Citibank, N.A. v Place for Achieving Total Health Med., P.C.
2017 NY Slip Op 30429(U)
March 2, 2017
Supreme Court, New York County
Docket Number: 652371/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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CITIBANK, N.A.,

Plaintiff,

-against-

PLACE FOR ACHIEVING TOTAL HEALTH MEDICAL, P.C., ERIC BRAVERMAN, TOTAL HEALTH NUTRIENTS, INC., and TOTAL HEALTH NUTRIENTS, LLC,

Defendants.

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DECISION AND ORDER

Index No. 652371/2015

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 3212 for summary judgment: 1) on its verified complaint against all defendants; and 2) dismissing the affirmative defenses and counterclaims asserted by defendants in their amended verified answer. Defendants oppose the motion.

Plaintiff Citibank, N.A., commenced this collection action by filing a summons and verified complaint on July 2, 2015. The complaint alleges the following facts.

Defendant Eric Braverman ("Braverman") is the President of defendant Place for Achieving Total Health Medical, P.C. ("THM").

Defendant THM, as borrower, entered into two loan transactions with plaintiff Citibank, as lender.

In the first transaction, plaintiff extended a "relationship ready line of credit" (the "RRC loan") to THM on January 20, 2012. THM executed a credit approval letter, agreeing to be bound by the terms of the disclosure booklet and other loan documents. Initially, the amount of credit available under the RRC loan was $2,000,000. Subsequently, the amount was reduced to $1,500,000.

Defendant Braverman executed the loan agreement. He and co-defendants Total Health Nutrients, Inc. ("THNI"), and Total Health Nutrients, LLC ("THNL") executed unconditional guaranties.

The guaranties expressly provided that the guarantors' obligations shall not be subject to any counterclaim or defense and "shall not be released, discharged or in any way affected by, any circumstance or condition whatsoever ... which might constitute a legal or equitable discharge or defense including ... (iii) any waiver, consent, change, extension, indulgence or other action or any action or inaction under or in respect to any loan document" (Walsh Aff., exhibit C, p. 6, para. 4(c)). In addition, the loan agreements expressly provide, "Each Credit Party absolutely, unconditionally and irrevocably waives any and all right to assert any set-off, counterclaim or crossclaim of any nature whatsoever with respect to the Standard Terms, the Credit Approval Letter and the other Loan Documents" (Walsh Aff., exhibit C, p. 14, para. 8(m)). "Credit Party" is defined as "each Borrower and each

Gurantor set forth in the Credit Approval Letter" (Walsh Aff., exhibit C, p. 15, para. 9).

The RRC loan agreement stated that THM was in default if it failed to pay any installment of principal or interest when due. Upon default, repayment of the loan would accelerate. The RRC loan agreement stated further that, upon default, THM was obligated to pay costs incurred by Citibank in enforcing its rights under the agreement, including reasonable attorneys' fees and expenses.

In the second transaction, THM executed a credit approval letter evidencing a $1,000,000 loan facility (the "term loan"). Braverman executed the loan agreement, and he, THNI, and THNL guaranteed the loan unconditionally.

Citibank sent defendants a Notice of Default and Acceleration Demand for Payment dated June 5, 2015.

By letter dated June 9, 2015, defendants disputed the default in payment and a breach of loan terms.

The complaint asserts four causes of action.

The first cause of action ("Breach of RRC Loan Agreement") alleges that THM breached its obligations under that agreement, and Citibank is entitled to recover the principal amount of $1,499,000, together with interest, late charges, collection costs and expenses, including reasonable attorneys' fees.

The second cause of action ("Breach of Term Loan Agreement") alleges that THM breached its obligations under that agreement, and THM is liable in the principal amount of $509,428.66, together with interest, late charges, collection costs and expenses, including attorneys' fees.

The third cause of action ("Breach of Guaranty") alleges that Braverman, THNI and THNL, are liable as guarantors in the amount of $2,008,428.66.

The fourth cause of action alleges that, pursuant to the terms of the loan agreements, defendants are liable to Citibank for its collection costs and expenses, including reasonable attorneys' fees.

Defendants served an amended answer, affirmative defenses and counterclaims. The first affirmative defense ("Payment") asserts that: 1) plaintiff would debit defendants' deposit accounts for the monthly loan payments; 2) defendants maintained sufficient funds in the accounts to cover such payments; and 3) plaintiff failed to charge the accounts for the scheduled payments it claims were not made even though the funds were available.

The second affirmative defense ("Waiver") asserts that plaintiff was aware of the alleged breaches of covenants committed by defendants and permitted defendants's conduct all the while continuing to accept payments on the loans and not objecting to the alleged breaches until shortly before commencing this action.

The first counterclaim alleges that plaintiff's conduct "caused defendant to reasonably rely on plaintiff continuing its practices" and "plaintiff's failure in continuing its practices and commencing this action" caused defendants to sustain damages (Amended Answer, p. 2, paras. 8-10). The first counterclaim seeks $2,000,000 in damages.

The second counterclaim alleges that on July 29, 2015, Citibank froze the funds in defendants' deposit accounts; provided no notice to defendants of its action; and, as a result, checks drawn on the accounts "bounced," resulting in the cancellation of defendants' scheduled radio show, damage to reputation, and lost business (Amended Answer, pp. 2-3, paras. 11-16). The second counterclaim seeks damages in the amount of $1,000,000.

Discussion

The standards for summary judgment are well settled. "The proponent of 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 University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently

established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]). The court's role is "issue-finding, rather than issue-determination" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

Plaintiff exhibits the sworn affidavit of Bernadette Walsh, who states that she is a Senior Vice President of Citibank. Ms. Walsh states that THM defaulted under the loan agreements in two respects. First, THM failed to pay amounts due in May 2015 and June 2015, and continuing to date. Second, THM defaulted by: 1) failing to have sufficient collateral, as required by the loan agreements; 2) granting a lien in favor of American Express cards without informing Citibank; 3) failing to maintain the maximum leverage ratio and Debt Service Ratio, as required by the loan agreements; and 4) failing to provide to Citibank the December 2013 and December 2015 CPA

reviewed financials for THM and a 2015 personal financial statement for Braverman, as required by the loan agreements.

In opposition, defendant Eric Braverman states in a sworn affidavit that Citibank would automatically debit defendants' account for loan payments every month on the due dates. Braverman contends that the monthly bank statements show that sufficient funds were available in the account to make the May 2015 payment that Citibank claims defendants failed to make.

Braverman contends that the bank never notified the defendants that the bank had changed its process and that the bank would no longer automatically debit defendants' accounts or that loan payments would have to be paid by other means.

Braverman also denies that defendants defaulted by failing to comply with the loans' financial covenants. He maintains that debt and leverage ratios vary based on various business factors; if such ratios were out of compliance on a certain day, they may have been back in compliance the next day; the credit approval letter from plaintiff stated that the debt and leverage ratios were to be tested annually, which was done and showed compliance; and plaintiff did not provide in its default notice when the breach of financial covenants occurred, nor did it provide an opportunity to cure if the breach existed.

Finally, Braverman asserts that Citibank wrongfully froze defendants' accounts

and wrongfully dishonored checks presented for payment as a result. He maintains that a letter from the bank dated July 27, 2015, evidences that the bank froze the account and that the action was taken in bad faith. Braverman contends that the bank's freezing of the account and dishonoring checks caused significant harm to defendants' trade relationships, relationships with other creditors and with defendants' patients and clients receiving refunds.

In a reply affidavit, Bernadette Walsh states that the account statement shows that the account did not have sufficient funds on May 23 and May 25 to make the loan payments; THM made no attempt to make the payment from any other source; and, pursuant to the loan agreements, once THM defaulted, Citibank had no obligation to attempt further debits. Contrary to defendant's contention, Citibank did not change the process of debiting the account for payment. Rather, Citibank could not debit the account because there were insufficient funds, so Citibank declared THM in default, accelerated the loans, and demanded payment in full. Further, Walsh points out that defendants do not deny their failure to provide Citibank required documentation, such as THM's December 2013 financials, THM's December 2014 financials, and Braverman's Personal Financial Statement, or that the failure to supply such documents constituted separate defaults under the loan agreements.

It is important to note that Eric Braverman does not state in his sworn affidavit

that the amount allegedly owed as a result of the default was ever paid to plaintiff.

On this record, the Court finds that plaintiff has made out a prima facie case on all four causes of action. The sworn affidavits of Bernadette Walsh and the supporting documentary evidence establish that there were insufficient funds in defendants' accounts to make the automatic monthly loan payments, resulting in a default. (Braverman Aff., exhibit A, F). Accordingly, the affirmative defense of "payment" is meritless.

The affirmative defense of "waiver" is meritless in light of section 7(d) of the loan agreement, which states, "No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power and shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient" (Walsh Aff., exhibit C, p. 12).

The documentary evidence establishes that the defendants are liable as guarantors. Plaintiff is entitled to recover attorneys' fees under section 8(d) of the loan agreement, which states:

> The Borrower agrees to pay on demand all costs and expenses of Citibank in connection with the administration of the Credit Approval Letter, the Standard Terms and any other Loan Documents, including, without limitation, the reasonable fees and expenses of counsel for Citibank with respect thereto and with respect to advising Citibank as to its terms and responsibilities under the Standard Terms, all costs and expenses (including reasonable counsel fees and expenses), in connection with the enforcement of the Standard Terms and any other

> Loan Documents, and all reasonable fees charged by Citibank in connection with the preparation and delivery of payoff statements, financing statements , termination statement and similar matters.

Next, we turn to the branch of the motion to dismiss the counterclaims.

Plaintiff exhibits a copy of the "Credit Terms and Conditions Disclosure Booklet (Wash Aff., exhibit C). It states as follows at pages 14 and 15:

> Each Credit Party absolutely, unconditionally and irrevocably waives any and all right to assert any set-off, counterclaim or crossclaim of any nature whatsoever with respect to the Standard Terms, the Credit Approval Letter and the other Loan Documents.
>
> * * *
>
> "Credit Party" means each Borrower and each Gurantor set forth in the Credit Approval Letter.

The Court finds that the counterclaims must be dismissed based on this unambiguous contractual provision.

Accordingly, it is

ORDERED that the motion for summary judgment on the complaint herein is granted, and the affirmative defenses and counterclaims are dismissed.

Settle judgment on notice.

Date: March 2, 2017
New York, New York

Anil C. Singh