

<b>O.C.P. Inc. v Minicozzi</b>
2016 NY Slip Op 32338(U)
September 14, 2016
Supreme Court, Nassau County
Docket Number: 603383/2016
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
O.C.P. INC.,

Plaintiff,

-against-

EDWARD M. MINICOZZI, JR. and  
STEPHEN MINICOZZI,

Defendants.  
-----X

IAS Part 23  
Index No.: 603383/2016  
Mot. Seq. Nos.: 001/002

**DECISION AND ORDER**

The following submissions, in addition to any memorandum of law, were reviewed in preparing this Decision and Order:

Plaintiff’s Notice of Motion, Affidavit & Exhibits .....	1
Defendants’ Notice of Cross Motion, Affirmation & Exhibits.....	2
Defendants’ Notice of Cross Motion, Affirmation & Exhibits .....	3
Plaintiff’s Affirmation in Reply .....	4

Plaintiff seeks an order granting summary judgment against defendants and holding defendants jointly and severally liable to plaintiff for the sum of \$303,755.77, plus interest, together with reasonable attorneys’ fees, costs and disbursements of this action. Plaintiff seeks for the court to issue an order severing plaintiff’s claim for counsel fees and setting that aspect of this matter down for an inquest. Defendants oppose the motion and cross-move for an order pursuant to CPLR 602(a) joining this action for trial and discovery with *General Bangston, LLC v. O.C.P., Inc., et al*, Supreme Court Nassau County, Index No. 603336/2015 (the “General Action”), and denying plaintiff’s motion for summary judgment in its entirety.

**BACKGROUND**

Plaintiff commenced this action with the filing of a Summons and Verified Complaint on May 12, 2016. The Verified Complaint alleges that on or about November 19, 2014, OCP and General Bangston, LLC (“General”) entered into a Purchase and Sale Agreement (“the

and General Bangston, LLC (“General”) entered into a Purchase and Sale Agreement (“the Agreement”), by which General agreed to purchase OCP’s heating oil business. The Agreement provides that the obligations of General under the Agreement are guaranteed, jointly and severally, by defendants Edward M. Minicozzi, Jr., and Stephen Minicozzi, members and officers of General. Defendants both contemporaneously executed a separate guaranty (“Guaranty”) to OCP. The Guaranty provides that defendants “jointly and severally, absolutely, irrevocably and unconditionally guarantee” to OCP the payment and performance of all obligations of General to OCP under and pursuant to the Agreement. The Guaranty further provides that each Guarantor “expressly waives and surrenders any defense to his liability” and that it is the purpose and intent of the parties that the obligations of defendants are “absolute and unconditional under any and all circumstances.”

The Verified Complaint alleges that General breached the material terms of the Agreement by failing to pay the sum of \$303,755.77 remaining due under the Agreement. Defendants do not deny that they signed the guaranty and do not contest that \$303,755.77 remains outstanding by General. Instead, defendants allege that General has a set-off for amounts it claims is owed to it by OCP as set forth in the General Action.

The complaint in the General Action asserts a cause of action for breach of contract against OCP, alleging that OCP withheld and refused to pay General the full amount of the accounts receivable due pursuant to the Agreement. The complaint in that action also asserts a second cause of action for breach of contract against OCP, alleging that OCP failed to reimburse General for an overpayment General allegedly made for service parts purchased from OCP pursuant to the Agreement. The complaint in that action further asserts a third cause of action for breach of the implied covenant of good faith and fair dealing, a fourth cause of action for fraud and a fifth cause of action for negligent misrepresentation, alleging that OCP failed to advise General that one of the trucks General was purchasing from OCP pursuant to the Agreement had significant engine problems and was inoperable.

Plaintiff seeks summary judgment against defendants arguing that since neither General nor defendants have paid the outstanding purchase price due plaintiff under the Agreement, plaintiff has an absolute and unconditional right to recover from defendants

under the Guaranty. Plaintiff further argues that the defenses raised by defendants are barred by the express language of the Guaranty.

Defendants argue that they are entitled to a set-off to the Guaranty for their fraud claim against OCP. Defendants further argue that this action should be joined for purposes of discovery and trial with the earlier action brought by General against OCP because both actions arise out of the same transaction and are inextricably intertwined.

Plaintiff has met its *prima facie* burden on its motion for summary judgment by establishing General's outstanding obligation, that defendants unconditionally guaranteed payment of that obligation and that there was a default of their obligation under the terms of the guaranty. *Hyman v. Golio*, 134 A.D.3d 992 (2d Dept. 2015). The burden then shifts to defendants to demonstrate through admissible evidence that there is a triable issue of fact regarding a viable defense. *Id.*

Since the express language of the Guaranty provides that it is absolute and unconditional and that defendants have waived any defenses, Generals' fraud claim (as well as its other claims) against OCP may not serve as a defense or set-off to defendants' liability under the Guaranty in this action. *Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v. Navarro*, 25 NY3d 485,495 (2015) (defendant's challenge to its liability under guarantee based upon "quintessential defense of fraud" rejected in face of agreed upon absolute and unconditional liability); *Plaza Tower LLC v. Ruth's Hospitality Group, Inc.*, 126 A.D.3d 579 (2d Dept. 2015). As in *Navarro*, defendants do not contest that General failed to pay \$303,755.77 owed to OCP under the terms of the purchase agreement. Even if defendants' claim of fraud were not barred as a defense against enforcement of the Guaranty, defendants have failed to offer evidence in admissible form sufficient to raise a triable issue of fact as to their purported defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008). The conclusory allegations of fraud contained in General's unverified complaint in its action against OCP are unsupported and insufficient to defeat plaintiff's motion for summary judgment herein.

Since plaintiff has established its entitlement to summary judgment, there is no purpose to be served in joining this action with General's earlier action against OCP and defendants' cross-motion for such relief is denied as moot.

Accordingly, it is hereby

**ORDERED**, that plaintiff's motion for summary judgment is granted, and it is further

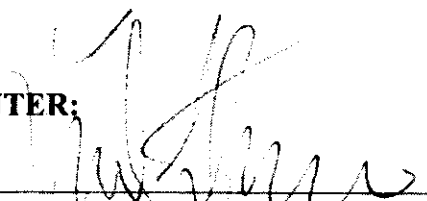
**ORDERED**, that plaintiff's claim for attorneys' fees, costs and disbursements is severed and this matter is referred to the Calendar Control Part (CCP) for an inquest to determine plaintiff's reasonable attorneys' fees. Subject to the approval there presiding, and provided that a Note of Issue has been filed at least ten days prior thereto, the matter shall appear on the CCP calendar on October 17, 2016. A copy of this Order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The directive with respect to the hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate, and it is further

**ORDERED**, that defendants' cross motion is denied as moot.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: September 14, 2016  
Mineola, New York

ENTER:  
  
LEONARD D. STEINMAN, J.S.C.

**ENTERED**

SEP 19 2016

NASSAU COUNTY  
COUNTY CLERK'S OFFICE