Toyota Tsusho Am., Inc. v Kaye Refining Corp.
2016 NY Slip Op 31236(U)
June 27, 2016
Supreme Court, New York County
Docket Number: 650691/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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TOYOTA TSUSHO AMERICA, INC.,

Plaintiff,

-against-

KAYE REFINING CORPORATION, ALAN KAYE, and JAVASH REALTY CORP.,

Defendants.

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Index No. 650691/2013
Motion Date: 3/7/2016
Motion Seq. No. 002, 003

BRANSTEN, J.

In this action, Plaintiff Toyota Tsusho America, Inc. ("Toyota") seeks to recover, *inter alia*, under a Guaranty and Security Interest Agreement ("Guaranty") executed by Defendant Javash Realty Corp. ("Javash"). Toyota and Javash each have filed motions for summary judgment on count eight of Toyota's complaint, which asserts breach of the Guaranty. In addition, Toyota moves for summary judgment on the sixteen affirmative defenses interposed in Javash's answer. For the reasons that follow, Javash and Toyota's motions for summary judgment on count eight are each granted in part and denied in part. Toyota's motion for summary judgment on Javash's affirmative defenses is granted.

I. Background

This action stems from November 3, 1995 Letter Agreement entered into by Toyota and Defendant Kaye Refining Corp. ("KRC"). KRC was engaged in the business of purchasing used catalytic converters, grinding them up, and selling the dust – which

contained precious metals – to Toyota. KRC entered into the Letter Agreement[1] because its business needed capital. Toyota agreed to provide advances to KRC; in exchange, KRC would deliver the catalytic converter "dust" and sell it to Toyota. Defendants contend that under the Letter Agreement, Toyota first would deduct the sale amount from any advance it had previously paid KRC. If the sale price of the "dust" exceeded the previously extended advance, KRC would receive a payment for any remaining balance.

Javash executed a Guaranty in favor of Toyota with regard to KRC's obligations under the Letter Agreement.[2] The central dispute between Javash and Toyota is whether, and to what extent, Javash is liable for KRC's debt. According to Toyota, KRC has failed to comply with its obligations under the Letter Agreement, and Javash has failed to make any payments due under the Guaranty. As of April 15, 2010, KRC owed Toyota repayment for advances in principal amount of $1,387,344. According to Toyota, Alan Kaye, KRC's principal, has acknowledged the debt. Plaintiff contends that Javash

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[1] Toyota and Javash also refer to the Letter Agreement as the "Advance Agreement" in their papers.

[2] While Javash halfheartedly argues that there is no proof that it executed the Guaranty, Toyota attaches a copy of the Guaranty to its motion. The Guaranty bears the signature of Javash's president, who undisputedly has the apparent authority to bind Javash. *See, e.g., Goldston v. Bandwith Tech. Corp.*, 52 A.D.3d 360, 360 (1st Dep't 2008) ("The president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify ... The true test of his authority to bind the corporation is ... whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation."). There has been no showing sufficient to demonstrate material facts in dispute as to whether the president was not engaged in the general duties of his office when the Guaranty was signed.

therefore owes the full principal amount, plus interest in the amount of 3% above the Prime rate from January 29, 2010, forty-five days after the last advance made by Toyota.

Plaintiff filed its Complaint on February 28, 2013, alleging various causes of action against KRC, Alan Kaye, and Javash. Only Javash has made an appearance in the case.[3]

II. Discussion

Toyota and Javash now cross-move for summary judgment regarding the sole claim asserted against Javash – breach of the Guaranty.

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party sufficiently has established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court

[3] On October 17, 2013, the Court granted Plaintiff's motion for a default judgment against KRC, execution of which was stayed until resolution of the claim against Javash, *see* Decision and Order on Motion Sequence No. 001. The Court did not issue a default judgment against Mr. Kaye due to his bankruptcy filing.

must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

A. *Scope of the Guaranty Obligation*

The instant motions – as well as Javash's alleged breach – hinge on the scope of the Guaranty. By its express terms, the Guaranty applies to the "any and all existing or future indebtedness or liability of [KRC] to [Toyota] *pursuant to that certain Letter Agreement between [Toyota] and [KRC] dated November 3, 1995,* a copy of which is attached hereto and incorporated by reference." (Serpico Aff. Ex. F ¶ 1) (emphasis added) ("Guaranty"). Since the Letter Agreement entered into on November 3, 1995 provided, *inter alia*, that "[i]n no event shall the aggregate principle [sic] amount of all outstanding Advances to [KRC] exceed $300,000 at any one time," the parties now dispute whether Javash's liability under the Guaranty is limited to $300,000 or whether it could be

construed to extend to the full $1,387,344 sought by Toyota. (Serpico Aff. Ex. G ¶ 6) ("Letter Agreement").

Toyota maintains that the Letter Agreement, to which only Toyota and KRC were parties, was subsequently modified to allow for larger advances of up to $6 million. *See* Toyota Resp. to Javash 19-a St. ¶ 35. Accordingly, notwithstanding the fact that Javash signed a Guaranty limiting its exposure to $300,000, Toyota maintains that Javash should be held liable for almost $1.4 million.

It is well-established that "[a] guaranty is to be interpreted in the strictest manner" and "cannot be altered without the guarantor's consent." *White Rose Food v. Saleh*, 99 N.Y.2d 589, 591 (2003). Moreover, "a guarantor should not be bound beyond the express terms of his guarantee." *Lo-Ho LLC v. Batista*, 62 A.D.3d 558, 559-60 (1st Dep't 2009); *see also Community Nat'l Bank & Trust Co. of N.Y. v. Cognetta*, 88 A.D.2d 897, 897 (2d Dep't 1982) ("It is the general rule that if the wording of a guarantee provides that the guarantor's undertaking is limited to a certain sum, such a specification of the maximum amount of the guarantee is indicative of an intention to limit the guarantor's liability and not to limit the amount of the net credit which the creditor may extend to the principal debtor as a condition of liability on the part of the guarantor.").

1. Modification and the Advance Limit

While Toyota concedes that it never informed Javash of its agreement to exceed the $300,000 limit set forth in the November 3, 1995 Letter Agreement, *see* Toyota Resp. to Javash 19-a St. ¶ 37, Toyota maintains that it was not required to do so. Paragraph 11 of the Letter Agreement provides that the agreement "may not be modified except in writing signed by [Toyota] and [KRC]." Thus, according to Toyota, since the Letter Agreement speaks to the possibility of modification, Javash was on notice that the Agreement could be modified and therefore should be deemed to have given its consent to an indefinite expansion of the amounts covered by the Guaranty – even expansion of the guaranteed amount by up to twenty times.[4]

The Court disagrees. Interpreting the Guaranty in the strictest manner, it clearly pertains only to the November 3, 1995 Letter Agreement, which was cited in paragraph one of the agreement and, for further clarity, was attached as an exhibit. Nothing in the Guaranty states – or could be construed to state – agreement by Javash to guarantee any additional amount above and beyond the $300,000 cap contained in paragraph 6 of the Letter Agreement.

Where courts have found guarantor consent to cover payments made pursuant to modification agreements subsequent to the guaranty, such consent has been explicitly

[4] Toyota's admitted advance of nearly $6 million to KRC was twenty times in excess of the $300,000 cap contained in the Letter Agreement. *See* Toyota Resp. to Javash 19-a St. ¶ 35.

provided by the guarantor. For example, in *White Rose Food v. Saleh*, 99 N.Y.2d 589 (2003), the Court of Appeals cited to language agreed to by the guarantor in concluding that the guarantor consented to the extension of a payment deadline. The language was explicit: "the Makers and Guarantors of this Note severally waive demand, presentment, notice of protest and notice of non-payment, *and agree and consent that the time for payment may be extended*." *White Rose Food*, 99 N.Y.2d at 591 (emphasis added).

There is no such provision in the Agreements here. Paragraph 11 of the Letter Agreement only states that any modification of that agreement must be in writing. This provision neither speaks to increase of the $300,000 limit nor any consent by Javash to such an increase. Accordingly, this Court cannot deem Javash to have consented to the modification and to have guaranteed any amount beyond $300,000. To hold otherwise would allow the parties to the Letter Agreement – KRC and Toyota – to change Javash's obligations under the Guaranty fundamentally and therefore "increase [Javash's] risk without his consent." *Lo-Ho LLC*, 62 A.D.3d at 561.

2. Effect of the Modifications on the Guaranty

While Javash cannot be held surety to the modified agreements, Javash likewise cannot use the modified agreements as an excuse to disclaim his original guaranty. "[T]he liability of a surety cannot be extended beyond the plain and explicit language of the contract, a surety is not entitled to any particular tenderness in the interpretation of the

language of his contract." *HSH Nordbank Ag v. Swerlow*, 672 F.Supp.2d 409, 419 (S.D.N.Y. 2009) (citation omitted) (construing N.Y. law). Here, the Guaranty unambiguously provides for Javash's guaranty of KRC's liability under the November 3, 1995 Letter Agreement. The subsequent modifications entered into by KRC and Toyota do not bind Javash; however, they likewise do not terminate the obligation that Javash knowingly and explicitly assumed under the Guaranty. Although "guarantor should not be bound beyond the express terms of his guarantee," *Lo-Ho LLC v. Batista*, 62 A.D.3d 558, 559-60 (1st Dep't 2009), a surety nonetheless may be held to the terms of its agreement.

3. "Continuing" Guaranty

The Guaranty's reference to Javash's obligation as "continuing" does not change this analysis. Plaintiff contends that the following language in Section 5 of the Guaranty binds Javash to guaranty all sums advanced under all modifications of the Letter Agreement:

> 5. Continuation of Guaranty. This Guaranty shall continue as to any indebtedness or liability of Borrower to Lender incurred prior to Lender's actual receipt of a written notice of termination of this Guaranty signed by the Guarantor.

(Guaranty ¶ 5.) However, continuation of the Guaranty does not mean that the Guarantor assumes new debts, created through amended agreements, to which it has not consented. Again, courts have found otherwise only where the guarantor expressly agrees to act as

surety for any new indebtedness. *See, e.g., Union Chelsea Nat'l Bank v. PGA Marketing Ltd.*, 166 A.D.2d 369, 370 (1st Dep't 1990) (holding guarantor liable where guarantees contained explicit language that they would apply to obligations incurred in the future until such time as the guarantors notified the creditor that it was not to give further accommodation in reliance thereon). There is no such explicit language here. Instead, better construed, Paragraph 5 provides for the survival of the debt guaranteed after termination of the Guaranty.

4. Attorneys' Fees

In addition to recovery under the Guaranty, count eight of Toyota's complaint also seeks attorney's fees incurred in enforcing the guaranty. To support its claim, Toyota cites to paragraph 9 of the Guaranty, which provides:

> 9. Payment of Costs. In addition to the principal and interest payments required to pay [KRC's] liability to [Toyota] hereby guaranteed, Guarantor also guarantees payment of all costs and expenses (including reasonable attorney [sic] fees) of enforcing the terms and provisions contained in the documents evidencing [KRC's] guaranteed liability to [Toyota] and in the preservation, custody, use, operation, preparation for sale, and sale of any collateral.

(Guaranty ¶ 9.)

This attorney's fee provision encompasses the instant litigation, which is a dispute to enforce the Guaranty – a document "evidencing [KRC's] guaranteed liability to [Toyota]." *Id.* The language of paragraph 9 "is unmistakably clear" and permits Toyota

to recover from Javash for "reasonable attorney [sic] fees". *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989).

5. Conclusion

Accordingly, the Court construes the Guaranty to provide for Javash to act as surety only up to the amount of $300,000, as explicitly provided in Javash's Guaranty of the Letter Agreement, dated November 3, 1995. Since the record demonstrates that Javash entered into the Guaranty and that KRC owes a debt to Toyota under the Letter Agreement, the only remaining issue is the amount owed under the Guaranty. Consistent with the Guaranty, Javash's liability is capped at $300,000. Nonetheless, the parties dispute the precise amount owed. *See* Javash Resp. to Toyota 19-a St. ¶ 19 (stating that Toyota received payments from KRC that reduce the balance owed by KRC). Therefore, while the issue of liability under the Guaranty is resolved, the amount of damages is not amenable to summary judgment.

Likewise, although paragraph 9 entitles Toyota to reasonable attorney's fees incurred in enforcing the Guaranty, the amount of reasonable attorney's fees is not established and therefore is not amenable to summary judgment.

B. *Affirmative Defenses*

Javash interposed sixteen affirmative defenses, twelve of which are dismissed, since Javash failed to oppose – let alone mention – them in his opposition brief to Toyota's summary judgment motion.[5] Specifically, these dismissed defenses are the first, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth defenses.

There are four remaining defenses, each of which repeat arguments already addressed above. The second, third, and sixteenth affirmative defenses seek to terminate Javash's obligation under the Guaranty on the grounds that Toyota exceeded the $300,000 advance limit, as well as shipped material in excess of the 500 tons described in the Letter Agreement. As discussed above, Toyota and KRC's modification of the Letter Agreement does not vitiate the $300,000 Guaranty entered into by Javash. In addition, the fourth affirmative defense asserts that Javash never entered into a Guaranty with Toyota. This argument likewise has been addressed, and rejected, above.

III. Conclusion

Therefore, Toyota and Javash's motions for summary judgment each are granted in part and denied in part. The remaining issues for trial, pursuant to CPLR 3212(c), are

[5] The Court notes as well that Javash likewise did not reference or rely on these defenses in his summary judgment motion.

the amount due to Toyota from Javash under the Guaranty for (1) KRC's indebtedness and (2) attorney's fees.

Accordingly it is,

ORDERED that Javash's motion for summary judgment (seq 002) is granted insofar as Javash's liability under the Guaranty is limited to $300,000, and is otherwise denied; and it is further

ORDERED that Toyota's motion for summary judgment (seq 003) is granted as to count eight insofar as Toyota is entitled to recover from Javash under the Guaranty and is otherwise denied as to count eight, and is granted as to Javash's affirmative defenses; and it is further

ORDERED that counsel are directed to appear for a pretrial conference in Room 442, 60 Centre Street, on Tuesday, August 30, 2016 at 10:00 am.

Dated: New York, New York
June 27, 2016

ENTER

Hon. Eileen Bransten, J.S.C.