

Valley Natl. Bank v Isaac's Fine Jewelry Inc.
2012 NY Slip Op 31110(U)
April 20, 2012
Supreme Court, New York County
Docket Number: 101988/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.

PART 11

Index Number : 101988/2011

VALLEY NATIONAL BANK

vs.

ISAAC'S FINE JEWELRY INC.

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

FILED

APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 20, 2012

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
VALLEY NATIONAL BANK,

INDEX NO. 101988/11

Plaintiff,

-against-

ISAAC'S FINE JEWELRY INC. and
ISAAC GENUTH,

Defendants.

FILED

APR 26 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
JOAN A. MADDEN, J.:

In this action to recover amounts due and owing under a Commercial Revolving Line of Credit Note and Agreement, and as a result of a checking account overdraft, and to recover under a personal guaranty, plaintiff Valley National Bank moves for an order pursuant to CPLR 3215 granting a default judgment against the defendant Isaac's Fine Jewelry Inc. ("Isaac's Jewelry") based on its failure to appear and answer, and for an order pursuant to CPLR 3212 dismissing defendant Isaac Genuth's answer and granting summary judgment against defendant Genuth. Defendant Genuth opposes the motion and cross-moves for an order pursuant to CPLR 3025 granting leave to amend his answer, and an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against him. Defendant Isaac's Jewelry has defaulted on the motion.

The following facts are not disputed unless otherwise noted. On or about November 30, 2004, defendant Isaac's Jewelry entered into a Commercial Revolving Line of Credit Agreement ("Agreement") with plaintiff bank, in which plaintiff extended a line of credit to Isaac's Jewelry

and agreed to made loans in an aggregate principal amount of up to \$75,000. At the same time, Isaac's Jewelry executed a Commercial Revolving Line of Credit Note ("Note") in the principal amount of \$75,000. Defendant Isaac Genuth signed both the Agreement and the Note in his capacity as President of Isaac's Jewelry. Also at the same time, defendant Genuth, in his individual capacity, signed and executed an unconditional guaranty of all indebtedness, liabilities and obligations of defendant Isaac's Jewelry to plaintiff bank. The guaranty provides in pertinent part as follows:

GUARANTY: By signing this guaranty I [Isaac Genuth] guarantee to you [Valley National Bank] that every Obligation will be paid when it is due, no matter what may happen. This means that you can demand payment from me if (a) the Borrower [Isaac's Fine Jewelry, Inc.] or (b) any other person or entity who may now or in the future have any duties, debts or liabilities to you pursuant to any Obligation ("Obligor") fails to pay you in full for all of the Obligations.

OBLIGATIONS GUARANTEED: This guaranty covers every kind of debt. It covers credit you extend to the Borrower, obligations of the Borrower that you buy from others, interest in all the Borrower's debts to you, and all other obligations that the Borrower owes you. In this guaranty, all of these debts will be called "Obligations."

CONTINUING EFFECT: This guaranty will continue to be in effect until you have received from me a written notice cancelling the guaranty. A notice of cancellation will not affect my liability for any Obligations that are in existence at the time I give you a cancellation notice.

* * *

EVENTS NOT AFFECTING THE GUARANTY: I agree that my liability under this guaranty will not be limited or cancelled because:

1. Any Obligation cannot be enforced against the Borrower or another Obligor;
2. You agree to any changes in the terms of any Obligation, such as extending the time for repayment or increasing the amount or interest rate;
3. You release any other Obligor from any or all of the Obligations;
4. You release, exchange or sell any collateral that any other Obligor has given you or you do not fully establish your security interest in any collateral;

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5. A law, regulation or order of any public authority affects your rights under any of the Obligations; and/or
 6. Anything else happens that may affect your rights against any other Obligor.

RIGHTS AND REMEDIES: If an event of default occurs under any Obligation, you can exercise all of your rights and remedies under, and in accordance with, applicable law, this guaranty, and agreements, all other documents, notes, affidavits and certificates executed in connection with any Obligation. I hereby waive all defenses based on suretyship, including, without limitation, all defenses discussed in Section 39 through 44 of the American Law Institutes Restatement of the Law (Third), Suretyship and Guaranty (1995). You can delay enforcing any of your rights and remedies without losing them.

NOTICES: You do not have to notify me that you have accepted this guaranty. You do not have to notify me, the Borrower or any other Obligor that any Obligation has not been paid or that wish me to make a payment under this guaranty.

RESPONSIBILITY: I understand that I am responsible for the payment of the full amount of the Obligations, even if there are other Obligor. You can demand payment from me without first (a) seeking payment from the Borrower or any other Obligor or (b) trying to collect from any collateral securing any Obligation.

* * *

COLLECTION COSTS: If you sue me to collect this guaranty, I will pay you all of your fees, costs, charges and expenses, including legal fees, which are allowed by law.

On or about December 24, 2010, plaintiff sent Isaac's Jewelry and Genuth a Notice of Default and Acceleration stating that the monthly installments of principal and interest have not been paid since October 15, 2010, and that as of the date of the letter the "aggregate amount of Obligations is \$56,520.87," and demanding "payment in full of the Obligations under the Loan Documents by the Borrower and the Guarantor." On or about January 26, 2010, plaintiff sent Isaac's Jewelry a letter advising that the "principal balance of the Note is presently \$66,511.44," and that it "has terminated the Line [of Credit] and has elected to allow you to pay off the outstanding balance of the Note over time. . . . in forty-eight (48) payments of principal in the

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amount of \$1,385.66 per month plus the Finance Charge (as defined in the Note).” The letter also advised that the first payment was due February 15, 2010, and the payments would continue each month thereafter until January 15, 2014.

Plaintiff submits an affidavit from John Cina, Vice President in the Special Assets Department of Valley National Bank, stating that Isaac’s Jewelry is in default for failing to make the installment payment due October 15, 2010, and each payment due thereafter,” and that Isaac’s Jewelry owes “the outstanding principal amount due under the Note of \$56,520.87 together with interest.” Mr. Cina also states that Isaac’s Jewelry maintained a checking account in its name, and that as of January 12, 2011, “as a result of, among other things, checks issued by defendant Isaac’s Jewelry and paid by the Bank at Isaac’s Jewelry’s request, the Isaac’s Account was overdrawn in the amount of \$3,844.59.” Plaintiff submits the bank statements from February 2010 through January 2011, “which were rendered to defendant Isaac’s Jewelry on a monthly basis [and] which it retained without protest or objection.” Mr. Cina states that Isaac’s Jewelry has failed to repay the overdraft “despite demand therefor made on January 27, 2011,” and that Isaac’s Jewelry “is indebted to the Bank in the sum of \$3,844.59, with interest from January 12, 2011.”

On February 17, 2011, plaintiff commenced this action against Isaac’s Jewelry and Isaac Genuth. The complaint asserts first and second causes of action for breach of the Agreement and Note, and breach of the guaranty in the amount of \$56,520,87 together with interest from September 16, 2010; third, fourth and fifth causes of action for breach of contract, an account stated and breach of the guaranty, based on the checking account overdraft in the amount of \$3,844.59 together with interest from January 12, 2011; and a sixth cause of action for

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reasonable attorney's fees, costs and expenses.

The borrower, defendant Isaac's Jewelry, neither appeared nor answered. The guarantor, defendant Isaac Genuth, served and filed an answer asserting seven affirmative defenses consisting of failure to state a cause of action, failure to make a demand, unjust enrichment, failure to perform, unclean hands, breach of the covenant of good faith and fair dealing, and "[a]ll acts performed by Defendant Genuth were performed in a corporate capacity, no personal liability may lie." The eight affirmative defense "reserves" Genuth's "right to amend his answer to plead" defenses which "may be available or apparent at any time prior to the trial of this action."

Plaintiff is now moving for summary judgment against the guarantor Genuth, and for a default judgment against the borrower, Isaac's Jewelry. Defendant Genuth opposes the motion and cross-moves to amend his answer to assert a ninth affirmative defense that plaintiff is in violation BCL § 1312 and lacks standing to maintain this action, a tenth affirmative defense of fraudulent inducement, and an eleventh affirmative defense of unconscionability. Defendant Genuth also cross-moves for summary judgment dismissing the complaint as against him. Defendant Isaac's Jewelry has defaulted on the motion.

To establish a prima facie right to summary judgment on its claim to enforce the written guaranty, plaintiff must prove the existence of an absolute and unconditional guaranty, the underlying debt and the guarantor's failure to perform under the guaranty. See Reliance Construction Ltd v. Kennelly, 70 AD3d 418, 419 (1st Dept), lv app disp 15 NY3d 848 (2010); Davimos v. Halle, 35 AD3d 270, 272 (1st Dept 2006); Kensington House Co v. Oram, 293 AD2d 304 (1st Dept 2002); City of New York v. Clarose Cinema Corp, 256 AD2d 69, 71 (1st Dept

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1998). Once plaintiff satisfies that showing, the burden shifts to defendant guarantor to submit competent proof establishing a triable issue of material fact with respect to a bona fide defense. See Griffon V. LLC v. 11 East 36th Street, LLC, 90 AD3d 705 (2nd Dept 2011).

Although motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, where the proposed amendment is plainly lacking in merit and legally insufficient, leave to amend should be denied. See Thompson v. Cooper, 24 AD3d 203 (1st Dept 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352 (1st Dept 2005); Heller v. Louis Provenzano, Inc., 303 AD2d 20, 25 (1st Dept 2003). As the party seeking amendment, defendant Genuth has the burden of making an evidentiary showing as to the merits of its proposed amendments by submitting “an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” Zaid Theatre Corp. v. Sona Realty Co., *supra* at 355; accord Hynes v. Start Elevator, Inc., 2 AD3d 178 (1st Dept 2003).

Plaintiff’s motion for a default judgment against defendant Isaac’s Jewelry is granted in the absence of opposition. As to defendant Genuth, plaintiff has made a prima facie showing for summary judgment enforcing the guaranty, as there is no dispute as to the existence of Genuth’s absolute and unconditional guaranty, the underlying Note and Agreement, and Genuth’s failure to perform under the guaranty. See Reliance Construction Ltd v. Kennelly, *supra*; Davimos v. Halle, *supra*.

In opposing the motion, defendant Genuth does not deny that money is owed, that the borrower Isaac’s Jewelry defaulted on the loan, or that he signed and executed the guaranty. Rather, he seeks to amend his answer and asserts that plaintiff: 1) “fraudulently misrepresented the contract to induce [him] to sign the guaranty”; 2) “failed to use other methods to settle the

debt before moving to foreclose on the note”; and 3) is a foreign corporation in violation of BCL § 1312 and “cannot avail itself of this forum.”

Genuth’s assertions and proposed defenses fail as a matter of law. First, as a national bank, plaintiff is not barred by Business Corporation Law § 1312(a) from bringing this action. See 12 USCA §24 (Fourth); Valley National Bank v. Soho Properties, Inc., 2012 WL 798643 (Sup Ct, NY Co 2012); Valley National Bank v. Sukhu Realty, Inc., 2009 WL 6451981 (Sup Ct, Queens Co 2009).

Second, in support of his fraudulent inducement defense, Genuth submits an affidavit or affirmation that he had a longstanding and “close relationship” with two bank officers, John Decker and David Kaplan, and when he discussed the underlying loan with them “personal guaranties were mentioned.” Genuth states that after he “expressed concern” and said he “did not wish to enter into a personal guarantee agreement I was told and I quote ‘The bank only needs it for its records – it will never be enforced.’” Genuth also states that “in the circumstances, with such a long standing relationship and an endorsement from two officers that I trusted and regularly worked with, I believed them. It was upon this belief I entered into the contract. Therefore, I was fraudulently induced into entering the loan agreement. Clearly the bank did not keep this oral agreement hence this litigation.”

As quoted above, the guaranty at issue is unconditional and explicit in its terms providing that defendant Genuth is absolutely liable for the full performance of all monetary obligations incurred by the borrower. Contrary to defendant’s assertion, the language in the guaranty waiving “all defenses based on suretyship” is a sufficiently specific disclaimer to foreclose as a matter of law a defense based on fraud. See Citibank v. Plapinger, 66 NY2d 90, 90-95 (1985);

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Danann Realty Corp v. Harris, 5 NY2d 317, 320-321 (1959); Fortress Credit Corp v. Hudson Yards, LLC, 78 AD3d 577 (2010); Hotel 71 Mezz Lender LLC v. Mitchell, 63 AD3d 447 (1st Dept 2009); Red Tulip LLC v. Neiva, 44 AD3d 204 (1st Dept 2007), lv app dismiss 10 NY3d 741 (2008); General Trading Co v. A&D Food Corp, 292 AD2d 266 (1st Dept 2002); Banco do Estado de Sao Paulo, SA v. Mendes Junior International Co, 249 AD2d 137 (1st Dept 1998);; Gannett Co, Inc v. Tesler, 177 AD2d 353 (1st Dept 1991); Marine Midland Bank, N.A. v. CES/Compu-Tech, Inc, 147 AD2d 396 (1st Dept 1989).

However, even if the fraudulent inducement defense were not barred by the guaranty and the alleged representations might otherwise support such a defense, defendant cannot establish the necessary element of reasonable reliance. Plaintiff's alleged oral representations that the guaranty was a mere formality that the bank would "never enforce" against Genuth, are flatly contradicted by the express terms of the written guaranty that Genuth would pay "every kind of debt" incurred by the borrower to plaintiff bank. Under these circumstances, where "an express provision in the written contract contradicts the claimed oral representations in a meaningful fashion . . . the conflict between the provisions of the written contract and the oral representations negates the claim of reliance upon the latter." Bango v. Naughton, 184 AD2d 961, 963 (3rd Dept 1992); accord HSBC Bank USA, National Association v. Laniado, 72 AD3d 645 (2nd Dept 2010); Old Clinton Corp v. 502 Old County Road, LLC, 5 AD3d 363 (2nd Dept 2004); Coutts Bank (Switzerland) Ltd v. Anatian, 261 AD2d 307 (1st Dept 1999), lv app den 95 NY2d 753 (2000); Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Bros International Ltd, 249 AD2d 232 (1st Dept 1998), lv app den 95 NY2d 762 (2000); Prestige Foods, Inc. v. Whale Securities Co., LP, 243 AD2d 281, 281-282 (1st Dept 1997).

Thus, since the conflict renders any reliance by defendant Genuth unreasonable and unjustifiable as a matter of law, plaintiff's alleged oral representations cannot support the proposed defense of fraud in the inducement. See Sandcham Realty Corp v. Taub, 299 AD2d 220, 221 (1st Dept 2002); Coutts Bank (Switzerland) Ltd v. Anatian, supra at 307.

Moreover, defendant Genuth's allegations as to his close and longstanding relationship with two bank officers is insufficient to show or even suggest that he had anything other than a conventional arm's length debtor/creditor relationship with plaintiff bank, so as to give rise to fiduciary duties that might justify a claim of reliance. See e.g. Weiner v. Lazard Freres & Co, 241 AD2d 114 (1st Dept 1998) (as a general matter, an arm's length lender/borrower contractual relationship between a bank and its customers may not give rise to a fiduciary obligation on the part of the lender); P.Chimento Co, Inc v. Banco Popular de Puerto Rico, 208 AD2d 385 (1st Dept 1994) (normal commercial relationship between bank and customer does not assume fiduciary nature whenever officers of company and officers of bank become friendly); but see e.g. Braddock v. Braddock, 60 AD3d 84 (1st Dept 2009) (family members stand in a fiduciary relationship toward one another in a co-owned business venture).

Defendant Genuth's further assertion that plaintiff "failed to use other methods to settle the debt before moving to foreclose on the note," likewise conflicts with the clear and express terms of the guaranty, which states that "I understand that I am responsible for the payment of the full amount of the Obligations, even if there are other Obligor. You can demand payment from me without first (a) seeking payment from the Borrower or any other Obligor or (b) trying to collect from any collateral securing my Obligation."

Finally, defendant Genuth's remaining arguments, including but not limited to his allegations as to unconscionability and waiver, and the defenses raised in his original answer, are insufficient to raise a material issue of fact as to a bona fide defense.

In light of the foregoing conclusions, the cross-motion by defendant Genuth to amend his answer and for summary judgment dismissing the complaint as against him, is denied in its entirety, and plaintiff's motion to dismiss Genuth's answer and for summary judgment against defendant Genuth is granted. As determined above, plaintiff is also entitled to a default judgment against defendant Isaac's Jewelry. The opposition papers submitted by defendant Genuth do not raise any issues of fact with respect to the damages in the amount of \$56,520.87 sought by plaintiff with respect to the loan, or the damages in the amount of \$3,844.59 sought by plaintiff with respect to the checking account overdraft. Pursuant to the terms of the guaranty, plaintiff is entitled to an award of reasonable attorney's fees against defendant Genuth, the amount of which shall be determined at a fee assessment hearing; plaintiff has waived its claim for attorney's fees against the defaulting defendant Isaac's Jewelry.

Accordingly, it is

ORDERED that plaintiff's motion is granted in its entirety and the Clerk is directed to enter judgment in favor of plaintiff Valley National Bank and against defendants Isaac's Fine Jewelry, Inc. and Isaac Genuth, in the amount of \$56,520.87, together with interest as computed by the Clerk at the rate of 5.5% from September 16, 2010 to December 24, 2010, and at the rate of 9.5% from December 25, 2010; and the Clerk is also directed to enter judgment in favor of plaintiff Valley National Bank and against defendants Isaac's Fine Jewelry, Inc. and Isaac Genuth, in the amount \$3,844.59, together with interest as computed by the Clerk at the statutory

rate from January 12, 2011; and all together with costs and disbursement as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the cross-motion by defendant Isaac Genuth is denied in its entirety; and it is further

ORDERED that plaintiff waives its claim for attorney's fees against defendant Isaac's Fine Jewelry, Inc.; and it is further

ORDERED that plaintiff's claim for an award of reasonable attorney's fees against defendant Isaac Genuth, is severed and shall continue; and it is further

ORDERED that on or before ^{May 25, 2012} ~~April 21, 2012~~, plaintiff shall file a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall the proper fees, if any, and said Clerk shall there upon place this action on the appropriate calendar for an assessment as to plaintiff's reasonable attorney's fees against defendant Isaac Genuth; and it is further

ORDERED that if plaintiff fails to comply with the immediately preceding paragraph, the claim for attorney's fees against defendant Isaac Genuth will be dismissed.

DATED: ~~April 20, 2012~~ ^{April 20, 2012}

FILED
ENTER: APR 26 2012
NEW YORK
~~COUNTY CLERK'S OFFICE~~
J.S.C.