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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Index Number : 101357/2007

ISRAEL DISCOUNT BANK OF NEW

VS

SCHWEBEL, AVROHOM M.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 101357/07

MOTION DATE 2/28/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

_____ were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 7/10/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

ISRAEL DISCOUNT BANK OF NEW YORK, IDB FACTORS DIVISION,

Plaintiff,

-against-

AVRAHOM M. SCHWEBEL (a/k/a Avi Schwebel), LEONARD FRIEDMAN, VOLVI LOWY (a/k/a William Lowy) & IRWIN JACOBS,

Defendants.

----------X

Index No.:101357/2007

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

In this action plaintiff Israel Discount Bank of New York, IDB Factors Division, seeks to collect from defendants on their guarantees of a $1,779,412.40 debt incurred by Timing Group, LLC (Timing) under a factoring agreement. Plaintiff now seeks summary judgment against defendants, who oppose. Defendant Jacobs, through his and counsel's affidavits, alternatively seeks an adjournment of this motion based on his "intention to submit an application for consolidation and/or joint trial" with a related action pending under Index No. 600145/2007 (Gische, J.). The latter action was filed by Jacobs and a co-plaintiff named Steve Kenger, individually and derivatively for Timing, against Schwebel, Classique Footwear, Inc., Capital Corp. and Timing as a nominal defendant. To date no application for consolidation or for joint trial has been filed in either action.

The court recently issued an order granting plaintiff's motion to sever the claims against Alan Friedman who is currently in Chapter 7 bankruptcy in California. Also, by order dated October 18, 2007, the court dismissed Irwin Jacobs' third-party action against Timing, et al. for failure to serve. Plaintiff is pursuing a separate action against Timing under Index No.

600230/2007 (Ramos, J.).

I. Statement of Undisputed Material Facts

Plaintiff's motion is supported by two affidavits of its Senior Vice President Jerry Hertzman and exhibits. A joint opposition, filed by defendants Schwebel, Lowy and the Friedmans, is supported by an attorney's affirmation, Schwebel's affidavit and exhibits. Defendant Jacobs has filed a separate opposition supported by his own affidavit, an affidavit of accountant Andrew Plotzker and exhibits.

On or about July 15, 2005, Timing entered into a Factoring Agreement (Agreement) with plaintiff in which plaintiff agreed, at its discretion, to advance Timing up to eighty per cent of the purchase price of receivables (as determined in the agreement). In return, Timing agreed to repay any loans or advances made on plaintiff's demand, whether or not then due, and that prior resort to any collateral would not be required. Timing further agreed to pay a factoring commission and interest. Exh. 6, Motion. Pursuant to Paragraph 9.1 of the Agreement provided:

> At the end of each month IDB [plaintiff] shall send [Timing] a Statement of Account reflecting all transactions under this Agreement for such month. The Statement of Account shall be deemed correct and binding upon [Timing] and shall constitute an account stated between the parties unless IDB [plaintiff] receives a written objection setting forth specific exceptions, within thirty (30) days after rendering such statement.

Plaintiff sent Timing monthly account statements showing the amount of indebtedness, to which Timing never objected. As of March 31, 2007, Timing was indebted to plaintiff in the amount of $1,618, 361.88.

Defendant Schwebel was CEO and Co-President of Timing. Defendant A. Friedman was Vice President and Treasurer, and defendant L. Friedman was Co-President. Defendants Jacobs,

Schwebel and A. Friedman were members of the Board of Managers. Exh. 12, Motion.

Defendants, members of Timing, personally executed identical guarantees providing, in pertinent part:

> Each of the undersigned hereby unconditionally, jointly and severally guaranties and agrees to be liable for the full and indefeasible payment and performance when due of all now existing and future indebtedness, obligations and liabilities of the Client [Timing]....
>
> This guaranty is executed as an inducement to you to make loans or advances to the Client [Timing] or otherwise to extend credit or financial accommodations to the Client .... Each of the undersigned agrees that any of the foregoing shall be done or extended by you in your sole discretion ....
>
> The undersigned also agree that you need not attempt to collect any Obligations from the Client or other obligors or to realize upon any collateral, but may require the undersigned to make immediate payment of Obligations to you when due ....
>
> This guaranty is absolute, unconditional and continuing regardless of the validity, regularity and enforceability of any of the Obligations ....
>
> In the event of any breach of, default under or termination of any of the Agreements executed between you [plaintiff] and the Client [Timing] ... then the liability of all of the undersigned for the entire Obligations shall mature even if the liability of the Client [Timing] therefor does not.
>
> This Guaranty may be terminated as to any one or more of the undersigned, which termination will be effective ten (10) days after actual receipt by one of your officers of written notice of termination ...; provided however, that any of the undersigned so terminating this Guaranty shall remain bound hereunder, and this Guaranty shall remain in full force and effect, with respect to any and all Obligations created or arising prior to the effective date of such termination and with respect to any and all extensions, renewals or modifications of said pre-existing Obligations. Termination as to any one of the undersigned shall not affect the obligations of any of the other party [sic], nor relieve the one giving such notice from liability for any post termination collection expenses or interest. ...
>
> Anything in this Guaranty to the contrary notwithstanding, the maximum aggregate liability of the undersigned under this Guaranty and under a certain Guaranty dated substantially simultaneously herewith made by the undersigned in your favor guarantying the obligations of Transantlantic Shoe Company, LCC, is limited to the

> principal amount of One Million Dollars ($1,000,000), plus interest after demand ..., plus all costs and expenses (including without limitation reasonable attorneys' fees) ....

Exhs. 7-11, Motion. The guarantees also included a waiver of jury trial.

Prior to March of 2006, plaintiff had also entered into a Factoring Agreement with Transantlantic Shoe Company, LLC (TSC), an affiliate of Timing. In connection with that agreement Timing executed a guaranty of TSC's debts to plaintiff. Exh. 12, Motion. In October of 2006 the TSC debt of $157, 275.55 was moved to Timing and included in the latter's debt to plaintiff.

Defendant Jacobs terminated his guaranty in March 2006, and the termination became effective April 9, 2006. Plaintiff then maintained two separate accounts to segregate debt guaranteed under Jacobs' guaranty from future Timing sales and advances. Collections of receivables were accordingly credited. Since the TSC debt had been incurred prior to April 9, 2006, the effective date of Jacobs' guaranty termination, on its transfer to Timing it was included in the account for debt on which Jacobs would be liable as guarantor. By letter dated January 11, 2007, plaintiff demanded payment from Timing of its accrued debt, which by then was $1,779,412.40, of which $1,490,332.98 was pre-Jacobs' termination debt. Exh. 14, Motion. Timing never responded. Plaintiff then demanded payment from defendants under the guarantees, to no avail. Hertzman Affid. ¶¶ 18-27.

II. Discussion and Rulings

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court, as a matter of law, in directing judgment in its favor. C.P.L.R. 3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v. New*

York, 49 N.Y.2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact. *Zuckerman*, 49 N.Y.2d at 560; *see GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dept. 2006). Moreover, the parties' competing contentions must be viewed "in a light most favorable to the party opposing the motion." *Lakeside Constr. v Depew & Schetter Agency*, 154 A.D.2d 513, 515-515 (2d Dept. 1989).

The critical documents for present purposes are the guaranty agreements, which are independent and by theirs terms stand alone in imposing direct and primary obligations for payment on the guarantors. 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. *Kensington House Co. v. Oram,* 293 A.D.2d 304 (1st Dept. 2002); *Israel Discount Bank of NY v. NCC Sportswear Corp.,18 Misc.3d 1140A* (Sup. Ct., N.Y. Cty., 2008). In this case, the guarantees each specifically state that it is "absolute, unconditional and continuing, regardless of the validity, regularity or enforceability of any of the Obligations" and that the guaranty "embodies the whole agreement of the parties and may not be modified except in writing, and no course of dealing between you and any of the undersigned shall be effective to change or modify this Guaranty." Consequently, because each guaranty is absolute and unconditional, plaintiff has met its burden and summary judgment is

appropriate unless defendants have submitted admissible evidence establishing that judgment requires a trial of disputed material issues of fact. They have not.

Defendants, in their answers to the Complaint and Counterclaims, allege, *inter alia,* that plaintiff engaged in bad faith and fraudulent conduct in negotiating and issuing the lines of credit and in its dealings with Timing. Defendants cannot assert these defenses and counterclaims based on fraud and bad faith to avoid their obligations under the guarantees. As the court found in another case brought by plaintiff for payment on a strikingly similar guaranty, `where the language of a guaranty "specifically provides that it was absolute, unconditional, unlimited and could not be altered or discharged orally," the defendant is foreclosed from defenses and counterclaims based on fraud.' *Id.* quoting *Citibank, N.A. v. Plapinger,* 66 N.Y.2d 90, 92 (1985). *See BNY Financial Corp. v. Clare,* 172 A.D.2d 203, (1st Dept 1991); *Kensington House Co. v. Oram*, 293 A.D.2d 304 (1st Dept 2002). Here defendants, under the explicit terms of the guarantees, agreed to pay Timing's debts to plaintiff on demand "regardless of the validity, regularity or enforceability of any of the Obligations ... [and not] to assert ... any set-off or counterclaim which the Client [Timing][may have." Exh. 8, pg. 2, Motion. The plain language of the operative documents preclude the asserted defenses and counterclaims.

Defendants' further contention that plaintiff's motion for summary judgment is premature is also without merit. This is not a case where the facts needed to oppose the motion were unavailable to the defendants. *Noy v. Everest Equities, Inc.*, 27 A.D.3d 629 (2d Dept. 2006). Indeed, since defendants' affirmative defenses and counterclaims are foreclosed by the language of the guarantees, their asserted ground for seeking discovery relevant to these matters is moot.

The court will grant summary judgment as to liability for plaintiff against all defendants,

but a hearing is required to determine proportional damages under the guarantees and plaintiff's claim of attorney's fees and costs. *See Slutsky v. Lefft, 160 Misc. 2d 959* (N.Y. Civ. Ct. 1993) (three co-guarantors jointly and severally liable must share proportionately in loss), *citing Easterly v. Barber,* 66 N.Y. 433 (1876). Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted in part as to liability; and it is further

ORDERED that the issue of proportional damages and plaintiff's claim of attorney's fees and costs will be referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, the Special Referee shall determine the aforesaid issues; and it is further

ORDERED that a copy of this order shall be served upon the Clerk of the Reference Part (Rm. 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing.

ENTER:

Date: July 10, 2008
New York, N. Y.

J.S.C.