Bank Leumi USA v GM Diamonds, Inc.
2016 NY Slip Op 32683(U)
February 8, 2016
Supreme Court, New York County
Docket Number: 150474/2015
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48
Justice

Index Number : 150474/2015
BANK LEUMI USA,
vs.
GM DIAMONDS, INC.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance w/ the accompanying Memorandum decision/order of this court.

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

Dated: 2/8/16

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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BANK LEUMI USA,

Plaintiff,

-against-

GM DIAMONDS, INC. GM IDEAL, INC. GILAD MESICA, AMI MESIKA, GEULA MESICA, VERED MESIKA, and JEREMY MEDDING

Defendants.

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Index No.: 150474/2015

Mtn Seq. No. 004

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Plaintiff Bank Leumi USA ("Bank Leumi") moves, pursuant to CPLR 3212, for summary judgment on its first cause of action for foreclosure of its security interest in the assets of defendant GM Diamonds, Inc. ("GMD"), its second and third causes of action against GMD for breach of contract, and its fourth cause of action against defendants Gilad Mesica ("Gilad"), Geula Mesica ("Geula"), Vered Mesika ("Vered") and Ami Mesika ("Ami") (collectively, the "Guarantors"); for the amounts owed to Bank Leumi by GMD under certain promissory notes guaranteed by these individual defendant Guarantors.

Factual Background

GMD was formed in 1993 by Gilad and Ami -- each of whom owns a fifty percent interest in GMD -- for the purpose of selling diamonds and "basic" jewelry at wholesale pricing (Gilad Mesica

Aff. in Opp., ¶ 4). In or around 2000, GMD began borrowing funds from Bank Leumi, secured by the assets of GMD (Gilad Mesica Aff., ¶ 6).

On or about April 30, 2008, GMD and Bank Leumi entered into a security agreement (the "Security Agreement") pursuant to which Bank Leumi obtained a security interest in all of GMD's tangible and intangible assets (the "Security") (Security Agreement, Selove Aff., Ex. 1). In the Security Agreement, GMD agreed that it could not "sell, lease, assign, or otherwise dispose of any of the Security without the prior written consent of the Bank" except in the ordinary course of its regular business (Security Agreement, ¶ 15, Selove Aff., Ex. 1). The Security Agreement stated that if certain "Events of Default" occurred, Bank Leumi was entitled to take possession of the Security and sell it (Security Agreement, ¶¶ 11(b), 11(e), Selove Aff., Ex. 1). One such Event of Default was GMD's failure to pay any debt to Bank Leumi when such debt became due (Security Agreement, ¶ 12, Selove Aff., Ex. 1). Bank Leumi subsequently filed three UCC-1 financing statements -- and, thereafter, the required continuation statements -- in connection with the Security. (Selove Aff., ¶ 4, Ex. 2).

On April 30, 2008, each of the Guarantors executed an Unlimited Guaranty (the "Unlimited Guarantees"), in which they

agreed to "irrevocably and unconditionally guarantee to the Bank, payment when due ... of any and all liabilities of the Borrower to the Bank, in the aggregate at any one time outstanding plus all interest thereon and all attorneys' fees, costs and expenses of collection incurred by the Bank in enforcing any of such liabilities" (Unlimited Guarantees at p. 1, Selove Aff., Ex. 3). These Unlimited Guarantees were "irrevocable" and "unconditional" and waived the Guarantors' right to "interpose any defense ... setoff or claim, deduction or counterclaim of any nature or description" in any action or proceeding instituted by Bank Leumi with respect to the Unlimited Guarantees (Unlimited Guarantees at pp. 1, 2, 5, Selove Aff., Ex. 3). The Guarantors also agreed to "pay all costs and expenses of every kind for collection [of GMD's liabilities by Bank Leumi], including reasonable attorneys' fees (Id. at 4).

In an August 17, 2012 letter agreement between GMD and Bank Leumi (the "Letter Agreement"), Bank Leumi offered GMD a $2,500,000 line of credit, which GMD accepted (Letter Agreement at p. 1, Selove Aff., Ex. 4). In the Letter Agreement, GMD agreed that it would maintain "all traditional banking services" with Bank Leumi (Letter Agreement, Selove Aff., Ex. 4 at § (B)(5)). In addition, the Guarantors "acknowledged and consented" to the terms of the Letter Agreement and agreed that

they would be jointly and severally liable for the repayment of the $2,500,000 (Letter Agreement at pp. 2, 6-7, Selove Aff., Ex. 4).

On August 21, 2013, GMD executed a Promissory Note in the principal amount of $2,500,000 (the "2013 Note") (2013 Note, Selove Aff., Ex. 5). The 2013 Note was payable on demand but, if no demand was made, payment was due by February 3, 2014 (2013 Note, Selove Aff., Ex. 5). The 2013 Note stated that if Bank Leumi retained an attorney to enforce or collect the 2013 Note due to GMD's non-payment, GMD would pay reasonable attorney's fee in addition to the money owed under the 2013 Note (Id. at p. 2). By March 2014, GMD had opened several operating accounts at various banks, including Valley National Bank and Wells Fargo (Opp. Memo at pg. 4).

On March 24, 2014, Bank Leumi and GMD executed an agreement (the "Forbearance Agreement") which referenced two promissory notes between the parties, the 2013 Note and a separate note dated February 3, 2014 in the amount of $1,500,000 (the "February 3, 2014 Note" and the 2013 Note collectively referred to as the "Notes") (Forbearance Agreement, Selove Aff., Ex. 6). In the Forbearance Agreement, GMD acknowledged that it was in default under the 2013 Note and February 3, 2014 Note due to: (i) its failure to make principal payments totaling $900,000 under the

Notes by February 3, 2014; and (ii) its establishment of a bank account outside of Bank Leumi that was not subject to Bank Leumi's security interest (Forbearance Agreement at §§ 1(a), 2, Selove Aff., Ex. 6). As a result of these defaults, the total principal amount due as of March 7, 2014 was $2,400,000 (Forbearance Agreement at §§ 1(a), 2, Selove Aff., Ex. 6). Under the Forbearance Agreement, Bank Leumi agreed to forbear from exercising its rights and remedies under the Security Agreement, Letter Agreement, or the Notes before December 31, 2014 in consideration of, inter alia, GMD's agreement to make ten monthly payments set forth in the Forbearance Agreement with a final payment on December 31, 2014, and conduct all of its banking with Bank Leumi (Forbearance Agreement at § 2, Selove Aff., Ex. 6). In addition, the Guarantors ratified and reconfirmed the Unlimited Guarantees, and GMD and the Guarantors waived any defenses, setoffs or counterclaims against Bank Leumi regarding all prior notes and the Unlimited Guarantees (Forbearance Agreement at §§ 1(d), 7, Selove Aff., Ex. 6). Contemporaneous with the execution of the Forbearance Agreement, GMD executed an Installment Promissory Note (the "Installment Note") which provided that GMD was to pay Bank Leumi $2,300,000 in nine installments, with a final payment on December 31, 2014 (Installment Note, Selove Aff., Ex. 7). Plaintiff alleges that

GMD made payments under the Payment Schedule set forth in the Forbearance Agreement and Installment Note up to June 13, 2014, but made no further payments after that date (Installment Note at ¶ 14, Selove Aff., Ex. 7). Defendants concede that they were unable to "cover" the payments set forth in the Payment Schedule (Opp. Memo. at p. 2). The Installment Note provided that GMD would "reimburse the Bank for all costs and expenses incurred by it and shall pay the reasonable fees and disbursements of counsel to the Bank in connection with enforcement of the Bank's rights hereunder (Installment Note at ¶ C3, Selove Aff., Ex. 7).

In October 2014, GMD opened a secondary operating account at Wells Fargo Bank and closed the Valley Bank account. According to defendants, two of Bank Leumi's officers were informed that GMD needed these alternate operating accounts to conduct business after Bank Leumi froze GMD's operating accounts (Mesica Aff., ¶ 25). Defendants claim that the officers of GMD acknowledged GMD's actions, and did not demand that GMD close these accounts (Mesica Aff., ¶ 25).

In November 2014, GM Ideal Corp. ("Ideal"), by its principal, Jeremy Medding ("Medding"), approached GMD with a proposal to purchase a portion of GMD's inventory for $335,000 to be paid in five installments commencing in December 2014 (the "Ideal Offer") (Mesica Aff., ¶¶ 39, 41). The Ideal Offer was

presented to Bank Leumi, which rejected it (Mesica Aff., ¶¶ 41-42).

Plaintiff contends that at some point in time before December 29, 2014 Gilad and Medding transferred the business and assets of GMD to GM Ideal without fair consideration by, inter alia, making Gilad a partner of GM Ideal, transferring possession or title to some or all of GMD's inventory to GM Ideal, causing GMD's principal clients to transfer their supplier identification numbers from GMD to GM Ideal, having GM Ideal move its business in GMD's premises, and replacing GMD's website with GM Ideal's website (Compl. ¶ 33).

On January 15, 2015, Bank Leumi commenced this action asserting claims for: (i) foreclosure of security interest; (ii) breach of contract (default); (iii) breach of contract (exclusivity); (iv) enforcement of the Unlimited Guarantees; (v) successor liability; (vi) fraudulent conveyance; and (vii) intentional interference with contract (against Medding).

GMD, Baruch, Gilad, and Geula interposed an Answer asserting the following affirmative defenses: (i) waiver; (ii) estoppel; (iii) unclean hands; (iv) failure to mitigate; (v) failure to dispose of collateral in a commercially reasonable manner; (vi) misconduct by plaintiff; (vii) violation of the Equal Credit Opportunity Act; and (viii) unconscionability.

Ami and Vered interposed an Answer asserting the following affirmative defenses: (i) unconscionability, (ii) failure to satisfy CPLR 3016; (iii) payment in full; (iv) failure to state a claim; (v) that defendants were not proper parties to the action; (vi) agreements were made by a corporation for which defendants were not responsible; (vii) laches; (viii) estoppel; (ix) unclean hands; and (x) failure to mitigate damages.

On February 25, 2015, this Court entered a stipulated order of seizure in which GMD agreed to turn over its diamond and diamond jewelry inventory (the "Diamond Security") to Bank Leumi (Selove Aff., ¶ 17, Ex. 10). After taking possession of the Diamond Security, Bank Leumi retained David Bucks ("Bucks"), a consultant with over fifty years of experience in the diamond jewelry industry who had audited GMD's inventory since 2009, to value the Diamond Security and to determine the process for disposing of it in a "commercially reasonable manner" (Bucks Aff., ¶¶ 3, 29). After evaluating the Diamond Security, Bucks estimated that Bank Leumi would be able to recover approximately $275,000 to $310,000 for the Diamond Security (Bucks Aff., ¶ 19). At the request of Bank Leumi, Yogesh Madhavni, chairman and CEO of SimplexDiam, a seller of distressed jewelry and diamond inventory, examined the Diamond Security three times in April 2015 (Bucks Aff., ¶ 20). Madhavni estimated that the Diamond

Security had a reserve price of $275,000 and would sell for between $325,000 and $360,000 if sold at a diamond and jewelry convention in Las Vegas in May 2015 (Bucks Aff., ¶¶ 20, 22). After making the Diamond Security available to four parties for examination and bidding, the Diamond Security was ultimately sold to the highest bidder, Sparkling Jewelry Inc., for $318,600, in or around May 2015 (Bucks Aff., ¶ 26). SimplexDiam placed a bid for the Diamond Security of $315,000 (Bucks Aff., ¶ 28). GMD claims that the Diamond Security's "book value" (i.e., the original cost less any "impairment cost") was $789,467.00 (Gilad Aff., ¶ 30).

Discussion

I. Foreclosure of Security Interest

Bank Leumi seeks to foreclose on its security interest in GMD's assets based on GMD's defaults in: (i) failing to repay the money it borrowed from Bank Leumi, and (ii) disposing of assets outside of the ordinary course of business by transferring certain intangible assets of GMD to GM Ideal, thereby violating the Security Agreement. In that regard, Bank Leumi argues that after a default a "secured party may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure" (UCC § 9-601[a][1]).

Bank Leumi has established its entitlement to foreclose on the Security by producing the Security Agreement, the Installment Note, the Forbearance Agreement, and the affidavit of David Selove ("Selove"), Deputy Head of Diamond and Jewelry Finance for Bank Leumi, attesting to GMD's nonpayment under the Installment Note and Forbearance Agreement (71 Clinton St. Apts. LLC v 71 Clinton Inc., 114 AD3d 583, 584 [1st Dept 2014]).

Defendants argue that the various contracts on which Bank Leumi relies do not satisfy the business records exception to CPLR 4518(a) because they are unauthenticated. This argument is unavailing. The business record rule is an exception to the rule against hearsay evidence, however, where a contract is not a hearsay document, but the very agreement or transaction at issue (Malloy v V.W. Credit Leasing, Ltd., 21 Misc 3d 1110(A) [Sup Ct 2008]). Given that the Installment Note and Forbearance Agreement are contracts offered to demonstrate the defendants' obligations thereunder, rather than as an account of what occurred, they are not hearsay (Id.). Furthermore, defendants' efforts to call the authenticity of these documents into question is belied by the fact that they reference plaintiff's exhibits throughout their opposition.

Defendants also make much of the fact that the Selove Affidavit refers to loans made to GMD "beginning prior to April,

2008" without including the loan documents which reflect GMD's obligations under these loans. This argument is equally unavailing. This omission fails to create an issue of fact given that Bank Leumi has attached the contracts relevant to its claims, all of which set forth GMD's obligations to Bank Leumi. Similarly, while defendants take issue with the fact that the February 3, 2014 Note referenced in the Forbearance Agreement is not attached to plaintiff's motion, this is insufficient to create an issue of fact, as plaintiff seeks to enforce GMD's obligations under the subsequent Forbearance Agreement and Installment Note.

Accordingly, that branch of plaintiff's summary judgment motion on the first cause of action is granted.

II. Breach of Contract - Default on Notes and Forbearance Agreement

Bank Leumi asserts a claim for breach of contract against GMD based on GMD's failure to repay money owed pursuant to the Forbearance Agreement and Installment Note. To establish a breach of contract, Bank Leumi must demonstrate that a contract was formed, defendants failed to perform, and that Bank Leumi was damaged by this failure (Flomenbaum v New York Univ., 71 AD3d 80, 91 [1st Dept 2009] aff'd, 14 NY3d 901 [2010]). As GMD concedes that it defaulted under the Forbearance Agreement and Installment

Note by failing to make all payments under the Payment Schedule set forth in those agreements, Bank Leumi has satisfied its prima facie case for breach of contract.

Defendants, however, argue that summary judgment is inappropriate because Bank Leumi's sale of the Diamond Security was not commercially reasonable. A secured party seeking a deficiency judgment bears the burden of establishing the commercial reasonableness of the disposition of collateral (GMAC v Jones, 89 AD3d 985, 986 [2d Dept 2011]). Where factual issues exist as to the commercial reasonableness of any aspect of the sale, summary judgment must be denied (National Bank of Delaware County v. Gregory, 85 AD2d 839 [1981]; Kohler v. Ford Motor Credit Co., 93 AD2d 205, 208 [1983]; see Mack Fin. Corp. v. Knoud, 98 AD2d 713 [1983]).

Although plaintiff argues that this defense was waived in the Unlimited Guarantees, a lender's obligation to deal in a commercially reasonable manner with collateral securing a loan may not be waived by a guarantor (NatWest Bank N.A. v Grauberd, 228 AD2d 337, 338 [1st Dept 1996]). Having said that, a disposition of collateral is made in a commercially reasonable manner if it occurs: "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with

reasonable commercial practices among dealers in the type of property that was the subject of the disposition" (UCC § 9-627(b)).

Bank Leumi argues it has satisfied UCC § 9-627(b)(3) by: retaining experts to appraise the collateral, seeking multiple bidders, and obtaining a price reasonably close to the appraised market value of the Diamond Security, as this process is similar to the process used in Merchants Bank of New York v Gold Lane Corp., in which "evidence of a certified appraiser indicating that the price obtained for the jewelry at auction was reasonably close to the market value of the inventory satisfied plaintiff's prima facie burden to demonstrate commercial reasonableness" (Merchants Bank of New York v Gold Lane Corp., 28 AD3d 266, 266-67 [1st Dept 2006]).

Defendants point out that in Merchants Bank the First Department denied plaintiff's motion for summary judgment holding that the defendant established that a triable issue of fact existed as to the commercial reasonableness of the collateral's sale by submitting "evidence that the actual cost of the jewelry at issue was significantly higher than the market value computed by the bank's appraiser" and "rais[ing] factual questions as to the validity of the methods apparently employed by the appraiser, whose report seems to concentrate on the weight of the

surrendered items and to assign little or no value to the items as high quality finished jewelry" and demonstrating that the bank was still in possession of certain items of unsold collateral (Merchants Bank of New York v Gold Lane Corp., 28 AD3d at 266-67).

As to the first point set forth in Merchants Bank, GMD argues that the sale of the Diamond Security was not commercially reasonable because the Diamond Security was sold for less than half of the claimed book value. Although a "wide discrepancy between the sale price and the value of the collateral signals a need for close scrutiny" (Fed. Deposit Ins. Corp. v Herald Sq. Fabrics Corp., 81 AD2d 168, 184-85 [2d Dept 1981] [emphasis added]), in this case the Diamond Security was sold for forty percent of its purported book value, a differential which does not automatically create a question of fact as to the commercial reasonableness of the sale (compare First Fed. Sav. and Loan Ass'n of Rochester v Romano, 253 AD2d 363 [1st Dept 1998] [bids as low as 30% of market value have been held to be commercially reasonable] and Fed. Deposit Ins. Corp. v Herald Sq. Fabrics Corp., 81 AD2d 168, 184-85 [2d Dept 1981] [sale not commercially reasonable where collateral disposed for approximately 10% of original sale price]). Even if this differential is sufficient to draw further scrutiny, however, in order to establish the

existence of a question of fact regarding the commercial reasonableness of the auction GMD would also have to allege procedural improprieties beyond this discrepancy. Its attempts to do so are unavailing.

GMD argues that the disposition of the Diamond Security was tainted by procedural impropriety because the Ideal Offer was greater than the amount obtained by Bank Leumi at the auction and because GM Ideal was not invited to participate in the auction. The argument fails because the fact that "a greater amount could have been obtained by a ... disposition, or acceptance at a different time or in a different method from that selected by the secured party," is not "of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner" (UCC § 9-627(a)). Furthermore, Bucks' affidavit established a reasonable explanation for Bank Leumi's rejection of the Ideal Offer, namely that GM Ideal would only purchase a portion of the Diamond Security over five months while leaving Bank Leumi to sell the remaining less-desirable portion of the Diamond Security piecemeal, which would be a long and time-consuming process with no assurance of success (Bucks Aff., ¶ 14).

GMD also argues that the auction was not commercially reasonable because only four parties submitted bids on the Diamond Security. Given that an auction with three bidders was held to be commercially reasonable in Merchants Bank of New York v Gold Lane Corp., 28 AD3d 266 [1st Dept 2006]), this argument is unavailing.

Lastly, defendants make much of the fact that the Diamond Security was sold to Sparkling Jewelry Inc., a creditor of GMD. As Sparkling Jewelry Inc. was the highest bidder and there is no allegation they received special treatment as a creditor of GMD, this does not impact the reasonableness of the sale.

Given that the Diamond Security was sold for a price greater than its appraised market value, and another bidder -- SimplexDiam -- was willing to pay a similar price at the auction, and the sale realized forty percent of the uncorroborated book value asserted by GMD, the sale was commercially reasonable (First Fed. Sav. and Loan Ass'n of Rochester v Romano, 253 AD2d 363 [1st Dept 1998]). As defendants have not created a question of fact regarding the procedural propriety concerning the sale of the Diamond Security, that branch of plaintiff's motion for summary judgment on its second cause of action is granted.

III. Breach of Contract - Exclusivity

In its third cause of action, Bank Leumi seeks to recover for breach of contract against GMD based on GMD's "opening and operating bank accounts" with banks other than Bank Leumi, in violation of the Security Agreement. Bank Leumi claims that more than $2 million passed through these bank accounts between February 2014 and December 2014 (Compl., ¶ 25). Bank Leumi fails, however, to provide evidence concerning the money allegedly transferred through these accounts or to explain how it was harmed by GMD's action or the amount of such damages.

Accordingly, that branch of plaintiff's motion for summary judgment on its third cause of action is denied (Arcidiacono v. Maizes & Maizes, LLP, 8 AD3d 119, 120 [1st Dept 2004]; Mizuno v Barak, 113 AD3d 825, 827 [2d Dept 2014]).

IV. Enforcement of Guarantees

Bank Leumi seeks to hold the Guarantors liable for the amounts owed by GMD under the Installment Note and Forbearance Agreement. A party establishes its entitlement to payment under a guaranty by submitting evidence of the underlying debt, the absolute and unconditional guaranty, and the guarantor's failure to perform thereunder (Gard Entertainment, Inc. v Country in New York, LLC, 96 AD3d 683 [1st Dept 2012]; IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A., 83 AD3d 573, 573 [1st Dept 2011]

aff'd sub nom. IRB-Brasil Resseguros, S.A. v Inepar Investments, S.A., 20 NY3d 310 [2012]; Provident Bank v Giannasca, 55 AD3d 812 [2d Dept 2008]).

Bank Leumi has satisfied its prima facie case for summary judgment by submitting: (i) the 2013 Note and Installment Note; (ii) the Unlimited Guarantees; and (iii) the Selove Affidavit attesting to GMD's default (71 Clinton St. Apts. LLC v 71 Clinton Inc., 114 AD3d 583, 584 [1st Dept 2014]; Signature Bank v Galit Properties, Inc., 80 AD3d 689, 689 [2d Dept 2011]; Val. Nat. Bank v Soho Properties Inc., 34 Misc 3d 1237(A) [Sup Ct 2012]).

Defendants argue that summary judgment is inappropriate as to Guarantor Geula because Bank Leumi required Geula to execute the Unlimited Guaranty, and subsequent affirmations of same, solely because she was the spouse of Gilad and, as a result, violated the Equal Credit Opportunity Act (the "ECOA") which prohibits a creditor from requiring a guaranty from the spouse of an obligor for the sole reason that he or she is the spouse of the obligor (15 USC § 1691, et seq.; 12 CFR part 202). Defendants argue that because Geula's Unlimited Guaranty was "entered into in violation of a statute [it] is an unlawful undertaking [which] cannot give rise to a viable cause of action" (Scotto v Mei, 219 AD2d 181, 183 [1st Dept 1996]).

The violation of a statute that is merely malum prohibitum will not necessarily render a contract illegal and unenforceable (Chirra v Bommareddy, 22 AD3d 223, 224 [1st Dept 2005]), particularly when "the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy" (Benjamin v Koeppel, 85 NY2d 549, 553 [1995] [internal citations omitted]). This principal is best illustrated in Lloyd Capital Corp. v. Henchar, 80 NY2d 124, 128 (1992) wherein a loan agreement that violated the Federal Small Business Administration regulations was held to be enforceable because "[a]llowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law" (Lloyd Capital Corp. v Pat Henchar, Inc., 80 NY2d at 128).

The logic of Lloyd Capital was applied to the ECOA in Citibank, N.A. v Norkin, 12994/92, 1993 WL 590130, at *2 (Sup Ct Nov. 24, 1993). There, Supreme Court held that even if Citibank violated the ECOA by requiring that defendant obligor's husband serve as guarantor of defendant's note solely because he was the defendant's spouse this fact did not preclude summary judgment for plaintiff because "[t]he Federal Trade Commission is

responsible for enforcement of the Equal Credit Opportunity Laws and related Federal Reserve Board Regulations and thus, is in the better position to determine if the regulations were breached ... [and] if [defendant] believes that the regulations were breached, she is not without remedy as she may sue to recover damages. However, the Court does not extend the remedy available to voiding the guarantee" (Citibank, N.A. v Norkin, 12994/92, 1993 WL 590130, at *2 [emphasis added]).

The Second Circuit has reached a similar conclusion, holding that "[t]he ECOA on its face provides only for a civil action in federal court for actual damages as a remedy for violations thereof" and therefore "defendants may be entitled to employ the ECOA only to assert a counterclaim, not a defense (United States v Joseph Hirsch Sportswear, Co., Inc., 85 CV 1546, 1989 WL 20604, at *1 [EDNY Feb. 28, 1989] affd sub nom. United States v Hirsch, 923 F2d 842 [2d Cir 1990]).

Finally, even assuming, arguendo, that an ECOA violation would serve to invalidate the Unlimited Guaranty, Geula has waived this defense in her Unlimited Guaranty (Fleet Bank v Petri Mech. Co., Inc., 244 AD2d 523 [2d Dept 1997] [guarantor's waiver of the "right to assert any defense, set-off or counterclaim" precluded guarantor from asserting counterclaim that creditor, violated the ECOA in obtaining guarantees, where guarantor did

not assert any fraud or negligence by creditor in disposition of its collateral]). As Geula's ECOA defense is unavailing, that branch of plaintiff's motion for summary judgment on its fourth cause of action is granted.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its first cause of action for foreclosure of its security interest is granted; and it is further

ORDERED that plaintiff's motion for summary judgment on its second cause of action for breach of contract (defaults) is granted; and it is further

ORDERED that plaintiff's motion for summary judgment on its third cause of action for breach of contract (exclusivity) is denied; and it is further

ORDERED that plaintiff's motion for summary judgment on its fourth cause of action against the Guarantors is granted; and it is further

ORDERED that plaintiff's first, second, and fourth causes of action are severed and referred to a Special Referee or Judicial Hearing Officer to hear and report -- or, if the parties so-agree, to hear and determine -- the amount due to plaintiff under the 2013 Note, Installment Note, Forbearance Agreement, and Unlimited Guarantees for principal and interest as well as any

other amounts that may be due and owing, including reasonable attorneys' fees.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/8/16

HON. JEFFREY K. OING, J.S.C.