[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Weiss IA Part ___
Justice

CHECKSPRING BANK, a New York Banking Institution,
Plaintiff,

-against-

L&E DONUTS, INC., EDUARD OCHILIDIYEV a/k/a EDWARD OCHILDIYEV, LADA MATATOVA, TWIN DONUTS, INC., TDS LEASING LLC, S&A DONUTS, INC., JOHN DOES #1-5, JANE DOES #1-5 and XYZ CORP.,

Defendants.

Index Number 15431 2010

Motion Date September 21, 2011

Motion Cal. Number 7

Motion Seq. No. 1

The following papers numbered 1 to 8 read on what the court deems to be a motion by plaintiff Checkspring Bank for, inter alia, summary judgment on its complaint against defendant Ochilidiyev and defendant Lada Matatova (collectively the defendant guarantors) and on this cross motion by the defendant guarantors for an order, inter alia, dismissing the complaint against them pursuant to CPLR 3211(a)(2) [sic: 8]

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits	2
Answering Affidavits - Exhibits	3-5
Reply Affidavits	6-7
Memorandum of Law	8

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendant L&E Donuts, Inc. (L&E), whose principals are defendant Ochilidiyev and defendant Lada Matatova, entered into a franchise agreement with defendant Twin Donuts, Inc. pursuant to which L&E received a license to operate a Twin Donuts store at 97-17 Queens Boulevard, Rego Park, New York. In order to finance its business venture, L&E executed a "loan note" in favor of plaintiff Checkspring Bank in the principal amount of $252,000. The note required L&E to make monthly payments of principal and interest. The plaintiff bank secured the repayment of the note by a pledge agreement, security agreement, and an assignment of corporate interests. The plaintiff bank filed a UCC-1 Financing Statement which granted it a security interest in L&E, its assets, and all of its profits, cash flow, and other distributions. Defendant Ochilidiyev and defendant Lada Matatova also gave the bank a mortgage on residential property, a condominium unit known as Unit 3A ,2350 61st Street, Brooklyn, New York. As additional security, the defendant guarantors executed a general guaranty covering payments due under the loan note.

L&E defaulted on the payments due February 9, 2010 and thereafter. On April 14, 2010, the plaintiff bank sent a notice of default to L&E and the defendant guarantors. Defendant Ochilidiyev and defendant Matatova transferred their interest in L&E to defendant S&A Donuts, Inc. (S&A) without the consent of the plaintiff bank.

That branch of the cross motion by the defendant guarantors which is for an order pursuant to CPLR 3211(a)(8) dismissing the complaint against them for failure of in personam jurisdiction is denied. An affidavit of a process server constitutes prima facie evidence of proper service (*Wells Fargo Bank, N.A. v. McGloster* 48 AD3d 457 [2008]), and conclusory denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of a process server. (*Beneficial Homeowner Service Corp. v. Girault*, 60 AD3d 984 [2009].)

That branch of the cross motion by the defendant guarantors which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them for failure to state a cause of action is denied. The plaintiff bank adequately alleged (1) the existence of an absolute and unconditional guarantee, (2) the existence of an underlying debt, and (3) the guarantors' failure to perform. (*See*, *IRB-Brazil Resseguros, S.A. v. Inepar Investments, S.A.* , 83 AD3d 573 [2011].)

That branch of the motion by the plaintiff bank which is for summary judgment on its complaint against the defendant guarantors is granted on the issue of liability. The court notes initially that the plaintiff bank is plainly seeking summary judgment pursuant to

CPLR 3212 rather than pursuant to CPLR 3213 as erroneously stated in its notice of motion. "[T]he 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 demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986].) Plaintiff Checkspring Bank successfully carried this burden. The plaintiff bank established a prima facie case on its motion for summary judgment by submitting evidence of an absolute and unconditional guarantee, the underlying debt, and the guarantors' failure to perform. (*See*, *IRB-Brazil Resseguros, S.A. v Inepar Invs., S.A.*, *supra*.) The burden on this motion shifted to the defendant guarantors to produce evidence showing that there is an issue of fact which must be tried (*see*, *Alvarez v. Prospect Hospital, supra*) or of demonstrating the existence of a defense warranting the denial of summary judgment. (*See*, *Plantamura v. Penske Truck Leasing, Inc*., 246 AD2d 347 [1998].) They failed to carry this burden .Affirmative defenses which merely plead conclusions of law without supporting facts are insufficient . (*See*, *Becher v. Feller*, 64 AD3d 672; *Fireman's Fund Ins. Co. v. Farrell*, 57 AD3d 721 [2008]; *Cohen Fashion Optical, Inc. v. V & M Optical, Inc*., 51 AD3d 619 [2008].)

That branch of the motion by the plaintiff bank which is for summary judgment dismissing the counterclaims asserted by the defendant guarantors is granted. The first counterclaim fails to state a cause of action pursuant to The Fair Debt Collections Practices Act (15 USC § 1692 et seq), the Truth in Lending Act (15 USC § 1601 et seq.), which does not apply to commercial transactions (*see*, 15 USC § 1603[1]; 12 CFR 226.3[a][1]; *Patriot Nat. Bank v. Amadeus B, LLC,* 29 Misc.3d 1217[A] [Table], 2010 WL 4272603 [Text]), The Home Ownership and Equity Protection Act of 1994 (15 USC § 1639), General Business Law § 349, which applies to consumer fraud aimed at the public (*see*, *Weinstein v Natalie Weinstein Design Assoc., Inc.,* 86 AD3d 641 [2011]), or pursuant to any other statute mentioned in the first counterclaim in grab bag fashion. (*See*, *U.S. Bank Nat. Ass'n v. Slavinski*, 78 AD3d 1167 [2010].)The second counterclaim fails to state a cause of action for damages pursuant to section 1640 of the Truth in Lending Act (*see*, *Delta Funding Corp. v. Murdaugh,* 6 AD3d 571 [2004];*HSBC Bank USA v. Picarelli,* 23 Misc.3d 1135[A] [Table], 2009 WL 1585773 [Text]) or for unjust enrichment. (*See*, *Nakamura v. Fujii*, 253 AD2d 387 [1998].) The third counterclaim fails to state a cause of action for breach of the implied covenant of good faith and fair dealing. (*See*, *Dalton v. Educ. Testing Serv*., 87 NY2d 384 [1995].)

That branch of the motion by the plaintiff bank which is for a default judgment against defendant L&E is granted. Defendant L&E did not answer the complaint or otherwise appear in this action. In order to obtain a default judgment, a party must submit proof of service of a summons and a complaint and proof of a meritorious cause of action. (*See*, CPLR 3215; *DeVivo v. Sparago*, 287 AD2d 535 [2001]; *Hann v. Morrison*,

247 AD2d 706 [1998]; *Zelnik v. Bidermann Industries U.S.A., Inc.*, 242 AD2d 227 [1997] .) In the case at bar, the plaintiff bank submitted an affidavit from a process server swearing that he made service upon defendant L& E on June 29, 2010 by delivering a copy of the summons and complaint to the Secretary of State. The plaintiff bank demonstrated that it has a meritorious cause of action against defendant L&E by offering proof of a promissory note and proof of the defendant's failure to make payments according to its terms. (*See*, *Verela v. Citrus Lake Development, Inc.* 53 AD3d 574 [2008].)

That branch of the motion by the plaintiff bank which is for summary judgment against defendant Twin Donuts is denied. The plaintiff bank alleges, inter alia, that Twin Donuts interfered with its security interest in the franchise agreement by permitting defendant L&E to transfer the franchise to defendant S&A. The plaintiff bank failed to submit proof establishing the elements of a cause of action for tortious interference with contract against defendant Twin Donuts. (*See*, *Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 424 [1996].) The plaintiff bank failed to submit proof that the franchisor knew of a specific contractual provision in the creditor's agreements with the debtor prohibiting L&E from transferring its franchise agreement. Moreover, a security interest is a "property interest created by agreement or by operation of law over assets to secure the performance of an obligation, usually the payment of a debt." (Wikipedia) The impairment of the plaintiff's property interests is not the same as an interference with its contractual rights.

That branch of the motion by the plaintiff bank which is for summary judgment against defendant TDS Leasing LLC is denied. The plaintiff bank alleges, inter alia, that the defendant landlord induced defendant L&E to breach the collateral assignment of its lease by consenting to defendant L&E's transfer of the lease to defendant S&A. The plaintiff bank failed to submit proof establishing the elements of a cause of action for tortious interference with contract against defendant Twin Donuts. (*See*, *Lama Holding Co. v. Smith Barney Inc.*, *supra*.)

That branch of the motion by the plaintiff bank which is for summary judgment dismissing the cross claims asserted by defendant Twin Donuts and defendant TDS is denied. The cross claims are not asserted against the plaintiff.

That branch of the motion by the plaintiff bank which is for summary judgment on its cause of action for tortious interference with contract asserted against defendant S&A is denied. The plaintiff failed to submit proof that the defendant S&A knew of its security interest and induced defendant L&E to breach its security agreements with the bank.

That branch of the motion by the plaintiff bank which is for summary judgment on its cause of action for a fraudulent conveyance asserted against defendant S&A is denied.

Debtor and Creditor Law § 273, "Conveyances by insolvent," provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." (*See*, *Citibank, N.A. v. Plagakis*, 8 AD3d 604 [2004]; *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 AD3d 780 [2003]; *St. Teresa's Nursing Home v. Vuksanovich*, 268 AD2d 421 [2000].) Debtor and Creditor Law § 278, "Rights of creditors whose claims have matured," provides in relevant part: "1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser, a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, ***." (*See*, *Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162 [2011].) Insolvency and lack of fair consideration are elements of a cause of action based on Debtor and Creditor Law § 273, and the party challenging the conveyance has the burden of proving these elements. (*Murin v. Estate of Schwalen*, 31 AD3d 1031 [2006]; *Joslin v. Lopez* , 309 AD2d 837 [2003].) In the case at bar, the plaintiff bank did not prove here that it has a prima facie cause of action based on Debtor and Creditor Law § 273. Moreover, Daniarov Arl, the President of S&A, swears that no one informed him that L&E owed a debt to the plaintiff bank, and, thus, the plaintiff failed to eliminate the issue of fact arising under Debtor and Creditor Law § 278 concerning whether S&A was a good faith purchaser for value.

That branch of the motion by the plaintiff bank which is for summary judgment dismissing the cross claims asserted by defendant S&A is denied. The cross claims are not asserted against the plaintiff bank.

That branch of the plaintiff bank's motion which is for an order of seizure pursuant to CPLR 7102 is denied. CPLR 7101, "When action may be brought," creates a cause of action "to try the right to possession of a chattel." (*See*, *Dubied Machinery Co. v Vermont Knitting Co., Inc*., 739 F Supp 867 [S.D.N.Y.,1990]; *Honeywell Information Systems, Inc. v Demographic Systems, Inc*., [D.C.N.Y.,1975].) CPLR 7102(d), "Order of seizure," creates a provisional remedy ancillary to the cause of action to recover a chattel. (*See*, *East Side Car Wash, Inc. v K.R.K. Capitol, Inc*., 102 AD2d 157 [1984].) The plaintiff bank did not assert a cause of action based on CPLR 7101.

That branch of the plaintiff bank's motion which is for an order pursuant to UCC 9-609 allowing it to take possession of the collateral in which it has a security interest is granted insofar as personal property is concerned. UCC 9-609, "Secured Party's Right to Take Possession after Default," provides in relevant part: "(a) ***. After default, a secured party: (1) may take possession of the collateral; ***(b) Judicial and nonjudicial process. A

secured party may proceed under subsection (a):(1) pursuant to judicial process ***." (*See*, *Usowski v. All Tom R.V. Inc*., 73 AD3d 754 [2010].) "The secured party's right to possession of the collateral upon default may be asserted against a third party in possession, which may not properly refuse upon the secured party's request for delivery ***." (*Bank of India v. Weg and Myers, P.C.,* 257 AD2d 183, 191 [1999]; *Long Island Trust Co. v. Porta Aluminum, Inc*., 49 AD2d 579 [1975].) The court notes that insofar as real property is concerned, the plaintiff bank must proceed "in accordance with the rights with respect to real property." (UCC 9-604[a][2].)

That branch of the plaintiff bank's motion which is for an order permitting it to amend the caption thereby substituting "S&A Queens Donuts, Inc" for "S&A Donuts, Inc." and deleting John Does #1-5, Jane Does #1-5 and XYZ Corp. is granted.

The amended caption shall be as follows.

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CHECKSPRING BANK, a New York
Banking Institution,

Plaintiff,

Inex No. 15431/1

-against-

L&E DONUTS, INC., EDUARD OCHILIDIYEV
a/k/a EDWARD OCHILDIYEV, LADA
MATATOVA, TWIN DONUTS, INC., TDS
LEASING LLC and S&A QUEENS DONUTS, INC,

Defendants.

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Dated: October 24 , 2011

J.S.C.