

TD Bank., N.A. v Goldberg's Int'l Mktg. Co, Inc.

2021 NY Slip Op 32182(U)

November 1, 2021

Supreme Court, Kings County

Docket Number: Index No. 510384/2020

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 510384/2020
Motion Date: 8-16-21
Mot. Seq. No.: 1, 2

-----X
TD BANK., N.A.

Plaintiff,

-against-

DECISION/ORDER

THE GOLDBERG'S INT'L MARKETING CO, INC. and
CHAIM GOLDBERGER,

Defendants.
-----X

Upon the following e-filed documents, listed by NYSCEF as item numbers 14-41, the motions are decided as follows:

Plaintiff TD BANK., N.A. moves pursuant to CPLR § 3212 for summary judgment in its favor against the defendants, THE GOLDBERG'S INT'L MARKETING CO, INC. (the "Borrower") and CHAIM GOLDBERGER (the "Guarantor") for the relief demanded in Plaintiff's Verified Complaint. Plaintiff also seeks an order summarily dismissing the defendants' Verified Answer and forty (40) affirmative defenses (**Mot. Seq. # 1**). Defendants cross-move for an order granting them leave to amend the Verified Answer pursuant to CPLR §3025(b), deeming the amended Verified Answer filed and serve nunc pro tunc on the same date as the defendants' initial Answer, and denying plaintiff's motion for summary judgment in its entirety (**Mot. Seq. # 2**). The two motions are consolidated for disposition.

This action arises out of a default on a loan by the defendant, THE GOLDBERG'S INT'L MARKETING CO, INC., the payment of which was guaranteed by the defendant CHAIM GOLDBERGER. The plaintiff made out a prima facie case as against these defendants by submitting proof of the note, the guaranty and the failure to make payment in accordance with their terms (*see, Key Bank of Long Island v. Burns*, 162 A.D.2d 501, 502, 556 N.Y.S.2d 829, 830; *Kornfeld v. NRX Technologies*, 93 A.D.2d 772, 461 N.Y.S.2d 342, *affd.* 62 N.Y.2d 686, 476 N.Y.S.2d 523, 465 N.E.2d 30; CPLR 3213). The plaintiff also demonstrated its entitlement to an award of attorneys' fees pursuant to the Note and that defendants' affirmative defenses are either without merit or insufficiently pled.

Defendants' contention that the plaintiff did not support the motion with admissible evidence is without merit. In his affidavit dated February 17, 2021, Divyesh Kothari, plaintiff's Vice-President, sufficiently established that the materials he relied on in preparing his affidavit, copies of which were attached thereto, were "business records" within the meaning of CPLR 4545. Further, the Goldberger affidavit, which was submitted in opposition to the motion and in support of the cross-motion, did not raise a triable issue of fact. Goldberger stated in his affidavit as follows:

5. After carefully reviewing the loan documents upon reviewing Plaintiff's motion for summary judgment, I only signed the business loan agreement and the promissory note on behalf of the co-Defendant, The Goldberg's Int'l Marketing Co. I did not sign the commercial guaranty on behalf of the company.

6. I am not sure why a signature appears on the commercial guaranty since I did not sign a guarantee pursuant to as Corporate debt.

7. The T.D. Bank. N.A. loan personnel advised me that I would not have to sign a personal guaranty and that I would not be personally liable for the Company's debt.

To the extent that the Goldberger affidavit can be construed as a denial by Goldberger that he signed the guaranty, it is well-settled that a conclusory denial by a guarantor that he did not sign a guaranty is insufficient to raise a triable issue of fact upon a motion for summary judgment (*North Fork Bank Corp. v. Graphic Forms Assoc., Inc.*, 36 A.D.3d 676, 676-77; *JPMorgan Chase Bank v. Gamut-Mitchell, Inc.*, 27 A.D.3d 622, 623; *see also Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 N.Y.3d 381, 383-384; *Peyton v. State of Newburgh, Inc.*, 14 A.D.3d 51, 54).

Goldberger's contention that he did not agree to be personally liable on the promissory note is without merit and also failed to raise a triable issue a fact. While officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually (*see generally Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 4, 254 N.Y.S.2d 521, 203 N.E.2d 206; *Weinreb v. Stinchfield*, 19 A.D.3d 482, 483, 797 N.Y.S.2d 521), here, the terms of the instant guaranty constituted a deliberately stated, unambiguous, and separate expression personally obligating Goldberger to guaranty payment of the loan (*see PNC Capital Recovery v.*

Mechanical Parking Sys., 283 A.D.2d 268, 270, 726 N.Y.S.2d 394; *Key Equip. Fin. v. S. Shore Imaging, Inc.*, 69 A.D.3d 805, 807, 893 N.Y.S.2d 574, 576). Since the written guaranty was unambiguous, parol evidence with respect to a contrary intent was not admissible and the parol evidence submitted in opposition to the plaintiff's motion failed to raise a triable issue of fact (see *Willsey v. Gjuraj*, 65 A.D.3d 1228, 1230, 885 N.Y.S.2d 528; *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864, 867, 827 N.Y.S.2d 581; *Yellow Book of New York, Inc. v. Shelley*, 74 A.D.3d 1333, 1335, 904 N.Y.S.2d 216, 217–18).

Goldberger's claim that he was told that by plaintiff's agents that he would not be personally liable under the Note did not raise a triable issue of fact on defendants' defense of fraud or any of the other alleged affirmative defenses. "A party who signs a document without any valid excuse for not having read it is 'conclusively bound' by its terms" (*Ferrarella v. Godt*, 131 A.D.3d 563, 567–568, 15 N.Y.S.3d 180, quoting *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 11, 537 N.Y.S.2d 787, 534 N.E.2d 824; see *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 162–163, 170 N.E. 530; *U.S. Legal Support, Inc. v. Eldad Prime, LLC*, 125 A.D.3d 486, 487, 5 N.Y.S.3d 1; *Ackerman v. Ackerman*, 120 A.D.3d at 1280, 993 N.Y.S.2d 53; *Matter of Aoki v. Aoki*, 117 A.D.3d 499, 503, 985 N.Y.S.2d 523, *lv. granted* 24 N.Y.3d 917, 2015 WL 752000; *Cash v. Titan Fin. Servs., Inc.*, 58 A.D.3d at 788, 873 N.Y.S.2d 642). Goldberger did not proffer any valid excuse for his failure to read the guaranty. "Under these circumstances, [Goldberger] is conclusively presumed to have agreed to the terms of [the guaranty] (see *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d at 11, 537 N.Y.S.2d 787, 534 N.E.2d 824; *Pimpinello v. Swift & Co.*, 253 N.Y. at 162–163, 170 N.E. 530; *Ferrarella v. Godt*, 131 A.D.3d at 567–568, 15 N.Y.S.3d 180; *U.S. Legal Support, Inc. v. Eldad Prime, LLC*, 125 A.D.3d at 487, 5 N.Y.S.3d 1; *Ackerman v. Ackerman*, 120 A.D.3d at 1280, 993 N.Y.S.2d 53; *Matter of Aoki v. Aoki*, 117 A.D.3d at 503, 985 N.Y.S.2d 523).

Turning to defendants' motion for leave to amend their answer, leave to amend a pleading is properly denied where "the proposed amendment is palpably insufficient or patently devoid of merit" (*Wells Fargo Bank, N.A. v. Spatafore*, 183 A.D.3d 853, 853, 122 N.Y.S.3d 557 [internal quotation marks omitted]; *Nationstar Mtge., LLC v. Jean-Baptiste*, 178 A.D.3d 883, 886, 114 N.Y.S.3d 402; *Oppedisano v. D'Agostino*, 196 A.D.3d 497, 151 N.Y.S.3d 150, 152–

53). For the reasons stated above, the proposed amendments are palpably insufficient and devoid of merit.

The court has considered defendants' remaining arguments in opposition to the motion and in support of the cross-motion and find them to be without merit

Accordingly, it is hereby

ORDERED that the plaintiff is awarded partial summary judgment on the issue of liability against both defendants; it is further

ORDERED that the matter is referred to a Special Referee to hear and report, with recommendations, on the issues of damages and attorney's fees, unless the parties agree to have the Special Referee hear and determine these issues; and it is further

ORDERED that the cross-motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: November 1, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020