

Citibank, N.A. v Wahlrich Group, LLC

2020 NY Slip Op 33152(U)

September 21, 2020

Supreme Court, New York County

Docket Number: 651527/2017

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. VERNA L. SAUNDERS</u>	PART	IAS MOTION 36
		<i>Justice</i>	
-----X		INDEX NO.	<u>651527/2017</u>
CITIBANK, N.A.,		MOTION SEQ. NO.	<u>003</u>
	Plaintiff,		

WAHLRICH GROUP, LLC, MICHAEL WAHL a/k/a
 MIKE WAHL, ERIC WAHL, ANDREW WAHL,
 JUDITH WAHL, HOWARD INTERNATIONAL
 CORP., and BONNIE KAYE, AND HERBERT
 KOZLOV, as Co-Executors of the ESTATE OF
 FRED HOWARD,
 Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 212, 213, 214, 215, 216, 220

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

This action was commenced by Citibank, N.A (“Citibank”) to recover for damages sustained as a result of over \$700,000.00 in defaulted loans by borrower, defendant Wahlrich Group, LLC (“Wahlrich Group”). Wahlrich Group is owned by co-defendants Michael Wahl, Eric Wahl, and Andrew Wahl. Citibank named Wahlrich Group, as well as, each individual owner who were guarantors of the loan. Citibank also named Howard International Corp. as a defendant as a Howard International account was offered as additional collateral for the Wahlrich Group loans.

Bonnie Kaye and Herbert Kozlov, as the current co-executors of the Estate of Fred Howard, (hereinafter “the Estate”) entered into a settlement agreement with Citibank wherein the Estate paid Citibank \$275,000.00 in exchange for ownership of the loans in question. As such, the Estate was recently substituted as plaintiffs, in place of former plaintiff, Citibank, N.A. (“Citibank”) pursuant to

a so-ordered stipulation and proposed order for substitution and discovery dated March 7, 2019.¹

The Estate now moves the court seeking partial summary judgment on the fifth and tenth causes of action against the guarantor defendants jointly and severally and asking that those causes of action be severed and referred to a Special Referee to calculate and liquidate a judgment amount, inclusive of accrued interest, attorney's fees, costs, and disbursements. The Estate also seeks an extension of the Note of Issue filing date.

Wahlrich Group obtained a \$300,000.00 line of credit from Citibank in 2008 and a \$500,000.00 line of credit from Citibank in 2010. It is undisputed that both lines of credit (hereinafter "loans") were guaranteed by Michael Wahl, Eric Wahl, and Andrew Wahl. The Estate argues that as the loans were not repaid and the guarantor defendants cannot dispute executing guarantees, no material issues of fact exist warranting a trial as to the fifth and tenth causes of action. The Estate concedes that the instant motion is essentially an "in lieu" motion for partial summary judgment under CPLR § 3213 brought under CPLR § 3212(e). The Estate contends, however, that it is undeniable that CPLR § 3213 relief is available under § 3212(e) in the form of partial summary judgment as the loans and corresponding guarantees are "instruments for payment of money only."

Defendants Michael Wahl, Eric Wahl, and Judith Wahl oppose the motion² arguing that Michael Wahl, while serving as co-executor of the Estate of Fred Howard, was wrongfully accused of improperly transferring over \$5,000,000.00 from the Estate of Fred Howard to the Wahlrich Group. Michael Wahl contends that Fred Howard and Howard International Corp. were indebted to him for an amount in excess of \$5,000,000.00 and that Michael pursued this claim in Supreme Court, an assertion with which co-defendants Eric Wahl and Judith Wahl concur. Nonetheless, the dispute between the Howard Estate and Michael Wahl was settled in the ensuing Surrogate's Court proceeding wherein the parties agreed that a portion of Michael Wahl's life insurance policy would

¹ See *NYSCEF Doc Nos. 107 & 126*.

² Andrew Wahl submitted an affidavit joining in the opposition filed by the other Wahl defendants.

be left to the Fridolin Charitable Trust, to which Fred Howard bequeathed the bulk of his estate, along with a portion of proceeds from the sale of a cooperative apartment owned by Judith Wahl. In the interim, it was agreed that the Estate would pay a portion of Michael's insurance premiums. Defendants, in sum and substance, argue that this settlement agreement included language releasing Michael Wahl, Andrew Wahl, Eric, and Judith Wahl from any claims "arising with respect to any actions taken concerning the Estate or its assets, whether known or unknown, whether or not discovered or concealed, accrued or unaccrued, anticipated or unanticipated, asserted or unasserted or matured or not matured." Thus, defendants contend that the claims now pursued by the Estate are barred. Finally, defendants assert that the Estate has failed to submit records detailing the amount of its claim.³

In reply, the Estate avers that the general release of claims given by the Estate of Fred Howard in 2017 only released claims arising or existing up to the date of the release and thus, any claims arising in 2019, when the Estate acquired the two Citibank loans and attendant rights pursuant to the guarantees, have not been released. The Estate further asserts that in 2017, when the settlement agreement was executed, Citibank owned the loans and guarantees hence, same could not have been included in any releases issued by the Estate as only Citibank could have issued releases with respect to these loans.

A party moving for summary judgment must make *prima facie* showing that it is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of

³ Defendants contend that the Estate reached settlement with Citibank after its failed attempt to have the complaint as against it dismissed. The agreement between Citibank and the Estate permitted Citibank to retain \$275,000.00 in funds from the Howard Corp. bank account which had been restrained in exchange for a release of further claims by Citibank and an assignment of Citibank's remaining claims against the Wahl Defendants. The agreement further provided that in the event the Estate recovers over \$150,000.00, a portion of such recovery would be paid to Citibank. Defendants argue that insofar as Wahlrich is out of business and without assets and Michael, Eric and Andrew Wahl have virtually no assets, the likelihood of such recovery is minimal.

any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital* and *Winegrad v New York University Medical Center*, 64 NY2d 851 (NY 1985). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

CPLR § 3213, a motion for summary judgment in lieu of complaint, allows a plaintiff to file a summons with an immediate motion for summary judgment any time an action is based on “an instrument for the payment of money only” or when it is based upon “any judgment.” With respect to an instrument for the payment of money only, the criterion is that the instrument must represent an unconditional obligation to pay money at a specified time, or upon demand.

Here, the Estate is moving for partial summary judgment under CPLR § 3212 in lieu of § 3213 as the complaint in this action was filed by the original plaintiffs who did not elect to seek relief pursuant to CPLR § 3213. In any event, it is undisputed that the loan agreements, guarantees, and demands for payment meet the criteria for relief under §§ 3213 and 3212, respectively. As a matter of fact, the arguments advanced in opposition to the Estate’s motion do not dispute the loans, guarantees, or the obligations imposed by the guarantees.⁴ Instead the Wahl defendants argue that any claims the Estate may have against the Wahls were released in the 2017 settlement agreement between the Estate and the Wahls. However, this argument is without merit as claims asserted by parties not signatories to the settlement agreement between the Estate and the Wahls, such as Citibank, could not have been released in said agreement. Furthermore, as the release contained in the 2017 settlement agreement between the Estate and the Wahls expressly states that it pertained to claims arising from “the beginning of the world to the date of this Agreement,” (*Wahl Exhibit 1*, pp.16-17), it is of no moment that the claims previously owned by Citibank have been assigned to

⁴ The opposition also raised arguments pertaining to the then pending motion to Amend, Motion Sequence 002. See the Court’s *September 21, 2020 Decision and Order*, under Motion Seq. 002.

and pursued by the Estate, now substituted in as plaintiffs in place of Citibank. Accordingly, these claims are not barred. Based upon the foregoing, it is hereby

ORDERED that movants/substituted plaintiffs⁵ Bonnie Kaye and Herbert Kozlov's, as the current co-executors of the Howard Estate, motion for partial summary judgment on the fifth and tenth cause of action is granted; and it is further

ORDERED that the fifth and tenth causes of action are severed, and the balance of the claims remain; and it is further

ORDERED that the guarantor defendants Michael Wahl, Andrew Wahl, and Eric Wahl are found liable to movant/substituted plaintiffs Bonnie Kaye and Herbert Kozlov, as the current co-executors of the Howard Estate on the fifth and tenth causes of action and the issue of the amount of a judgment to be entered thereon shall be determined by a Special Referee at a future date to be directed by the Court; and it is further

ORDERED that the action shall continue as to the remaining causes of action pursuant to the Decision and Order of this court issued on September 21, 2020 under Motion Sequence 002; and it is further

ORDERED that counsel are directed to appear for a status conference on January 13, 2021. The Note of Issue filing date is hereby extended to February 25, 2021.

This constitutes the decision and order of the court.

September 21, 2020


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

⁵ See the Decision/Order of the Court under Motion Seq. 002.