

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
STANLEY S. ZINNER,

Plaintiff,

-against-

FIONA GRAHAM, M.D.,

Defendant.
-----X

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 011325-10
Motion Seq. No: 1
Submission Date: 8/9/10**

The following papers have been read on this motion:

- Notice of Motion, Supporting Affidavit and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Response to Motion and Attachments.....X**
- Reply Affidavit and Exhibit.....X**

This matter is before the Court for decision on the motion filed by Plaintiff Stanley S. Zinner ("Plaintiff") on July 23, 2010 and submitted on August 9, 2010. For the reasons set forth below, the Court grants Plaintiff's motion and awards Plaintiff judgment against Defendant in the sum of \$159,000, plus interest, costs and disbursements to be determined at an inquest.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3212, granting summary judgment to Plaintiff in the sum of \$159,000, plus interest and costs.

Defendant Fiona Graham, M.D. ("Defendant") opposes Plaintiff's motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to P's Aff.) alleges as follows:

On April 22, 2010, Defendant entered into a written agreement with Plaintiff titled

“Unconditional Agreement of Guaranty” (Ex. C to P’s motion), pursuant to which she personally and unconditionally guaranteed the payment to Plaintiff of \$159,000 on or before May 22, 2010. On May 11, 2010, Plaintiff asked Defendant whether she would timely deposit the sum of \$159,000 into Plaintiff’s bank account and Defendant responded that she would. On May 19, 2010, Defendant notified Plaintiff that the money she owed to him would be sent in installments of two (2) checks on either May 21 or May 24, 2010. Later in the day on May 19, 2010, Defendant advised Plaintiff that the money she owed him would be wire transferred from her offshore bank account on the Isle of Man to Plaintiff’s New York bank account.

Despite Defendant’s numerous assurances that she would pay Plaintiff in a timely fashion, Defendant failed to make the \$159,000 payment due pursuant to the parties’ agreement (“Agreement”) and offered explanations, including an alleged bank error. Plaintiff has performed his obligations pursuant to the Agreement. Plaintiff asserts causes of action for breach of contract and unjust enrichment and seeks damages in the sum of \$159,000, plus attorney’s fees incurred in pursuing this action. ¹

In her Verified Answer (Ex. B to P’s motion), Defendant denies many of the allegations in the Complaint but admits the allegations in paragraph 3 of the Complaint which are as follows:

On the 22nd of April 2010 Graham entered into a written agreement with the Plaintiff under and by which she personally and unconditionally guaranteed the payment to Zinner of ONE HUNDRED FIFTY NINE THOUSAND (\$159,000) DOLLARS on or before May 22, 2010. A true copy of the agreement, entitled “Unconditional Agreement of Guaranty” is annexed hereto as Exhibit “A” and incorporated by reference.

Defendant also asserts six (6) affirmative defenses in which she submits that Plaintiff’s claims are barred by: 1) the doctrines of unclean hands/estoppel, 2) the terms of the parties’ agreement, 3) Plaintiff’s failure to mitigate damages, 4) the fact that Plaintiffs’ damages are not attributable to Defendant, 5) lack of consideration, and 6) the doctrines of accord and satisfaction, settlement agreement, modification of the original agreement and/or novation.

¹ As noted *infra*, Plaintiff, an attorney, is not seeking an award of counsel fees in the instant motion.

Plaintiff affirms as follows in his Supporting Affidavit:

Plaintiff is an attorney authorized to practice law in New York. In 2007, at the suggestion of Defendant, Plaintiff lent \$150,000 to an individual named Julius Mwale (“Julius”). Julius’ company, called SBA Techonology, Inc. (“SBA”), guaranteed repayment of that loan (“Loan”). When the Loan was not repaid, Plaintiff obtained a Judgment by Confession (“Judgment”) against Julius and SBA in the sum of \$150,265.00 (Ex. D to P’s motion). The Judgment was entered on December 9, 2009.

While Plaintiff was pursuing enforcement of the Judgment, Defendant interceded and agreed to pay the sum of \$159,000 that was due to Plaintiff if Plaintiff agreed to cease collection proceedings against Julius and SBA. Defendant sent to Plaintiff an e-mail dated March 27, 2010 (Ex. E to P’s motion) with a subject line reading “RE: Return of check.” The e-mail read as follows:

Hey Stanley! Believe it or not, the money has arrived and cleared this morning. I will call you tomorrow to get the details of where the money should be wired to and arrange for it to be sent first thing Monday morning. I didn’t bother to tell you, because I knew you would not believe that the money was sent to the wrong account and sent back, hence the delay. But now it is really here and I will find out what the exchange rate is and send it. Julius says I should send \$159,000. Is that right? I hope you will forgo further court proceedings, as that would hurt all of us far more than your cashing my check.

Fiona

When the money due was not repaid, Plaintiff instituted contempt proceedings against Julius and SBA in the Supreme Court of New York County (Index Number 117241-09) related to their failure to appear for a deposition or produce company records. Defendant again asked Plaintiff to cease enforcement proceedings for thirty (30) days and said that she would pay Plaintiff the money owed to him.

Plaintiff agreed to cease enforcement proceedings against Julius and SBA on the condition that Defendant unconditionally guarantee payment of the \$159,000 due within thirty (30) days. Defendant and Plaintiff subsequently executed the Agreement which reflected that guaranty. Specifically, the Agreement provides, in pertinent part:

In order to induce Zinner to cease judgment enforcement proceedings against

the Judgment Debtors [SBA and Julius] and withdraw information and deposition subpoenas served upon the Judgment Debtors, pending timely receipt of payment, the Guarantor [Plaintiff] does hereby unconditionally guaranty to pay Zinner the full amount of the Obligation, plus applicable interest, in the sum of ONE HUNDRED FIFTY-NINE THOUSAND (\$159,000) DOLLARS in lawful currency of the United States, without any defense, set-off, counterclaim, rescission, recoupment, or reduction of any kind not later than thirty (30) days from the date hereof as if such amount constituted a direct and primary obligation of the Guarantor. Payment of said amount shall be by certified or bank check payable to Zinner at the address set forth above. If payment is timely made, the Obligation shall be fully satisfied, void and of no further effect. If payment is not timely made, interest shall accrue from the first day following the due date at a rate of 8 (%) percent per annum on the principal amount of \$159,000 and shall continue to accrue until payment in full is made. Upon payment in full, the Obligation shall be fully satisfied, void and of no further effect. In the event of collection proceedings arising out of the failure of the Guarantor to pay the amount due, Guarantor shall be responsible for all collection and court costs and disbursements plus reasonable attorneys' fees incurred in connection therewith.

Despite Plaintiff's repeated demands, Defendant has failed to remit payment to Plaintiff. Plaintiff affirms that, although the Agreement provides for an award of attorney's fees incurred in collection proceedings, he waives his right to counsel fees.

In her Opposition, Defendant submits that Plaintiff's action should fail because there is a lack of consideration. Defendant affirms that the purpose of the Agreement was "that Zinner would stop harassing Julius or going after him with enforcement proceedings and that he would only look to me for payment of the loan, and that would prevent Julius from being distracted so he can focus on his business projects in Africa" (D's Response at p.1). Defendant also avers that she has a "personal economic interest in Julius' business pursuits in Africa because I have made substantial investments in Julius' African projects" (*Id.* at p. 2).

Defendant affirms that, despite Plaintiff's promise to cease enforcement proceedings against Julius and SBA, those proceedings continued. She avers that Julius was forced to suspend a business trip to Africa to appear at a deposition in Manhattan. Defendant does not affirm that she attended that deposition, and does not provide an affidavit of Julius or other documentation establishing that Plaintiff pursued the enforcement proceedings during the thirty (30) day payment period provided for in the Agreement.

Defendant provides a copy of an e-mail ("E-mail") dated April 22, 2010 from Plaintiff to

Julius, SBA and Defendant which read as follows:

Mr. Mwale: Please be advised that all Judgment enforcement proceedings are hereby canceled and all subpoenas served upon you and SBA Technologies are likewise withdrawn and canceled, pending payment of \$159,000 by Dr. Graham pursuant to an unconditional guaranty of payment executed this day.

Defendant also provides copies of e-mails dated April 22, 2010 reflecting 1) Plaintiff's receipt of the Agreement and promise to cancel enforcement proceedings "pending timely payment of the \$159,000," and 2) Defendant's receipt of Plaintiff's e-mail in which he acknowledged receipt of the Agreement and agreed to cancel enforcement proceedings pending timely payment by Plaintiff.

In his Reply Affidavit, Plaintiff cites the E-mail as evidence that he complied with the Agreement by canceling his efforts to enforce the Judgment for thirty (30) days, pending receipt of payment by Defendant. He avers that, when Defendant failed to make payment within the prescribed time, he resumed enforcement proceedings as expressly authorized by the Agreement. On June 7, 2010, he appeared before a judge in New York County who granted Plaintiff's application for an Order directing Julius and SBA to appear for depositions. A copy of that Order, dated July 12, 2010, is annexed to the Reply Affidavit as Exhibit A. Plaintiff still has not received payment from Defendant.

C. The Parties' Positions

Plaintiff submits that he is entitled to judgment on the Agreement, a guaranty, by providing proof of the existence of the guaranty, the underlying obligation and the Defendant's default. Plaintiff submits, further, that Defendant waived her right to interpose affirmative defenses in light of the language in the Agreement providing that Defendant agreed to pay Plaintiff \$159,000 "without any defense, set-off, counterclaim, rescission, recoupment or reduction of any kind..."

Defendant submits that Plaintiff did not comply with the Agreement because he pursued enforcement proceedings against SBA and Julius in violation of the Agreement.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Guaranty

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept., 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept., 1994).

C. Waiver of Affirmative Defense

As a general rule, a waiver of the right to assert a setoff or counterclaim is not against public policy and will be enforced in the absence of fraud or negligence in the disposition of collateral. *Fleet Bank v. Petri*, 244 A.D. 523, 524 (2d Dept. 1997). In *Fleet Bank, supra*, the plaintiff-bank extended credit to the corporate defendant and, in return, obtained personal guarantees from the other defendants which included language reflecting that the guarantors were waiving the right to interpose any defense, set-off or counterclaim. *Id.* at 523. The Appellate Division reversed the trial court's denial of plaintiff's motion for summary judgment dismissing defendants' counterclaim in light of the waiver provision. As the defendants had not asserted

either fraud or negligence in the disposition of collateral, and in light of its conclusion that enforcement of the waiver provision would not violate public policy, the Second Department held that “[s]ince the defendants clearly and unequivocally waived their right to interpose any counterclaims in this action, the counterclaim should have been dismissed as a matter of law.” *Id.* at 524. *See also Inland Mortgage v. Realty Equities*, 71 A.D.3d 1089 (2d Dept. 2010) (as defendants effectively waived their right to assert defenses with respect to the notes, the defenses they asserted were insufficient to raise a triable issue of fact.

D. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated his right to judgment against Defendant, pursuant to the Agreement, by demonstrating 1) the existence of the underlying obligation, 2) the guaranty, as set forth in the Agreement, and 3) the failure of Julius and SBA to satisfy the Judgment. Although Defendant affirms that Plaintiff did not comply with his obligation to cease enforcement proceedings, she has provided no proof that Plaintiff pursued enforcement proceedings during the thirty (30) day payment period provided for in the Agreement. Plaintiff resumed those proceedings after Defendant failed to make payment as promised and, accordingly, Defendant has failed to raise a triable issue of fact.

The Court also dismisses Defendant’s affirmative defenses in light of her waiver of those defenses, as outlined in the Agreement, and the Court’s conclusion that her waiver would not violate public policy, and the absence of fraud or negligence in the disposition of collateral.

ORDERED, that Plaintiff have judgment against Defendant in the amount of \$159,000, plus interest, costs and disbursements; and it is further

ORDERED, that this matter is respectfully referred to Special Referee Frank Schellace (Room 060, Special 2 Courtroom, Lower Level) to hear and determine all issues relating to the computation of interest, costs and disbursements on October 27, 2010 at 9:30 a.m.; and it is further

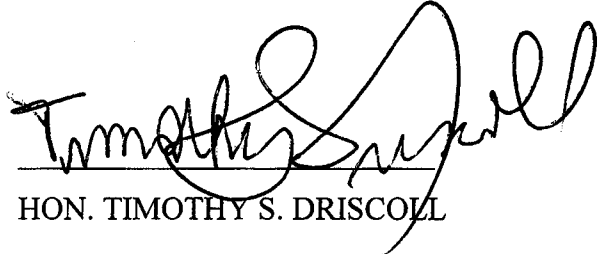
ORDERED, that Plaintiff shall serve upon the Defendant by certified mail, return receipt requested, a copy of this Order with Notice of Entry, a Notice of Inquest or a Note of Issue and shall pay the appropriate filing fees on or before October 13, 2010; and it is further

ORDERED, that the County Clerk, Nassau County is directed to enter a judgment in favor of the Plaintiff and against the Defendant in accordance with the decision of the Special Referee.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
September 23, 2010

ENTER

A handwritten signature in black ink, appearing to read "Timothy S. Driscoll", written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
SEP 28 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE