

Aronson Mayefsky & Sloan, LLP v Toboroff
2020 NY Slip Op 30021(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 151038/2018
Judge: Anthony Cannataro
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

-----X

INDEX NO. 151038/2018

ARONSON MAYEFISKY & SLOAN, LLP

MOTION DATE 03/17/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

LEONARD TOBOROFF,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISMISSAL.

This action to collect on a guaranty arises from matrimonial litigation in which plaintiff Aronson Mayefsky & Sloan, LLP (“AMS”) represented the daughter of defendant Leonard Toboroff’s (“Toboroff”) as counsel. Toboroff signed a written agreement in which he guaranteed payment of his daughter’s obligations arising under her retainer agreement with plaintiff AMS. On this motion, Toboroff moves to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. AMS cross-moves for summary judgment on its claim to enforce the guarantee and seeks sanctions.

Toboroff argues that the guarantee is conditional and collection is improper without AMS first satisfying the condition precedent of seeking to recover from and obtaining a judgment against his daughter. Toboroff also asserts that AMS is barred by collateral estoppel and *res judicata* from relitigating its claim for attorneys’ fees, arguing that the claim has been fully determined in the underlying divorce action. Toboroff further argues that AMS is not entitled to summary judgment as there are questions of

fact concerning the amount of legal fees and whether Toboroff objected to bills for certain fees.

AMS opposes the motion to dismiss asserting that the guarantee is one of payment, not of collection. AMS alleges that it is not limited by the fee awards made in the underlying divorce action and can recover the full amount of attorneys' fees due under the retainer from the guarantor. AMS also argues that is entitled to summary judgment as to both liability and damages under the guarantee. As to damages, AMS argues that, in accordance with principles of equitable estoppel and account stated, damages can be fixed without a hearing.

On a motion to dismiss pursuant to CPLR 3211 courts afford pleadings a "liberal construction" and "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

"A guaranty is an agreement to pay a debt owed by another which creates a secondary liability and thus is collateral to the contractual obligation. The principal debtor is not a party to the guaranty and the guarantor is not a party to the principal obligation" (*Shire Realty Corp. v Schorr*, 55 AD2d 356, 360 [2d Dept 1977]). While it is undisputed that the parties to this action entered into a guaranty agreement, they disagree as to whether it is a guaranty of payment or of collection. Courts have long held that the distinction between these types of guaranties is as follows:

The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking steps to collect of the principal debtor ... while in the second case the undertaking is that if the demand cannot be collected by legal

proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of guarantor (*McMurray v Noyes*, 72 NY 523, 524-25 [1878]).

Whether a guaranty is one of payment or collection depends on the intention of the parties as expressed in the agreement (*Gen. Phoenix Corp. v Cabot*, 300 NY 87, 92 [1949]). “Where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law, and parol evidence is not admissible as an aid in interpretation; no trial is necessary to determine the legal effect of the contract” (*id.*). A guaranty agreement “does not depend upon the use of technical words but upon a clear intent that one party as surety binds himself to the second party as creditor to pay a debt contracted by a third party, either immediately upon default of the third party or after attempts to effect collection from the third party have failed” (*id.*).

In interpreting specific language of guaranty agreements, the Court of Appeals has held that “[t]he use of the words ‘full and prompt***payment’ would be inapt if all that the parties intended was a guaranty of collection” (*First Nat. Bank v Jones*, 219 NY 312, 315 [1916]). Here, the guaranty agreement states that Toboroff “guarantees the timely payment and timely performance of all obligations of his daughter ... arising out of the Retainer Agreement...” This language, referring to “timely” payment of “all obligations” is substantially similar to the “full and prompt” language analyzed in *First National Bank* and, as such, the guaranty at issue here should also be read as one of payment.

Further, it has been held that a guaranty is one of payment where “it provides for payment by the guarantor immediately upon default and there is no mention whatsoever of a requirement that the creditor first attempt to recover from the debtor” (*Guardzman Lease Plan, Inc. v Gibraltar Transmission Corp.*, 129 Misc 2d 887, 889 [Sup Ct

1985)). Where, as here, there is no mention of any requirement that AMS first attempt to recover from Toboroff's daughter, the guaranty is one of payment.

The parties also dispute whether the award of attorneys' fees in the underlying divorce action and subsequent judgment entered against the husband bar AMS from recovering fees due under the retainer agreement against the guarantor. An award of counsel fees against the opposing spouse in a divorce proceeding does not preclude an attorney from seeking to recover payment of the full amount billed in a separate action against his or her client based on the retainer agreement (*Law Firm of Joel R. Brandes, P.C. v Ferraro*, 257 AD2d 610, 610 [2d Dept 1999]). Following this line of reasoning, an action against the client's guarantor, such as the one here, would also be permitted. As such, AMS has stated a cause of action to recover payment of attorneys' fees under the retainer agreement from the guarantor.

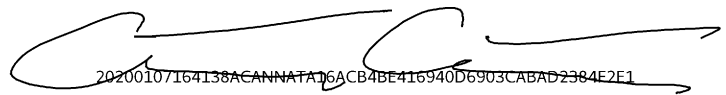
The Court now turns to plaintiff's cross-motion for summary judgment. "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made the required showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*). "On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

Summary judgment is inappropriate here as issues of fact remain regarding the underlying debt, or more precisely the total amount of attorneys' fees due, in this

action. AMS relies solely on its invoices to establish the underlying debt, claiming that they should be accepted in whole based on principles of equitable estoppel and account stated. While the Court agrees that AMS may be able to collect an amount greater than the judgment against the spouse in the divorce action, the amount that AMS can collect under its retainer agreement has yet to be established. It remains to be determined whether the total amount of the fees charged is reasonable and conscionable under the circumstances (see *Law Firm of Joel R. Brandes, P.C.* at 610). The appropriate amount of attorneys' fees is presently at issue in a separate action between AMS and Toboroff's daughter, which is also before this Court. As there is a pending dispute over the attorneys' fees payable by defendant's daughter, summary judgment for plaintiff must be denied. Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is denied.



20200107164138ACANNATA16ACB4BE416940D6903CABAD2384E2E1

1/6/2020
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

CHECK IF APPROPRIATE: