

Citibank, N.A. v Wahlrich Group, LLC
2018 NY Slip Op 32549(U)
October 9, 2018
Supreme Court, New York County
Docket Number: 651527/17
Judge: Doris Ling-Cohan
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NYSCEF DOC. NO. 98

RECEIVED NYSCEF: 10/09/2018

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 36

-----X
 CITIBANK, N.A.,

Plaintiff,

-against-

Index No.

WAHLRICH GROUP, LLC, MICHAEL WAHL, a/k/a
 MIKE WAHL, ERIC WAHL, ANDREW WAHL, JUDITH
 WAHL, HOWARD INTERNATIONAL CORP., and
 BONNIE KAYE and HERBERT KOZLOV, as Co-
 Executors of THE ESTATE OF FRED HOWARD,

651527/17

Motion Seq. No.001

Defendants.

-----X
 DORIS LING-COHAN, J. :

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, it is

ORDERED that defendants Howard International Corp. and Bonnie Kaye ("Kaye") and Herbert Kozlov ("Kozlov"), as co-executors of the Estate of Fred Howard (collectively "the Howard Defendants") motion for dismissal of the eleventh cause of action in the complaint pursuant to CPLR 3211 (a) (1) is denied, as detailed below.

BACKGROUND OF THIS ACTION

This action was brought by plaintiff bank, Citibank, N.A., in order to recover damages and collateral related to defaulted loans totaling \$800,000. The borrower, defendant Wahlrich Group, LLC ("Wahlrich Group"), is owned by defendants Michael Wahl, a/k/a Mike Wahl, Eric Wahl and Andrew Wahl. Until late 2015, Michael Wahl was a co-executor of the Estate of Fred Howard. The Howard Defendants claim that Wahl was removed from that position after the

other co-executors discovered that he had fraudulently transferred estate assets to himself and his family through Wahlrich Group.

Prior to the commencement of this suit, Wahl signed documents in connection with the subject loans, including a hypothecation agreement and an assignment of collateral with plaintiff. The Howard Defendants contend that Wahl, who signed on behalf of Howard International Corp., was not authorized to do so, and, therefore, the documents are not valid. The Howard Defendants move to dismiss the eleventh cause of action in the complaint, in which plaintiff is seeking a declaration that its interest in the bank account of Howard International Corp. (which was the collateral assigned to plaintiff by Wahl), is superior to any interest held by the Estate of Fred Howard.

The Howard Defendants argue that plaintiff never filed a UCC financing statement to perfect its purported interest in the account, but is seeking a judgment declaring that it has a valid first lien and security interest in the account. Plaintiff claims that Howard International Corp. pledged the account as security for the repayment of one of the defaulted loans, a relationship ready credit agreement that extended credit in the principal amount of \$500,000, to Wahlrich Group. Plaintiff alleges that it maintains an interest in an account described in the complaint as "Citibank, N.M. IMMA Account Number xxxxxx6526," pursuant to a hypothecation agreement and an assignment of deposit account, executed on February 9, 2010.

Relying on documentary evidence, the Howard Defendants contend that they have sufficient proof that Wahl lacked the authority to pledge the account as collateral, and that plaintiff was aware of this at the time. They submit a copy of plaintiff's internal document, entitled Compliance Database-Account Details, which was produced and authenticated by plaintiff in response to a subpoena in another action, *Matter of the Estate of Fred Howard*, File

No. 2008-4776/A, Surrogate's Court of the County of New York. In that action, the remaining co-executors of the Howard Estate are seeking a turnover of estate assets allegedly held by Wahl and Wahlrich Group. The Howard Defendants argue that the internal document establishes that the signatures of defendants Kaye and Kozlov were required to validate any action regarding the Howard account and that Wahl was not identified as an authorized signatory. Thus, the Howard Defendants contend that Wahl could not pledge the subject account as collateral to plaintiff, and that plaintiff lacks a valid security interest in the account.

In opposition to the motion, plaintiff contends that the Howard Defendants provided a document that is insufficient in form, and failed to include other documents which would contradict their position on authorized signatories. Plaintiff also contends that the Howard Defendants intentionally did not make full disclosure of the significant evidence. According to plaintiff, the incomplete evidence warrants denial of the motion and constitutes "frivolous" conduct", in violation of 22 NYCRR 130-1.1 (c).

Plaintiff submits copies of the signature cards for the subject account, which include three signatures-Wahl's, Kaye's and Kozlov's; a business deposit application, which is signed by Wahl and Kaye on behalf of Howard International Corp.; a business-general deposit resolution; and a client manual, which allegedly provides that a single signature was sufficient to transact account business. Plaintiff argues that, with respect to the account, Wahl has as much authority as a signatory as Kaye and Kozlov.

Plaintiff asserts that its counsel sent a Rule 130 letter, dated January 16, 2018, to the Howard Defendants' counsel, who responded by letter dated February 8, 2018. Instead of withdrawing the within motion, the Howard Defendants challenged the authenticity of the additional documents mentioned in plaintiff's letter and stated that plaintiff should be estopped

from forwarding them. Although not cross-moving for sanctions, plaintiff suggests that such conduct by the Howard Defendants could merit a sanction.

In reply, the Howard Defendants affirm their position that the evidence provided by them clearly precludes Wahl from signing singly, and demonstrates that two signatures were necessary for a valid transaction, such as the pledge of the account as collateral. The Howard Defendants argue that their motion is meritorious and should not be denied or subject to sanctions.

In a separate affidavit, Wahlrich Group and Wahl claim that the Howard Defendants have made erroneous allegations in their moving papers with respect to the pledge of the account. Wahlrich Group and Wahl argue that these defendants were well aware of plaintiff's interest in the account for a considerable time before the commencement of this action. Regarding the Surrogate's Court proceeding, Wahlrich Group and Wahl contend that the turnover procedure by the co-executors was preceded by Wahl's action against Howard International Corp. for breach of contract, specifically, Howard International Corp.'s alleged failure to pay Wahl interest from the proceeds of a real property transaction. Wahlrich Group and Wahl state that the turnover procedure was discontinued after a settlement agreement was reached, with neither side acknowledging liability.

CPLR 3211 (a) (1) provides that a cause of action can be dismissed when documentary evidence is presented which conclusively establishes a defense to a claim, as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The evidence submitted herein is a copy of the part of the Howard International Corp. account which lists the names of the signers. There are three names: Howard International Corp. (Signer undefined), Herbert F. Kozlov (non owner/signer) and Bonnie Kaye (non owner/signer). The account apparently constitutes the assets of the Howard Estate. Kozlov and Kaye are the co-

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executors of the Estate and apparently not principals of Howard International Corp. There is no individual name listed for Howard International Corp., and on the bank agreements, Wahl signed in his capacity as president of Howard International Corp. Upon the within submissions, this Court cannot hold that the submitted document conclusively proves that Wahl, in his capacity as president of Howard International Corp., is not authorized to pledge this account to plaintiff, as collateral. Nor has it been conclusively shown that only defendants Kozlov and Kaye together have the authority to transact account business with plaintiff. Therefore, the motion to dismiss must be denied. This Court, however, will not sanction the Howard Defendants', nor their counsel, for allegedly withholding evidence because this motion is not on its face meritless.

Accordingly, it is

ORDERED that the Howard Defendants' motion to dismiss the eleventh cause of action in the complaint is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.¹

Dated: 10/9/18



Hon. Doris Ling-Cohan, J.S.C.

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

☒

DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

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¹ The Court notes that by separate order dated 10/9/18, a Preliminary Conference order has been issued, for the expeditious completion of discovery.