

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 10

NASSAU COUNTY

P.T. BANK CENTRAL ASIA, NEW YORK BRANCH,

Plaintiff(s),

-against-

INDEX No. 4931/02

MOTION DATE: 9/30/02

KENLIN, INC., d/b/a THE KENLIN COMPANY, INC.
AND KENLIN OF NEW YORK, and KENNETH
CAINE,

Defendant(s).

MOTION SEQ. No. 2, 3

The following papers read on this motion:

Plaintiff Notice of Motion/Affirmation Affidavit/Exhibits

Memorandum of Law

Caine Notice of Cross Motion

Plaintiff Affidavit in Opposition to Cross Motion

Defendant Reply Affirmation

Memorandum of Law

Plaintiff Supplemental Affidavit

Defendant Further Reply

Plaintiff seeks an Order granting it summary judgment pursuant to CPLR § 3212 on its sixth cause of action against KENNETH CAINE individually. CAINE seeks summary judgment dismissing the Complaint as against him personally.

Plaintiff commenced this action against corporate defendant KENLIN INC on its default in failing to repay a loan of more than one million dollars. In its sixth cause of action plaintiff seeks to collect the

P.T. Bank Central Asia v. Kenlin, Inc., et al.

outstanding monies owed from CAINE on his personal guaranty executed to secure loans to KENLIN. KENLIN filed an involuntary petition in U.S. Bankruptcy Court, thus the action against it, including the pending motion relating to this defendant, is stayed.

Plaintiff seeks to pursue the sixth cause of action alleged against CAINE alleging that he is liable for the sums owed by KENLIN due to his personal guaranty. The plaintiff brings this application for summary judgment in the sum of \$877,698.15 with interest, costs and disbursements. It also seeks a dismissal of CAINE's affirmative defenses, which contend that plaintiff does not have a valid security interest and that it has not properly demanded the sums allegedly owed by KENLIN, thus it is not in default. CAINE seeks a dismissal of the claims against him.

That portion of the motion seeking to sever the claim against the corporate defendant from the cause of action alleged against KENNETH CAINE, is Granted. This action arises out of an alleged breach of a commercial contract by defendant business, which was personally guaranteed by the individual defendant, an executive with the corporate defendant. The plaintiff has demonstrated that it can proceed against the individual defendant without prejudicing any of the defendants.

Based on the proof presented, the plaintiff's application for the severance is Granted in its entirety. The automatic stay does not extend to non-bankrupt co-defendants. Banker Code, 11 U.S.C.A. § 362(a). *Rosenbaum v. Dane & Murphy, Inc.*, 189 A.D.2d 760, 592 NYS2d 391 (2nd Dept. 1993); *Golden v. Moskowitz*, 194 A.D.2d 385, 598 NYS2d 522 (1st Dept. 1993); *Centrust Services, Inc. v. Guterman*, 160 A.D.2d 416, 554 NYS2d 113 (1st Dept. 1990); *Velez v. Seymour Moslin Assoc., Inc.*, 2000 WL 1880607 (1st Dept. 2000).

Both parties contend that they are entitled to summary judgment on the sixth cause of action wherein plaintiff seeks to collect on CAINE's alleged personal guaranty. It is apparently undisputed that the defendants' relationship began in 1997. In January, 1997 KENLIN obtained a line of credit from the plaintiff pursuant to a written agreement. This loan agreement was secured by an additional separate guaranty executed by CAINE. The initial line of credit was extended in the sum of \$150,000.00, which was properly repaid.

CAINE argues that this sum was repaid, as were several subsequent loans. CAINE contends that although the subject loan in this case was not repaid, he did not personally guaranty it, and has no continuing obligation to the plaintiff. Plaintiff disagrees, contending that CAINE did in fact agree to personally guaranty the loan by executing the Letter Agreement. The Plaintiff claims that the Letter Agreement clearly contained the contractual terms of both the line of credit and the personal guaranty.

It is uncontested that on January 14, 2002, CAINE signed a Loan Agreement, the "Letter Agreement", dated December 14, 2001. (Motion Exh. 3). On or about January 14, 2002 KENLIN also executed a Promissory Note in furtherance of this Agreement. Further, it is undisputed that pursuant to this Agreement on or about January 14, 2002, KENLIN obtained an additional line of credit from the plaintiff for the maximum sum of 1.1 million dollars.

CAINE signed the Letter Agreement on behalf of KENLIN. CAINE concedes that he also personally acknowledged the Letter Agreement and personally agreed to comply with all the requirements therein.

CAINE argues that by agreeing to comply with the terms of the Letter Agreement he did not personally guaranty the Loan to KENLIN. CAINE contends that the terms set forth in the Letter Agreement did not include a personal guaranty, and that he did not execute any separate such guaranty. He claims he only signed the Letter Agreement in his corporate capacity, not personal capacity. Thus, CAINE contends that he is not personally bound by its terms.

The plaintiff disagrees, contending that CAINE personally guaranteed the Loan and Note for KENLIN in his personal acknowledgment of the Letter Agreement.

The Plaintiff relies upon language in the Letter Agreement which states that "the undersigned, the Guarantor referred to in the foregoing Agreement . . . hereby agrees to comply with all the requirements contained therein. Such guaranty with respect to the issuance or utilization of the facility or credit thereunder shall be irrevocable and unconditional and shall be a guaranty of payment . . . the guarantor hereby binds himself as direct primary obligor for full and punctual payment of all obligations when due . . ." (Motion, Exh. 3, p. 11). Plaintiff argues that there is no legal necessity to present a guarantor with a separate Guaranty Agreement, and that the terms of the Loan explaining the terms of the guaranty were clear and unequivocal and bound CAINE as the guarantor when he agreed to comply with the terms of the entire agreement.

CAINE argues that the language of the Letter Agreement, including this agreement to abide by its terms, merely indicated that a separate personal guaranty was anticipated in the future. He argues that the language did not state that this was such an agreement, but merely a “forward looking statement”.

The Court notes that CAINE does not mention that he personally initialed each page of the Letter Agreement which he executed, including that page which acknowledged the “Unlimited, unconditional, continuing guaranty of Mr. Kenneth Caine (the “Guarantor”) . . . (Agreement, p. 4)

The Agreement states, on numerous pages, again initialed by CAINE, the various obligations of the Company, KENLIN and the Guarantor, CAINE. CAINE executed this Agreement in two separate places, first, on behalf of KENLIN, and second, as Guarantor.

CAINE’s arguments that the Agreement did not contain a personal guaranty but only acknowledged an anticipated future separate Agreement, are wholly without merit.

In his Reply, CAINE also objects to enforcement of the Guaranty as barred by the Statute of Frauds. As this affirmative defense was not raised in defendant’s Answer, it was waived, and thus does not prevent summary judgment for the plaintiff. CPLR § 3018(b).

CAINE also contends that the plaintiff may not seek recovery from him until KENLIN has been found liable. Again, this defense is wholly without merit. A guarantor’s liability accrues after the principal obligor defaults. *Midland Steel Warehouse Corp. v. Godinger Silver Art. Ltd.*, 276 AD2d 341 (1st Dept. 2000). It has been conceded by CAINE that KENLIN did not repay the loan. The uncontested proof presented demonstrates that KENLIN is in default on its promised payments. The Guaranty continued in the Letter Agreement executed by CAINE secured those payments. There is no need for a formal finding that KENLIN is in default necessary prior to plaintiff proceeding against the guarantor.

The Court notes that CAINE also guaranteed this loan by an earlier Guaranty.

Although CAINE maintains that his earlier Continuing Guaranty, dated August 30, 2000, cannot be enforced as against him, the Court disagrees. CAINE argues that the earlier guaranty was executed before the Promissory Note at issue was given and only guaranteed an antecedent debt which has been paid. Counsel also argues that since it was not referred to in the Complaint, it could not be proper to rely upon it in summary judgment.

P.T. Bank Central Asia v. Kenlin, Inc., et al.

These arguments are rejected by the Court.

The plaintiff may properly refer to, and rely upon this Continuing Guaranty without having attached it to the Complaint or without having specifically referred to it in the sixth cause of action. As noted by the plaintiff, Appendix A to the subject Loan Agreement, attached to the Complaint, specifically incorporated the Continuing Guaranty under the provision referencing the Personal Guaranty of CAINE. (Appendix, page 12, no. 4). This page of the Loan Agreement was specifically acknowledged by CAINE by his signature.

Reliance on this Continuing Guaranty admittedly executed by CAINE is therefore appropriate on this motion for summary judgment. Moreover, the Court has the power to grant summary judgment to the plaintiff on the Continuing Guaranty even if not referenced and found to be an unpled cause of action. The Court may deem the pleadings amended to conform with the proof presented. *Weinstock v. Handler*, 254 AD2d 165 (1st Dept. 1998). In this case the Court does so as it is clear that the proof supports the claim and the defendant has not been misled to his prejudice.

The Continuing Guaranty guarantees unconditional payment of claims of every nature and every obligation and future liability of KENLIN to plaintiff whether already in existence, or incurred in the future. (Cross Motion, Exh. C). It provides that it is unconditional guaranty of payment. "Personal guaranties which contain language of a continuing obligation are enforceable and survive payment of the original indebtedness. *Chemical Bank v. Sepler*, 60 NY2d 289 (1983). 'Unless the parties to a continuing guarantee provide otherwise in the writing, such a guarantee is not limited to the life of loans executed contemporaneously therewith and generally cannot expire by mere conduct . . . change of circumstances . . . or lapse of time.' *Supra*, at 294; *USI Capital and Leasing, a Div. of USI Credit Corp. v. Chertock*, 172 AD2d 235 (1st Dept. 1991). The Guaranty executed by defendant CAINE contained unequivocal language obligating him for obligations incurred by defendant KENLIN in the future.

There is no allegation, let alone any evidence, that this Guaranty was ever terminated in accordance with its terms. The plaintiff Bank is accordingly entitled to summary judgment against defendant CAINE on the Continuing Guaranty. *USI Capital and Leasing, a Div. of USI Credit Corp. v. Chertock, supra*; see also, *North Fork Bank v. R & T Corp. of OW*, 279 AD2d 512 (2nd Dept. 2001).

P.T. Bank Central Asia v. Kenlin, Inc., et al.

Based on the proof presented, the motion of the plaintiff for an Order granting it summary judgment against CAINE in the sum of \$877,698.00 with interest, costs and disbursements, and striking his counterclaims, is Granted, and the affirmative defenses asserted by CAINE are dismissed as without merit. The cross motion is Denied.

The request for attorney's fees is Granted to the following extent. A hearing is directed to determine the reasonable attorneys fees to be awarded. That hearing is directed to take place before Justice Warshawsky on December 13, 2002 at 9:30 a.m.

In lieu of such hearing, however, at least ten days prior to the hearing date scheduled, the party seeking the award may submit a detailed affidavit by counsel attesting to the time and efforts expended, specifying by whom they were expended (i.e. partner or associate) and stating the usual and customary rate of compensation of such person or persons. Absent any objection by a party entitled to appear at the proposed hearing, the matter will be determined on papers. If it is established that no party entitled to appear intends to appear, no appearance by the party seeking the award will be required.

It is, SO ORDERED.

Dated:

OCT 23, 2002


HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

6

OCT 31 2002

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**