

Citibank, N.A. v Villano
2018 NY Slip Op 31379(U)
June 28, 2018
Supreme Court, New York County
Docket Number: 653823/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

X

CITIBANK, N.A.,

Index No.
653823/2013

Plaintiff,

- v -

**DECISION
and ORDER**

Mot. Seq. #3, 4

ROXANN VILLANO,

Defendant.

X

HON. EILEEN A. RAKOWER, J.S.C.

This action was commenced on November 1, 2013 to recover the aggregate principal sum of \$261,506.15, plus interest, late charges, and attorneys' fees and expenses allegedly owed by defendant, Roxann Villano ("Defendant" or "Villano") to plaintiff, Citibank, N.A ("Plaintiff" or "Citibank"). Plaintiff claimed that Villano, the Borrower, defaulted under the terms of the subject Loan Agreements and Guaranty and failed to pay Citibank the amount owed due under the loans.

Procedural Background

Plaintiff moved (Mot. Seq. #001) for an Order, pursuant to CPLR § 3212, awarding Plaintiff summary judgment on its Complaint against Villano. In support, Plaintiff submitted the affidavit of Deborah Lesueur, a Vice President of Plaintiff, which annexed the subject Loan Agreements and Guaranty. In opposition, Villano submitted an affidavit in which she averred, "I have no recollection of ever providing the Plaintiff with a personal guaranty of any sort." In reply, Plaintiff argued that Villano had failed to raise any issues of fact. Plaintiff contended that Defendant had not alleged that her signature on the Guaranty was forged, did not deny signing the Guaranty, and did not state that the signature on the Guaranty did not appear to be hers. Plaintiff also argued that Villano failed to present the report of a handwriting expert, notwithstanding her request for a 45 day extension to oppose Plaintiff's motion for summary judgment in order to consult with a handwriting expert.

Oral argument was held on January 20, 2015. By Order entered on January 23, 2015, the Court granted Plaintiff's motion for summary judgment. On May 1, 2015, Plaintiff obtained a Judgment against Defendant, awarding Plaintiff the total sum of \$305,416.40.

Villano moved for an Order, pursuant to CPLR § 2221 and 5015(a)(2), granting Villano's motion to renew, and upon renewal, vacating the Judgment that was obtained against Villano by Citibank. Villano argued that she had obtained "a report from a handwriting expert who has determined that the signature on the Guaranty is not her signature." Citibank opposed. By Decision and Order entered on January 22, 2016, the Court denied Villano's motion and held, "Defendant's failure to provide a reasonable justification for her failure to previously retain a handwriting expert - coupled with Villano's failure to explicitly deny that the signature on the Guaranty is hers - warrants the denial of Villano's motion."

Villano appealed the Court's January 23, 2015 and January 22, 2016 decisions. By Decision and Order dated June 21, 2016, the First Department unanimously affirmed "the grant of summary judgment as to liability in favor of plaintiff" and the denial of Villano's motion for renewal. *Citibank, N.A. v. Villano*, 140 A.D.3d 553, 553 (1st Dept. 2016). The First Department stated:

"Defendant's failure, both in opposition and on renewal, to deny that she executed the personal guaranty, and other loan documents under which she was sued, mandated the grant of summary judgment as to liability in favor of plaintiff. While she had a handwriting expert's report in support of her motion for renewal, it was proffered solely on renewal. Moreover, defendant's repeated failure to expressly and unequivocally deny signing the documents made her opposition futile (cf. *All State Flooring Distrib., L.P. v MD Floors, LLC*, 131 AD3d 834, 836 [1st Dept 2015]). Nor was the motion premature. While it was made predisclosure, defendant obviously knew whether or not she signed the documents without needing access to plaintiff's records."

(*Id.* at 553).

The First Department stated, "However, defendant is correct that plaintiff never established its *prima facie* entitlement to judgment as to the amount of the debt." (*Id.*). The First Department wrote:

"Plaintiff submitted no records with its moving papers supporting its calculation of the debt amount. It revealed on reply that half the debt was based on older loan documents that it never submitted, either in reply or in moving papers. The "records" upon which it relied for the calculation of this previous indebtedness were cryptic and bore the header, "Eh hem . . . does this belong to you?" Plaintiff's affiant never explained these documents or produced or even identified the specific documents upon which she relied in calculating the total alleged indebtedness.

For these reasons, the judgment must be vacated, and further proceedings held to determine the amount of the indebtedness for which defendant is liable under the guaranties."

(*Id.*).

Pending Motions

Plaintiff's Motion (Motion Sequence 3)

Plaintiff moves for an order of reference, pursuant to CPLR 4311, directing a special referee to determine the amount of Plaintiff's damages, including applicable interest and attorneys' fees.

Defendant opposes. Defendant contends that "Citibank's motion should be denied because the motion's entire premise - which is that the only issue remaining in this action is how much Villano owes to Citibank under the Guaranties - is erroneous." Rather, Defendant contends that there are still various questions of fact which she raised in her appeal. Defendant contends that discovery is outstanding that could demonstrate that she is not liable under the Guaranties, and therefore Plaintiff's motion is premature. Separately, under Motion Sequence 4, Defendant seeks to compel outstanding discovery relating to the purported open questions of fact and a deposition.

Specifically, Villano argues that “there were still questions of fact (1) as to whether the Guarantees were void, and (2) “as to whether Citibank increased the risk under the Guarantees without Villano’s knowledge, including issues as to whether Citibank transferred the amounts that were owed by the borrower, Roselli Moving and Storage Corp. pursuant to lines of credit obtained years earlier and \$22,639.67 relating to an undocumented and unidentified ‘outstanding business installment loan’ to the loans guaranteed by Villano.” Villano further argues, “In addition, given the specific language in the Guarantees, there is an issue of fact as to whether Villano can be liable under the Guarantees when the amounts owed by Roselli under the original lines of credit were transferred to the loans guaranteed by Villano.”

Villano argues, “[I]f the First Department found, as Citibank claims, that Villano's liability to Citibank is a certainty then it would not have included the phrase ‘if any.’” Villano focuses on the portion of the First Department's which states “the [decision of the lower court] which granted plaintiff's motion for summary judgment against defendant guarantor, [is] unanimously modified, on the law, the judgment vacated, the matter remanded for further proceedings to determine the amount of indebtedness, **if any**, for which defendant is liable under the guarantees, and otherwise affirmed, without costs.” (emphasis added).

Defendant's Motion to Compel (Motion Sequence 4)

Defendant moves for an Order pursuant to CPLR 3124, compelling Plaintiff to provide the outstanding discovery sought in her July 19, 2016 demands. Defendant contends that Plaintiffs' responses served on February 9, 2018 are insufficient. Specifically, Defendant contends, “Although Citibank produced documents, none of the documents relate to Villano and there was not a single document produced for the Business Checking Plus account prior to September 2010.” Defendant also contends that Plaintiff has not produced a witness for a deposition.

In opposition, Citibank states it has provided information and documents in its possession responsive to the remaining issue which is “the amount of the indebtedness for which defendant is liable under the guarantees.” Citibank also states that it has been, and continues to be, willing to produce an employee for deposition regarding the calculation of the indebtedness prior to a referee's hearing.

Discussion

The First Department unanimously affirmed “the grant of summary judgment as to liability in favor of plaintiff” and remanded the case solely for “further proceedings [to be] held to determine the amount of the indebtedness for which defendant is liable under the guaranties.” *Citibank*, 140 A.D.3d at 553. Contrary to Defendant’s contention, the First Department did not remand for this Court to also determine the issue of her liability under the Guaranties. Plaintiff is directed to provide all information and documents “to demonstrate the amount of the indebtedness for which defendant is liable under the guaranties,” to the extent not previously provided, and to produce an employee for deposition regarding the calculation of the indebtedness prior to a referee’s hearing.

Wherefore, it is hereby

ORDERED that Plaintiff’s motion (Mot. Seq. 3) for an order of reference, pursuant to CPLR 4311, directing a special referee to determine the amount of Plaintiff’s damages is premature and denied without prejudice; and it is further

ORDERED that Defendant’s motion to compel discovery (Mot. Seq. 4) is granted only to the extent that Plaintiff is directed to provide all information and documents “to demonstrate the amount of the indebtedness for which defendant is liable under the guaranties,” to the extent not previously provided, and to produce an employee for deposition regarding the calculation of the indebtedness within 30 days from the date of this Order; and it is further

ORDERED that the parties are directed to appear for a compliance conference on August 14, 2018 at 9:30 AM at 71 Thomas Street, Room 205.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 28 2018



EILEEN A. RAKOWER, J.S.C.