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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

JPMORGAN CHASE BANK N.A., as acquirer of certain assets of WASHINGTON MUTUAL BANK from the FEDERAL DEPOSIT INSURANCE CORPORATION as acting receiver,

Plaintiff,

- against -

MANDY BAUER, a/k/a MANDY R. BAUER, a/k/a MANDY ROFFE BAUER, individually and d/b/a LLOYD AND MANDY BAUER DDS,

Defendants.

Index No.: 2868/10
Motion Seq. No.: 01
Motion Date: 06/29/10
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Memorandum of Law in Support of Motion for Summary Judgement	2
Affidavit in Opposition	3
Affirmation in Reply	4

In an action for monies due and owing under a certain Business Line of Credit ("BLC") and the absolute, personal, unconditional and continuing guarantee thereunder, the plaintiff, JPMorgan Chase Bank N.A., as acquirer of certain assets of Washington Mutual Bank from the Federal Deposit Insurance Corporation as acting receiver, moves, pursuant to CPLR § 3212, for an order granting summary judgment on the grounds that defendant Mandy Bauer d/b/a Lloyd and Mandy Bauer DDS ("DDS") is liable for amounts due and owing under said BCL and that

individual defendant Mandy Bauer ("Bauer") is liable under said BLC's Personal Guarantee of the obligations of defendant DDS. Defendants oppose plaintiff's motion.

With respect to plaintiff's motion, the complaint alleges and plaintiff's proof shows that, on or about June 28, 2006, defendant DDS made, executed and delivered to Washington Mutual, and now plaintiff J.P. Morgan Chase Bank N.A. as acquirer, a BLC in writing, dated on that day, wherein and whereby defendant DDS promised to pay to the order of Washington Mutual, and now plaintiff J.P. Morgan Chase Bank N.A. as acquirer, the principal sum of $50,000.00 with interest on the unpaid principal balance at a rate per annum equal to rate of Prime plus 2.25% and a default rate equal to the rate of Prime plus 9.00% with late charges at the rate of 5.00% of each payment due. The complaint further alleges that the BLC was personally guaranteed by defendant Bauer. Lastly, the complaint alleges that the defendant DDS was in default on the BLC by failing to pay each and every installment due under said BLC since August 28, 2009 and each and every month thereafter. Thereafter, defendant Bauer was required to make payments to plaintiff under the terms of the BLC Personal Guarantee. Defendant Bauer defaulted under the BLC Personal Guarantee by failing to pay each and every installment due under the Note and the Note Personal Guarantee beginning August 28, 2009 and continuing each and every month thereafter. Since defendants' defaults, no payments upon the obligations of the defendants have been made in accordance with the BLC and BLC Personal Guaranty. Based upon said defaults, defendants are liable to plaintiff in the principal sum of $65,410.23, accrued interest in the sum of $2,417.73, plus interest on $65,410.23 at a rate of Prime plus 9.00% from January 20, 2010, together with late charges in the sum of $1,754.13.

Plaintiff submits that the defendants appeared in the action on March 3, 2010 and

submitted an answer consisting of general denials and eight boilerplate affirmative defenses. Plaintiff further submits that defendants' answer did not raise any meritorious defenses or triable issues of material fact. General denials in a defendant's answer are insufficient to raise a triable issue of fact to defeat a plaintiff's motion for summary judgment. *See New York Higher Education Service Corp. v. Ortiz*, 104 A.D.2d 684, 479 N.Y.S.2d 910 (3d Dept. 1984).

Plaintiff satisfied its initial burden of establishing its entitlement to judgment as a matter of law by submitting proof of the existence of the underlying obligation, the guarantee executed by defendant Bauer, the unconditional terms of repayment and defendants' failure to make payment in accordance with their terms. *See Famolaro v. Crest Offset, Inc.*, 24 A.D.3d 604, 807 N.Y.S.2d 387 (2d Dept. 2005). *See also Superior Fidelity Assurance, Ltd. v. Schwartz,* 69 A.D.3d 924, 893 N.Y.S.2d 256 (2d Dept. 2010); *Verela v. Citrus Lake Development, Inc.,* 53 A.D.3d 574, 862 N.Y.S.2d 96 (2d Dept. 2008). The burden then shifts to defendants DDS and Bauer to demonstrate by admissible evidence the existence of a triable issue of fact with respect to a *bona fide* defense. *See Famolaro v. Crest Offset, Inc, supra; MDJR Enterprises, Inc. v. LaTorre*, 268 A.D.2d 509, 703 N.Y.S.2d 54 (2d Dept. 2000); *Quest Commercial, LLC v. Rovner*, 35 A.D.3d 576, 825 N.Y.S.2d 766 (2d Dept. 2006).

In opposition, defendants DDS and Bauer claim that the BCL application annexed as Exhibit A to the affidavit of Shirley White in support of plaintiff's motion is not an application upon which the Court can rely because "(a) the description of product or service on the application lists 'wholesale caterers & food (selling food at mass volume).' I am not presently, nor have I ever in the past, engaged in a business in the food industry, I am a dentist; (b) the social security number listed for me in the Business Credit Application is not mine; (c) the

applicant signature, which appears in multiple places throughout application, is not my signature; and (d) the application has been altered as the tax ID number has been crossed out and a new one filled in."

Plaintiff replies that defendants' opposition does not contain admissible evidence sufficient to create a triable issue of material fact and accordingly summary judgment is warranted. Plaintiff argues that "[w]hile not quite coming out and saying so, Defendants seem to be alleging in their reply-at the eleventh hour-that they are not the defendants in this case. They claim that the social security number is not accurate, the tax id number has been crossed out, the signature is not theirs, and finally, that because they are dentists they could never have been involved in a wholesale catering business. None of these conclusory statements are supported with competent admissible evidence."

Although summary judgment is a drastic remedy (*see Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974), nevertheless, a "court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*see Assing v. United Rubber Supply Co., Inc.*, 126 A.D.2d 590, 511 N.Y.S.2d 31 (2d Dept. 1987); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978)) and where there is nothing left to be resolved at trial, the case should be summarily decided. *See Andre v. Pomeroy, supra* at 364.

In conclusion, plaintiff has established its entitlement to summary judgment against defendants DDS and Bauer for the amounts due and owing pursuant to the BLC and the BLC Personal Guarantee. Defendants DDS and Bauer have failed to raise an issue of fact or viable defense to the action. *See Famolaro v. Crest Offset, Inc., supra; Bankers Trust of Rockland County v. Keesler*, 49 A.D.2d 918, 373 N.Y.S.2d 637 (2d Dept. 1975).

Accordingly, it is hereby

ORDERED, that the motion by plaintiff for summary judgment against defendants DDS and Bauer, jointly and severally, in the sum of $65,410.23, accrued interest in the sum of $2,417.73, plus interest on $65,410.23 at a rate of Prime plus 9.00% from January 20, 2010, together with late charges in the sum of $1,754.13 is hereby **GRANTED**.

ORDERED, that the motion by plaintiff awarding plaintiff the sum of $4,061.50 in attorneys' fees plus costs and expenses as may be fixed by the clerk is hereby **GRANTED**.

Settle clerk's judgment.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.
XXX

Dated: Mineola, New York
September 7, 2010