2010 WL 4108491
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Superior Court of New Jersey, Appellate Division.

JP MORGAN CHASE BANK, Plaintiff-Respondent,
v.
UNIVERSITY DONUT, INC., Defendant,
and
Abdul C. Jaleel and Mazeena Jaleel, Defendants-Appellants.

Argued March 1, 2010.
|
Decided April 7, 2010.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7080-07.

Attorneys and Law Firms

Abdul C. Jaleel and Mazeena Jaleel, appellants, argued the cause pro se.

David Fornal argued the cause for respondent (Maselli Warren, attorneys; Paul J. Maselli, of counsel; Kimberly Pelkey Sdeo and Mr. Fornal, on the brief).

Before Judges RODRÍGUEZ and YANNOTTI.

Opinion

PER CURIAM.

***1** This matter comes before us for the second time. Abdul and Mazeena Jaleel (Guarantors) appeal from the June 4, 2009 final judgment, following a bench trial, in favor of plaintiff JP Morgan Chase Bank, N.A. (Bank) for $28,926.99.[1] This judgment is based on the Guarantors' personal guarantee of the obligations of University Donuts, Inc. (UDI), a New York Corporation. We affirm.

[1] This amount consists of $15,000 balance due, plus $5,246.99 interest, $1,180 costs, and $7,500 in attorney's fees.

These facts are not contested. The Guarantors purchase UDI in 1997 for $37,000 for the purpose of operating a donut shop. One year later, the Bank extended a $25,000 line of credit to UDI. The Guarantors agreed to repay this obligation if the loan went into default.

The loan documents entitle the Bank to recover all outstanding principal, interest, attorney fees and costs. The Guarantors individually agreed to the terms of the guaranty evidenced by their signatures. In particular, the credit application provided:

> [t]his guaranty shall continue in effect unless and until I give written notice to the bank terminating my future liability under this guaranty in which event I recognized that this guaranty shall continue in effect with respect to any and all obligations incurred prior to the time the bank receives such notice.

The application also provided that all notices must be received by certified mail, return receipt requested and addressed to the Bank. Abdul Jaleel signed this credit application as "President."

The Credit Line Agreement (Agreement), which was provided to the Guarantors after the credit line was approved, specified that UDI could not transfer or assign any of its rights or obligations without first obtaining written consent of the Bank. The Agreement also provided that it was governed by, construed and interpreted in accordance with New York law.[2]

[2] It is therefore clear that New York law governs the contract.

In May 2006, the Guarantors agreed to sell their shares in UDI for $24,000 to Liaqat Ali Khan, and Ahmad W. Niazi (collectively the "Buyers"). The Bill of Sale held the Buyers responsible for all taxes, violations or any dues of the business accruing after May 5, 2006. The Bill of Sale was prepared by a New York notary. The closing took place without lawyers representing either side.

The Guarantors owed $2,792.14 to the Bank at the time of the sale. On May 4, 2006, after the closing, the Guarantors and the Buyers visited the Bank's branch located next to their business and informed an employee of the sale of

the business. The Guarantors told the employee that they wished to terminate the line of credit. The Guarantors provided a letter on UDI letterhead to the Bank employee requesting the Bank to continue conducting business with UDI and to maintain the credit line account. The letter in its entirety states:

> **[w]**e, Abdul Cader Mohamed Jaleel, and Mazeena U. Jaleel certify as the out going board members in the capacity of president and the director of the above corporation that from May 2nd 2006 we were replaced by the incoming Board members Mr. Liaqat A. Khan, as the president and Ahamad W. Niazi, as the director of the above named corporation. They will be responsible for maintaining the accounts i.e. depositing and withdrawal of the money and all other related activities related to the bank.
>
> ***2** Therefore, please do the needful enabling them to continue to do business with you as you provided to us all these days.
>
> We appreciate your kind cooperation.
>
> Thank you,
>
> Yours truly,

/S/	/S/
Abdul C. Jaleel	Khan, Liaqat
(out going president)	(in coming president)
/S/	/S/
Mazeena U. Jaleel	Niazi Ahamad W
(out going director)	(Incoming Director)

The Bank employee instructed the Guarantors to surrender their ATM card. The Buyers received a new ATM card. The Guarantors paid off $2,792.14 in cash, the existing balance on the line of credit. They were provided a receipt. The receipt does not indicate that the Guarantors' personal obligation was terminated. Abdul testified that he instructed the Bank employee to terminate the Guarantors' personal guarantee. The Guarantors believed that the line of credit was terminated. The Guarantors did not withdraw any funds against the credit line following this date.

In December 2006, the credit line went into default. In August 2007, the Bank sued UDI and the Guarantors seeking to collect the balance due on the line of credit. The Guarantor answered.[3] They denied that they owned the corporation, which they sold to the Buyers. Further, the Guarantors alleged that they "clearly told the bank employees to relieve us of any responsibilities to this account" and they presented the bank with a document signed by the buyers stating that "they will be responsible for maintaining the accounts."

[3] To our knowledge, the Guarantors did not file any claim against the Buyers.

The Bank moved for summary judgment and supported this motion with, among other items, a copy of the Guarantors' personal guarantee, which provided that the guarantee would continue until the Guarantors gave written notice to the Bank terminating their future liability pursuant to the guarantee. In their opposition to the summary judgment motion, the Guarantors, still acting pro se, submitted a certification which essentially tracked their answer. They alleged that they paid off the loan balance, surrendered their ATM card and "requested the bank to relieve [us] from all responsibilities related to the business accounts." They attached proof that they had sold the business on May 2, 2006, as well as a receipt for $2,792.14, which they contended was the balance remaining when they asked the Bank to transfer the line of credit to the Buyers. They also attached a written notice, signed by the Guarantors and the Buyers, attesting that "from May 2nd 2006," the Guarantors were replaced by the Buyers, who would be "responsible for maintaining the accounts." The Bank submitted a responding certification to the effect that the Bank did not

"receive written notice of termination of the [a]ccount" or "written revocation of the guarantees on this [a]ccount."

The judge granted the Bank's summary judgment motion and entered judgment against UDI and the Guarantors. The Guarantors appealed to us. We reversed the grant of summary judgment against the Guarantors and remanded, concluding that there existed disputed issues of fact. *JP Morgan Chase Bank, N.A. v. University Donut, Inc., et al,* No. A-4724-07T3 (App.Div. Feb.9, 2009).

***3** At a bench trial, a different judge heard the testimony of two witnesses, Ruth Pineda, an employer of the bank who testified from records, and Abdul Jaleel. The judge found that nothing on the substitute payment receipt or letter provided to the Bank expressly terminated the line of credit. The judge noted that the credit application stated that the credit line would remain in effect unless the Guarantors provided written notice to the Bank terminating their future liability. However, the judge did not find that the Bank was entitled to the full amount claimed. Because Pineda had no actual knowledge, the judge found:

> Well, what the [Bank] has shown is that there is money that is due and owing to them. What the [Guarantors] have shown is that they went into a bank, they spoke with a cashier, they paid $2,792.14, but they didn't show that that payment was considered by the bank as the final payment. That may have been the balance due on that date.
>
> The fact of the matter is that if [the Guarantors] had had an attorney, the attorney would have made certain that the corporate entity, [UDI] was ended or terminated, that the Bill of Sale says that the assets went over to the [Buyers] but apparently I am satisfied from the testimony that [UDI] went over to this, these purchasers and that these purchasers may have used the line of credit for [UDI] to enrich themselves. I'm sorry about that. I think that's a terrible thing. That's not the bank's fault. I don't think that [the Guarantors], with all due respect, acted in a business like manner in terminating their obligation. So it may very well be that people under the [UDI] name took out credit from this credit line afterwards. Nothing on the substitute payment receipt, nothing on the other form says this terminates the credit line.

Following the bench trial on remand, Guarantors appeal again. They contend:

> A) WE ARE INNOCENT, BECAUSE WE FULFILLED ALL OUR OBLIGATIONS.
>
> B) THE TRIAL COURT JUDGE DID NOT CONSIDER THE APPEAL COURT JUDGE'S OPINION.
>
> C) THE BANK DID NOT PROVIDE THE EVIDENCE THAT THE DEFENDANTS REPEATEDLY REQUESTED.
>
> D) THE CASE WAS AGAINST TWO DEFENDANTS; ONLY ONE WAS HEARD, WHILE THE OTHER WAS BARRED.
>
> E) THE WITNESS BROUGHT BY THE PLAINTIFF WAS NOT RELIABLE.
>
> F) THERE ARE A LOT OF OMISSIONS IN THE DEFENDANT'S PART OF THE TRANSCRIPT.
>
> G) ALSO SOME OTHER FACTORS CONVINCE WE ARE INNOCENT.

We understand that the Guarantors thought that they had legally terminated their guarantee. However, it is clear to us that they did not do so according to documents that established their obligation with the Bank.

We note at the outset our agreement with the judge that the transfer of the business was not a sale of assets by UDI to the Buyers. Rather, it was a sale of UDI shares by Guarantors to Buyers. Thus, UDI continued to exist after the sale. The credit line was extended to UDI. Therefore, there was nothing improper about it being used by the Buyers in connection with the business. The Guarantors thought they had terminated their personal guarantee upon the sale, but they failed to request the termination in writing. More importantly, they failed to follow up on their oral request or obtain a *written* termination of their guarantee from the Bank. Thus, unwittingly, they became personal guarantors of the Buyers.

***4** A guaranty agreement is a contract and should be construed like a contract to give effect to the parties' intentions. *Fehr Bros. v. Scheinman,* 121 *A.D.2d* 13, 15, 509 N.Y.S.2d 304 (N.Y.App.Div.1986). A written guarantee which specifically provides that it can be terminated only

upon written notice cannot be waived except in writing signed by the person against whom enforcement of the waiver is sought. *N.Y. Gen. Oblig. Law* 15-301[4] (2010); *Marine Midland Bank, N.A. v. Bob Daubney Bowling Enters., Inc.,* 136 *A.D.2d* 963, 963-64, 524 N.Y.S.2d 945 (N.Y.App.Div.1988). Moreover, personal guarantees issued in connection with loans to a corporation may survive repayment of the corporate indebtedness where the guarantees provide that they are continuing unless terminated by written notice. *Chem. Bank v. Sepler,* 60 *N.Y.2d* 289, 291, 469 N.Y.S.2d 609, 457 N.E.2d 714 (N.Y.1983).

A creditor may waive the written notice requirement. *Alside Aluminum Supply Co. v. Berliner,* 32 *A.D.2d* 731, 732, 302 N.Y.S.2d 180 (N.Y.App.Div.1969). In particular, where a creditor is aware of the guarantor's intent to terminate its obligation, acquiesced therein and provides the guarantor assurances that the agreement is no longer in effect, such conduct may provide a triable issue of fact as to whether the requirement was waived. *Ibid.*

However, that did not occur here. The judge so found. The Guarantors concede that no written notice was sent to the Bank. They argue that the conduct of the Bank's employee should be construed as a waiver of the written notice requirement. Trial court's factual findings are binding on appeal when supported by substantial, credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co.,* 65 *N.J.* 474, 484, 323 A.2d 495 (1974). Thus, we should not disturb the findings of the trial court unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Ibid.*

Moreover, the underlying agreement here states that, "[a]ll notices must be received by certified mail, return receipt requested, addressed to the [Bank] ..." Pursuant to New York law, only written notice will suffice absent conduct inducing reliance that the provision is waived. *Chem. Bank, supra,* 60 *N.Y.2d* at 291, 469 N.Y.S.2d 609, 457 N.E.2d 714; *Alside Aluminum, supra,* 32 *A.D.2d* at 731, 302 N.Y.S.2d 180. Abdul Jaleel acknowledged at trial that he signed this written agreement and acknowledged that he did not provide the Bank with written notice.

Moreover, the letter provided to the Bank on the day the Guarantors paid off the then remaining balance did not state that the Guarantors were terminating their obligation. The letter stated that the new Board Members would be responsible for maintaining the accounts. Further, the letter requested that the Bank continue to do business with the Buyers as the Bank previously did with the Guarantors. Consequently, this letter did not indicate the Guarantors' intention of terminating their obligation and did not assign their obligation to the Buyers in accordance with the requirements set forth in the Agreement.

***5** Finally, the Guarantors' proof of the payoff of the remaining balance is insufficient to support a finding that the Bank "waived" their obligation. The receipt does not indicate an acknowledgment from the Bank employee that the personal guarantees were terminated. Moreover, the fact that the Guarantors' debit card was replaced with a debit card issued to the Buyers supports a finding that the Bank employee considered merely a change in ownership of the corporation, not a termination of the personal guarantee.

The Guarantors also contend that the judge did not take into consideration our previous decision in reaching his holding. They argue that they were not provided the proper opportunity to litigate the issue and the trial was conducted in a hasty manner. We disagree.

Our previous decision did not make a determination on the contested factual disputes. Rather, we concluded that the Guarantors were entitled to a trial on the merits based on the evidence in the record. We noted that the proofs submitted by the Guarantors "could" support a finding that the Guarantors gave the Bank's employee clear notice that they intended to pay off the balance of the loan and terminate their personal obligations and the Bank employee led the Guarantors to believe that their actions were sufficient to terminate their obligation. We did not compel that determination. Instead, it was up to the judge as fact finder to make this determination. The judge's findings of facts and conclusions of law are supported by the evidence.

The Guarantors contend that the judge precluded Mazeena Jaleel from testifying at trial. This contention is refuted by the record. The judge asked Abdul, "who is going to testify, you?" Abdul did not indicate that Mazeena was also going to testify. Nowhere in the record did Mazeena request to testify.

The Guarantors contend that the trial record does not contain evidence that the subsequent transactions of the Buyers writing checks against the credit line occurred. The judge acknowledged the Guarantors' allegations that the Bank failed to present evidence to substantiate how it calculated the total amount in default. In light of the Bank's failure to present such evidence, the judge found that the Bank was not entitled to the full amount sought, $22,395.84. The judge noted that P-4, which displayed the amount owed, was an official business record. However, the judge was not satisfied that the Bank met its burden in proving how it calculated the amount. Consequently, the judge entered judgment in favor of the Bank for a reduced amount, $15,000, plus interest.

We will not disturb a trial court's award of damages where the findings are supported by sufficient, credible evidence in the record. *Rova Farms Resort, supra,* 65 *N.J.* at 483-84, 323 A.2d 495. The judge concluded that although the Bank's witness did not testify as to how the amount owed was calculated, the judge found that the records presented at trial constituted business records and were sufficient to establish that the Borrower was in default. These records provide credible evidence that there were checks written against the account.

***6** The Guarantors further argue that the testimony of Pineda, the Bank's witness, was not trustworthy. They based this allegation on the fact that the judge noted that Pineda did not have personal knowledge regarding the underlying transaction. The Guarantors misunderstood the judge's findings. The judge did not find the testimony of Pineda incredible. Instead, the judge did not give much weight to her testimony regarding the amount due because she did not address how the Bank calculated the amount due. However, the record contained business records that were sufficient, credible evidence to support a finding that the Buyers defaulted on the credit line.

In addition, the Guarantors contend that there is a discrepancy between the trial transcript and the actual audio recording. The Guarantors therefore provided this court with the "missing words" in its brief. The Guarantors argue that their claim can be resolved by listening to the audio. Again, we disagree.

The transcript submitted does not preclude this court from properly considering the issues. *See Johnson v. Schragger, Lavine, Nagy & Kransy,* 340 *N.J.Super.* 84, 87 n. 3, 773 A.2d 1164 (App.Div.2001). Although there are some notable "blanks" contained in the record, the record does not contain "inaudible" indicating that the court below was unable to understand the Guarantors' responses.

This decision does not preclude an action by the Guarantors against the Buyers based on the Bill of Sale. Payment of the line of credit for charges incurred after the May 4, 2007 closing, is in the first instance, the Buyers' obligation.

Affirmed.

All Citations

Not Reported in A.2d, 2010 WL 4108491