TD Bank, N.A. v KR Laundry, Inc.
2024 NY Slip Op 35444(U)
April 30, 2024
Supreme Court, Queens County
Docket Number: Index No. 712214/2022
Judge: Anna Culley
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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ANNA CULLEY IAS PART 27

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TD BANK, N.A.,

Plaintiff,

-against-

NKR LAUNDRY, INC. and CHAIM DEUTSCH,

Defendants.

Index No.:712214/2022

Motion Seq. No.: 1

Motion Date: 2.13.2024

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Plaintiff TD Bank, N.A. ("Plaintiff") commenced this action by filing a Summons and Verified Complaint on June 9, 2022, wherein it claimed that Defendant NKR Laundry, Inc. ("NKR" or "Borrower"), the borrower, and Defendant Chaim Deutsch ("Deutsch"), the Guarantor, defaulted on a commercial line of credit ("LOC") extended by Plaintiff. Defendants filed an Answer with Counterclaims on August 21, 2022, which included the following ten[1] affirmative defenses: failure to state a cause of action; any default or amount unpaid to Plaintiff was caused by the affirmative acts and bad faith of Plaintiff; lack of standing; statute of limitations; failure to comply with a condition precedent to demand payment in full by failing to properly send mandated notices; Plaintiff's claims for damages should be reduced, in whole or in part, by amounts paid by Defendants, by amounts owing to Defendants as deductions and credits for the benefit of Defendants, and by set-offs for expenditures and losses of Defendants as a direct result of, inter alia, Plaintiff's misrepresentation or fraudulent conduct; laches, abandonment, waiver; unclean hands; and breach of covenant of good faith and fair dealing. Defendants also asserted Counterclaims for a declaratory

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[1]Defendants asserted lack of standing defense twice.

judgment declaring the Note current, and not in default; damages for breach of implied covenant of good faith and fair dealing; a declaratory judgment directing the Plaintiff to withdraw all negative reports made by it to credit reporting agencies reporting on behalf of the Defendants; and legal fees. On October 12, 2022, Plaintiff filed a Verified Reply to the Counterclaims.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), and the "facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of a material issue of fact. (*See Zuckerman v City of New York, supra.*)

In this case, Plaintiff demonstrated its prima facie entitlement to summary judgment through submission of the note, the unconditional guarantee and the affidavit of Glenn Anderson, Assistant Vice president of Plaintiff, which established the existence of the subject note executed by the corporate Defendant, the unconditional guarantee and the Defendants' nonpayment according to their terms (*see Gullery v Imburgio*, 74 AD3d 1022 [2d Dept 2010]; *Webster v Murray*, 70 AD3d 674 [2nd Dept 2010]), as well as the Security Agreement (UCC § 9-203). The plaintiff also established that it has standing to commence this action since it is a party to the loan agreement and guaranty, and holder of the Note. Plaintiff further established through its submissions, its prima facie entitlement to judgment dismissing defendants' affirmative defenses and counterclaims. Since

Plaintiff met its initial burden on this summary judgment motion, the burden shifts to defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact.

Defendants have failed to meet this burden. Defendants did not submit any evidence in opposition to the motion. Where a defendant fails to oppose a motion for summary judgment, the facts, as alleged in the moving papers, may be deemed admitted and there is, in effect, a concession that no question of fact exists. (*See Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *see also Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079 [2d Dept 2010].) In addition, where a party does not oppose a motion or branches thereof, he or she is deemed to have acquiesced in the relief sought therein. (*See Flake v Van Wagenen*, 54 NY 25 [1873]; *Mixon v TBV, Inc.*, 16 AD3d 144 [2d Dept 2010].) Further, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy. (*See New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *see also Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013].)

Accordingly, the branch of Plaintiff's motion for summary judgment and a judgment in its favor against defendants NKR and Deutsch, jointly and severally, in the amount of $119,298.84, comprised of outstanding principal in the amount of $98,297.98, plus accrued outstanding interest of $12,745.39 (as of January 12, 2023), site inspection fees of $150.00, plus UCC fees of $20.00, and for reasonable legal fees incurred in connection with the collection of the outstanding debt, plus interest on the outstanding principal amount due from the date of January 13, 2023 through the date of the entry of Judgment at the contract rate of 11.99% per annum ($32.74 per day), as calculated by the Clerk of Court, and thereafter at the statutory rate; together with costs and disbursements to be taxed by the Clerk of Court upon submission of an appropriate bill of costs, is granted.

The branch of Plaintiff's motion for summary judgment in its favor dismissing Defendants' affirmative defenses and counterclaims is also granted.

In light of the foregoing, the remaining branches of Plaintiff's motion seeking the following relief against defendant Borrower are also granted: (a) restraining and enjoining Borrower, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of Borrower from selling, moving, liquidating, disposing or permitting the removal of the Collateral; (b) compelling Borrower, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of Borrower to segregate in an account controlled by TD Bank all proceeds of accounts receivable; (c) compelling Borrower, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of Borrower to turn over to TD Bank, in their original form, all payments of accounts receivable now and hereafter received; (d) compelling Borrower, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of the Borrower to turn over to TD Bank a statement setting forth the names and addresses of Borrower's account debtors and the amount owed by each of them; (e) compelling the Borrower, its agents, employees, accountants, attorneys and such other persons acting at the direction of or on behalf of Borrower to assemble and make the Collateral available or deliver the Collateral to TD Bank for inspection, appraisal and sale or other disposition pursuant to the Uniform Commercial Code in order to satisfy the amounts due to TD Bank; (f) authorizing TD Bank to sell, liquidate, dispose of or retain the Collateral in a commercially reasonable manner, with the proceeds from same being applied first to the costs of such sale or other disposition, including reasonable attorneys' fees, and then in reduction of the amounts due TD Bank from Borrower; (g) appointing a receiver, or other agent of this Court, to manage the affairs of Borrower and, as an alternative to the relief Requested in (e) and (f) above, to take possession of the Collateral on behalf of TD Bank and any other creditors of Borrower and to hold the Collateral pending further order of this Court; (h) ordering that the sheriff of any county of the State of New York wherein the Collateral is found, be directed to seize the Collateral at issue, and for the purpose, if the Collateral is not delivered to him or her, to break open, enter, and search for the Collateral in the place specified, and to hold the Collateral pursuant to CPLR 7101, et al.; (i) issuing a Writ of Replevin directed to the Sheriff or other lawfully authorized officers of the County where the Collateral may be found and directing that such Sheriff or other officers to seize and/or take immediate possession of the Collateral and deliver same to TD Bank, the court-appointed receiver or other court-appointed agent, as this Court may direct; (j) barring and foreclosing Borrower from all equity of redemption in and to the Collateral; and (k) directing that to the extent any of such Collateral has already been sold or otherwise liquidated, Borrower account for the proceeds derived from such sale or liquidation and remit such proceeds to TD Bank.

Plaintiff's attorney is directed to submit an affirmation with the proposed judgment setting forth in detail all costs, expenses, and attorney fees incurred for services rendered which amount shall be fixed in the judgment to be entered hereon.

SETTLE JUDGMENT.

ANNA CULLEY, J.S.C.

Dated: April 30, 2024

FILED
5/1/2024
COUNTY CLERK
QUEENS COUNTY

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