

**TD Bank, N.A. v SMS Indus., Inc.**

2012 NY Slip Op 33261(U)

December 17, 2012

Supreme Court, New York County

Docket Number: 651844/12

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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TD BANK, N.A.,

Plaintiff,

Index No.  
651844/12

Mot. Seq No.: 001

- against -

Decision and  
Order

SMS INDUSTRIES, INC. AND LESLIE  
HAMERSCHLAG, INDIVIDUALLY,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff TD Bank, N.A. (“Plaintiff”) moves for an Order: (i) granting summary judgment in favor of Plaintiff, pursuant to CPLR 3212, as against defendant Leslie Hamerschlag (“Hamerschlag”), individually, for the relief demanded in the Complaint; (ii) dismissing Hamerschlag’s Answer with prejudice on the grounds that no triable issues of fact exist; and (iii) pursuant to CPLR 3215 directing the entry of a default judgment against defendant SMS Industries, Inc. (“SMS Industries” or “SMS”) based on its failure to appear or answer. In support of its motion, Plaintiff submits the attorney affirmation of Howard Jaslow and the affidavit of Amanda Constantineau (“Constantineau”), an Assistant Vice President for Plaintiff. Hamerschlag opposes. SMS Industries does not oppose.

On or about May 30, 2012, Plaintiff commenced this action by purchasing an Index Number and filing the Summons and Verified Complaint with the Clerk of the Court. Plaintiff’s action seeks to recover the principal sum of \$91,497.63, plus interest through May 8, 2012 in the sum of \$1,806.28, late fees in the amount of \$117.45 in bank fees plus additional interest at the default rate of 18% percent per annum due pursuant to certain loan documents, including a Business Loan Agreement, Commercial Security Agreement, a Promissory Note executed by the

Borrower on April 4, 2011 (the “Note”), and the Guarantor’s separate Guaranty of Payment executed by the Guarantor on or about April 4, 2011 (“Guaranty”) (collectively, “Loan Documents”).

The Summons and Complaint were served on each of the defendants on or about June 7, 2012 and June 11, 2012. An additional copy of the Summons and Complaint, pursuant to CPLR 3215(g)(4) and BCL 306(b), were mailed to SMS Industries on June 13, 2012. An additional copy was also mailed to the Hamerschlag. Plaintiff annexes copies of the related Affidavits of Service and Affidavits of second mailings as exhibits to Howard Jaslow’s attorney affirmation. Plaintiff states that SMS Industries has defaulted by failing to appear, interpose an Answer to the Complaint or otherwise move to extend its time to do so.

Defendant Hamerschlag interposed an answer, which denied the allegations of the Verified Complaint and interposed an affirmative defense that the “complaint fails to state a claim upon which relief may be granted.” Hamerschlag also asserted a cross claim on the basis that she “executed and delivered the guaranty at issue, if any, at the special request and insistence of defendant SMS,” for the benefit of SMS, with “the express understanding that defendant SMS would make all the required payments pursuant to the loan agreement at issue,” and seeks indemnification from SMS in the event that a judgment is entered against SMS.

As set forth in Constantaneau’s Affidavit, on or about April 4, 2011, Plaintiff extended a loan to SMS Industries and SMS Industries entered into a certain Business Loan Agreement, Commercial Security Agreement and Note for a loan in the principal amount of \$95,000. (Copies of the agreements and Note are annexed to Constantaneau’s Affidavit.) Pursuant to the terms of the Note, the interest rate on the Note is at the Prime Interest (3.25% as of May 2012), plus 1.00% per annum. Additionally, upon default, interest is to accrue on the unpaid principal balance at the rate of 18% per annum. Pursuant to the terms of the Note, upon default, including failure to pay upon final maturity, Plaintiff may declare the entire unpaid balance under the Note and all accrued unpaid interest immediately due and SMS Industries is required to pay that amount. Pursuant to the terms of the Note, SMS Industries agreed to pay all costs and expenses Plaintiff incurs to collect under the Note including attorneys’ fees. On April 4, 2011, Hamerschlag executed her personal unconditional guaranty (the “Guaranty”) of any and all obligations of SMS Industries to the Plaintiff. (A copy of the Guaranty is also provided).

As also set forth in Constantaneau's Affidavit, SMS Industries defaulted under the Note by failing to pay the monies due thereunder. On or about March 29, 2012, Plaintiff sent a default letter to SMS Industries and Hamerschlag advising of the default and the amounts due. SMS Industries and Hamerschlag have refused to pay the account stated for the principal sum of \$91,497.63, plus interest through May 8, 2012 in the sum of \$1,806.28, late fees in the amount of \$117.45, bank fees in the sum of \$950 accruing thereon through May 8, 2012, plus additional late fees and interest continuing to accrue at the Default Interest Rate thereon from May 9, 2012 through the date of entry of judgment, plus attorneys' fees, expenses, costs and disbursements.

In her opposition to Plaintiff's motion, Hamerschlag asserts that she is not responsible for SMS Industries' indebtedness due to her alleged transfer of complete ownership of SMS Industries to Peter G. Milazzo in or about January 2012. She also states that "to [her] personal knowledge, plaintiff did not provide co-defendant SMS with funds, under the April 4, 2011 [sic], totaling a principal sum of \$91,497.63 during the time period of April 4, 2011 through the time it commenced the instant case, nor did the plaintiff submit any evidence to establish the actual amounts it provided to co-defendant SMS from April 4, 2011 through commencement of this action."

In reply, Defendants submit the affirmation of Evan Fox. Defendants state that Hamerschlag is liable for SMS Industries' indebtedness under the Loan Documents despite her alleged transfer of ownership of SMS Industries in January 2012, as her obligations arose out of her execution of the Guaranty. Plaintiff points to the "continuing guaranty" provision of the Guaranty and the provision that prohibits Hamerschlag from transferring her assets without Plaintiff's consent. Defendants also submit the most recent account statement sent to SMS Industries. Pursuant to the Account Statement, as of September 12, 2007, the principal amount due is \$91,467.63, which is also reflected in Constantineau's Affidavit submitted in Plaintiff's original motion.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue

remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v. Clarose Cinema Corp.*, 256 AD2d 69, 71 [1<sup>st</sup> Dept. 1998]). Here, Plaintiff makes a prima showing of its entitlement to summary judgment as to Hamerschlag. Plaintiff has presented the Note, the loan documents related thereto, the Guaranty, and SMS Industries’ default thereunder. Hamerschlag fails to raise any issue of fact which would preclude a granting of summary judgment. Her opposition to Plaintiff’s motion also does not raise any triable issues of fact, as Hamerschlag is still liable under the terms of the Guaranty even if she transferred SMS Industries. Furthermore, her allegation that Plaintiff did not provide the funds to SMS Industries under the Loan Agreements is unsupported and contradicted by the evidence proffered by Plaintiff.

Wherefore, it is hereby

ORDERED that plaintiff TD Bank, N.A.’s motion for summary judgment as against defendant Leslie Hamerschlag is granted; and it is further

ORDERED that defendant Leslie Hamerschlag’s Answer is dismissed; and it is further

ORDERED that the Clerk of the court is directed to enter judgment in favor of plaintiff TD Bank, N.A., and against defendant Leslie Hamerschlag in the amount of \$94,371.36 with interest as prayed for allowable by law at the rate of 9% per annum from the date of May 9, 2012 until the date of entry of this judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff TD Bank, N.A.'s motion for default judgment as against defendant SMS Industries, Inc., is granted without opposition; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff TD Bank, N.A. and against defendant SMS Industries Inc., in the amount of \$94,371.36 with interest as prayed for allowable by law at the rate of 9% per annum from the date of May 9, 2012 until the date of entry of this judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated:

12/17/12



Eileen A. Rakower, J.S.C.