

Matter of DeMarco (Earth Structures, Inc.)
2019 NY Slip Op 33070(U)
October 10, 2019
Supreme Court, Kings County
Docket Number: 519370/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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In the Matter of the Application of
LOUIS DEMARCO,

Petitioner, Decision and order

Index No. 519370/18

For Judicial Dissolution of
EARTH STRUCTURES, INC.,
Pursuant to Section 1104-a of the
Business Corporation Law

ms # 3

October 10, 2019

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FELDMAN LUMBER-US LBM, LLC
d/b/a FELDMAN LUMBER,

Index No. 520353/18

Plaintiff,

- against -

EARTH STRUCTURES INC., AND LOUIS DEMARCO,
Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff Feldman Lumber has moved seeking summary judgement pursuant to CPLR §3212 on the grounds there are no questions of fact concerning the guaranty signed by the defendant Louis Demarco. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On September 29, 2014, Feldman Lumber entered into an agreement with Earth Structures guaranteeing payment of all invoices for items sent by Feldman Lumber. The defendant Louis

Demarco executed the guaranty in his individual capacity.

Feldman Lumber has now moved seeking summary judgement arguing there are no questions of fact the defendant owes \$37,670.61 plus interest at the rate of 1.5% per month from January 12, 2018 plus attorney's fees. The defendant opposes the motion arguing there are questions of fact.

Conclusions of Law

Summary Judgment may be granted where the movant establishes sufficient evidence which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary Judgment would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is well settled that a prima facie showing sufficient for summary judgment is made by submitting proof of an underlying agreement, the personal guaranty of the obligations under that agreement, and the failure to make payment in accordance with the terms of the agreement (HSBC Bank USA, N.A. v. Laniado, 72 AD3d 645, 897 NYS2d 514 [2d Dept 2010]). Moreover, in this case, the guarantee was clearly accompanied by consideration, namely the inducement by the plaintiff to provide the loan (see, Dabriel, Inc., v. First Paradise Theaters Corp., 99 AD3d 517, 952 NYS2d 506 [1st Dept., 2012]). The defendant does not deny the existence of the debt. Rather, he argues that he was not aware

he was the sole guarantor of the debt and that he believed another individual, Jeanine Garafola would also sign the document. While the guaranty does consist of two spaces for the signatures of two individuals and the language of the guaranty is written as "I/WE" indicating the possible existence of another signatory, in fact only the defendant signed the document. Thus, a party that signs and agrees to a contract is generally presumed to know the contents of the contract and to have assented to its terms (Choung v. Allstate Insurance Co., 283 AD2d 468, 724 NYS2d 882 [2d Dept., 2001]). Therefore, the defendant's thoughts as expressed in his affidavit that he was never told he "was going to be the sole guarantor" (see, Affidavit of Louis De Marco, ¶ 6) does not raise any question of fact sufficient to defeat summary judgement. Equally unavailing is the argument that Jeanine Garafalo promised to hold Demarco harmless from any liabilities related to Earth Structures Inc. While that may be true and Demarco can surely pursue that claim against Garafalo it does not alter the validity of Demarco's guaranty as related to Feldman Lumber.

Lastly, Demarco argues that he left Earth Structures on December 31, 2016 and that the debt sought in this action was incurred after that date, therefore, Demarco cannot be responsible for that debt. It is true that the guaranty states that "materials may be sold and credit extended to the applicant

without notice to Guarantors, who hereby waive presentment, demand, protest or evidence of indebtedness" (see, Credit Application and Agreement, ¶ 3). Further, the Agreement states that the guaranty shall exist "unconditionally, at all times" (see, Credit Application and Agreement, ¶ 4). Thus, the guaranty bound Demarco despite his departure. Demarco argues that Feldman Lumber was aware he was no longer involved with the company. However, there is no proof supporting that contention and indeed the contention is disputed by evidence submitted that even though Demarco might have formally exited the company he was still involved in some capacity. In any event, there has been no evidence presented that Feldman Lumber could have reasonably believed Demarco someone abrogated the guaranty or that the guaranty was no longer enforceable. To the extent Demarco must pay for materials he never ordered, that issue can be further pursued by Demarco against Garafalo.

Therefore, based on the foregoing, the motion of Feldman Lumber seeking summary judgement is granted.

So ordered.

ENTER:

DATED: October 10, 2019
Brooklyn NY

Hon. Leon Ruchelsman
JSC

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 KINGS COUNTY CLERK
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