

TD Banknorth, NA v. Norwich River, LLC, 120808 CTSUP, CV075008138

TD Banknorth, NA

v.

Norwich River, LLC et al.

CV075008138

Superior Court of Connecticut, New London

December 8, 2008

Caption Date: December 7, 2008

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Martin, Robert A., J.

Opinion Title: MEMORANDUM OF DECISION RE MOTION FOR SUMMARY JUDGMENT

[#198]

FACTS

On November 13, 2007, the plaintiff, TD Banknorth, NA. (TD Banknorth), filed the present foreclosure action against the defendants, Norwich River, LLC (Norwich River) and Matthew P. Barach (Barach).^[1] In its complaint TD Banknorth alleges the following facts. At all times relevant to the foreclosure action, Norwich River owned real property situated at 285 Taftville-Occum Road, Norwich, Connecticut. By way of two separate lines of credit notes, both dated June 19, 2006, Norwich River promised to pay to the order of TD Banknorth the principal sums of \$2,000,000 and \$2,300,000, payable with interest thereon. On or about June 19, 2006, Norwich River, to secure the obligations arising under the \$2,000,000 and \$2,300,000 notes, executed and delivered to TD Banknorth an open-end mortgage and security agreement encumbering the property situated at 285 Taftville-Occum Road, Norwich, Connecticut. TD Banknorth remains the owner and holder of the mortgage and the notes. To further secure the obligations under the notes, Barach executed and delivered to TD Banknorth a guaranty agreement, dated June 19, 2006, unconditionally guaranteeing the obligations of Norwich River to TD Banknorth under the notes. Pursuant to the terms of the notes, Norwich River is obligated to pay monthly installments of interest thereunder. However, on July 19, 2007, and each month thereafter, Norwich River has failed to tender the monthly payments of interest due under the notes. Accordingly, pursuant to the terms of the notes, Norwich River is in default and TD Banknorth has exercised its option to declare the entire principal and interest balance on the notes due and payable. Demand for payments of the amounts due has been made upon Norwich River, and Barach as the guarantor, however, such payment has been refused. Therefore, TD Banknorth seeks various remedies, including foreclosure of the mortgage and money damages.

On June 23, 2008, TD Banknorth filed a motion for summary judgment, as to liability on the complaint against Norwich River and Barach, on the ground that there are no genuine issues as to any material fact regarding TD Banknorth's ownership of the notes and mortgage, Norwich River's default on the payments on the notes as the borrower, and Barach's liability as the guarantor of the notes.

Thereafter, on July 29, 2008, this court (Martin, J.) granted a motion for summary judgment, that was filed on March 11, 2008, as to liability against Norwich River. Specifically, this court found that TD Banknorth is the owner of the notes and mortgage at issue and that Norwich

River, as borrower, has defaulted thereunder. Accordingly, the present decision, regarding the motion for summary judgment filed on June 23, 2008, will only address Barach's liability, as the alleged guarantor of the notes.

DISCUSSION

"Practice Book §17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Cadlerock Joint Venture II, L.P. v. Milazzo*, 287 Conn. 379, 390, 949 A.2d 450 (2008). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." *Nolan v. Borkowski*, 206 Conn. 495, 500, 538 A.2d 1031 (1988).

I

Prima Facie Case for Liability Under a Guaranty Agreement

"[A] guarant[y] is a promise to answer for the debt, default or miscarriage of another . . . It is simply a species of contract." (Citations omitted; internal quotation marks omitted.) *Regency Savings Bank v. Westmark Partners*, 59 Conn.App. 160, 164, 756 A.2d 299 (2000). "More specifically, a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, of another person in the event of default." 38 Am.Jur.2d Guaranty §1. "Where the guaranty is absolute-that is, subject to no condition except the default of the principal debtor . . . the guarantor is primarily liable for the debt. In that event, the creditor may maintain an action against the guarantor immediately upon default of the debtor, without demand upon the debtor for payment, and without first proceeding against the debtor." 38 Am.Jur.2d Guaranty §105.

"To establish a prima facie case of entitlement to recover on [a] [g]uaranty . . . plaintiff must show (1) that it is owed a debt from a third party; (2) that defendant made a guaranty of payment of the debt; and (3) that the debt has not been paid by either the third party or defendant. *Chase Manhattan Bank, N.A. v. Harris*, 899 F.Supp. 64, 67 (Conn. 1995)." (Internal quotation marks omitted.) *North American Bank & Trust Co. v. Biebel*, Superior Court, judicial district of New Britain, Docket No. CV 03 0522575 (August 16, 2005, Berger, J.) (40 Conn. L. Rptr. 59). See also *Community Economic Dev. Fund v. King*, Superior Court, judicial district of Hartford, Docket No. CV 020813315 (September 19, 2003, Berger, J.).

(i)

Plaintiff Owed Debt From Third Party

In order to succeed on its motion for summary judgment as to liability against Barach, the guarantor, TD Banknorth must first establish that it is owed a debt from Norwich River, the borrower. "[T]he liability of the guarantor is based on the liability of the debtor." *Cadle Company of Connecticut, Inc. v. C.F.D. Dev. Corp.*, 44 Conn.App. 409, 413, 689 A.2d 1166 (1997). "[S]ince the guaranty contract secures a principal or primary obligation, the liability of the guarantor also

depends upon a construction and application of the primary contract." 38 Am.Jur.2d Guaranty §69.

As previously stated, on July 29, 2008, this court (Martin, J.), granted a motion for summary judgment as to liability against Norwich River. In its decision, this court specifically found that TD Banknorth is the owner of the notes and mortgage at issue and that Norwich River, as borrower, has defaulted on the installment payments by failing to pay certain sums due under the notes. Accordingly, based on this court's prior decision, it has been established that TD Banknorth is owed a debt from Norwich River, the borrower under the notes.

(ii)

Defendant Made a Guaranty of Payment of the Debt

TD Banknorth must also establish that Barach made a guaranty of payment of the debt that is owed by Norwich River, in order to succeed on its motion for summary judgment. "As the party moving for summary judgment, the [movant] is required to support its motion with supporting documentation . . ." *Heyman Associates No. 1 v. Ins. Co. of Pennsylvania*, 231 Conn. 756, 796, 653 A.2d 122 (1995). In support of its motion, TD Banknorth has submitted properly authenticated copies of the guaranty agreement between Barach and TD Banknorth, the lines of credit notes, and the open-end mortgage and security agreement.^[2]

"[A] guaranty contract defines the obligations and rights of both the guarantor and the creditor, and contains any express conditions on the guarantor's liability. Thus, the liability of a guarantor depends primarily on the construction and application of the guaranty contract." 38 Am.Jur.2d Guaranty §69. "[O]ur Supreme Court has stated that where the guaranty of a note [is] unconditional or absolute 'default of the maker or endorser to pay the note promptly . . . [causes] the guarantor [to become] liable to the holder, and the relation of debtor and creditor [is] at once established between the guarantor and the holder of the note,' (Internal quotation marks omitted.) *Perry v. Cohen*, 126 Conn. 457, 459, 11 A.2d 804 (1940)." (Internal quotation marks omitted.) *First Union National Bank v. Rath*, Superior Court, judicial district of New Haven, Docket No. CV 99 0431811 (December 29, 2000, Celotto, J.T.R.).

The guaranty agreement executed between Barach, the guarantor, and TD Banknorth, the lender, states that TD Banknorth agrees to lend to Norwich River the principal sums of \$2,000,000 and \$2,300,000, evidenced by the lines of credit notes and secured by the loan agreement and the open-end mortgage and security agreement. The guaranty agreement further states that TD Banknorth requires that, as a condition precedent for making the loan to Norwich River, Barach enter into the guaranty to "secure payment" of the loan and the "performance and compliance" of Norwich River's obligations under the loan. The "Guaranty" clause therein specifically states in relevant part: "[Barach] hereby irrevocably and unconditionally guaranties to [TD Banknorth] the following . . . (a) full, punctual, and prompt payment of all sums payable under the terms of the Loan Documents; and (b) the performance of all of [Norwich River's] obligations under the [l]oan [d]ocuments . . ." The extent of this guaranty is further explained in the "Primary Nature of Guaranty" clause, which provides in relevant part: "The liability of [Barach] . . . is present, absolute, unconditional, continuing, primary, direct, and independent of the obligations of [Norwich River]. [TD Banknorth] shall not be required to pursue any other remedies before invoking the benefits of this Guaranty . . ."

It is apparent, from the language of the guaranty agreement, that Barach unconditionally guaranteed the payment of Norwich River's debt upon default. Specifically, Barach unconditionally guaranteed, to TD Banknorth, the full and prompt payment of all sums payable under the terms of the loan documents and the performance of all of Norwich River's obligations pursuant thereto. Upon the default, Barach became primarily liable to *TD Banknorth* for the payment of the debt. Since Barach's guaranty is unconditional, the default of Norwich River to pay the note promptly caused Barach to become liable to TD Banknorth, and the relation of debtor and creditor was at that instance established between Barach and TD Banknorth.

Furthermore, in his answer to the complaint, filed on April 11, 2008, Barach admitted that to secure the \$2,000,000 and \$2,300,000 notes he executed and delivered to *TD Banknorth* a guaranty agreement unconditionally guaranteeing the obligations of Norwich River to TD Banknorth arising under the notes, mortgage, and loan documents executed in connection therewith.^[3]

Based on the aforementioned, the court finds that *TD Banknorth* has established that Barach made a guaranty of payment of the debt that is owed by Norwich River.

(iii)

Debt Has Not Been Paid by Either the Third Party or Defendant

Lastly, in order to succeed on its motion for summary judgment as to liability against Barach, TD Banknorth must establish that the debt currently due and owing, and personally guaranteed by Barach, has not been paid by either Norwich River or Barach. The various pleadings and documentary evidence submitted establish that neither Norwich River nor Barach has paid the outstanding debt owed to TD Banknorth under the loan documents. Also, neither party contests this fact in support or in opposition to this motion. Specifically, Barach, in his memorandum in opposition to the motion for summary judgment, states that he "does not dispute that a technical default exists under the loan documents." Accordingly, the court finds that TD Banknorth has established that the debt has not been paid by either Norwich River nor Barach, thereby establishing the final element to its prima facie case for Barach's liability under the guaranty agreement. Therefore, the court finds that there is no genuine issue as to any material fact regarding Barach's liability as a guarantor, and that TD Banknorth is entitled to judgment as a matter of law on the issue of liability. Furthermore, the court finds that Barach has failed to present evidence that demonstrates the existence of some disputed factual issue, and has failed to prove any affirmative defense.

CONCLUSION

Based on the foregoing, the court hereby grants TD Banknorth's motion for summary judgment, as to liability, against Barach.

Martin, J.

Footnotes:

[1]. The other named defendants include: Chace Building Supply of CT, Inc., Viking Kitchen Cabinets, LLC, Native Sons, LTD, Lyon & Billard Company, NLC Enterprises, Coventry Lumber, Inc., Willie's Quality Installations, LLC, Delia Mechanical, LLC, and United Rentals.

[2]. The "Governing Law" clause of the guaranty agreement provides: "This Guaranty shall be enforced and construed in accordance with the laws of the State of Connecticut, and Guarantor waives the right to be sued elsewhere."

[3]. An admission in a defendant's answer is a judicial admission conclusive on the defendant, and causes the matter admitted to be not in issue. See *Jones Destruction, Inc. v. Upjohn*, 161 Conn. 191, 199, 286 A.2d 308 (1971).