

Iberiabank v Kramer

2012 NY Slip Op 33165(U)

July 24, 2012

Sup Ct, NY County

Docket Number: 650800/2010

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice

PART 3

Index Number : 650800/2010
IBERIABANK
vs.
KRAMER, KEVIN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 650800/10
MOTION DATE 3/13/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7-24-12

[Signature]
HON. EILEEN BRANSTEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

-----X
IBERIABANK,

Plaintiff,

Index No. 650800/2010
Motion Date: 3/13/2011
Motion Seq. No. 001

-against-

KEVIN KRAMER,

Defendant.

-----X
BRANSTEN, J.

INTRODUCTION

Plaintiff Iberiabank brings this cause of action against defendant Kevin Kramer. Iberiabank asserts that Kramer is liable to Iberiabank for amounts owed to it of not less than \$5,085,760.43 (the "Guaranteed Obligations"). Iberiabank asserts that Kramer is liable as a result of Kramer's unlimited, absolute and unconditional guaranty (the "Guaranty") of a demand note (the "Note") between West End Mercury Short Term Mortgage Fund, LP (the "Borrower") and Century Bank, F.S.B. ("Century Bank"). Century Bank has been succeeded by Plaintiff.

Iberiabank alleges that as a result of the Borrower's default under the Note, Kramer is liable pursuant to the terms of the Guaranty for the full payment of all of the Borrower's Guaranteed Obligations. Iberiabank also brings a cause of action against Kramer to recover Iberiabank's costs and expenses, including reasonable attorneys' fees and disbursements, in connection with its collection of the Guaranteed Obligations and enforcement of the Note.

In the instant Motion Sequence No. 001, Iberiabank moves for summary judgment pursuant to CPLR 3212.

FACTS

I. Background

This is an action by Iberiabank to enforce a guaranty executed by Defendant in favor of Century Bank on amounts owed by the Borrower.

On April 10, 2008, the Board of Directors of Century Bank (the "Board") approved a short-term loan for \$2,200,000 to the Borrower. Affidavit of Kevin Kramer in Opposition to Plaintiff Iberiabank's Motion for Summary Judgment ("Kramer Aff."), ¶ 21.

On April 24, 2008, William Landberg, the chairman and chief executive officer of West End Financial Advisors, LLC ("West End"), an entity that managed the Borrower, requested that Century Bank increase the loan to the Borrower to \$5,000,000. Affirmation of John A. Wait, Esq. in Opposition to Plaintiff's Summary Judgment Motion ("Wait Aff."), Ex. A, Century Bank's Memorandum ("Century Mem."). As per Landberg's request, Century Bank increased the amount of the loan to \$5,000,000 in August, 2008. Kramer Aff., ¶ 23.

The Borrower executed notes in connection with the loan transactions between the Borrower and Century Bank. Affidavit of John P. Troyan in Support of Plaintiff Iberiabank's Motion for Summary Judgment ("Troyan Aff."), Ex. 3, Transcript of

Deposition of Kevin Kramer dated July 14, 2011 (the “Deposition Transcript”), pp. 37-38 (“Question: And do you recall that [the Borrower] executed notes in connection with that transaction with that loan? Answer: Yes. Question: Do you remember the amount that was borrowed? Answer: 5 million [dollars]”). The Note evidencing the loan was later amended several times. Defendant’s Responses to Plaintiff’s Statement Pursuant to Rule 19-A (“Def. Response”), ¶ 7. It is uncontested that the principal amount of the Note was increased to \$5,500,000. *Id.* Thereafter, on October 20, 2008, the Note was further amended and restated to the principal amount of \$4,829,278.56. Reply Affidavit of John Bougiamas in Further Support of Plaintiff Iberiabank’s Motion for Summary Judgment (“Bougiamas Aff.”), Ex. 2 Amended and Restated Note (“Amended Note”).

Plaintiff moves to collect \$5,903,782.76 as per the terms of the Guaranty. This sum reflects the original amount owed under Amended Note inclusive of accrued interest and late charges but exclusive of attorneys’ fees. Troyan Aff., ¶ 16.

The Borrower and Century Bank executed an assignment that was notarized October 17, 2008. Bougiamas Aff., Ex. 2, Amended and Restated Assignment (the “Assignment”), p. 5. The Assignment acknowledges indebtedness of Century Bank to the Borrower as “evidenced by a certain Demand Note in the principal sum of Five-Million-Five Hundred Thousand Dollars made by Assignor [Borrower] . . . to the Assignee [Century Bank].” *Id.*, at p. 1. The Assignment was executed for the purpose of securing “payment of all advances and other sums with interest thereon becoming due and payable to the Assignee . . . under the provisions of the Note” *Id.*

Iberiabank has submitted records which reflect the Borrower's current obligations to Iberiabank, as further evidenced by the Assignment and the Amended Note. Troyan Aff., Ex. 4 ("Loan Payoff Inquiry"). As of November 14, 2011, Loan # 60069183, the loan at issue in the instant motion, reflected a current balance of \$4,397,521, excluding accrued interest, late charges and other charges or fees owed by the Borrower to Iberiabank. *Id.*

On August 20, 2008, Kramer signed the Guaranty that is the subject of this action. Troyan Aff., Ex. A (the "Guaranty"); *see also* Troyan Aff., Ex. 2 (Verified Answer, "Answer"), ¶ 6 ("[I]t is admitted only that defendant signed a certain guaranty document with [Century Bank]"). Kramer, as Guarantor, guaranteed the full and prompt payment and performance of any and all of the Borrower's Guaranteed Obligations to Century Bank, as the lender. Guaranty, § 1(a). Kramer acknowledged the receipt of valuable consideration in exchange for the Guaranty, and further acknowledged that Century Bank relied on the Guaranty in extending the Note. *Id.*, at § 1(b). The Guaranty was "irrevocable, absolute, continuing, unconditional and general without any limitation." *Id.*, at § 2. Kramer admits to providing and signing the Guaranty in connection with the loan Century Bank made to the Borrower. Troyan Aff., Ex. 3, p. 42:5-7 ("Question: Do you recall providing a guarantee in connection with that loan? Answer: Yes"); *see also id.*, at 42:12-24 ("Question: If you go to [the Guaranty], is that your signature on that page? Answer: Yes").

II. Default

The Borrower defaulted on its obligations under the Note by failing to make the payments due March 20, 2009 and thereafter. Def. Response, ¶ 16 (admitting the assertion of default, but claiming that “Century Bank’s wrongful actions subsequent to the execution of the loan documents *caused the borrower’s default*”)(emphasis added).

III. Plaintiff Has Succeeded Century Bank

On November 13, 2009, the Office of Thrift Supervision closed Century Bank. Troyan Aff., ¶ 4. The Federal Deposit Insurance Corporation (“FDIC”) was named Receiver of Century Bank. *Id.*

On that same date, Iberiabank entered into a purchase and assumption agreement with the FDIC to acquire certain assets formerly owned by Century Bank. Iberiabank acquired the Note and related agreements and rights. *Id.*

a. Demand Under the Guaranty

On May 25, 2010, Iberiabank, as successor to Century Bank, sent Kramer a notice demanding payment of the Guaranteed Obligations pursuant to the Guaranty. Troyan Aff., Ex. B (Notice of Demand for Payment Under Guaranty, the “Demand Notice”). Iberiabank demanded that Kramer pay the \$5,085,760.43 that Iberiabank contended was due, consisting of the principal amount of the loan and accrued interest and late charges. *Id.*

Iberiabank advised Kramer that if it did not receive the Guaranteed Obligations in full by June 4, 2010, it would commence an action to obtain a judgment against him. *Id.* It is uncontested that Kramer did not pay Iberiabank any sum of money under the Guaranty. Answer, ¶ 16 (“[I]t is admitted only that defendant has not paid any sums to Iberiabank under any alleged guaranty”).

IV. Defendant’s Allegations in Defense of This Motion

Kramer avers in defense of Plaintiff’s motion for summary judgment that Century Bank failed to distribute the loan amount to the Borrower or, alternatively, that Century Bank failed to distribute the loan amount in accordance with the closing documents. Defendant’s Counter-Statement to Plaintiff’s Statement Pursuant to Rule 19-a (“Def. Counter”), ¶ 13. In support of his contention, Kramer relies upon a April 24, 2008 Century Bank internal memorandum between Darrell Hill, First Vice President in the Century Bank Commercial Loan Department, and the Board of Directors (the “Board”). Therein, Hill advised the Board about the specifics of increasing the principal loan amount to the Borrower from \$2,200,000 to \$5,000,000. Wait Aff., Ex. A. Mr. Hill explained to the Board that the mortgage loans that the Borrower purchased were “generally funded as follows: 80% borrowed by MCC (a subsidiary of Mercury) and 20% cash equity provided by the partnership [the Borrower].” *Id.* The proceeds of the loan that Century Bank provided were supposed to finance the 20 percent of the Borrower’s mortgage loan transactions. Kramer Aff., ¶ 22.

Kramer contends that, instead of using the loan proceeds to fund mortgage loan transactions, Landberg misused the loan principal and spent it on other purposes. Kramer Aff., ¶ 25. Kramer provides evidence of Landberg's plead of guilty to securities fraud to support the allegation. Wait Aff., Ex. C (Federal Bureau of Investigation New York Field Office Press Release ("Press Release"), stating: "William Landberg . . . pleaded guilty today in Manhattan federal court to a one-count information charging him with securities fraud . . ."). Kramer provides no direct connection between the Century Bank internal memo and Landberg, nor does Kramer provide a connection between Landberg's securities fraud and the Loan.

Kramer instead contends in his defense that Century Bank knew or should have known that Landberg was using the loan money inappropriately. Kramer alleges that Century Bank allowed Landberg, as Borrower's agent, to misuse the principal loan amount through Century Bank's disbursement of the funds to entities and individuals, other than the Borrower, including to Landberg. Kramer Aff., ¶ 27. Kramer supports his contention with Plaintiff's alleged admission that Century Bank, as Plaintiff's predecessor, advanced portions of the principal loan amount to "recipients other than [the Borrower]." Wait Aff., Ex. B (Plaintiff's Responses to Request for Admission "Plaintiff's Response"), Response to Request No. 5 ("The Plaintiff admits the allegations contained in Request No. 5 to the extent that, as is routine in the closing of a commercial loan, funds are transferred by the lender to recipients at the direction of the borrower").

Kramer, in further support of his defense, also points to the fact that Mr. Florescu, President of Century Bank, was an investor with Landberg and West End. *See Kramer Aff.*, ¶ 20. Kramer alleges that the relationship between Florescu and Landberg, and Landberg's wrongdoing, as evidenced by his guilty plea in the Southern District of New York, *supra*, supports the allegation that Century Bank knew that Landberg was using the loan money inappropriately. Kramer does not state, beyond his general allegation, any basis for how Florescu's investment led to Century Bank's alleged knowledge that Landberg misused the Loan proceeds.

Kramer finally avers in his defense that if he had known that the loan proceeds would not be spent on financing the mortgage loans, he would not have signed the Guaranty. *Kramer Aff.*, ¶ 26.

Kramer alleges that for the above reasons the Guaranty is invalid, void for lack of consideration and unenforceable. *See Def. Response*, ¶ 10 (“[T]he guaranty is void, invalid, and unenforceable as the loan proceeds were not transferred to finance the purchase of the Mortgage Loans as indicated in the closing documents.”).

STANDARD OF LAW

A court properly grants a motion for summary judgment pursuant to CPLR 3212 if the movant has made a “*prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Motions for

summary judgment merely search the record to ascertain the existence of triable issues of fact, and do not “determine the strength of either party’s case.” *Cross v. Cross*, 112 A.D.2d 62, 64 (1st Dep’t 1985). Only a dispute over facts that might affect the outcome of the suit under the governing substantive law will properly preclude a motion for summary judgment. *People of the State of New York v. Grasso*, 50 A.D.3d 535, 545 (1st Dep’t 2008)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment. *F. Garofolo Elec. Co. v. New York Univ.*, 300 A.D.2d 186, 188 (1st Dep’t 2002)(citing *Dauman Displays Inc. v. Masturzo*, 186 A.D.2d 204, 205 (1st Dep’t 1990)). Because summary judgment is such a drastic remedy, summary judgment should be denied “[i]f there is any doubt as to the existence of a triable issue” *Id.* (internal citations omitted).

If the movant has demonstrated a *prima facie* entitlement to summary judgment, the burden then shifts to the nonmoving party to demonstrate “by admissible evidence the existence of a factual issue requiring a trial of the action.” *Broadway 36th Realty, LLC v. London*, 29 Misc. 3d 1238(A) at *4 (Sup. Ct., N.Y. County 2010)(internal citations omitted). In order to successfully oppose a motion for summary judgment, “a party must assemble and lay bare sufficient affirmative proof to demonstrate the existence of a genuine triable issue of fact.” *Forray v. New York Hosp.*, 101 A.D.2d 740, 741 (1st Dep’t 1984)(internal citations omitted).

ANALYSIS

Iberiabank alleges that the principal obligor, the Borrower, has not paid debts owed to Iberiabank, as successor-in-interest to Century Bank. Iberiabank seeks to recover the amount owed to them from Kramer in his capacity as unconditional and absolute guarantor. The outstanding amount allegedly owed is \$5,903,782.76, including all accrued and accruing interest, fees and costs.

Iberiabank contends in its motion for summary judgment pursuant to CPLR 3212 that it is entitled to judgment against Kramer because Kramer guaranteed the payment of the Borrower's indebtedness to Iberiabank and has failed to repay that debt. Iberiabank further argues that Kramer has failed to raise a triable issue of fact because his unconditional guaranty precludes his affirmative defenses as a matter of law.

In opposition, Kramer argues that genuine issues of material fact exist in the case which prevent the grant of summary judgment. Kramer alleges that there are disputed issues of whether Century Bank, plaintiff's predecessor, disbursed the loan funds to the Borrower and did so in accordance with the closing documents. Next, Kramer contends that Century Bank knew or should have known that Landberg, the Borrower's chief executive officer, was using the loan money inappropriately. Finally, Kramer avers that there is an issue as to the validity of the Guaranty.

I. Unconditional Guaranties under CPLR 3212

Plaintiff has sufficiently demonstrated a *prima facie* entitlement to judgment on the Guaranty in the instant action. On a motion for summary judgment to enforce an unconditional guaranty, the creditor, Plaintiff, must prove: (1) the existence of the guaranty; (2) the underlying debt; and (3) the guarantor's failure to perform under the guaranty. *Davimos v. Halle*, 35 A.D.3d 270, 272 (1st Dep't 2006)(citing *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71 (1st Dep't 1998)).

a. Existence of Guaranty

Plaintiff has proven the existence of the Guaranty in dispute. Pursuant to the terms of the Guaranty, Defendant unconditionally guaranteed the "full and prompt payment and performance of any and all of Borrower's [Guaranteed Obligations] to [Century Bank] when due" Guaranty, § 1(a). Defendant acknowledges that he in fact signed the Guaranty, and that the Guaranty was a loan document "relating to the \$ 5 million loan." Transcript of Deposition of Kevin Kramer dated July 14, 2011, Troyan Aff., Ex. 3 ("Transcript"), at p. 42.

b. The Underlying Debt

Plaintiff has sufficiently proven the underlying debt that the Defendant guaranteed.

The Assignment executed between the Borrower and Century Bank acknowledges indebtedness to the Borrower. Bougiamas Aff., Ex. 2, Assignment, p. 1. Furthermore, the Assignment was executed by the Borrower with the stated purpose of securing the loan at

issue, payable to Century Bank. *Id.* Although the Assignment is itself undated, it was notarized just three days prior to the signed Note. *Id.*, at p. 5. The Amended Note in connection with the Assignment is further evidence of the existence of an underlying debt between Plaintiff, as successor-in-interest to Century Bank, and the Borrower. *See Bougiamas Aff.*, Ex. 2, Amended Note, p. 1 (listing the Principal Amount as \$5,500,00, and agreeing upon the a first payment date of November 20, 2008).

Further, the Amended Note and the Assignment were filed by Plaintiff in a pending bankruptcy case in the United States Bankruptcy Court for the Southern District of New York as a Proof of Claim of West End's indebtedness to Plaintiff in connection with the loan to the Borrower. *See Bougiamas Aff.*, ¶ 4. The Proof of Claim was submitted under penalty of perjury that the Borrower is indebted to Plaintiff, as Century Bank's successor. *Bougiamas Aff.*, Ex. 2 (Rider to Pre-Petition Proof of Claim "Proof of Claim"), p. 4. The Loan Payoff Inquiry further supports Plaintiff's proof of the existence of an underlying debt. *Troyan Aff.*, Ex. 4.

c. Guarantor's Nonpayment

"Submission of an unconditional guaranty along with an affidavit of nonpayment is sufficient for judgment under CPLR 3212." *Dell'Anno v. Molinari*, 19 Misc. 3d 1117(A) at *4 (Sup. Ct., N.Y. County 2008)(citing *European Am. Bank & Trust Co. v. Schirripa*, 108 A.D.2d 684, 684 (1st Dep't 1985)). The Guaranty is annexed to the Troyan Affidavit as Exhibit A and the affidavit avers nonpayment. *See Troyan Aff.*, ¶ 8.

Defendant has also admitted that he did not pay any sum of money under the Guaranty.

See Answer, ¶ 16.

Plaintiff has thus sufficiently demonstrated a *prima facie* entitlement to judgment in the enforcement of the Guaranty.

d. Defendant's Opposition

As Plaintiff has demonstrated a *prima facie* entitlement to judgment, the burden shifts to the defendant to produce sufficient admissible evidence to demonstrate the existence of a genuine issue of material fact preventing the grant of summary judgment. See *Forray*, 101 A.D.2d at 741 (internal citations omitted). A party opposing a motion for summary judgment “cannot defeat the motion by general conclusory allegations which contain no specific factual references.” *Poluliah v. Fidelity High Income Fund*, 102 A.D.2d 720, 722 (1st Dep’t 1984)(citing *Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc. 2d 138 (Sup. Ct., Oswego County 1968)). “Vague and conclusory allegations based on conjecture or suspicion cannot defeat a motion for summary judgment.” *Marine Midland Bank, N.A. v. Embassy E., Inc.*, 160 A.D.2d 420, 422 (1st Dep’t 1990)(citing *Oates v. Marino*, 106 A.D.2d 289, 291(1st Dep’t 1984)).

Defendant has provided only conclusory and unsupported allegations in support of his defense. Insufficient factual evidence exists in the record to support Kramer’s contention that “Century Bank failed to distribute the loan amount to the borrower or in accordance with the closing documents.” Kramer Aff., ¶ 28. The “closing documents”

that the Defendant relies upon is a Century Bank Memorandum, an internal office memorandum which notes only how “[l]oans are generally funded” Wait Aff., Ex. A. Century Bank’s Memorandum is dated April, 24, 2008, and is not a memorandum between Century Bank and the Borrower that would suggest that it bears any relation to Century Bank’s knowledge of any potential, alleged or actual wrongdoing by Landberg. *Id.* The October 20, 2008 Amended Note and the corresponding Assignment contain no provision to support Kramer’s averment: (1) that the funds were disbursed to any person or entity other than the Borrower; and (2) that the funds were disbursed contrary to any agreement between Century Bank and the Borrower.

Further, insufficient evidence exists to support Defendant’s allegation that Century Bank knew or should have known that Landberg was misappropriating the loan money for his own benefit. *See Kramer Aff.*, ¶ 27. “[S]ummary judgment cannot be avoided on the basis of general, conclusory and unsubstantiated allegations” *US 7 Inc. v. Transamerica Ins. Co.*, 173 A.D.2d 311, 312 (1st Dep’t 1991). The mere fact that Mr. Florescu invested with the Borrower, coupled with Landberg’s subsequent indictment for securities fraud, does not raise Defendant’s averment from an unsubstantiated level to that of a genuine issue of triable fact required to defeat a motion for summary judgment. *See Kramer Aff.* ¶ 20 (alleging that Mr. Florescu had invested with Landberg and West End); *see also id.*, at ¶ 27 (“I believe that Century Bank knew or should have known that Landberg was using loan money for improper purposes”).

While the court “should draw all reasonable inferences in favor of the nonmoving party,” *F. Garofolo Elec. Co.*, 300 A.D. 2d at 188, Defendant’s unsubstantiated claims are insufficient to overcome his burden to prove the existence of a genuine issue of material fact. *Poluliah*, 102 A.D.2d at 722.

Further, Defendant’s defense that the Guaranty is void for lack of consideration is without merit. Defendant cites *Walcut v. Clevite Corp.*, 13 N.Y.2d 48, 56 (1963) in support of his defense that guarantors may always assert total failure of consideration as a defense by showing that the creditor “totally failed to perform his obligations to the principal.” *Id.* However, the defense to the enforcement of the unlimited guaranty is separate to the defense of lack of consideration of the Amended Note; the documents and their obligations are distinct. *See Bank Leumi Trust Co. of New York v. D’Evori Int’l, Inc.*, 163 A.D.2d 26, 32 (1st Dep’t 1990)(denying the defense of lack of consideration because “the security agreement and the unlimited guarantees . . . [were] separate documents supported by independent consideration”). Pursuant to the terms of the Guaranty, Defendant waived any “circumstance that might otherwise constitute a legal or equitable defense to Guarantor’s obligations under this Guaranty.” *Troyan Aff., Ex. A (Guaranty)*, § 3(a); *see also Gannett Co. v. Tesler*, 177 A.D.2d 353, 353 (1st Dep’t 1991)(affirming a grant of summary judgment because, “by the plain language of the guarantee, defendant was precluded from raising any defenses or counterclaims relating to the underlying debt”)(citing *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90 (1985)).

“An extension of credit is ample consideration for the execution of a guaranty.” *Movado Grp., Inc. v. Presberg*, 259 A.D.2d 371, 371 (1st Dep’t 1999)(internal citations omitted. Defendant’s promise to unconditionally pay all of his company’s debts in consideration for the extension of credit constitutes a valid written expression of past consideration. *Id.* (“Such a written expression of past consideration satisfies General Obligations Law § 5–1105”)(internal citations omitted). Defendant acknowledged receipt of valuable consideration when he executed the Guaranty, and further acknowledged that Century Bank was “relying on [the] Guaranty in making a financial accommodation to the Borrower” Guaranty, § 1(b). Defendant’s argument that the Guaranty is void for lack of consideration is not sufficient to defeat Plaintiff’s instant motion.

Plaintiff is thus entitled to summary judgment pursuant to CPLR 3212. Defendant has failed to demonstrate the existence genuine issue of triable fact to defeat Plaintiff’s motion for summary judgment pursuant to CPLR 3212 with respect to the enforcement of the Guaranty.

II. Attorneys’ Fees

Plaintiff also moves in the instant motion for summary judgment pursuant to 3212 to recover attorneys’ fees in connection with its first cause of action on the Guaranty.

The Guaranty expressly provides that Defendant, as Guarantor, agreed to reimburse Plaintiff, as successor-in-interest to Century Bank, as Lender, “on demand for all the Lender’s expenses, damages and losses of any kind of nature, including without

limitation costs of collection and actual reasonable attorneys' fees . . . incurred by the Lender in attempting to enforce [the] Guaranty" Guaranty, § 5. When the guaranty expressly allocates these costs to one party, then liability for attorney's fees is clear. *BNY Fin. Corp. v. Clare*, 172 A.D.2d 203, 205 (1st Dep't 1991)(citing *Mohawk-Schoharie Production Credit Assoc. of Fultonville v. Wilber*, 71 A.D.2d 720, 419 N.Y.S.2d 762 (3d Dep't 1979)).

Plaintiff is therefore entitled to attorneys' fees and costs incurred as a result of this action.

ORDER

Accordingly, it is hereby

ORDERED that the plaintiff Iberiabank's motion for summary judgment on the complaint herein for the cause of action to enforce the guaranty of defendant Kevin Kramer is GRANTED, and the Clerk is directed to enter judgment in favor of Iberiabank and against defendant in the amount of \$ 5,903,782.76, together with interest at the rate as per the terms of the underlying loan from the date of March 17, 2011 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that portion of plaintiff Iberiabank's action to recover upon the guaranty is SEVERED and plaintiff is to settle judgment upon that portion of this decision and order; and it is further

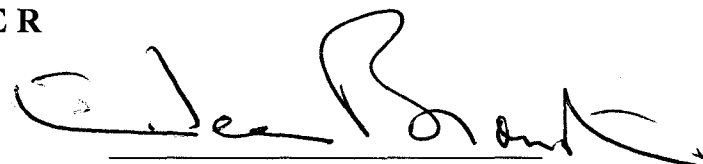
ORDERED that that portion of the plaintiff Iberiabank's action that seeks the recovery of attorney's fees is GRANTED and SEVERED and the issue of the amount of reasonable attorneys' fees which plaintiff may recover against the defendant Kevin Kramer is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the Decision and Order of the Court

Dated: New York, New York
July 24, 2012

ENTER



Hon. Eileen Bransten, J.S.C

¹ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/suptmanh under the "References" section of the "Courthouse Procedures" link).