

<b>Citibank, N.A. v Shah</b>
2017 NY Slip Op 31772(U)
August 22, 2017
Supreme Court, New York County
Docket Number: 652332/2016
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER Justice

PART 61

-----X

CITIBANK, N.A., Plaintiff, - v - TARUN SHAH, WONDER ENTERPRISES, INC., WONDER INTERNATIONAL TRADING, INC. Defendants.

INDEX NO. 652332/2016 MOTION DATE 6/19/2017 MOTION SEQ. NO. 004

DECISION AND ORDER

-----X

HON. BARRY R. OSTRAGER:

On August 30, 2013, plaintiff Citibank, N.A. ("Citibank") provided defendant Wonder International Trading, Inc. ("Wonder" or "Borrower") with a revolving credit line in an amount up to \$1,850,000 (the "Loan") that Citibank made available to Borrower subject to credit terms and conditions set forth in a Credit Approval Letter dated August 30, 2013 and a Disclosure Booklet (collectively, "Loan Documents") (see Caggiano Affidavit, ¶3; Exhs. C and D). Defendants Tarun Shah and Wonder Enterprises, Inc. absolutely and unconditionally guaranteed Wonder's repayment of the Loan (id., ¶ 5; Exhs. D at 6). The Borrower is engaged in an import/export business, and the Loan is collateralized by, among other things, the Borrower's accounts receivables and inventory (id., Exh. D at 8, 15); (see Affirmation in Opposition at 13).

In the Disclosure Booklet, the defendants affirmatively represented and warranted that they would keep business assets in good working order, maintain adequate books and records, and maintain

all inventory in good saleable or useable condition (*id.*, Exh. D at 4). Additionally, the Disclosure Booklet provides that an Event of Default on the Loan occurs, among other things, if: (i) a payment is not made when due; (ii) a party fails to perform any term or covenant in the Loan Documents; (iii) the obligations or any part of the collateral is rendered unsafe, insecure, or insufficient; or (iv) a material adverse change in the financial condition, business, operations, or results of operations has occurred or is likely to occur (*id.* at 9-10). Upon the occurrence and continuance of an Event of Default, the Disclosure Booklet gives Citibank the right to accelerate the defendants' obligations and declare the principal and interest immediately due and payable (*id.* at 9, 11).

Citibank has moved for summary judgment pursuant to CPLR § 3212, seeking: (a) a judgment on its breach of contract claims against the defendants, jointly and severally, in the amount of \$1,992,372.92 plus prejudgment interest accruing in the amount of \$459.76 per day from June 19, 2017 until the Clerk of the Court enters judgment, and thereafter at the statutory rate; (b) a judgment on plaintiff's claim to foreclose upon the UCC security interest granted by the Borrower; (c) a judgment on liability against defendants, jointly and severally, for attorneys' fees and costs incurred by Citibank in an amount fixed by the Court; and (d) pursuant to CPLR §§3211(b) and 3212, an Order striking the defendants' affirmative defenses and counterclaims with prejudice.

The counterclaims are: (1) money damages in the amount of \$180,000 for the plaintiff's refusal to stop a fraudulent wire transfer of \$90,000, and (2) money damages for compelling the defendants to undergo field audits in the absence of such a requirement in the Loan Documents.

On May 12, 2017, a third-party consultant hired by Citibank conducted a field audit of the Borrower's business ("Field Audit"). Paragraph 2(h) of the Disclosure Booklet permits Citibank to conduct such a field audit (*see* Caggiano Aff., Exh. D at 4), and upon the defendants' agreement to participate in such a Field Audit in prior Court proceedings, the Court so ordered (*see* NYSCEF Doc. No. 86). The Field Audit revealed, and the defendants do not dispute, that the Borrower's inventory was

sold off or otherwise dissipated; that the Borrower moved its business operations from a warehouse in Maspeth, New York to Mr. Shah's home; and that the Borrower has not made any sales since July 2016 and has had no cash receipts since December 2016. In addition, Mr. Shah apparently failed to provide the auditor with monthly sales, credit and cash receipt journals for the six months ending December 31, 2016, and failed to provide the federal withholding tax payments for the fourth quarter of 2016. Further, Mr. Shah apparently conceded that the business has outstanding accounts payable totaling \$555,000 as of December 31, 2016, and no funds to pay these vendors (Howley Affirmation at 7-8).

In opposition, the defendants argue in a conclusory fashion that estoppel, waiver, and accord and satisfaction should apply here, in part because Citibank's "team of bean counters" declared default three years ago and continued to accept payments from the defendants (*see* Aff. in Opp. at 7). Defendants also accuse Citibank of predatory lending because Citibank increased the Borrower's line of credit several years ago, and thereby contributed to one stated Event of Default, namely an increase in the Borrower's "leverage ratio" from 3.5 to 1.0 (*see* Shah Affidavit, ¶7). Defendants also claim that they have complied with the various Court orders with respect to the Field Audit, and paid Citibank over \$300,000 in interest from August 2013 through March 2016 (*id.*). In addition, defendants argue that the affirmative defenses and counterclaims should not be stricken, but rather that discovery be completed and the matter tried on a fuller record.

It is undisputed that an enforceable contract exists between Citibank and the defendants and that Citibank loaned nearly \$1,850,000 to the defendants under that contract. Citibank asserts that the Borrower breached the contract by, among other things, the material adverse change in the Borrower's financial condition, and by its failure to maintain inventory in good and useable condition which rendered the collateral insecure. The opposition papers have not disputed these assertions. Indeed, the Borrower has continued to make interest-only monthly payments of approximately \$7,000, but such

payments cannot cure the monetary and non-monetary defaults at issue, nor can a non-operating business repay the nearly \$2 million debt owed to Citibank.

Citibank has established a *prima facie* case on its breach of contract claims, and the burden shifts to defendants to produce evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial. Defendants failed to meet that burden and plaintiff is therefore entitled to judgment on liability as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). With respect to the affirmative defenses and the first counterclaim,<sup>1</sup> discovery should conclude by October 31, 2017, as stated at the August 15, 2017 conference. The plaintiff shall file the Note of Issue by October 31, 2017. An inquest on damages and attorneys' fees will be held on December 1, 2017 at 9:30 a.m. Finally, plaintiff and defendants are directed to e-file briefs no longer than 5 pages by November 9, 2017, and address whether the waiver provisions in Paragraphs 4(d) and 8(m)<sup>2</sup> in the Disclosure Booklet are enforceable as the issue was not fully briefed in this motion.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by the plaintiff is granted on liability, jointly and severally, against defendants Wonder International Trading, Inc., Wonder Enterprises, Inc., and Tarun Shah; and it is further

ORDERED that the parties shall appear for an inquest on December 1, 2017 at 9:30 a.m.

Dated: August 22, 2017

  
BARRY R. OSTRAGER  
JSC

J.S.C.

<sup>1</sup> The second counterclaim is hereby dismissed since Paragraph 2(h) of the Disclosure Booklet permits Citibank to conduct field audit (Caggiano Aff., Exh. D at 4).

<sup>2</sup> Paragraph 8(m) provides that "Each Credit Party absolutely, unconditionally and irrevocably waives any and all right to assert any set-off, counterclaim or crossclaim of any nature whatsoever with respect to the Standard Terms, the Credit Approval Letter, and the other Loan Documents." (Caggiano Aff., Exh. D at 14). The waivers contained in Paragraph 4(d) apply to the guarantors (*id.* at 6-7).