

<b>Citibank, N.A. v Open Fin. LLC</b>
2024 NY Slip Op 35057(U)
December 20, 2024
Supreme Court, Westchester County
Docket Number: Index No. 66070/2023
Judge: Paul I. Marx
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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CITIBANK, N.A.,

Plaintiff,

Index No.: 66070/2023

-against-

**DECISION AND ORDER**

OPEN FINANCE LLC, EDWARD T. LOUGHRAN a/k/a EDWARD LOUGHRAN, LLOYD A. OESTREICHER a/k/a LLOYD OESTREICHER and CODEDMINDS, LLC d/b/a CODEDMINDS,

Motion Sequence # 1  
Motion Date: September 4, 2024

Defendants.  
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The papers filed electronically via NYSCEF, numbered 19 through 41 were read on Plaintiff’s motion for (1) default judgment against Defendant Open Finance LLC, and (2) summary judgment against Defendants Edward T. Loughran a/k/a Edward Loughran, Lloyd A. Oestreicher a/k/a Lloyd Oestreicher, and CodedMinds, LLC d/b/a CodedMinds.

Upon reading the foregoing papers, it is ORDERED that the motion is disposed as follows.

**BACKGROUND**

On June 30, 2008, Plaintiff Citibank, N.A. (“Citibank”) issued to Defendant Open Finance LLC (“Open Finance”) a Credit Approval Letter wherein it offered Open Finance a relationship ready line of credit in the sum of \$750,000 (the “Loan”), pursuant to the terms and conditions set forth in the letter. Open Finance accepted the Loan, and acknowledged receipt of, and agreement to, the Disclosure Booklet, which sets forth the terms of the Loan. Defendants Edward T. Loughran a/k/a Edward Loughran (“Loughran”), individually and as a member of CodedMinds, LLC d/b/a CodedMinds (“CodedMinds”), and Lloyd A. Oestreicher a/k/a Lloyd Oestreicher (“Oestreicher”) each guaranteed the payment of any and all of Open Finance’s indebtedness to Citibank under the Loan. Open Finance executed amendments to the Credit Approval Letter on January 22, 2016 and February 26, 2016 (the “Amendments”).

Loan. Open Finance executed amendments to the Credit Approval Letter on January 22, 2016 and February 26, 2016 (the “Amendments”).

Pursuant to the Disclosure Booklet and Credit Approval Letter (the “Loan Documents”), Open Finance granted Citibank a first priority security interest in all of its assets and personal property, whether existing at the time of agreement or acquired later (the “Collateral”), as security for payment in full of Open Finance’s indebtedness.

On August 1, 2008, Citibank perfected its security interest in the Collateral by filing a UCC-1 Financial Statement with the Delaware Department of State. Citibank filed a UCC-3 Continuation Statement on April 27, 2013, July 13, 2018, and June 15, 2023 (collectively “UCC Statements”).

On October 30, 2022, Open Finance defaulted on its payments under the Loan.

On March 10, 2023, Citibank notified Open Finance of its default and demanded payment of the full amount due by letter (the “Default Letter”).

On April 20, 2023, May 3, 2023, July 6, 2023, and August 7, 2023, Open Finance made partial payments, but it failed to pay the entire outstanding amount due and owing.

On August 29, 2023, Citibank commenced this action to collect the amount due by filing the Summons and Verified Complaint. It asserts four causes of action against Open Finance: (1) breach of contract, (2) account stated, (3) unjust enrichment, and (4) possession of the collateral. Citibank asserts one cause of action against Oestreicher, Loughran, and CodedMinds LLC for breach of guarantees.

On September 8, 2023, October 5, 2023, November 7, 2023, and December 7, 2023, Open Finance made partial payments, but still did not pay the entire outstanding amount due and owing. Citibank issued a Reservation of Rights Letter to Open Finance after each partial payment, advising Open Finance that its partial payments do not constitute a cure or waiver of its defaults.

Citibank alleges that, as of May 28, 2024, Open Finance owes the outstanding principal sum of \$360,939.53, plus \$25,574.49 accrued and unpaid interest through that date, plus interest on the outstanding principal sum continuing to accrue at the interest rate set forth in the Loan Documents, plus legal fees and disbursements in the sum of \$8,037.03, plus costs and disbursements of the instant action.

On December 15, 2023, Loughran and Defendant CodedMinds LLC d/b/a (“CodedMinds”) filed their Verified Answer with six affirmative defenses and cross-claims for indemnification and contribution against Open Finance and Oestreicher.

On March 4, 2023, Oestreicher filed his Verified Answer with six affirmative defenses and two cross-claims: (1) against Open Finance for indemnification, and (2) against Open Finance and Loughran for contribution and indemnification.

Open Finance has not answered or otherwise appeared in the action.

On July 1, 2024, Citibank filed the instant motion for (1) default judgment against Open Finance, and (2) summary judgment against Oestreicher, Loughran, and CodedMinds (“Answering Defendants”).

On August 21, 2024, Oestreicher filed his opposition to the motion.

On August 23, 2024, Loughran filed his opposition to the motion.

On August 27, 2024, Citibank filed its reply.

## DISCUSSION

### *Default Judgment Against Open Finance*

Citibank moves for default judgment against Open Finance on its causes of action for breach of contract, account stated, unjust enrichment, and possession of the collateral.

CPLR § 3215(a) states in pertinent part: “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.” The plaintiff must submit “proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party’s default in answering or appearing...[and] [p]roof of mailing the notice required by subdivision (g) of this section, where applicable[.]” *Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2<sup>nd</sup> Dept 2011]; CPLR § 3215(f).

Citibank submits (1) an affidavit of service stating that it served the Summons and Verified Complaint upon Open Finance through the New York Secretary of State on October 2, 2023 at 9:00 a.m.; (2) an affidavit of service stating it mailed the additional notice required by CPLR §3215(g)(4) upon Open Finance by first class mail to its last known business address on October 9, 2023; (3) the affidavit of Scott Austin, a Credit Portfolio Officer for Citibank; (4) the Credit

Approval Letter; (5) the Credit Terms and Conditions Disclosure Booklet; (6) the UCC Statements; (7) the Amendments; (8) the Default Letter; (9) “Reservation of Rights” letters it sent to Open Finance on August 28, 2023, September 26, 2023, October 11, 2023, November 14, 2023, and December 15, 2023; (10) Open Finance’s payment history, and (11) the affirmation of Teresa Sadutto-Carley, Esq.

Citibank has demonstrated that Open Finance was properly served, was provided the additional mailing notice required by CPLR §3215(g)(4), and that it defaulted in answering.

*Breach of Contract and Possession of the Collateral*

The essential elements of a breach of contract claim are: (1) the existence of a contract, (2) the plaintiff’s performance pursuant to the contract, (3) the defendant’s breach of their contractual obligations, and (4) damages resulting from the breach. *Friends of Wickars Cr. Archaeological Site, Inc. v Landing on the Water at Dobbs Ferry Homeowners Assn., Inc.*, 198 AD3d 726, 728 [2<sup>nd</sup> Dept 2021].

The affidavit of Scott Austin, who has personal knowledge of the facts, and the supporting documents prove that a contract exists, Citibank performed its obligations under the contract, Open Finance breached its contractual obligation to make all required payments, and Citibank has been damaged in the outstanding sum due. The documents further demonstrate Citibank’s entitlement to the Collateral.

Accordingly, Citibank has established its entitlement to default judgment on its first and fourth causes of action for breach of contract and possession of the Collateral, respectively.

*Account Stated and Unjust Enrichment*

Where a valid and enforceable contract between the plaintiff and defendant exists, the plaintiff cannot recover for unjust enrichment for events arising out of the same subject matter. *A. Montilli Plumbing & Heating Corp. v Valentino*, 90 AD3d 961 [2<sup>nd</sup> Dept 2011]. “Similarly, the cause of action for an account stated [is] simply an alternative theory of liability to recover the same damages allegedly sustained as a result of [a] breach of contract.” *Id.* at 962.

Citibank has prevailed on its motion seeking default judgment against Open Finance on its cause of action for breach of contract, therefore it is precluded from obtaining default judgment on its causes of action for account stated and unjust enrichment.

Accordingly, the branch of Citibank's motion which seeks default judgment on its second and third causes of action for account stated and unjust enrichment is denied.

*Summary Judgment Against Answering Defendants*

Citibank seeks summary judgment against Answering Defendants on its fifth cause of action for breach of guaranty.

CPLR §3212 provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" such that there are no triable issues of fact. CPLR §3212(b); *Roos v King Construction*, 179 AD3d 857, 859 [2<sup>nd</sup> Dept 2020]; *Zuckerman v City of New York, et al.*, 49 NY2d 557 [1980]. The Court is required to view the evidence "in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party." *Santiago v Joyce*, 127 AD3d 954 [2<sup>nd</sup> Dept 2015] (citing *Green v Quincy Amusements, Inc.*, 108 AD3d 591, 592; *Pearson v Dix McBride, LLC*, 63 AD3d 895).

The burden is on the moving party to establish "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." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). "If the moving party meets this burden, the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action.'" *Id.* (quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503). "The defendant has the burden of proof of affirmative defenses, which in effect assume the truth of the allegations of the complaint and present new matter in avoidance thereof." *HSBC Bank USA Nat. Ass'n v Roumiantseva*, 39 Misc3d 1239(A) [Kings County Sup. Ct. 2013], *aff'd*, 130 AD3d 983 [2<sup>nd</sup> Dept 2015] (quoting 57 NY Jur. 2d Evidence and Witnesses 165).

The essential elements of a breach of guaranty cause of action are the existence of (1) the guaranty, (2) the underlying debt, and (3) the guarantor's failure to perform under the guaranty. *Cooperatieve Centrale Raiffesen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 [2015]. Citibank has established its prima facie entitlement to summary judgment, because it has demonstrated the existence of the guarantee, the underlying debt, and Answering Defendants'

failure to make the payments due under the Loan. The burden shifts to Answering Defendants to raise a triable question of fact.

Answering Defendants do not contest the validity of the Loan or guaranty, that they signed the guaranty, or that they satisfied their obligation to make payments on the Loan. They state that they do not have sufficient information about the Loan or amount due, in light of Open Finance having been acquired by Digital Financing Group, LLC (“DiFi”) in December of 2018. They contend that the motion for summary judgment is premature because they have not had the opportunity to review any records related to the Loan or to verify the amount due, and those are essential issues of fact that are exclusively in Citibank’s knowledge and control, therefore they should be afforded the opportunity to conduct discovery. *Salamehi v Yarkovski*, 156 AD3d 659 [2<sup>nd</sup> Dept 2017].

Oestreicher avers that he is not currently in control of Open Finance or DiFi, and that he has not had any direct involvement in the repayment of the Loan since December 2018, though he has “seen statements from Citibank over the years in connection with the Loan” and “summary financial statements related to Open Finance and DiFi from time to time”. NYSCEF Doc. No. 38 ¶ 11. He states that in late 2021 and early 2022, he provided documents and information requested by Citibank to reaffirm the due diligence on the Loan, but he does not have any detailed information with respect to the amount due on the Loan or repayment thereof. Oestreicher believes that Citibank and DiFi have had negotiations with respect to the Loan, but he does not have any information about those purported negotiations.

Loughran states that his association with Open Finance ended in March 2021, and the only role he played with respect to the Loan was as a guarantor. He contends that on May 20, 2020, DiFi exercised its option to acquire a controlling interest in Open Finance, and thereafter assumed operational control over Open Finance, including the Loan. He alleges that DiFi was supposed to pay him and the other members of Open Finance with promissory notes, but DiFi was not obligated to pay anyone for their Open Finance equity while a balance remained on the Loan. He speculates that DiFi “deliberately kept [the Loan] open and with a substantial balance so it would not have to begin to pay [him] and others for the Open Finance equity it purportedly purchased”. NYSCEF Doc. No. 40 ¶ 6. Loughran asserts that his employment with Open Finance was terminated

effective March 2, 2021, and DiFi and Open Finance have since rebuffed his requests for “substantive financial information” about the Loan.

Neither Oestreicher nor Loughran explain what documents they believe may be in Citibank’s exclusive control that would negate their obligations as guarantors. In fact, they expressly agree that it is their responsibility to stay informed of Open Finance’s financial condition or circumstance at all times, and that Citibank is under no obligation to provide them any information related to Open Finance’s financial condition or circumstances. The “Guarantee Provisions” section of the Disclosure Booklet provides, in relevant part:

(f) Condition of [Open Finance]. The Guarantor assumes the responsibility for being and keeping informed of the financial condition of [Open Finance] and of all other circumstances bearing upon the risk of nonpayment of the [Loan] and agrees that Citibank shall not have any duty to advise the Guarantor of information regarding any condition or circumstances or any change in such condition or circumstance. The Guarantor acknowledges that Citibank has not made any representations to the Guarantor concerning the financial condition of [Open Finance].

Further, Answering Defendants expressly agreed that their obligations as guarantors are continuing obligations. The “Guarantee Provisions” section of the Disclosure Booklet states:

(c) Continuing Obligation. The obligations of the Guarantor shall not be subject to any counterclaim, setoff, deduction or defense based upon any claim the Guarantor may have against Citibank or [Open Finance] or any other person, and shall remain in full force and effect without regard to, and, to the fullest extent permitted by applicable law, shall not be released, discharged or in any way affected by, any circumstance or condition whatsoever (whether or not the Guarantor shall have any knowledge or notice thereof) which might constitute a legal or equitable discharge or defense[.]

Oestreicher and Loughran’s assertions that there may be facts that exist, that are exclusively in Citibank’s control, that relieve them of the obligations they expressly agreed to is not enough to raise a triable issue of fact. Additionally, Answering Defendants have not met their burden of proving any of their affirmative defenses, and many of those affirmative defenses were waived in the “Guarantor Waivers” subsection of the Disclosure Booklet.

Accordingly, Citibank’s motion for summary judgment is granted.

**CONCLUSION**

It is hereby ORDERED that Plaintiff's motion for default judgment against Defendant Open Finance LLC is granted; and it is further

ORDERED that Plaintiff's motion for summary judgment against Defendants Edward T. Loughran a/k/a Edward Loughran, Lloyd A. Oestreicher a/k/a Lloyd Oestreicher, and CodedMinds, LLC d/b/a CodedMinds is granted; and it is further

ORDERED that Plaintiff shall settle judgment with the Westchester County Clerk within sixty (60) days of the date hereof.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 20, 2024  
White Plains, NY

E N T E R



HON. PAUL I. MARX, J.S.C.