

TD Bank, N.A. v EI Nalixa, LLC
2015 NY Slip Op 30091(U)
January 12, 2015
Supreme Court, New York County
Docket Number: 651165/2012
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

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TD BANK, N.A.,

Plaintiff,

DECISION AND ORDER

-against-

INDEX NO.: 651165/2012

**EL NALIXA, LLC, RGS HOLDINGS, LLC and
HANS FUTTERMAN,**

Defendants.

-----X

NANCY M. BANNON, J.

In this action to recover a Swap Settlement Amount pursuant to an interest rate Swap Agreement, the plaintiff moves for summary judgment on the complaint, striking the defendants' answer and affirmative defenses, and dismissing the defendants' counterclaims. For the reasons set forth below, the plaintiff's motion is granted.

BACKGROUND

The plaintiff, TD Bank, N.A., seeks to recover the sum of \$144,776 from the defendants as a swap settlement amount. On July 9, 2009, defendant El Nalixa executed a promissory note in the amount of \$1,325,000. As security for the note El Nalixa also executed and delivered to TD Bank a mortgage dated July 9, 2009, which was recorded in the Office of the City Register of the County of New York on July 28, 2009 as CRFN# 2009000232724 (the "Mortgage"). El Nalixa further entered into an International Swap Dealers Association, Inc. ("ISDA") Master Agreement and Schedule on July 9, 2009, in the amount of \$1,325,000 (collectively the "Swap Agreement"). On the same day, defendants RGS and Futterman executed a guaranty of payment of both the note and the Swap Agreement (the "Guaranty"). In the course of the transaction, the defendants received a standard "Interest Rate Swap Product Disclosure" which was signed on behalf of El Nalixa by Futterman as the Managing Member of RGS, El Nalixa's sole member and managing member. The defendants were represented by counsel during the course of the transaction. On September 8, 2009, Futterman, as President of El Nalixa, executed an amended swap transaction confirmation, which outlined the terms of the proposed swap transaction with TD Bank.

Under the Swap Agreement, TD Bank and El Nalixa agreed to exchange interest rate cash flows based on the principal amount of the note, \$1,325,000. Section 2(a) of the Swap Agreement addresses El Nalixa's payment obligation. Sections 12, 6(b)(iii)(2), 5(b)(iii), and sections 1(G), 3(C), and 3(D) of the Schedule define the occurrences that trigger and parameters of TD Bank's right to declare early termination of the Swap Agreement, including El Nalixa's pre-payment of its obligations under the note and mortgage. These sections designate and determine the swap settlement amount to be paid by as a result of early termination. Sections 6(c) and (e) of the Swap Agreement govern early termination and payments thereupon.

On December 21, 2011, El Nalixa refinanced the Loan, thereby pre-paying the Loan in full due, and the note and mortgage ceased to be in full force and effect. As a result of El Nalixa's pre-payment of the Loan, the defendants' obligation to pay the swap settlement amount arose pursuant to the early termination provisions in sections 6(c) and (e) of the Swap Agreement. On January 31, 2012 and February 1, 2012, TD Bank notified El Nalixa of the early termination and designated the early termination date as February 1, 2012. TD Bank demanded immediate payment of \$144,776 as the swap settlement amount. TD Bank sent an additional demand letter on February 29, 2012. The defendants have failed to pay the swap settlement amount pursuant to the Swap Agreement and the Guaranty.

TD Bank commenced this action by summons and complaint on April 10, 2012, asserting two causes of action for breach of contract pertaining to El Nalixa's breach of the Swap Agreement and RGS's and Futterman's breach of the Guaranty. Issue was joined by the defendants' answer, dated May 29, 2012. On December 23, 2013, TD Bank moved for summary judgment on the complaint, striking the defendants' answer and affirmative defenses, and dismissing the defendants' counterclaims. The defendants did not submit papers in opposition to TD Bank's motion.

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town

of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

A contract is to be construed in accordance with the parties intent. See Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002). The court is concerned "with what the parties intended...only to the extent that they evidenced what they intended by what they wrote." Akaska Holdings, LLC v Sweet, 115 AD3d 556 (1st Dept. 2014) quoting Ashwood Capital Inc. v OTG Mgt., Inc., 99 AD3d 1, 7 (1st Dept. 2012). An "agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Greenfield v Philles Records, Inc., 98 NY2d at 569; see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1; 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1st Dept. 2004). A contract is unambiguous and may not be altered if "on its face it is reasonably susceptible of only one meaning." See Greenfield v Philles Records, 98 NY2d at 570. The "[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact." Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d 403, 406 (1st Dept 2012), quoting Unisys Corp. v Hercules Inc., 224 AD2d 365, 367 (1st Dept 1996). Where a contract has been negotiated between sophisticated, counseled business people, negotiating at arm's length, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 (2004).

Here, the terms of the Swap Agreement, disclosures, and Guaranty between TD Bank and the defendants are clear and unambiguous. The language of the Swap Agreement establishes that the Swap Agreement and the Loan were two transactions into which the defendants entered, creating completely separate obligations. Part 1(l) of the Schedule to the Swap Agreement states:

Additional Event of Default...if the obligations under the Loan Agreement are paid in full, the Loan Agreement is otherwise terminated or canceled, or Party A for any reason ceases to remain a party thereto, for purposes of this Additional Event of Default, Loan Agreement means the Loan Agreement as it existed immediately prior to such event or termination, and the covenants, terms, and provisions under the Loan Agreement (other than those requiring payments in respect of amounts owed under the Loan Agreement) shall remain in force and effect until the date on which all of Party B's obligations under this Agreement are fully performed and this Agreement is terminated.

The reference in the Swap Agreement to (i) the Loan Agreement, (ii) El Nalixa's obligations thereunder, and (iii) events, such as a refinancing or default, which lead to a termination of the lender-borrower relationship under the Loan Agreement result in termination of the Swap Agreement, establishes that the defendants' obligations under the Swap Agreement are separate and distinct from the obligations under the Loan. Because the Swap Agreement was a stand-alone document from the Loan Agreement, the defendants' satisfaction of the note did not release them from their wholly separate obligations under the terms of the Swap Agreement.

When the defendants refinanced the mortgage on December 21, 2011, an early termination provision under the Swap Agreement was triggered, which entitled TD Bank to terminate the Swap Agreement, resulting in the defendants' obligation to pay the swap settlement amount based upon market conditions existing at the time of the termination event. The defendants have not paid the swap settlement amount pursuant to the Swap Agreement and Guaranty. Accordingly, the branch of TD Bank's motion for summary judgment on the complaint, asserting two causes of action for breach of contract pertaining to El Nalixa's breach of the Swap Agreement and RGS and Futterman's breach of the Guaranty, is granted.

In addition, TD Bank seeks dismissal of the defendants' ten affirmative defenses. In their answer, the defendants contend that the complaint is barred by the doctrine of unclean hands, the doctrine of waiver and estoppel, release and satisfaction, accord and satisfaction, fraud, set-off of damages, the doctrine of unconscionability, the swap settlement amount being an unenforceable penalty, failure to mitigate damages, and the termination and inapplicability of the guaranty. The defendants' affirmative defenses are meritless on their face or are not substantiated with factual allegations and are conclusory in nature. See Katz v Miller, 120 AD3d 768 (2d Dept. 2014); 308 West 78th Corp. v 360 9 Rest. LLC, 115 AD3d 464 (1st Dept. 2014). Specifically, the defendants' affirmative defenses of unclean hands, waiver and estoppel, release and satisfaction, accord and satisfaction, fraud, set-off of damages, and failure to mitigate damages are facially without merit.

Inasmuch as the defendants argue that the Swap Agreement is unconscionable because it was secured by a personal residence and the swap settlement amount is an unenforceable penalty, the defendants do not supply any factual allegations addressing the elements of either defense. Futterman is a sophisticated real estate developer and attorney, who obtained the advice of Phillips Nizer, LLP to review the Swap Agreement and Disclosure prior to their execution. Phillips Nizer issued an opinion letter as to the *bona fides* of the pertinent transfer. All of the terms were disclosed prior to the execution of the Agreements and the defendants had the opportunity to decline to execute both Agreements after consideration

and proper legal advice on their terms. "Parties are free to make their own contracts, and courts do not serve as business arbiters between parties in approximately equal stances." CBS, Inc. v P.A. Building Co., 200 AD2d 527, 527 (1st Dept. 1994); see Soldiers', Sailors', Marines' and Airmen's Club, Inc., 95 AD3d 687 (1st Dept. 2012); Murray Hill Mews v Rio Restaurant Assocs., 92 AD3d 453 (1st Dept 2012). Thus, the terms of the Swap Agreement to not rise to the level of unconscionability and do not constitute an unenforceable penalty.

To the extent that the defendants argue in their tenth affirmative defense that the Guaranty terminated upon refinance of the property, or, alternatively, that the Guaranty does not apply to the Swap Agreement, the defendants' contentions are without merit. The Guaranty specifically lists rate swap transactions as a source of obligations guaranteed by RGS and Futterman. The Swap Agreement provides that the obligations arising therein survive the termination of the Agreement. The swap settlement amount owed by the defendants is a result of the Swap Agreement and default thereon by El Nalixa. The obligations of RGS and Futterman under the Guaranty were not terminated at the time the note and mortgage were satisfied and the Guaranty encompasses the Swap Agreement. Accordingly, the branch of TD Bank's motion for summary judgment dismissing the defendants' affirmative defenses is granted.

With respect to the defendants' first counterclaim for violation of General Business Law § 349, TD Bank established, prima facie, that it did not engage in "a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury [to the defendants]." Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc., 3 NY3d 200, 206 (2004). The defendants argue that TD Bank induced Futterman to re-title the property in order to re-characterize the loan as commercial and that it assured Futterman that there would be no pre-payment penalty associated with the loan or Swap Agreement. TD Bank maintains that the loan was commercial in nature because it was provided to El Nalixa to pay off an existing commercial building loan. Even if this court were to consider the parties' intent and conversations prior to the execution of the agreements at issue here, which it will not (see Greenfield v Philles Records, Inc., 98 NY2d at 569; see Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d 403; Jet Acceptance Corp. v Quest Mexicana S. A., 87 AD3d 850 [1st Dept. 2011]), there is no evidence that TD Bank's conduct affected the consuming public at large. See Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25 (1995). This case involves a "private contract dispute, unique to the parties...which is outside the ambit of [General Business Law § 349]." Brooks v Key Trust Co. National Association, 26 AD3d 628, 631 (3d Dept. 2006) [internal quotation marks omitted], *lv dismissed* 6 NY3d 891 (2006), *quoting Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25. Although the defendants claim damages on this counterclaim in the

amount of \$144,776, such damages merely represent the sum TD Bank claims it is owed, which the defendants have not paid. As such, they failed to allege any actual injury.

The defendants' second counterclaim for negligent lending practices must be dismissed on the grounds that no such cause of action is recognized in New York. To the extent that the defendants allege negligent conduct, generally, on the part of TD Bank, the defendants fail to allege any duty of care owed to it which is separate from and independent of any obligation the parties created contractually. See New York University v Continental Insurance Co., 87 NY2d 308, 316 (1995); Clark-Fitzpatrick, Inc. v Long Island Railroad Co., 70 NY2d 382, 390 (1987). The defendants contend that TD Bank breached a duty of care by insisting that Futterman transfer title of the property from himself to El Nalixa because the Swap Agreement was inappropriate to be connected to a personal residence. The defendants provide no support for their contention that an independent duty of care existed and that such conduct constituted a breach of such duty. See Verizon New York, Inc. v Optical Communications Group, Inc., 91 AD3d 176 (1st Dept. 2011). As in the first counterclaim, the defendants claim damages in the amount of \$144,776, which is the sum TD Bank claims it is owed and which the defendants did not pay. The allegations are, thus, insufficient to support a claim of negligence on the part of TD Bank. See Clark-Fitzpatrick, Inc. v Long Island Railroad Co., 70 NY2d at 390.

TD Bank established its prima facie entitlement to summary judgment dismissing the defendants' third counterclaim for violations of Banking Law § 6-1. TD Bank seeks to recover pursuant to the terms of the Swap Agreement, which it established is an agreement separate and apart from the Loan secured by a mortgage on the property. TD Bank does not seek to recover on the Loan. The Swap Agreement pertained to the exchange of interest rate cash flows based on the principal amount of the promissory note and was not secured by a mortgage on a family dwelling. Furthermore, the borrower in both the Swap Agreement and the Loan was El Nalixa. Contrary to the defendants' contentions, El Nalixa, not Futterman, was the "true borrower." See Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade, 98 AD3d at 406. Because the borrower was a corporation and the Swap Agreement was not secured by a mortgage on a family dwelling, Banking Law § 6-1 is inapplicable to the circumstances in this case. See Tribeca Lending Corp. v Bartlett, 84 AD3d 496 (1st Dept. 2011).

In their fourth counterclaim for fraud in the inducement, the defendants claim that TD Bank made materially false statements by telling Futterman that there would be no pre-payment penalty with the Loan and Swap Agreements and by failing to warn him that there could be a "substantial, six-figure penalty" in the event the loan was refinanced. The defendants argue that Futterman was not told that, in the event of refinancing, the Loan would be paid in full and the note and mortgage would cease to be in full force and effect. The defendants contend that such

statements were made to induce Futterman into entering into the Loan and Swap Agreements and that he would not have done so but for such statements. However, TD Bank established that Futterman is a sophisticated real estate developer and attorney, who obtained the advice of counsel to review the Swap Agreement and Disclosure prior to their execution. Phillips Nizer issued an opinion letter and all terms were disclosed prior to the execution of the Agreements. The Swap Agreement also contains disclaimers which set forth that the defendants were not relying on any advice or representations of TD Bank in entering into the Agreement. Because Futterman is a sophisticated party and was represented by counsel, the defendants had no right to look to TD Bank for advice concerning the suitability of the deal and a fraud claim cannot be predicated on such allegations. See HSH Nordbank AG v UBS AG, 95 AD3d 185, 193-194 (1st Dept. 2012). Furthermore, the defendants do not allege any pecuniary loss due TD Bank's conduct, apart from the \$144,776, which TD Bank claims it is owed and which the defendants have not paid. See Starr Foundation v American International Group, Inc., 76 AD3d 25, 27 (1st Dept. 2010). Accordingly, the branch of TD Bank's motion for summary judgment dismissing the defendants' counterclaims is granted.

CONCLUSION

TD Bank established its prima facie entitlement to summary judgment on the complaint, striking the defendants' answer and affirmative defenses, and dismissing the defendants' counterclaims. The defendants failed submit any papers in opposition to raise a triable issue of fact. Accordingly, the plaintiff's motion for summary judgment is granted.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted and may enter judgment as against the defendants, jointly and severally, in the sum of \$144,776.00, plus statutory interest from February 1, 2012, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: January 12, 2015

 _____, JSC

HON. NANCY M. BANNON
J.S.C.