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Order on Plaintiff's Motion for Summary Judgment (MERRILL LYNCH BUSINESS FINANCIAL SERVICES INC.)

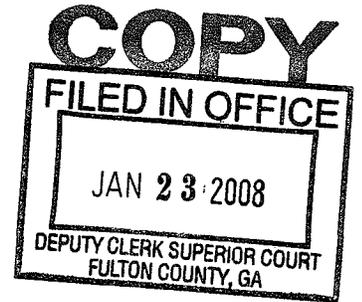
Alice D. Bonner
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

**MERRILL LYNCH BUSINESS
FINANCIAL SERVICES, INC.,**

Plaintiffs,

v.

**TSC ARTEFFECTS, INC., AND
LOUIS H. TATUM**

Defendants,

Civil Action File No. 2006-CV-111093

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On January 14, 2008, counsel presented oral argument on Plaintiff's Motion for Summary Judgment. After reviewing the briefs on the motion, the record of the case, and the parties' arguments, the Court finds as follows:

FACTS

Merrill Lynch Business Financial Services, Inc., ("ML") and TSC Arteffects, Inc., ("Arteffects") entered into a loan and security agreement on February 12, 2001 (collectively the "Loan").¹ Louis H. Tatum, ("Mr. Tatum"), as the sole shareholder of Arteffects, signed a personal guaranty (the "Guaranty").² The Loan originally provided

1. Arteffects previously had a working capital management account with ML. Defendants raised the issue that the Working Capital Management Account Agreement No. 81V-07088 (Arteffects' account number with ML) referenced and incorporated into the Loan was not attached to the pleadings. Plaintiff, however provided a WCMA "Agreement and Program Description Booklet" as Exhibit A to Daniel J. Downs, the Vice President and Special Accounts Supervisor for Plaintiff, affidavit, filed January 10, 2008, just three days before this hearing. As such, the Downs Affidavit is not properly before this Court for consideration on Plaintiff's Motion for Summary Judgment. Counsel for Plaintiff, however, as an officer of this Court stated on the record, and Defendants did not contradict this fact, that Plaintiff provided this same document to Defendants' Counsel in November, 2007. Therefore, Defendants had the document and the opportunity to raise any issues related to it in their arguments in connection with the motion for summary judgment. Thus, the Court shall proceed with its evaluation of Plaintiff's Motion for Summary with the record that is properly before it.

2. The guaranty provided that Tatum would ensure:

- (i) the prompt and full payment when due, by acceleration or otherwise, of all sums now or any time hereafter due from [Arteffects] to MLBFS under the Guaranteed Documents, (ii) the prompt, full and faithful performance and discharge by [Arteffects] of each and every other covenant and

for a line of credit equal to the lesser of \$1M or the sum of 80% of accounts receivable plus 20% of inventory. Through a series of letter agreements, the credit line was increased and decreased several times, but was finally amended pursuant to a January 4, 2005, letter agreement setting the amount at the lesser of \$1.3M or the sum of 80% of accounts receivable, plus 20% of inventory³ and \$500,000, but removing the additional \$500,000, effective March, 2005. The loan included an indemnification agreement and required that any term extension⁴ or modification of the Loan must be in writing to be effective. The Loan was scheduled to mature in 2002, but was extended several times through the letter agreements between ML and Arteffects, with the final maturity date of May 31, 2005.

On February 9, 2005, ML notified Arteffects that it had exceeded its credit line and requested that it be paid down by April 1, 2005 (the "February 9th Letter").⁵ ML calculated the available credit line as the lesser of \$1.5M or the sum of 80% of accounts receivable plus 20% of inventory.⁶ The credit line was not paid down, and when the Loan matured on May 31, 2005, Arteffects did not pay the balance.⁷

warranty of [Arteffects] set forth in the Guaranteed Documents, and (iii) the prompt and full payment and performance of all other indebtedness, liabilities and obligations of [Arteffects] to MLBFS, howsoever created or evidenced, and whether now existing or hereafter arising (collectively, the "Obligations").

3. The inventory calculation excluded "works-in-progress" and was capped at \$500,000.

4. The Loan provided that renewal was reserved to ML "in its sole discretion and at its sole option... ."

5. ML calculated Arteffects' line of credit as \$704,309 (80% of accounts) and \$191,332 (20% of inventory) totaling \$895,641.

6. The inventory calculation excluded "works-in-progress" and was capped at \$500,000. Defendants challenge ML's calculation of the credit line because it excluded several hundred thousand dollars' worth of paid-for inventory, which was being shipped from China to Arteffects.

7. Plaintiff made four (4) payments, one each in August and October and two in November.

On June 13, 2005, Arteffects, Mr. Tatum, and ML entered into a final letter agreement (the "Forbearance Agreement"), which required payment by July 31, 2005, of the full amount of the Loan, plus interest and fees. The Forbearance Agreement contained a waiver of all claims against ML.⁸

Arteffects did not pay ML in accordance with the Forbearance Agreement. ML made a demand for payment on Arteffects on September 27, 2005, October 25, 2005, and December 13, 2005 with final payment to be made by December 20, 2005. Defendants claim that ML promised to extend the payment date to January 30, 2006. In December, however, ML turned the Arteffects Loan over to their collections department and filed suit on January 12, 2006, for breach of contract and for attorneys' fees.

Defendants counterclaimed against ML alleging a violation of O.C.G.A. § 11-1-208 for acceleration of debt, claiming promissory estoppel, alleging negligent misrepresentations, alleging breach of contract, and claiming that Plaintiff acted with stubborn litigiousness in bringing this action. Plaintiff moves the Court for Summary Judgment on both the claim and the counterclaim.

STANDARD

To prevail on their motion for summary judgment, Plaintiff must demonstrate that "there is no genuine issue of material facts, viewed in the light most favorable" to Defendants, "to warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga.

8. "By their execution of this Letter Agreement, the below-named obligors hereby consent to the foregoing modification to the Loan Agreement, and hereby agree... Customer and the other Obligors acknowledge, warrant and agree as a primary inducement to MLBFS to enter into this Letter Agreement, that: (a) neither Customer nor any of the other Obligors have any claim against MLBFS or any of MLBFS' affiliates arising out of or in connection with the Loan Documents or any other matter whatsoever; and (b) neither Customer nor any of the other Obligors have any defense to payment of any amounts owing, or any right

491 (1991). See also, Danforth v. Bullman, 276 Ga. 531, 532 (2005).

COUNT I: BREACH OF CONTRACT

To prevail on a breach of contract claim, the moving party must demonstrate the existence of an enforceable agreement and a failure of the other party to perform.

Budget Rent-a-Car of Atlanta, Inc. v. Webb, 220 Ga. App. 278, 279 (1996).

It is undisputed that Arteffects signed the Loan with ML, accepted the credit extensions, and has not paid the principal balance. The Forbearance Agreement, which was signed by Arteffects, Mr. Tatum, and ML controls the Court's analysis in this case. Defendants raise several challenges to the circumstances under which the Forbearance Agreement was entered into, but there is no evidence in the record of duress, economic or otherwise, which would cancel or question the effect of the Forbearance Agreement.

Mr. Tatum also challenges the effect of the Guaranty. Mr. Tatum claims that miscalculations contained in the February 9th Letter constituted a novation of his Guaranty, because ML reduced the line of available credit and altered a material term of the underlying obligation. See, O.C.G.A. § 10-7-1; see, e.g., Upshaw v. First State Bank, 244 Ga. 433 (1979); Thomas-Sears v. Morris, 278 Ga. App. 152 (2006); Bank of Terrell v. Webb, 177 Ga. App. 715 (1986). Consent to changes, however, can be implied or given in advance. See, e.g. Staten v. Beaulieu Group, LLC, 278 Ga. App. 179 (2006) (holding that an extension of the contract and alteration of its terms was not a novation of the managing member's guaranty, which stated that his obligation was "continuing, absolute and unconditional and shall remain in full force and effect until the

of counterclaim for any reason under, the Loan Documents."

payment in full of all obligations...irrespective of the validity or enforceability of any changes, modification or amendments..."); Builders Dev. Corp. v. Hughes Supply, Inc., 242 Ga. App. 244 (2000) (holding that the extension of additional credit was not a novation of an "unlimited" guaranty granted by the borrowing corporation's sole shareholder).

In this case, Mr. Tatum signed the Guaranty which stated that he "unconditionally guarantees to MLBFS" the prompt and full payment of obligations arising under the Loan agreement and "all present and future amendments, restatements, supplements and other evidences of any extensions, increases, renewals, modification and other changes of or to the Loan Agreements... ." As in Staten v. Beaulieu Group, LLC, 278 Ga. App. 179, this Court finds that the Guaranty Mr. Tatum signed encompassed future changes to the Loan. Thus, even assuming that the February 9th Letter changed a material term of the Loan,⁹ Mr. Tatum's obligation to secure Arteffects' debt was not discharged because of the "unconditional" Guaranty he signed.

Finally, Defendants oppose Plaintiff's Motion for Summary Judgment on this count by raising questions about the termination date of the Loan and the principal owed under it. A review of the Loan, its letter agreements, the Forbearance Agreement, and subsequent demand notices sent to Defendants by ML demonstrate that the principal advanced under the Loan was due on May 31, 2005. It is also clear that the Forbearance Agreement added additional fees to the principal owed under the Loan and required final, full payment by July 31, 2005.

Defendants also claim that the amount owed under the ML loan is inaccurate

9. Plaintiff, of course, argues that the February 9, 2005 letter did not materially alter a term of the Loan.
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because after the Loan terminated, ML assessed interest on the principal due, thus increasing Defendants' repayment obligation. This argument is without merit as there is nothing in the record to challenge the numbers presented by ML, the calculation of interest, or ML's right to attach such interest to the unpaid principal.

For the foregoing reasons, Plaintiff has established that there is no genuine issue of material fact on the claim for breach of contract and that it is entitled to Summary Judgment as a matter of law.

COUNT II: ATTORNEYS' FEES

Plaintiff seeks recovery of its attorneys' fees pursuant to O.C.G.A. § 13-1-11(a) and the terms of the written loan agreement. O.C.G.A. § 13-1-11(a) provides that a party may enforce a provision for attorneys' fees in a note after the obligation has matured and the holder of the note unsuccessfully demands payment there under. See e.g., TermNet Merchant Services, Inc. v. Phillips, 277 Ga. 342 (2004), on remand 264 Ga. App. 612 (the promissory note holder was entitled to attorneys fees where the note had matured, note maker was given notice of payment demand, note maker did not make payment, and note holder sought collection through an attorney). A plaintiff who is entitled to summary judgment on a document establishing "evidence of indebtedness," within the meaning of O.C.G.A. § 13-1-11(a) is also entitled to judgment for attorney fees thereon. Phillips v. TermNet of New Mexico, Inc., 260 Ga. App. 645 (2003), rev'd on other grounds, 277 Ga. 342 (2003), on remand, 264 Ga. App. 612. See also Frame v. Booth, Wade & Campbell, 238 Ga. App. 428 (1999).

Section 3.4(k) of the Loan, "Indemnification" provides that "the Customer shall indemnify, defend and save [ML] harmless...(iii) any failure by Customer to perform any

of its obligations hereunder; excluding however, from said indemnity any such claims, liabilities, etc. arising directly out of the willful wrongful act or active gross negligence of MLBFS.” Defendants argued that ML acted willfully or with gross negligence in reducing the Arteffects credit line, negotiating the Forbearance Agreement, and filing suit before Arteffects had secured additional financing. These claims are without support in the record.

In addition, the Loan contains Section 3.7(d) “Fees, Expenses, and Taxes,” which states that

“Customer shall pay or reimburse [ML] for... (iii) all reasonable fees and out-of-pocket expenses (including, but not limited to, reasonable fees and expenses of outside counsel” incurred by [ML] in connection with the collection of any sum payable hereunder or under any of the Additional Agreements not paid when due, the enforcement of this Loan Agreement or any of the Additional Agreements and the protection of the [ML] rights hereunder or thereunder...”

Under either Section 3.4(k) or 3.7(d), it is clear that the Loan provides a vehicle for Plaintiff to recover attorneys’ fees. Additionally, included in the record are the ML demand notices sent in September, November, and December of 2005. Thus, Plaintiff has complied with the requirements of O.C.G.A. § 13-1-11(a) and is entitled to recover its reasonable attorneys’ fees in bringing this action for an amount to be calculated in accordance with the statute.

COUNTERCLAIM COUNT I: ACCELERATION OF DEBT

Plaintiff moves for Summary Judgment on Defendants’ counterclaim alleging acceleration of debt in violation of O.C.G.A. § 11-1-208. To prevail on an O.C.G.A. § 11-1-208 claim, Defendants must demonstrate that Plaintiff wrongly accelerated

payment due without a good faith belief that the prospect of payment was impaired. Defendants' claim that the February 9th Letter unilaterally reduced Arteffects line of credit which acted as an acceleration of debt.

First, Defendants failed to put forth any evidence in the record to demonstrate a lack of good faith on behalf of ML. Second, the February 9th Letter calculated the credit line in accordance with paragraph (b) of the January 4, 2005 letter agreement, that last amendment to the Loan.¹⁰ Third, while the February 9th Letter requested that the overdraft be paid down, no action was taken until after the Loan matured under its terms on May 31, 2005. Fourth, the Forbearance Agreement expressly waived any cause of action held by Arteffects or Mr. Tatum against ML. Thus, in light of the facts of this case, Defendants have no cause of action under O.C.G.A. § 11-1-208.

COUNTERCLAIM COUNTS II, III, AND IV: PROMISSORY ESTOPPEL, BREACH OF CONTRACT, & NEGLIGENT REPRESENTATION

Defendants allege that Plaintiff promised to extend the Loan maturity date to January 31, 2006, or to allow sufficient time to secure another loan so that Plaintiff could repay the ML loan. Defendants claim that by filing this suit on January 6, 2006, Plaintiff breached its promise and is liable to Defendants under promissory estoppel/detrimental reliance, and negligent representation claims.

The Loan expressly required that any extensions or amendments thereto be made in writing. Additionally, other than Mr. Tatum's deposition testimony regarding

10. Paragraph (b) states that effective March 1, 2005, the available line of credit would be the lesser of \$1.3M or 80% of accounts' plus 20% of inventory, excluding works in progress, up to \$500,000. The February 9th letter calculated the available line of credit as the lesser of \$1.5M or 80% of accounts' plus 20% of inventory, excluding works in progress, up to \$500,000. The discrepancy between the two is that the January 4th Letter Agreement set the maximum at \$1.3M and the February 9th Letter calculated the credit maximum at \$1.5M. Thus, the difference was in Defendants' favor and would not result in acceleration. Second, while the letter was sent on February 9, 2005, payment was not due until April 1,

statements made by an ML account representative, Ms. Rogan, there is no evidence in the record of any mutual agreement to extend the payment date. Third, there was no consideration for the new promise, even if ML had agreed to an extension. Citizens Trust Bank v. White, 274 Ga. App. 508, 511 (2005).

In accordance with the foregoing analysis, this Court finds that there was no enforceable agreement to extend the payment date to January 31, 2006. Plaintiff, therefore, prevails on the breach of contract and promissory estoppel¹¹ counterclaims.

Defendants' negligent representation claims must also fail. "The essential elements of negligent representation are: "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." J.E. Black Const. Co., Inc. v. Ferguson Enterprises, Inc., 284 Ga. App. 345, 348 (2007) (quoting Hardaway Co. v. Parsons, Brinckerhoff, etc., 267 Ga. 424, 426(1) (1997)).

Defendants claim that their loan with Presidential Financial fell through because ML filed suit before the loan closed. The Affidavit of Raymond Alberti, credit manager for Presidential Financial, demonstrates, however, that they did not learn of the ML suit until after the January 31, 2006, deadline and that the loan was denied, not because of the ML suit, but because Arteffects had insufficient assets. As such, Defendants cannot demonstrate economic injury and Plaintiff is entitled to summary judgment on

2005, after the effective date of the reduced credit line.

11. To prevail on a promissory estoppel claim, Defendants must show that (1) Plaintiff made certain promises, (2) Plaintiff should have expected that Defendants would rely on such promises, (3) the Defendants did in fact rely on such promises to their detriment, and (4) injustice can be avoided only by enforcement of the promise." Lane Supply, Inc. v. W.H. Ferguson & Sons, Inc., 286 Ga. App. 512, 516 (2007) (citations omitted).

this claim.

COUNTERCLAIM COUNT V: STUBBORN LITIGIOUSNESS

Defendants seek recovery of their expenses pursuant to O.C.G.A. § 13-6-11 for abusive litigation. In light of this Court's grant of Summary Judgment to Plaintiff on all other counts, this claim may not survive.

CONCLUSION:

The Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment on all counts of the Complaint and Counterclaim in this case.

SO ORDERED this 23rd day of January, 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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