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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

NATIONAL AUTO DEALERS EXCHANGE, L.P. d/b/a Manheim New Jersey and Manheim Automotive Financial Services, Inc., Plaintiffs–Respondents,
v.
Michael SAUBER and Vantage Motors, Inc., Defendants,
and
Cindy S. Sauber, Defendant–Appellant.

Argued Sept. 29, 2010.
|
Decided Oct. 3, 2011.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, L–1583–08.

Attorneys and Law Firms

David Fornal argued the cause for appellant (Maselli Warren, P.C., attorneys; Mr. Fornal, of counsel and on the brief, Kimberly Pelkey Sdeo, on the brief).

Grace Strom Power argued the cause for respondents (Sterns & Weinroth, attorneys; Robert P. Zoller and Anthony E. Bush, of counsel and on the brief; Ms. Power, on the brief).

Before Judges R.B. COLEMAN, LIHOTZ and J.N. HARRIS.

Opinion

PER CURIAM.

***1** Defendant Cindy S. Sauber[1] appeals from a January 4, 2010 order granting summary judgment in favor of plaintiffs National Auto Dealers Exchange, L.P. (NADE), d/b/a Manheim New Jersey (MNJ) and Manheim Automotive Financial Services, Inc. (MAFS).[2] She also appeals from the denial of her cross-motion for summary judgment. At issue is the enforceability of a personal guarantee requested by NADE and given by Cindy in connection with an application by her husband and his used-automotive retail sales business for a substantial increase in the line of credit for the business.

1 We refer to the Saubers by their first names for the sake of clarity.

2 A separate order granting summary judgment to plaintiffs against defendants Michael Sauber and Vantage Motors, Inc. was entered and filed on December 3, 2009. Michael and Vantage have not appealed from the order.

Cindy contends NADE required her to serve as a personal guarantor solely because of her marital status and without reliance upon her creditworthiness. She argues the personal guaranty is void under the Equal Credit Opportunity Act (ECOA), 15 *U.S.C.A.* § 1691 to –1691f and its regulations, 12 *C.F.R.* § 202. NADE contends the motion court properly found that plaintiffs committed no violation of the ECOA when it required Cindy to sign as a personal guarantor because property Cindy jointly owned with her husband served as a basis for NADE's increase to the line of credit for the husband's business. Because questions of credibility and intent pervade, we conclude the motion court should have denied NADE's motion for summary judgment. It appropriately denied Cindy's cross-motion for summary judgment.

The relevant facts are derived from the motion record. We view these facts in a light most favorable to the non-moving party, in this case Cindy. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N .J.* 520, 523 (1995). NADE conducts wholesale automotive auctions, providing for the sale and purchase of used vehicles on a wholesale basis. Vantage Motors, Inc. (Vantage) is a used-automotive retail sales business of which defendant Michael Sauber is the president and principal. In 1994, NADE extended a business line of credit to Vantage, allowing it to make purchases through financing. Initially, Vantage was granted a line of credit of $750,000, and in 1996, the line of credit was increased to $950,000. In 1998, Vantage applied for another increase, seeking to double its line of credit. On this occasion, without having undertaken any analysis of Cindy's creditworthiness, NADE required the personal guaranties from both Michael and Cindy.

According to her certification, Cindy was essentially a stay-at-home mother, raising the couple's children while

Michael was the primary source of income for the family. In late 1996, Cindy formed her own boutique business, which she operated for several years, before it closed. That business was never profitable, and Cindy did not draw a salary. Cindy was never an officer or shareholder of Vantage and was not otherwise associated with Vantage. She did not apply jointly with her husband for the line of credit from NADE and did not recall signing any documents related to the transaction; however, she acknowledges that her signature appears on the September 29, 1998 Subordination Agreement and Individual Guaranty produced in this litigation. In his certification, Michael states that NADE provided him with a personal guaranty to be signed by Cindy and that NADE would not extend credit to Vantage in 1998 unless Cindy signed as a personal guarantor. Accordingly, he told Cindy she needed to sign and she complied.

***2** Under the terms of the Individual Guaranty, Cindy unconditionally and absolutely guaranteed the full and prompt payment of any obligation or indebtedness of any kind of Vantage to MAFS, NADE's corporate affiliate. Pursuant to the Subordination Agreement, the payment of all obligations of Vantage to Cindy are postponed and subordinated to payments to MAFS.

NADE admits it requested Cindy's personal guaranty. It asserts it did so because Vantage's 1998 application relied on Michael and Cindy's jointly-owned home "as a major component of [Michael's] net worth." NADE insists requesting Cindy's personal guaranty does not constitute discrimination based on marital status which is prohibited by 15 *U.S.C.A.* § 1691(a)(1).

On June 28, 2008, almost ten years after the Individual Guaranty was executed, plaintiffs filed a verified complaint against defendants alleging breach of contract, fraud, book account and seizure of collateral purchased on Vantage's floor plan line of credit. On that date, the court entered an order to show cause for summary action, which it subsequently vacated, following a series of oral arguments. In place of the order to show cause, the court ordered the Saubers to turn over any and all net proceeds from the sale of real property owned by them, either individually or jointly, to be held in escrow pending adjudication of the complaint filed in this action. Defendants' motion for leave to appeal from that interlocutory order was denied.

Thereafter, Cindy filed her answer and a counterclaim that asserted the requirement of her personal guaranty in connection with Vantage's 1998 request for a line of credit increase violated the ECOA. On October 9, 2009, plaintiffs filed a motion for summary judgment and Cindy cross-moved for partial summary judgment. On the November 13, 2009 return date, Michael and Vantage indicated they did not oppose plaintiffs' motion. Accordingly, plaintiffs' motion was granted; the judgment against Michael and Vantage was memorialized in an order dated December 3, 2009. Following oral arguments on November 13 and December 18, 2009, the court granted NADE's motion for summary judgment and denied Cindy's cross-motion.

In its ruling from the bench, the court explained the rationale for its decision:

> The question is what they did back at the time that she was required to be a guarantor on this loan.
>
> I believe they could do what they did, and consequently the application for a summary judgment holding her in this case should be granted. It was known what the assets were of the husband, the loan that he was applying for was very substantial.
>
> I'm satisfied, too, ... that there was knowledge that there was a residence, I don't know exactly how much it was, but under the principle that more equity or more security is better than not having reached out for it if you will being the operating principle, it made sense that they would want to tie that up and make sure they did it.
>
> ***3** The[y] could've done it in a lot of ways. This wasn't the greatest way to do it, and that's what leads to all of this. That's why there's so many talking points on both sides. It really isn't clean. It could've been done differently.
>
> But, I'm satisfied that the thrust of the application here was to get that extra security for a very substantial amount of money that he was requesting for this rather substantial business that was ongoing and ultimately busted. For those reasons I believe, and I do hold, that she is in this case as a guarantor and she is not going to be released.

Cindy now appeals and seeks to reverse the court's order.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.,* 406 *N.J.Super.* 524, 538 (App.Div .), *certif. denied,* 200 *N.J.* 209 (2009); *Agurto v. Guhr,* 381 *N.J.Super.* 519, 525 (App.Div.2005). Thus, we consider, as the motion judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury [or trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.,* 189 *N.J.* 436, 445–46 (2007) (internal quotation marks omitted). The applicable rule directs that summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46–2(c).

Although a party's allegations may raise issues of fact, if the other papers accompanying the pleadings show there is no genuine material issue, then summary judgment may be granted. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 75 (1954). Disputed issues "of an insubstantial nature" will not result in the denial of a motion for summary judgment. *Brill, supra,* 142 *N.J.* at 530. However, "a party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues 'to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.' " *D'Amato v. D'Amato,* 305 *N.J.Super.* 109, 114 (App.Div.1997) (quoting *Brill, supra* 142 *N.J.* at 523). "A case may present credibility issues requiring resolution by a trier of fact even though a party's allegations are uncontradicted." *D'Amato, supra,* 305 *N.J.* at 115.

If there is no genuine issue of material fact, we are to "decide whether the trial court correctly interpreted the law." *Massachi v. AHL Servs., Inc.,* 396 *N.J.Super.* 486, 494 (App.Div.2007), *certif. denied,* 195 *N.J.* 419 (2008). Of course, a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378 (1995).

***4** The ECOA bars discrimination by creditors against any credit applicant[3] "with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status." 15 *U.S.C.A.* § 1691(a)(1). Thus, the ECOA and its guidelines prohibit a creditor from requiring a spouse's signature on a note when the applicant individually qualifies for credit. *Riggs Nat'l Bank of Wash., D.C. v. Linch,* 36 *F.3d* 370, 374 (4th Cir.1994); *Anderson v. United Finance Co.,* 666 *F .2d* 1274, 1227 (9th Cir.1982). "If [a person] was required to sign said Guaranty without any reliance by the lender upon her creditworthiness, solely for the purpose of expediting a loan for her spouse and his business, that Guaranty cannot be enforced against her by the original lender[.]" *Silverman v. Eastrich Multiple Investor Fund, L.P.,* 51 *F.3d* 28, 33 (3d Cir.1995). The regulations of the Federal Reserve Board allow a spouse to be a guarantor, but the creditor cannot require that the spouse be the guarantor. The relevant regulation states:

> If, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request a cosigner, guarantor, endorser, or similar party. The applicant's spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.
> [12 *C.F.R.* § 202.7(d)(5).]
> "Evidently the Regulation is not meant to prohibit spouses from signing as guarantors generally, but is instead meant to prohibit a spouse's being required to sign because he or she is a spouse...." *U.S. v. Meadors,* 753 *F.2d* 590, 593 (7th Cir .1985).

[3] The Federal Reserve Board has defined "applicant" for credit (the term in the statute) to include a guarantor. 12 *C.F.R.* §§ 202.2(e), 202.7(d). In *Moran Foods, Inc. v. Mid–Atlantic Market Development Co., LLC,* 476 *F.3d* 436, 441 (7th Cir.2007), the Seventh Circuit Court of Appeals questioned whether the statute can be stretched far enough to allow that regulatory interpretation. However, Cindy's standing to assert a defense to the enforcement of the Individual Guaranty does not depend on that interpretation. *See, e.g., Silverman v. Eastrich Multiple Investor Fund, L.P.,* 51 *F.3d* 28, 32 (3d Cir.1995) (holding that even though a party required to guarantee a loan for her spouse may be barred after two years from instituting an independent action to assert it, she is not barred from asserting such violation as a defense to efforts of the creditor to collect on the guaranty).

Cindy does not argue that Vantage or Michael met NADE standards of creditworthiness, though that appears implicit in the record. She argues NADE violated the ECOA because it did not assess her creditworthiness before requiring her to sign the Individual Guaranty for Michael's loan through Vantage. Hence, she asserts she was required to guarantee the loan because of her marital status. NADE counters that Michael's financial status warranted further security; Vantage was requesting a 100 percent increase in its line of credit, and Michael was relying upon the couple's jointly-owned property as a "major component of his net worth." Moreover, NADE suggests that it did not undertake a close analysis of Cindy's personal creditworthiness because "the sole reason Cindy was asked to sign the guaranty was because of concerns about Michael's creditworthiness as part of the assets used to secure Vantage's credit line were jointly owned." Hence, plaintiffs deny that they required Cindy to sign the personal guaranty for any discriminatory reason.

The motion court eventually reached what plaintiffs describe as a "common sense ruling." The court reasoned as follows:

> Why can't they require that? How is that in violation of any law? They're putting out a whole lot of money, a whole lot of money, she's got an interest in property, that property is being put up as a guarantee and they require that she either does it or doesn't and she does decide to do it.
>
> ***5** ....
>
> If I were the lender I'd be interested to know who has an interest in the property that's going to be put up as security. And if she has an interest in the property don't you think I have a right to say yeah, I'll give you the extra money, but this is what we require? Why is that wrong?

That common-sense ruling may ultimately prevail; however, in ruling on a motion for summary judgment, the court is obliged to give the benefit of all facts and inferences to the party opposing the motion.

According to the proofs before the court, Cindy had no personal involvement with Vantage and, even without a careful investigation of her financial circumstances, plaintiffs understood Cindy's income was meager at best. By requiring her personal guarantee, plaintiffs made Cindy responsible for payment of all the debts of Vantage to NADE. To the extent the court may have accepted that the value contributed by Cindy, through her guarantee, was only her interest in jointly-owned property, it undervalued the impact of the guaranty. In addition, when the court asked "Why can't they require that?", the response is it is arguably a violation of the federal statute and its implementing regulations, the purpose of which is to protect spouses of applicants for credit from discrimination based solely upon their marital status. For example, in its opinion in Anderson, the Ninth Circuit Court of Appeals noted that if an applicant qualifies for a loan, the signature of the applicant's spouse cannot be required on a note, even if the property pledged to secure the loan is jointly owned. 666 *F.2d* at 1277. That court noted that there is a distinction between a security agreement which pledges an interest in property and a note that renders the signer personally liable on a loan. *Ibid.*

Here, the motion court recognized that customary investigations and formalities had not been observed, and "there's so many talking points on both sides." The court was nevertheless satisfied that the creditor was entitled to demand from the applicant's spouse the security of whatever equity existed in property jointly owned by the applicant and his spouse. The circumstances leading to that demand are known in only the most general sense. A determination of the interaction and understandings of the parties turns in part on an assessment of credibility that should have been reserved for a more complete development of the record. [4]

4 We recognize that before rendering his decision, the judge offered the parties an opportunity to raise any further issue and to present any further information they felt he should consider, and neither party proffered anything more. In this case, we nevertheless perceive the need for an assessment of the motivation and credibility of the actors in the transaction.

The certifications seeking to reconstruct the 1998 decision to extend additional credit to Vantage are insufficient to lead to a single inevitable result. Left unanswered by the certifications and materials offered by NADE are, among other issues: the exact role the jointly-owned residence played in NADE's decision to extend credit, what percentage of equity the residence comprised, or the creditworthiness of Vantage or Michael in 1998. Given the meager record before us and amorphous circumstances, it

is possible the trier of the facts could decide that NADE did not have an unassailable economic agenda in requiring Cindy to provide a personal guaranty.

***6** Reversed and remanded for further proceedings.

All Citations

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