STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-07-08

TD Banknorth, N.A.,

Plaintiff

DECISION AND JUDGMENT

v.

Benjamin Hawkins and
Timothy Morse,

Defendants

This matter was heard on Count I of Plaintiff's Amended Complaint on June 8, 2009.[1] Attorney Ed MacColl represented the Plaintiff. Attorney Ralph Dyer represented Defendant Benjamin Hawkins.[2] Attorney Tom Hallet represented Defendant Timothy Morse.

Following the hearing, the parties filed written closing argument, which the Court received on July 2, 2009. Plaintiff also filed a Motion to Clarify Trial Record, which the Court granted on August 3, 2009.

Findings of Fact

Based on the evidence, the Court finds the following facts:

1. In 2001, Morse Brothers, Inc. (Morse Brothers) obtained a line of credit from Plaintiff, which line of credit had a $3,000,000 limit. Defendants Benjamin Hawkins and Timothy Morse, the principals of Morse Brothers, signed a guaranty by which they agreed to repay the amounts advanced under the line of credit in the event that Morse Brothers did not repay the amounts due in accordance with the terms of the line of credit.

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[1] Through pretrial motions, the Court resolved Plaintiff's other claims, and Defendants' counterclaims. Accordingly, at the time of trial, Count I of Plaintiff's Amended Complaint was the sole remaining claim for the Court's consideration.

[2] The Court previously entered a default on Count I in favor of Plaintiff and against Defendant Hawkins. Although Plaintiff moved for a default judgment, the Court deferred the entry of default judgment until after the hearing in order to permit the parties the opportunity to present evidence on the damages issue.

2. The loan agreement, pursuant to which the line of credit was established, was dated March 16, 2001, and incorporated the January 2, 2001, commitment letter that Plaintiff extended to Morse Brothers. Under the loan agreement, Morse Brothers was required to maintain its primary deposit relationship with Plaintiff during the term of the loan.

3. The promissory note by which the line of credit was confirmed provided that Morse Brothers would make payment of the balance on demand, and that Morse Brothers waived "presentment, notice of dishonor, protest, notice of protest, and any and all other notices of any nature whatsoever in connection with the delivery, acceptance, performance, default or enforcement" of the note.

4. In connection with the loan agreement, Morse Brothers granted Plaintiff a secured interest in Morse Brothers' property, including its accounts. Morse Brothers also agreed that the collateral for the loan would not be removed from its primary business location without Plaintiff's written consent.

5. By June 2005, Morse Brothers owed $3,370,000 on the line of credit. As of July 30, 2005, the outstanding balance was $4,305,500.

6. Given the state of the account, the parties negotiated a "Sixth Amendment", which agreement was effective as of July 30, 2005. As part of the "Sixth Amendment", Morse Brothers acknowledged that it was overdrawn on the line of credit, acknowledged that the overdraw constituted a default of the loan documents, and acknowledged that Plaintiff had not waived, but had reserved its rights with respect to the default.

7. The "Sixth Amendment" also provided that the line of credit would expire when Plaintiff called the loan, in the event of a default, or on September 30, 2005, whichever date first occurred.

8. The earlier loan documents limited the guarantors' liability to $1,000,000 on the line of credit. In the "Sixth Amendment", the guarantors agreed to unlimited liability.

9. In reliance on and in accordance with the "Sixth Amendment", Plaintiff continued to advance funds to Morse Brothers on the line of credit. By the end of August 2005, Morse Brothers was overdrawn on its line of credit by approximately $1.5 million.

10. Because of the troubled state of the Morse Brothers' account, Plaintiff transferred the account to its workout department in September 2005. Plaintiff scheduled a meeting with Morse Brothers representatives for September 20, 2005, in order to discuss the status of the account.

11. When preparing for the meeting, Dana Wedge, a vice president with Plaintiff, discovered checks drawn on Plaintiff's account that Key Bank had presented for payment. With this information, at the September 20, 2005, meeting with representatives of Morse Brothers, Mr. Wedge inquired about the Key Bank account and Morse Brothers' practices with respect to its revenues and the Key Bank account.

12. At the meeting, Morse Brothers' representatives, including Defendant Hawkins, acknowledged that they had deposited proceeds from the sale of some of Morse Brothers' product in the Key Bank account. At least some of the proceeds were generated through the sale of property that was subject to Plaintiff's security interest. Mr. Wedge requested that the funds be returned to Plaintiff's account. Defendant Hawkins, on behalf of Morse Brothers, refused to do so. Mr. Wedge demanded payment of the outstanding balance. Morse Brothers did not make and has not as of the date of the hearing made payment.

13. Plaintiff learned that in July 2005, Morse Brothers established an account at Key Bank. During the month of July, Morse Brothers deposited a total of $400,893.72 in the account. As of the end of August 2005, the balance in the Key Bank account was $620,855.27.

14. Morse Brothers deposited funds in the Key Bank account in order to prevent Plaintiff from seizing or having access to the funds as the result of Morse Brothers' default under the terms of the loan documents.

15. On September 21, 2005, Plaintiff commenced this action in an effort to recover the amounts outstanding on the line of credit. As part of the filing, Plaintiff requested and obtained an order of attachment. Plaintiff was, however, unable to attach the proceeds in the Key Bank account because Morse Brothers withdrew the funds, which exceeded $600,000, in the form of a bank check, on September 20, 2005, the date of the meeting with Plaintiff's representatives.

16. On September 28, 2005, Morse Brothers filed a voluntary petition for bankruptcy protection. Defendants Morse and Hawkins were aware of and authorized the filing of the petition.

17. Section 7 of the loan agreement provides that the filing of bankruptcy by Morse Brothers constituted an immediate default for which no notice was required in order for Plaintiff to recover as the result of the default.

18. As part of the bankruptcy proceeding, various assets of Morse Brothers were sold, and sale proceeds disbursed to Plaintiff. Plaintiff credited Morse Brothers' account with the proceeds that it received from the sale of Morse Brothers' property.

19. The loan documents provide that Morse Brothers is responsible for the costs associated with the collection of the loan, which costs include attorneys' fees.

20. As of June 4, 2009, the outstanding balance on Morse Brothers' account with Plaintiff was $3,224,294.25.

Discussion

In this action, Plaintiff seeks to recover judgment against Defendants Morse and Hawkins for the amount outstanding on the Morse Brothers' loan for which Defendants guaranteed payment. The record establishes, and Defendants do not seriously contest, that the outstanding balance on the loan for which Defendants guaranteed payment is in excess of $3,000,000. Defendant Morse maintains that he is not responsible for the debt because Plaintiff failed to comply with the terms of the parties' agreement in its effort to collect the amount due.[3]

Defendant's primary contention is that despite Morse Brothers' failure to repay the loan, he is not responsible under the terms of the guaranty because Plaintiff did not provide the required notice of and a right to cure the default on the loan. More specifically, Defendant argues that because Plaintiff did not send a formal notice of default before it commenced suit, Plaintiff cannot recover in this action. Whether some or all of Plaintiff's claims were ripe at the time of the filing of the original complaint in

[3] Throughout this matter, Defendant Hawkins also argued that Plaintiff is foreclosed from recovering against him because Plaintiff did not comply with the terms of the parties' agreement in its collection efforts. However, because a default was entered against Defendant Hawkins, the Court will restrict its discussion on the liability issue to issues raised by or pertinent to Defendant Morse.

this action is irrelevant to Plaintiff's ability to recover at this stage of the proceedings. The question is whether at the time of trial, the claims presented to the Court for its consideration are ripe. Because Plaintiff sent a notice of default after the filing of the original complaint, and almost four years before the trial in the matter, Defendant's contention that the notice is ineffective because it was served after the commencement of this action fails.

Defendant also argues that the notice of default is ineffective because it did not include a notice of a right to cure. Defendant's argument ignores several critical facts. First, under the terms of the note by which the line of credit was confirmed, Morse Brothers and the guarantors (i.e., Defendant Morse) waived notice. The terms of the waiver are broad and arguably include the notice of default and any notice of a right to cure.

In addition, with respect to some of the defaults - the failure to maintain the primary deposit relationship with Plaintiff and to maintain the collateral in Plaintiff's account – Plaintiff, in the person of Mr. Wedge, requested that the money be returned from the Key Bank account in order to cure the default. Morse Brothers refused to do so. Thus, to the extent that a cure period was required for some of the incidents of default, Plaintiff provided Morse Brothers with the opportunity to cure, but Morse Brothers declined. In many ways, Morse Brothers statements during and actions before the September 20, 2005, meeting demonstrate that Morse Brothers did not intend to make payment on the loan and, in fact, intended to prevent Plaintiff from obtaining partial satisfaction of the debt through the collateral in which it had a secured interest. In other words, Morse Brothers' words and actions clearly showed that any cure period would be futile and would only serve to jeopardize Plaintiff's security interest.

Regardless of whether the waiver in the loan documents applies, and regardless of whether Mr. Wedge's statements to Morse Brothers' representatives at the September 20, 2005, meeting constitute proper notice under the terms of the loan documents, Plaintiff is entitled to recover against Defendant because Plaintiff was not required to provide a cure period for at least some of the acts of default by Morse Brothers. For instance, pursuant to section 7.1 of the loan agreement, the filing of the bankruptcy petition constitutes an immediate default at which point "*the principal of and all interest on the Loans, and all sums owing hereunder shall become forthwith due and payable without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived.*" (emphasis supplied). Morse Brothers' bankruptcy filing would, therefore, appear to constitute a default for which notice was not required.

Defendant contends that the bankruptcy filing cannot serve as the basis for the default because Defendant filed for bankruptcy after and because of the commencement of this action. Contrary to Defendant's argument, the filing of Morse Brothers' bankruptcy petition as it relates to the filing of this action does not bar Plaintiff's recovery. During the course of this action, the Court permitted Plaintiff to supplement its Amended Complaint to allege as the bases for its recovery certain defaults that occurred after the commencement of this action. Morse Brothers' bankruptcy filing was among the additional bases cited. The Court's order in this regard recognizes that business relationships, such as the one between Plaintiff and Morse Brothers, are not static. In the interests of fundamental fairness and judicial economy, the law must allow parties to assert additional claims or grounds for recovery as they develop. To do otherwise would ignore the fluidity of business relationships.[4] The bankruptcy filing, therefore, is relevant and an act of default upon which Plaintiff can proceed in this case. Because the bankruptcy filing constitutes a default for which no notice and cure period are required, Defendant's contention that Plaintiff cannot recover must fail.[5]

In sum, in his attempt to avoid responsibility as a guarantor of Morse Brothers' indebtedness to Plaintiff, Defendant cites the absence of a notice of default with a cure period, and the timeliness of the allegations of incidents of default that did not require notice. As explained above, both arguments are unpersuasive. Accordingly, because Morse Brothers has not made payment on the debt for which Defendant Morse is a guarantor, Defendant Morse is responsible for Morse Brothers' debt to Plaintiff.[6]

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[4] Defendant's assertion that Plaintiff is precluded from recovering because Morse Brothers filed for bankruptcy protection due to the fact that Plaintiff called the loan is unsupported by the record. Other than a temporal relationship between Plaintiff's demand for payment at the September 20, 2005, meeting, and the September 28, 2005, bankruptcy filing, there is no evidence to suggest that Morse Brothers filed for bankruptcy protection *because of* Plaintiff's actions. To the extent, therefore, that Defendant contends that Plaintiff's actions precipitated Morse Brothers' immediate default thereby preventing Plaintiff from recovering, Defendant's argument fails.

[5] Defendant's contention that Plaintiff's failure to provide Morse Brothers with a written notice to cure period precludes recovery also fails given that the line of credit was due as of September 30, 2005. That is, upon the expiration of the loan, Plaintiff is not required to provide a notice of default with a right to cure in order to collect the debt. The term of the loan had expired, and the outstanding balance was due as of September 30, 2005. The evidence at trial established that Morse Brothers has not satisfied the balance. Accordingly, under the terms of the guaranty, Defendant is responsible for payment of the balance.

[6] Because a default has been entered against Defendant Hawkins, the Court also concludes that Defendant Hawkins is responsible for the debt as a guarantor.

Conclusion

Based on the foregoing analysis, the Court orders as follows:

1. On Count I of Plaintiff's Amended Complaint, judgment is entered in favor of Plaintiff and against Defendant Hawkins in the sum of $3,224,294.25, plus interest and costs.

2. On Count I of Plaintiff's Amended Complaint, judgment is entered in favor of Plaintiff and against Defendant Morse in the sum of $3,224,294.25, plus interest and costs.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Judgment into the docket by reference.

Date: 8/14/09

Justice, Maine Business & Consumer Docket