Wells Fargo Trade Capital Servs., Inc. v Sinetos
2012 NY Slip Op 33373(U)
December 19, 2012
Supreme Court, New York County
Docket Number: 652317/2010
Judge: Shirley Werner Kornreich
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[* 1]
FILED: NEW YORK COUNTY CLERK 12/21/2012
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C.
Justice

PART 54

Index Number : 652317/2010
WELLS FARGO TRADE CAPITAL
vs.
SINETOS,, PANAGIOTIS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

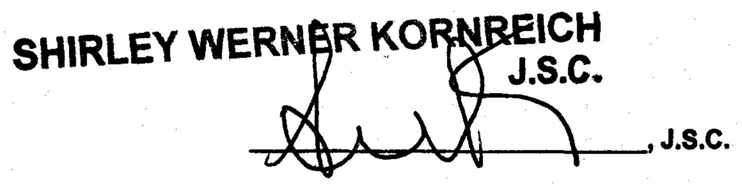
The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). 12, 13
Answering Affidavits — Exhibits ______ | No(s). 15
Replying Affidavits ______ | No(s). 16

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision

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

Dated: 12/19/12


SHIRLEY WERNER KORNREICH 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: PART 54
---X

WELLS FARGO TRADE CAPITAL SERVICES, INC., a/k/a, WELLS FARGO CENTURY

Index No.: 652317/2010

Plaintiff,

-against-

DECISION and ORDER

PANAGIOTIS SINETOS,

Defendants.
---X
SHIRLEY WERNER KORNREICH, J.:

In this action, plaintiff, Wells Fargo Trade Capital Services, Inc. (Wells Fargo), seeks to enforce a guaranty executed by defendant, Panagiotis Sinetos (Sinetos). It asks for $1,699,571.84, which it claims includes the debt due, interest accrued after May 31,2012, and reasonable attorney's fees. Wells Fargo now moves for summary judgment pursuant to CPLR 3212 on all its claims. The motion is granted for the reasons discussed below.

I. Background

On July 29, 2005, Wells Fargo provided a loan to Inteco International Trade Corporation (Inteco Corp.), a company later acquired by Inteco International Trade, LLC (Inteco).[1] Affidavit of James C. Bodie (Bodie Aff.) ¶ 3-4. Sinetos was the founder and 51% owner of Inteco Corp. Affirmation of Stuart J. Wells (Wells Aff.) Exh. 1. In May 2008, Sinetos sold his ownership in Inteco Corp. in exchange for a 20% ownership in Inteco, $500,000 in cash, and a promissory note for $1.2 million to be paid by Inteco in monthly installments of $20,000 and yearly payments of $132,000. *Id.*

Inteco assumed all rights and obligations under the Original Loan Documents as part of the transaction in June 2008. Bodie Aff. at ¶ 4. In connection with the assumption, Inteco and

[1]The amount of the 2005 loan, and any related personal guarantees or other documents pertaining to that loan, were not included in the documents presented to the court.

Wells Fargo entered into another loan agreement and related documents (the Loan Documents), pursuant to which Wells Fargo agreed to make advances and other financial accommodations to Inteco up to a maximum of $12,000,000. *Id.* In order to induce Wells Fargo to enter into the Loan Documents, Sinetos and the two other owners of Inteco executed unlimited personal guaranties. Sinetos' guaranty is dated July 20, 2009. *Id.* at ¶ 5; Wells Aff. Exh. 1; *see also* Bodie Aff. Exh. B.

Sinetos' guaranty (the Guaranty) states that it is an "absolute, unconditional and unlimited guaranty of payment" of Inteco's obligations under the Loan Documents. Bodie Aff. ¶ 6, Exh. B. Sinetos promised to guaranty Inteco's obligations "without deduction by reason of setoff, defense, or counterclaim, of any party, or loss of contribution from any co-guarantor." *Id.* The Guaranty stated that Sinetos agreed to reimburse Wells Fargo for expenses, damages, and losses, "specifically including reasonable attorneys' fees" incurred by Wells Fargo in attempting to enforce the Guaranty. *Id.*

Following the execution of the Loan Documents and the guarantees, Wells Fargo advanced funds to Inteco. *Id.* at ¶ 7.

B. The Default

In 2010, Inteco defaulted; the outstanding debt was $8,913,400. *Id.* at ¶ 8, 10. At the request of Inteco and Sinetos, Wells Fargo agreed to forbear from exercising its default rights under the Loan Documents and Guaranty, as memorialized in the First Forbearance Agreement. which Sinetos signed under the caption "guarantor consent." *Id.* at ¶ 9. In the First Forbearance Agreement, Sinetos acknowledged the validity of the Guaranty, expressly reaffirmed it, and released Wells Fargo from any claims and liabilities. *Id.* at ¶ 10-11, Exh. C.

Inteco failed to cure its defaults and committed other defaults under the Loan Documents, and in August 2010, Inteco and Sinetos again asked Wells Fargo to forbear from exercising its rights and remedies under the Loan Documents and Guaranty. *Id.* at 13-14. Wells Fargo agreed and amended the First Forbearance Agreement (the Amended Forbearance Agreement), which

Sinetos signed as guarantor. Bodie Aff. ¶ 15. The outstanding debt due was $6,723,058.37. *Id.* at 16. Again, Sinetos confirmed the debt due, acknowledged the validity of the Guaranty, reaffirmed his Guaranty, and released Wells Fargo from any and all claims and liabilities. *Id.* at ¶16-19, Exh. D. The Amended Forbearance Agreement also stated that Sinetos represented and warranted that he had no defense, counterclaim, or offset with respect to the Guaranty. *Id.* at 19, Exh. D.

Inteco failed to cure its defaults, and in September 2010, Inteco surrendered and turned over its collateral to Wells Fargo pursuant to the terms of the September 27, 2010 letter, titled "Peaceful Possession Letter" (the Possession Letter). *Id.* at 21; Exh. E. Sinetos signed the letter as Guarantor and expressly acknowledged and agreed to its terms, including that: as of September 24, 2010, Inteco was indebted to Wells Fargo in the amount of $5,840,561.39, plus interest accrued and accruing; obligations owed by Inteco to Wells Fargo were unconditionally owed, without offset, defense, or counterclaim; and various events constituting default had occurred. *Id.* at ¶ 22, Exh. E.

After liquidation of the collateral, the debt totaled $1,731,519.84. *Id.* at 24. By letter dated December 9, 2010, Wells Fargo advised Sinetos of the debt and demanded payment under the Guaranty. *Id.* Sinetos has failed to repay any portion of the debt. *Id.* at 25.

C. The Motion

Wells Fargo claims it is entitled to judgment as a matter of law because the underlying debt existed, Sinetos signed the Guaranty, and Sinetos has failed to pay in accordance with that Guaranty. Sinetos argues in response that: Wells Fargo has failed to state a claim upon which relief can be granted; he is not bound to pay because he did not sign the Guaranty, claiming forgery and that he did not know the documents were guaranties; Wells Fargo failed to minimize or mitigate its damages; "unclean hands and culpable conduct";[2] and alternatively, if he owes money under the Guaranty, it is only 20% of the total amount.

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[2]Sinetos later calls this "fraud," but does not detail the alleged fraud.

II. Discussion

In a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact." *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003). Once the moving party has established his prima facie case, the burden shifts to the non-moving party to produce evidence, in admissible form, sufficient to establish the existence of an issue of material fact requiring a trial. *Id.* Parties opposing a motion for summary judgment must disclose all evidence on a disputed issue. *See Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 (1976); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Vague and conclusory allegations based on conjecture or suspicion cannot defeat a motion for summary judgment." *Marine Midland Bank v Embassy E. Inc.*, 160 AD2d 420, 422 (1st Dept. 1990).

A. Wells Fargo Has Established a Prima Facie Showing

"On a motion for summary judgment to enforce a written guaranty, all that a creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty." *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept. 1998). Wells Fargo has sufficiently shown all the aforementioned factors.[3] First, Wells Fargo has produced an executed copy of the Guaranty. The Guaranty explicitly states, "[t]his instrument is and shall be construed to be an *absolute, continuing, unconditional and unlimited guaranty*. . . ." (Emphasis added.) Second, Wells Fargo has presented the court with an affidavit by James C. Bodie, Vice President of Wells Fargo and the representative in charge of the Inteco loan, in which he details the underlying debt. Finally, Wells Fargo has submitted proof of its demand upon Sinetos. Hence, Wells Fargo has sufficiently presented a prima facie showing of entitlement to summary judgment.

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[3]The rules specific to this court state that in lieu of the typical rule 19-a filing, the parties should instead try to put together a joint statement of facts. However, by order dated April 26, 2012, this court permitted Wells Fargo to go forward with normal rule 19-a procedure. As such, because Sinetos has not submitted a counter 19-a statement, all the facts in Wells Fargo's statement are deemed admitted.

B. Sinetos Has Failed to Establish the Existence of an Issue of Material Fact

Sinetos, on the other hand, has failed to raise a material issue of fact. By executing the Guaranty, Sinetos explicitly agreed to waive and release Wells Fargo from any "deduction by reason of setoff, defense or counterclaim. . . ." Generally, a release provision in an agreement will be effective in waiving defenses, save some reason the provision itself is improper. *See Liberty Marble v Elite Stone Setting Corp.*, 248 AD2d 302, 302 (1st Dept. 1998). Sinetos, however, argues that the original Guaranty is a nullity because: the signature on it is a forgery (a claim belied by his deposition testimony), there was some sort of fraud involved in its creation, and he was unaware that the document he was signing was a guaranty. None of these alleged defenses succeeds.

In the event that a release provision is improper, a party who ratifies the provision, despite knowing of the defect, is still subject to the release. *See Graubard Mollen Dannet & Horrowitz v Edelstein*, 173 AD2d 230, 231 (1st Dept. 1991); *see also Liberty*, *supra* at 302. A party is deemed to have ratified an agreement if he receives a benefit from it after having discovered the defect and/or wrongdoing. *See Graubard*, *supra* at 231; *see also Liberty*, *supra* at 302 ("[m]oreover, even if duress were sufficiently set forth, it is undisputed that [defendant] took the $101,000, thereby ratifying the release").

Even were the court to credit the claim fo forgery, Sinetos ratified the Guaranty. First, Inteco, the company in which Sinetos an active shareholder, received the benefit of the agreement by keeping his company afloat and by receiving a portion of the money loaned. He clearly knew of this benefit both through his involvement and his negotiation and signing of the forbearance agreements. As the court noted in *Liberty*, *supra* at 32, regardless of the claimed wrongdoing, defendant's acceptance of the payment ratified the release there.

Moreover, a person who fails to offer evidence of an attempt to repudiate an agreement he believes was improperly attained is considered to have affirmed it. *See Orix Credit Alliance, Inc. v Bell Realty, Inc.*, 1995 WL 505891 (SDNY 1995). In *Orix*, the defendant claimed duress when

signing the agreement, however, the court rejected this as he had the opportunity to challenge the agreement subsequently, but did not present any evidence that he had. *Id.* Here, not only did Sinetos fail to present any evidence that he challenged the validity of the Guaranty after it was signed, but he ratified the guaranty by consenting to the first and second forbearance agreement and signing the collateral letter, acknowledging the debt.

Additionally, Sinetos' argument that the Guaranty was improperly executed because he only signed the signature page, fails. Sinetos, a sophisticated businessman, in this defense, admits he signed the Guaranty. "[A] party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it." *Arnav Indus., Ind. v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 304 (2001); *J & J Structures, Inc. v Callanan Indus., Inc.*, 215 AD2d 890, 892 (3d Dept 1995). His claim that his former lawyer sent out the signed document without his permission does not affect the validity of the Guaranty.

Sinetos also contends that he misunderstood the content of the agreement, but this alone is not sufficient. *See Sterling Natl. Bank & Trust Co. of N.Y. v I.S.A. Merchandising Corp.*, 91 AD2d 571, 572 (1st Dept. 1982) citing *Pimpinello v Swift & Co.*, 253 NY 159, 162-3 (1930)(if signer could read instrument, not to have read it was gross negligence; if he could not read it, it is equally negligent not to procure someone to read it to him). Absent fraud or other wrongful conduct on the part of Wells Fargo, Sinetos cannot escape liability. *Da Silva v Musso*, 53 NY2d 543, 550 (1981); *Pimpinello, id.* His unsupported allegation of fraud is not sufficient to meet his burden of raising a triable issue of fact.

Sinetos also fails to expound on his defense that Wells Fargo failed to mitigate or minimize damages. As with his claim of fraud, he provides no detail, relying instead upon a bare conclusory allegation.

Finally, discovery has ended. If a party is given sufficient time for discovery, the lack of discovery cannot be a basis to defeat summary judgment. *Young v Business Furniture, Inc.*, 195 AD2d 308, 308 (1st Dept. 1993). Nor can a party who fails to perform discovery claim discovery

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is needed to defeat summary judgment. *Unisource, Inc. v Wolfe*, 169 AD2d 567, 567 (1st Dept. 1991). Here, Sinetos conducted no discovery.[4] The court gave him over two months to make demands before deeming his right waived. Any opportunity to seek further discovery has ended.

C. Wells Fargo is Entitled to Attorneys' Fees

The Guaranty provides attorneys' fees for efforts undertaken to collect. Accordingly, it is

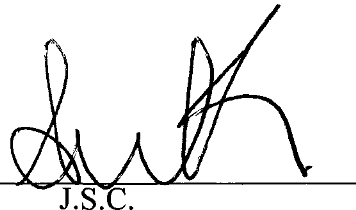
ORDERED and ADJUDGED that the motion for summary judgment by plaintiff Wells Fargo against defendant Sinetos is granted both as to the First Cause of Action for enforcement of the Guaranty and the Second Cause of Action for an award of attorneys' fees pursuant to the Guaranty, and it is further

ORDERED and ADJUDGED that defendant shall pay plaintiff damages in the amount of $1,699,571.84, plus interest at 2% per annum accrued after May 31,2012, the last date of debt computation; and it is further,

ORDERED that the amount of reasonable attorneys' fees and costs due under the Guaranty is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendants, of the date of the hearing.

Dated: December 19, 2012 ENTER:



J.S.C.

[4]It should be noted that although Sinetos now is *pro se*, he previously was represented by counsel who could have participated in discovery.