entry of a final judgment shall be held in abeyance pending the completion of the assessment of damages.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: July 23, 2018

ENTER:



HON. FRANK P. NERVO
JSC