

TD Bank, N.A. v Musi Bambino Corp.

2023 NY Slip Op 31205(U)

April 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652000/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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TD BANK, N.A.,

Plaintiff,

- v -

MUSI BAMBINO CORP., IRINA KOSSOLAPOVA

Defendant.

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INDEX NO. 652000/2022

MOTION DATE 04/04/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is granted.

Background

Plaintiff brings this case to recover on a line of credit loan extended to defendant Musi Bambino Corp. ("Musi") for \$60,000 in December 2017. The note contained a variable interest rate (with an initial rate of 8.38%). It alleges that defendant Kossolapova signed a guarantee in connection with the loan.

Plaintiff argues that it entered into a change in the terms of the agreement with defendants on March 4, 2021 where the principal balance of the note was modified to \$59,949.55, the interest rate was amended to a fixed rate of 7.380% per annum and the line of credit was converted to a term obligation requiring monthly payments of principal and interest for \$1,201.11. Plaintiff argues that Musi stopped making the monthly payments since at least January 19, 2022.

Plaintiff insists that as of November 21, 2022 there is \$58,937.74 due. It seeks summary judgment and to dismiss defendants' affirmative defenses and counterclaims.

In opposition, defendants assert that there are issues of fact that compel the Court to deny the instant motion. They insist they run a music program for young children and they borrowed money in order to expand the business. Defendants insist that they were in good standing until the pandemic struck. They insist that plaintiff made Kossolapova come, in person, to the bank office to execute a change of terms on the spot and plaintiff refused to let her consult with someone before signing the agreement. Defendants characterize the new agreement as unconscionable.

Defendants complain that plaintiff removed a hold overdraft fees and credit line fees (a hold originally initiated by government mandate) in November 2020, which caused Musi's bank account to go negative and for plaintiff to close the account. Musi then reached out to plaintiff in February 2021 to reinstate the hold on overdraft fees on the ground that the business could not reopen due to pandemic restrictions. According to defendants, plaintiff insisted that it would covert the line of credit to a term loan and then require monthly payments that were three times the amount owed prior to the pandemic. Defendants also point out other financial issues, including the fact that Musi fell behind on monthly rent and that Kossolapova's husband was allegedly defrauded out of \$95,000 in an unrelated business transaction.

Plaintiff argues in reply that defendants do not dispute that they executed the loan documents. It insists that defendants' reliance on the doctrines of duress, unclean hands, coercion, and unconscionability are without merit. Plaintiff argues that defendants failed to show that there was a wrongful threat made by someone at the bank. It highlights that the guaranty bars the guarantor from bringing affirmative defenses or counterclaims.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion. “The defense of duress is established upon the showing of a wrongful threat precluding the exercise of free will” (*Yoon Jung Kim v Gahee An*, 150 AD3d 590, 593, 55 NYS3d 20 [1st Dept 2017]). Nothing in the motion papers establishes an issue of fact about a wrongful threat. Instead, the record on this motion demonstrates that defendants were struggling due to the pandemic. Their business, a music program for young children, was

unsurprisingly hit hard by the pandemic. Kossolapova admits that customers were asking for refunds while the business remained closed and that she had to use COVID unemployment money to keep her account with plaintiff open. She also admits that she asked for another \$30,000 credit line advance and that plaintiff responded with a counter offer, which she ultimately signed (and for which she made payments).

The Court recognizes that Kossolapova feels that plaintiff left her no choice—but there is no dispute that plaintiff simply offered a change in the terms of the parties' agreement. And defendants agreed to that change. Moreover, the record suggests that defendants reached out, on their own, to plaintiff about a \$30,000 credit line advance. In other words, plaintiff was under no obligation to simply grant defendants' request for another advance and plaintiff counter offered with a proposal that defendants signed. The circumstances surrounding these proposals, even if the Court were to wholly credit Kossolapova's affidavit in opposition, do not raise an issue of fact concerning defendants' claims of duress, unconscionability, unclean hands, or coercion. Nor is there a basis to conclude the instant motion is premature.


Summary

There is no question that the pandemic devastated certain business, particularly those that necessarily involve in-person services. Here, defendants' music program was struggling and she asked for an additional \$30,000 advance. Plaintiff countered by offering to convert the original agreement into a loan and defendants accepted. And there is no dispute that Musi made a few payments before defaulting. The Court cannot alter or void a contract that defendants signed and got the benefit of the bargain.

The Court awards the \$5,142.90 requested in reasonable legal fees as this amount is clearly reasonable in a contested litigation in New York County and defendants did not sufficiently dispute this amount.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, defendants' affirmative defenses and counterclaim is dismissed and the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$58,937.74 plus interest at the contractual rate of 7.38% from November 21, 2022 along with \$5,142.90 in reasonable legal fees costs and disbursements upon presentation of proper papers therefor.

<p>4/10/2023</p> <hr/> <p>DATE</p>	 <hr/> <p>ARLENE P. BLUTH, J.S.C.</p>																																
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