

<b>Citibank, N.A. v Vernikov</b>
2023 NY Slip Op 35021(U)
July 31, 2023
Supreme Court, Kings County
Docket Number: Index No. 507167/2021
Judge: Richard J. Montelione
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At IAS Part 99, at the Kings County  
Supreme Court, 360 Adams St., Brooklyn,  
NY 11201, on the \_\_\_\_\_ day of  
\_\_\_\_\_ 2023

**JUL 31 2023**

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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

Plaintiff,  
-against-

GRIGORIY VERNIKOV d/b/a INTERPAGE CO.,

Defendant.  
-----X

**DECISION/ORDER**

Index No.: 507167/2021  
Mot. Seq. 2, 3, 4

The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Motion for Summary Judgment, dated 7/27/2022 (Motion Sequence #2); Affidavit of Plaintiff's Attorney in Fact, Tari Barber, Esq., sworn to on 7/27/2022; Exhibits A-F; Attorney Affirmation of Linda Mandel Gates, affirmed on 7/18/2022; Exhibits A-C; Affirmation of Attorney's Fees; Exhibit A; Memorandum of Law in Support; Statement of Material Facts.....	15-23
Defendant's Motion for Summary Judgment, dated on 1/30/2023 (Motion Sequence #3); Attorney Affirmation of Romeo Salta, Esq., affirmed on 1/30/2023; Affidavit of Defendant Grigoriy Vernikov, Sworn to on 1/26/2023; Exhibits A-F; Response to Statement of Material Facts; Statement of Material Facts.....	27-29
Affidavit of Plaintiff's Attorney in Fact, Tari Barber, Esq., in Reply, sworn to on 2/6/2023; Plaintiff's Attorney Affirmation of Linda Mandel Gates in Reply, affirmed on 2/6/2023; Proposed Judgment; Bill of Costs.....	94-95, 97-98
Defendant's Attorney Affirmation of Romeo Salta, Esq., in Further Support of Defendant's Cross-Motion, sworn to on 3/21/2023.....	96
Order dated 3/22/2023 granting Plaintiff's Motion for Summary Judgment (Motion Sequence #2) and denying Defendant's Motion for Summary Judgment (Motion Sequence #3) for defendant's failure to appear at oral argument.....	110
Defendant's Signed Order to Show Cause to Vacate his Default (Motion Sequence #4), filed 3/24/2023; Attorney Affirmations of Romeo Salta, Esq., in Support, sworn to on 3/23/2023; Exhibits A-E.....	100-108

Plaintiff Citibank, N.A. commenced this action by filing a summons and complaint on March 25, 2021, asserting a breach of contract claim under its contract with defendant Grigoriy Vernikov d/b/a Interpage CO. On August 22, 2018, plaintiff and defendant entered into a commercial credit agreement whereby plaintiff extended defendant a business line of credit in the amount of \$100,000.00 (NYSCEF #4). Defendant is in the business of supplying various specialty food items to other businesses and retail

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outlets. Plaintiff obtained a security interest in all of defendant's personal collateral (NYSCEF #3). In the complaint, plaintiff alleges that defendant defaulted by failing to make the payment due on August 23, 2019 and all payments due thereafter. Plaintiff also asserts a claim for unjust enrichment, seeks possession of defendant's collateral, in which plaintiff had a security interest, and seeks an order of replevin.

Defendant failed to answer or appear, and a judgment was entered by the Kings County Clerk on July 16, 2021 (NYSCEF #19). That judgment and defendant's default was vacated by Justice Peter P. Sweeney by decision and order dated April 14, 2022 (NYSCEF #62). Justice Sweeney determined that defendant had a reasonable excuse for his default and a potentially meritorious defense as defendant claims he never missed a payment. Justice Sweeney opined, "While plaintiff was within its right to terminate the line of credit at any time, the plaintiff secured the default judgment by maintaining that the defendant was in default under the agreement because he missed a payment." *Id.*

Defendant filed a verified answer on April 22, 2022, denied the allegations in the complaint, and asserted six counterclaims, including fraud, fraudulent inducement, breach of fiduciary duty, breach of contract, breach of the covenant of good faith and fair dealing, and seeks a declaratory judgment.

Both plaintiff and defendant moved for summary judgment. The motions were scheduled before this court on March 22, 2023. Defendant failed to appear for oral argument, and plaintiff's motion for summary judgment (Motion Sequence #2) was granted and defendant's cross-motion for summary judgment (Motion Sequence #3) was denied due to defendant's default. Defendant filed an Order to Show Cause two days later seeking to vacate its default at oral argument pursuant to CPLR 5015(a)(1) (Motion Sequence #4).

In seeking to vacate its second default in appearing, pursuant to CPLR 5015(a)(1), defendant must demonstrate a reasonable excuse for its default and a potentially meritorious defense to the action. *Velez v. Mr. Demolition, Inc.*, 172 A.D.3d 1140, 1141, 101 N.Y.S.3d 74 (2d Dep't 2019). Defendant's attorney, Romeo Salta, Esq., submitted an affidavit that states he did not appear at oral argument due to law office failure. Specifically, Mr. Salta's law firm had this matter scheduled before Supreme Court, New York County, where no personal appearance is required. In light of this reason, the two-day delay in filing the Order to Show Cause, and the lack of any written opposition for the relief requested, the court is satisfied that defendant has proffered a reasonable excuse for his failure to appear at oral argument. Justice Sweeney has already determined that defendant has a potentially meritorious defense as defendant claims he never missed a payment. Accordingly, Motion Sequence #4 is granted, and defendant's default is vacated.

The court will now consider the respective motions for summary judgment. Plaintiff moves for summary judgment arguing that defendant breached the contract "by failing to pay the monthly payment as and when due on the Account on August 23, 2019, and thereafter and as a result of insufficient cash flow" (NYSCEF #68, 82). On September 9, 2019, plaintiff issued a letter stating that the loan was terminated as of September 6, 2019, and the loan was termed out (NYSCEF #71-72). The "term out" letter, dated September 9, 2019, states that plaintiff found "insufficient cash flow to support the existing credit" and "[a]s a result . . . Citibank [canceled] [defendant's] borrowing rights and will not extend any additional credit under the Account effective immediately." (NYSCEF #72). Plaintiff sent a notice of default and intent to accelerate on March 6, 2020, which requested an immediate

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payment of \$15,644.52 within ten (10) days or the entire amount due would become immediately due (NYSCEF #5). Plaintiff alleges that defendant failed to make a payment, and plaintiff sent a second notice of default on February 19, 2021, in which plaintiff also made a replevin demand and accelerated all amounts due under the loan (\$92,666.83) (NYSCEF #6). Plaintiff also alleges that defendant paid the \$100.00 annual fee, but then reversed the charge and payment (NYSCEF #74).

Defendant opposes the motion arguing that a payment was automatically made from his bank account to plaintiff on August 23, 2019. He submitted a copy of his checking account showing that \$2,776.22 was paid on August 23, 2019 (NYSCEF #91). The transaction description reads "BUSINESS LOAN PAYMENT." *Id.* Defendant then received a letter from plaintiff, dated August 27, 2019, that states that the annual fee was satisfied, and defendant's account was renewed for another year (NYSCEF #87). Defendant alleges that, in reliance on that letter, he placed an order with a supplier on September 6, 2019 but the wire transfer from defendant's account to the supplier's account would not go through because defendant's account was "locked." He alleges that he lost his business relationship with that supplier and was damaged financially, but does not provide any evidence of such. Defendant claims he contacted Citibank customer service several times but the representatives he spoke with were unable to tell him why he could not access the funds in his account. Defendant states that on September 13, 2019, he received the September 9, 2019 letter which stated that the loan was terminated and the loan was termed out (NYSCEF #71-72).

In reply, plaintiff claims that the default was due to a "lack of cash flow" and that the default by defendant actually occurred on September 23, 2019, not August 23, 2019. Plaintiff states that the default occurred when defendant failed to remit any payments after the line of credit was terminated and termed out. Plaintiff fails to explain why they sent defendant a letter on September 9, 2019, before his default and eleven days after renewing the line of credit for one year, stating that the line of credit was terminated due to a "lack of cash flow." Plaintiff claims that they had the right to terminate the line of credit at any time for any or no reason. The relevant contractual provisions are as follows (NYSCEF #4):

All accounts are subject to periodic credit review, even if payment of the annual fee has recently been submitted.

...

Citibank will review the Account from time to time and may elect not to renew it or may reduce the maximum amount that may be borrowed.

...

We may refuse to pay your check or make additional credit available to you from your Account if you have reached your Limit, your Account is in default, you no longer maintain your primary business checking account with us, your credit privileges have been suspended or cancelled, or upon any other reasonable circumstance, including without limitation an adverse change in your financial condition or the financial condition of any guarantor, without incurring liability to you or others.

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...

[Citibank] can change the Agreement, including all fees, interest rate and method of computation, and increase, reduce or cancel the credit available, at any time, by providing you with written notice.

...

Upon default, [Citibank] can at our option, without further notice or demand, refuse to pay any outstanding checks and deny more credit to you under the Agreement, and the outstanding Account balance shall, at our option, immediately become due and payable.

There are 18 enumerated provisions which, if violated, constitute a default. The relevant provisions include failing to make the minimum payment listed, failure to pay the annual fee, if plaintiff believes in good faith that their security is impaired or credit risk increased, or if plaintiff believes in good faith that there is an adverse change in defendant's financial condition. Citibank initially alleged that defendant failed to timely pay his August 23, 2019 payment. As discussed above, defendant submitted evidence of a payment dated August 23, 2019 (NYSCEF #91), and plaintiff now claims the breach occurred one month later due to defendant's failure to remit payment after the line of credit was terminated. Plaintiff has not provided evidence that they, in good faith, determined that changes in the account holder's financial condition or credit risk occurred and led to the termination of the line of credit.

Implicit in all contracts is an implied covenant of fair dealing and good faith. *Components Direct, Inc. v. Eur. Am. Bank & Tr. Co.*, 175 A.D.2d 227, 229-30, 572 N.Y.S.2d 359, 361 (2d Dep't 1991). "The covenant of good faith and fair dealing cannot negate express provisions of the agreement . . . nor is it violated where the contract terms unambiguously afford [the lender] the right to exercise its absolute discretion to withhold the necessary approval." *Transit Funding Assocs., LLC v. Cap. One Equip. Fin. Corp.*, 149 A.D.3d 23, 29, 48 N.Y.S.3d 110, 114 (1st Dep't 2017) (internal citations omitted). "Where a contract allows one party to terminate the contract in 'its sole discretion' and for 'any reason whatsoever,' the covenant of good faith and fair dealing cannot serve to negate that provision." *Id.*

While the agreement here does give plaintiff the authority to terminate the line of credit at any time, it does not unambiguously afford plaintiff the right to terminate the line of credit for any or no reason, or at its sole discretion, as plaintiff argues. Accordingly, a question of fact exists as to whether plaintiff had the authority to terminate the line of credit for any or no reason, or only in the event of one of the enumerated circumstances of default or change in defendant's financial condition.

While Citibank alleges that defendant paid and then reversed the \$100 annual fee, it is unclear on the "Customer Activity Report" whether the \$100 fee was added to the account (Transaction Code 4032) and then paid the same day (Transaction Code 4532), or if it was paid and then reversed (NYSCEF #70, page 7). The same is true of the September 2019 statement (NYSCEF #74). Therefore, a question of fact exists as to whether defendant paid the annual fee or breached the contract when he reversed the annual fee.

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Additionally, a question of fact exists as to whether plaintiff violated the covenant of fair dealing and good faith when it sent defendant a notice, dated August 27, 2019, that defendant's account was renewed for another year, canceled defendant's line of credit shortly after, on September 6, 2019, and failed to provide notice of the termination until, at the earliest, September 9, 2019. *See Advanced Safety Sys. NY, Inc. v. Manufacturers & Traders Tr. Co.*, 188 A.D.2d 1009, 1011, 592 N.Y.S.2d 159, 160 (4th Dep't 1992); *see also Components Direct, Inc.*, 175 A.D.2d at 229-30, 572 N.Y.S.2d at 361. There is also a question of fact as to whether the termination notice, sent after the line of credit was terminated and after defendant's business was allegedly impacted to its detriment, was sufficient notice. *See Components Direct, Inc.*, 175 A.D.2d at 229-30, 572 N.Y.S.2d at 36; *see also Sterling Nat'l Bank v. Goldberg*, 277 A.D.2d 45, 47, 715 N.Y.S.2d 409, 411 (1st Dep't 2000).

These questions of fact preclude the court from granting either plaintiff's or defendant's motion for summary judgment.

Based on the foregoing, it is

**ORDERED** that defendant's motion to vacate his default (Motion Sequence #4) is **GRANTED**; and it is further

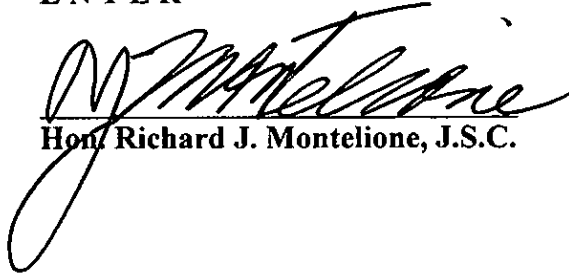
**ORDERED** that the decision and order of the court dated March 22, 2023 and entered on March 24, 2023 is vacated and Motion Sequences #2 and #3 are restored to the calendar; and it is further

**ORDERED** that both plaintiff's and defendant's motions for summary judgment (Motion Sequence #2 and #3) are **DENIED** as questions of fact exist; and it is further

**ORDERED** that any other request for relief is **DENIED**.

This constitutes the decision and order of the court.

ENTER

  
Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK  
FILED

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