

Citibank, N.A. v Silverman

2010 NY Slip Op 33422(U)

December 6, 2010

Supreme Court, New York County

Docket Number: 105168/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 105168/2009
CITIBANK, N.A.
vs.
SILVERMAN, HARVEY
SEQUENCE NUMBER : 003
COMPEL DISCLOSURE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 12/6/10
which disposes of motion sequence(s) no. 002, 003, 004 & 005.

FILED

DEC 13 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/6/10

Saliann Scarpulla
SALIANN SCARPULLA

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
CITIBANK, N.A.,

Plaintiff,

Index No.:105168/09

- against-

DECISION AND ORDER

HARVEY SILVERMAN and KAREN SILVERMAN,

Defendants.

FILED

DEC 13 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

For Plaintiff:
Blank Rome LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174

For Defendants:
Danzig Fishman & Decea
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White Plains, NY 10601

HON. SALIANN SCARPULLA, J.:

Motions with sequence numbers 002, 003, 004, and 005 are consolidated for disposition.

In this action for failure to repay a loan: (i) in motion sequence number 002, plaintiff Citibank, N.A. ("Citibank") moves, pursuant to CPLR 1001 (a), 1002 (b), 1003, and 3025 (b), for leave to file an amended complaint; (ii) in motion sequence number 003, Citibank moves, pursuant to CPLR Article 31, for an order compelling defendants Harvey Silverman ("Mr. Silverman") and Karen Silverman ("Mrs. Silverman") (together, the "Silvermans") to respond to Citibank's discovery request; (iii) in motion sequence number 004, the Silvermans move, pursuant to CPLR 3212, for a summary judgment dismissing Citibank's claims against

002, 003, 004, 005

them; and (iv) in motion sequence number 005, Citibank moves, pursuant to CPLR 3214 (b), for an order directing continuation of discovery pending determination of the Silvermans' motion for summary judgment.

Background

Citibank alleges that, in August 2007, it entered into a credit agreement (the "Original Agreement") pursuant to which it established a line of credit (the "Line of Credit") of up to \$10 million in favor of the Silvermans. Simultaneously, the Silvermans executed a note (the "Original Note"), in which they promised to repay, by August 26, 2008, the funds borrowed pursuant to the Line of Credit. The Original Note's jurat provides that it was executed on August 27, 2007, before a notary public in Suffolk County, New York.

The parties agree that disbursements from the Line of Credit were made to an account controlled by a nonparty, Marc Roberts ("Roberts"), pursuant to a consumer durable power of attorney (the "POA"). The POA provides that the Silvermans authorized Roberts, among other things, to borrow money in their name from Citibank and to "renew, extend or modify the terms of any agreement in [their] name with Citibank . . . for the borrowing of money." The POA's jurat provides that the document was executed by the Silvermans on August 27, 2007 before a notary public in Palm Beach County, Florida. The Silvermans deny that they were in Florida on that date and claim that their signatures were either forged or obtained through fraud.

On August 27, 2007, the Silvermans also allegedly executed a document entitled Client Funds Transfer Instruction Agreement (the "Fund Transfer Agreement"), in which they authorized Roberts to give instructions to Citibank to transfer funds from their individual and business Citibank accounts to other accounts within, or outside of, Citibank.

Pursuant to Roberts's instructions, between September 2007 and May 2008, Citibank transferred approximately \$12 million under the Line of Credit to an account controlled by Roberts in Wachovia Bank. Citibank claims that, in August 2008, the Silvermans allegedly requested a one-year extension of the maturity date under the Original Note to August 25, 2009 and provided a financial statement (the "2008 Statement") listing their assets and liabilities. Citibank agreed, and, on August 26, 2008, the parties allegedly entered into another credit agreement (the "Revised Agreement"), and the Silvermans allegedly executed another note (the "Revised Note") in favor of Citibank. (The Original and Revised Agreements, as well as the Original and Revised Notes, are together referred to as the "Loan Documents.") The Silvermans claim that their signatures on the Revised Agreement were forged or obtained through fraud.

Pursuant to the Original Note, the Silvermans were obligated, among other things, to maintain their net worth at a minimum of \$150 million and not to incur additional debt in an aggregate amount exceeding \$1 million. Citibank alleges in its complaint that in February 2009, the Silvermans provided Citibank with a net worth statement (the "2009 Statement"), which allegedly disclosed that they had failed to maintain the minimum net worth amount

and that they had incurred additional debt in excess of \$1 million. On this basis, Citibank declared that the Silvermans were in default, and that the outstanding principal amount with interest was due immediately.

The Silvermans have not repaid Citibank the outstanding amounts, and, in this action, Citibank seeks repayment of the principal amount of \$10 million with accrued interest.

In their amended answer, the Silvermans interposed three counterclaims against Citibank: (i) aiding and abetting Roberts's breach of his fiduciary duty to the Silvermans; (ii) breach of contract, for Citibank's alleged advancement of the Loan without the Silvermans' knowledge or authorization; and (iii) aiding and abetting Roberts's fraud upon the Silvermans.¹

In motion sequence number 001, Citibank had previously moved for summary judgment. By order entered on November 19, 2009, the court (Lehner, J.) denied Citibank's motion, with leave to renew after the completion of discovery. The Silvermans now move for summary judgment, and Citibank moves for (i) leave to amend the complaint; (ii) an order compelling discovery; and (iii) an order directing continuation of discovery while the Silvermans' motion is pending.

¹ In March 2010, Roberts filed for bankruptcy under Chapter 7 in the Bankruptcy Court for the Southern District of Florida.

Citibank's Motion to Amend the Complaint

Although leave to amend a pleading is freely granted, “an examination of the underlying merits of the proposed causes of action is warranted.” *Non-Linear Trading Co. v. Braddis Assoc.*, 243 A.D.2d 107, 116 (1st Dept 1998); *see also Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584, 585 (1st Dept 2001) (“leave to amend will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law”) (internal citations omitted). A party seeking leave to amend pleadings must “allege facts legally sufficient to support its proposed pleading” by way of an affidavit of merit and evidentiary proof. *Non-Linear Trading*, 243 A.D.2d at 117.

By motion dated April 12, 2010, Citibank originally sought to amend the complaint as follows: (1) to add Roberts as a defendant and assert against him causes of action for unjust enrichment and fraud, and (2) as against the Silvermans, to amend a cause of action for breach of contract and to add causes of action for unjust enrichment and fraud. In opposition, the Silvermans provided a copy of Roberts's bankruptcy petition, which was filed on March 2, 2010, and argued that, as a result of an automatic statutory stay on commencement of any judicial proceedings against him, pursuant to the Bankruptcy Code, 11 USC § 362 (a), Roberts may not be added as a defendant. In reply, Citibank withdrew its request for leave to add Roberts as a defendant, and instead sought leave to amend a cause of action for breach of contract and to add causes of action for unjust enrichment, fraud, and indemnification as against the Silvermans only (the “Revised Proposed Amended

Complaint”). Pursuant to a so-ordered stipulation, dated July 21, 2010, the Silvermans submitted a sur-reply.

The Silvermans argue that Roberts is a necessary party to this action, and that, as a result of the aforementioned statutory stay, this action must either be dismissed or stayed pending the outcome of the bankruptcy court proceedings. CPLR 1001 (a) defines necessary parties as those “who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgement in the action” CPLR 1001(a); *see e.g. Eclair Advisor Ltd. v. Jindo Am., Inc.*, 39 A.D.3d 240, 244 (1st Dept 2007).

Here, the Court’s determination would not adversely affect Roberts’s rights. Additionally, complete relief can be accorded between the current parties to this action without Roberts. *See e.g. Spector v. Toys “R”Us, Inc.*, 12 A.D.3d 358, 359 (2d Dept 2004). The primary issues are (1) whether Roberts has actual or apparent authority to act on the Silvermans’ behalf, and (2) even if Roberts acted outside of this authority, whether the Silvermans ratified his acts and retained the benefit derived from them. *See e.g. Parlato v. Equitable Life Assur. Socy. of U.S.*, 299 A.D.2d 108, 113 (1st Dept 2002); *see also Chase Manhattan Bank, N.A. v. Perla*, 65 A.D.2d 207, 211 (4th Dept 1978). It is possible that Roberts’s testimony could be important to determine these issues. However, the parties can subpoena Roberts, as a nonparty, to provide documents and give testimony. In fact, Citibank has already procured an affidavit from him, dated June 25, 2010, and submitted it in support

of motion sequence numbers 004 and 005. To the extent that the Silvermans and Roberts may be deemed as joint tortfeasors, Citibank need not sue them together. *See e.g. Peak v. Bartlett, Pontiff, Stewart & Rhodes, P.C.*, 28 A.D.3d 1028, 1030 (3d Dept 2006). Accordingly, Roberts is not a necessary party within the meaning of CPLR 1001(a).

Even if Roberts may be deemed a necessary party, pursuant to CPLR 1001(b), continuation of this action is still warranted because Citibank “has another effective remedy in case the action is dismissed on account of the nonjoinder.” CPLR 1001(b)(1). Specifically, Citibank has appeared in Roberts’s bankruptcy proceedings in an apparent attempt to recover some of its losses.

The Silvermans further argue that Citibank was aware of the facts asserted in the Revised Proposed Amended Complaint even before it commenced this action, and yet chose to sit on this information until now while the parties have been actively litigating this action. Citibank, however, claims that it was only after the commencement of this action that it learned about the Silvermans’ preexisting liabilities, which they failed to disclose as part of their application for the Line of Credit. Additionally, since the commencement of the action in April 2009, the maturity date on the loan of August 25, 2009 has passed.

Discovery has not been completed, as evidenced by two concurrent motions to compel discovery. The Silvermans chose to move for summary judgment (motion sequence number 004) after Citibank had moved to amend the complaint (motion sequence number 002) and to compel discovery (motion sequence number 003). The parties stipulated that Citibank had

a right to move for leave to amend the complaint. Accordingly, the Silvermans have failed to demonstrate prejudice if leave to amend were granted. *Cf. Lattanzio v. Lattanzio*, 55 A.D.3d 431, 431-432 (1st Dept 2008) (defendants' motion to amend their answer denied where (1) relevant facts were known to them at the time of the original answer; (2) defendants previously moved to amend their answer; (3) plaintiff had moved for summary judgment with respect to affirmative defenses, which defendants failed to delete in their prior motion; and (4) discovery had been completed).

The Silvermans further contend that Citibank has failed to provide an affidavit of merit or other evidentiary proof in support of its motion. Evidentiary proof is required in support of a motion for leave to amend pleadings. *See e.g. Non-Linear Trading*, 243 A.D.2d at 117. Here, Citibank, in support of its motion, has referenced affidavits, previously submitted as part of this action, satisfying the evidentiary proof requirement.

Proposed Breach of Contract Cause of Action

Citibank seeks leave to amend a cause of action for breach of contract. An allegation of breach of contract should specify "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant."

Furia v. Furia, 116 A.D.2d 694, 695 (2d Dept 1986); *see also Sebro Packaging Corp. v. S.T.S. Indus., Inc.*, 93 A.D.2d 785, 785 (1st Dept 1983).

Citibank alleges that it entered into the Loan Documents with the Silvermans, pursuant to which it advanced to them at least \$10 million. The Silvermans allegedly

breached the Loan Documents by failing to (i) repay their obligation; (ii) maintain a minimum net worth of \$150 million; (iii) disclose to Citibank the existence of other debts worth approximately \$70 million; and (iv) incurring a debt exceeding \$1 million. As a result, Citibank has been allegedly damaged in the amount of at least \$10 million.

Documentary evidence submitted as part of this and prior motions supports these allegations. Specifically, Mr. Silverman conceded that he executed the Original Note. The Original Agreement, which was executed simultaneously with the Original Note, provides that it is a condition precedent to Citibank's obligation to make advances under the Line of Credit, that "the representation and warranties" made by the Silvermans in the Original Note are true, and that no event of default exists. The Original Note, in turn, obligates the Silvermans to repay the Loan by the maturity date, to provide accurate annual financial statements, to maintain a minimum net worth of \$150 million, and not to incur additional debts over \$1 million. The Silvermans do not dispute that the Loan is still outstanding and that they, or Roberts on their behalf, incurred other debts, the existence of which was not disclosed to Citibank until February 2009. The 2009 Statement that Silvermans provided to Citibank showed that they failed to maintain the minimum net worth of \$150 million and incurred debts of over \$1 million. Accordingly, leave to amend the breach of contract cause of action is granted.

Proposed Unjust Enrichment Cause of Action

Citibank seeks to add a cause of action for unjust enrichment. “To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor.” *Nakamura v. Fujii*, 253 A.D.2d 387, 390 (1st Dept 1998).

“The theory of unjust enrichment lies as a quasi-contract claim,” *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005), and a party may not proceed on a quasi-contractual claim where an express contract between the parties exists. *See e.g. Parsa v. State of New York*, 64 N.Y.2d 143, 148 (1984); *SAA-A, Inc. v. Morgan Stanley Dean Witter & Co.*, 281 A.D.2d 201, 203 (1st Dept 2001). However, “[w]here ... there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed alternatively upon quasi-contractual theories.” *Halliwell v. Gordon*, 61 A.D.3d 932, 934 (2d Dept 2009).

Here, the Silvermans claim (1) impropriety with respect to execution of the POA, the Revised Note, and the Revised Agreement; (2) that the financial statements submitted to Citibank were created without their knowledge or participation; (3) that Citibank improperly opened the Line of Credit and complied with Roberts’s instructions, without notifying the Silvermans, by transferring the alleged \$12 million to Roberts’s account in Wachovia Bank. Accordingly, given that the Silvermans dispute the validity of some of the Loan Documents, Citibank may plead, in the alternative, unjust enrichment.

The Silvermans further maintain that they did not receive any of the Line of Credit proceeds, all of which were transferred to Roberts. However, at this juncture, it is unclear whether some of the funds were used towards the real estate projects, such as Miami WorldCenter, on which the Silvermans and Roberts worked together, and which would be a benefit to the Silvermans. Therefore, leave to add a cause of action for unjust enrichment is granted.

Proposed Fraud Cause of Action

Citibank seeks to add a cause of action for fraud. The elements of a cause of action for fraud require (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). “[A] fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information.” *Kaufman v. Cohen*, 307 A.D.2d 113, 119-120 (1st Dept 2003).

Citibank alleges that in 2007, the Silvermans provided a financial statement (the “2007 Statement”), prepared by their accountant, as part of their application for the Line of Credit, which failed to disclose tens of millions of dollars that the Silvermans had borrowed from different banks (the “Undisclosed Liabilities”). Similarly, in 2008, a financial statement (the “2008 statement”) and a letter (the “2008 letter”), provided as part of the Silvermans’

request to extend the August 2008 maturity date, allegedly had the same omissions. Only a financial statement provided in February 2009 included the Undisclosed Liabilities.

Citibank, in its proposed amended complaint, alleges that the Silvermans intended that Citibank rely on their financial statements in order to offer them the Line of Credit and to extend the August 2008 maturity date. Citibank allegedly relied on these financial documents as part of its decision to extend credit to the Silvermans, and they have not repaid their debt to Citibank.

The Silvermans argue that Citibank has failed to plead fraud with sufficient particularity. “[I]n any action based upon fraud, ‘the circumstances constituting the wrong shall be stated in detail.’” *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dept 2003) (quoting CPLR 3016(b)). “[S]ection 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct.” *Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). In this respect, Citibank identifies specific financial statements and letters that allegedly had misrepresentations and omissions, which satisfies CPLR 3016(b) requirements. *See e.g. P.T. Bank Cent. Asia*, 301 A.D.2d at 376-377; *see also Kaufman*, 307 A.D.2d at 121.

The Silvermans further contend that Citibank’s allegations pertain to the their misrepresentations about future conduct, which is not actionable as fraud. However, Citibank alleges, among other things, that when the Silvermans applied for the Line of

Credit, they failed to disclose existing debts, which is an allegation of failure to disclose an existing material fact.

The Silvermans also maintain that they had no knowledge of, and were not involved in the preparation of, the 2007 or 2008 Statements, which were prepared by their accountant at Roberts's direction. Accordingly, the Silvermans contend that Citibank cannot show that they knowingly made a false statement with intention to induce reliance. Additionally, they argue that, in any event, their alleged misrepresentation was not a cause of injury. Rather, an intervening event, consisting of Roberts's procuring the POA and obtaining the funds, caused Citibank's injury.

However, even if Roberts lacked actual authority to act on the Silvermans' behalf, he might have had apparent authority. Citibank alleges that Mr. Silverman introduced Roberts to its employees as his business partner and informed them that Roberts was authorized to act on his behalf.

[A] principal may be held liable in tort for the misuse by its agent of his apparent authority to defraud a third party who reasonably relies on the appearance of authority, even if the agent commits the fraud solely for his personal benefit, and to the detriment of the principal.

Parlato v. Equitable Life Assur. Socy. of U.S., 299 A.D.2d 108, 113 (1st Dept 2002).

Additionally, a principal is liable for an agent's fraudulent acts, which were committed while the agent was acting outside of his authority, if the principal later ratifies these acts and retains the benefits derived from them. *See e.g. Perla*, 65 A.D.2d at 211. Citibank claims

that the Silvermans, in their 2009 Statement, acknowledged that they owe \$10 million to Citibank, thereby ratifying, and benefitting from, Roberts's acts. Accordingly, the Silvermans' alleged lack of participation in creating the financial statements at issue and Roberts's alleged improper acts do not bar Citibank from alleging fraud as against the Silvermans.

The Silvermans contend that the 2008 Statement should be disregarded because it was submitted after Roberts drew down all of the funds in question. However, Citibank alleges that it relied on this statement in deciding to extend the August 2008 maturity date by another year, which may constitute a separate injury to Citibank.

Accordingly, the leave to add the cause of action for fraud is granted.

Contractual Indemnification Cause of Action

Citibank claims that, pursuant to the POA and the Fund Transfer Agreement, the Silvermans agreed to indemnify, defend, and hold Citibank harmless from any claims, losses, and costs, including attorneys' fees. Citibank seeks that the Silvermans indemnify it for \$10 million in losses with interest, as well as attorneys' fees and costs.

"A contract of indemnity runs not to the creditor but to a third person who is or will become a debtor upon the imposition of a contingent liability." *General Phoenix Corp. v. Cabot*, 300 N.Y. 87, 93 (1949). Indemnification clauses are triggered only when Citibank becomes liable to a third party in connection to the POA or the Fund Transfer Agreement. *See e.g. Matter of Campbell*, 176 Misc. 543, 544 (Sur. Ct. 1941). The claim that the

Silvermans are liable to Citibank for \$10 million is one for breach of contract, not indemnification.

Moreover, the Silvermans are contractually obligated to pay attorney's fees and expenses associated with enforcement of the Original Note to Citibank, pursuant to the term of the Original Note, § 15, which provides that "(t)he Borrowers agree to pay on demand all costs and expenses in connection with the ... enforcement ... of this Note and all other Credit Documents (such costs and expenses shall include ... the fees and disbursements of legal counsel." Accordingly, these items also fall under the breach of contract cause of action. However, to the extent that the breach of contract claim may fail, Citibank may seek, in the alternative, attorney's fees and expenses under contractual indemnification. Therefore, leave to plead contractual indemnification is granted only with respect to attorney's fees and expenses.

Citibank's Motion to Compel Discovery

Citibank seeks an order compelling the Silvermans (1) to produce all non-privileged documents responsive to Plaintiff's First Request for the Production of Documents dated January 6, 2010 ("Document Request"), and (2) to provide verified responses to Plaintiff's First Set of Interrogatories dated January 6, 2010 ("Interrogatories"). The Document Request consists of 45 separate demands, and the Interrogatories consist of 16 interrogatories.

Previously, the parties entered into a so-ordered stipulation, dated February 24, 2010, providing that the Silvermans had 30 days from that date to respond to the Interrogatories and

to produce documents in response to the Document Request, for which no objection was asserted. Citibank's counsel also claims that (1) in April 2010, he sent a letter to the Silvermans' counsel requesting that they comply with these discovery demands, and (2) spoke to defense counsel over the phone with respect to discovery compliance.

The Silvermans have agreed to produce non-privileged documents responsive to document demands numbered 1-26, 29, 35, and 36. In reply Citibank agrees that the Silvermans have, in fact, complied with these document demands. The Silvermans, however, object to Document Requests numbered 27 and 30-33, as well as to Interrogatories numbered 13 and 15.

Request 27 seeks production of all documents, reflecting communications between Silverman Partners, L.P. (a company owned by the Silvermans), the Silvermans, and Roberts. Requests 30-33 seek documents, with respect to any entity in which both Mr. Silverman and Roberts "have or had an interest," such as operating agreements, financial statements, and tax returns. Interrogatories 13 and 15 ask the Silvermans to identify all agreements, including partnership agreements, between Mr. Silverman and Roberts and whether the Silvermans ever authorized Roberts to take any action on their behalf, respectively.

The Silvermans contend that these demands are overly broad and unduly burdensome, because they have known Roberts for over 20 years, in the course of which they have had numerous communications with him, entered into a number of joint business ventures, and formed dozens of entities.

In reply, Citibank points out that it requests documents that have been created only during, or pertaining to, the period from January 1, 2003 to the present. In 2003, the Silvermans allegedly began obtaining lines of credits from various banks, including Citibank, in connection with large real estate projects. One of the main issues, according to Citibank, is whether Roberts acted as the Silvermans' agent with respect to multiple lines of credit, including the one at issue here, or whether, as the Silvermans contend, he acted in general without their knowledge or consent.

However, as previously discussed, the pertinent issues here are (1) whether Roberts had actual or apparent authority to act on behalf of the Silvermans with respect to *Citibank's* Line of Credit, and (2) if he lacked authority, whether the Silvermans subsequently ratified and benefitted from his acts. *See Parlato*, 299 A.D.2d at 113; *see also Chase Manhattan Bank, N.A.*, 65 A.D.2d at 211. Additionally, the parties agree that the proceeds from the Line of Credit were intended primarily for the Miami WorldCenter project. Accordingly, Citibank's Requests numbered 27 and 30-33 and Interrogatories 13 and 15 are not "material and necessary" for Citibank's case, and its motion in this respect is denied. Citibank may serve new discovery requests that are tailored to address the aforementioned issues.

The Silvermans further object to Requests numbered 28, 34, 37, 44, and 45, as well as to Interrogatory 4. Request 28 seeks bank documents with respect to the Silvermans' accounts at Citibank and a number of other banks. Request 44 seeks copies of all cancelled checks and account statements for all checking accounts of the Silvermans for the period

from January 1, 2007 to December 31, 2008. Request 37 seeks all tax returns filed by Silverman Partners and the Silvermans. Request 45 seeks documents reflecting communications to/from the Silvermans' accountant, Jeff Reynolds ("Reynolds"), regarding balance sheets and financial statements prepared with respect to the Silvermans and Silverman Partners or loans for which the Silvermans and Silverman Partners intended to be a guarantor or obligor.

Interrogatory 4 asks whether the Silvermans retained the services of the Kellogg Group, Reynolds's accounting firm, and Request 34 seeks documents reflecting communications between Mr. Silverman and the Kellogg Group. Citibank maintains that documents and information responsive to these requests relate to (1) the Silvermans' financial condition before, and over the course of, the Loan Documents, and (2) the Silvermans' interactions with their accountant, if any, in preparation of the financial statements submitted to Citibank. These documents and information are "material and necessary" with respect to the causes of action for unjust enrichment and fraud, and the motion in this respect is granted.

The Silvermans also object to Requests 38 to 43, which seek litigation documents, such as pleadings, discovery requests, and motions, relating to litigation with or against Wachovia Bank, Deutsche Bank, First Bank, Pacific Mercantile Bank, Orion Mercantile Bank, and Roberts.

Citibank claims that it needs these records in order to determine whether the Silvermans misrepresented their financial condition, incurred debt in excess of \$1 million, and routinely authorized Roberts to manage their financial affairs. However, many documents that Citibank is seeking are court records, and, as such, are freely available to the public. *See e.g. Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 28 A.D.3d 322, 324 (1st Dept 2006). Accordingly, Citibank need not resort to discovery mechanisms to obtain them. Citibank has not shown why it also needs records from other litigations that are not court records. Additionally, Requests 5-20 request documents pertaining to the loans with the aforementioned banks, and the Silvermans have agreed to produce these documents. As evident from the affidavit of Roberts submitted as part of this motion, Roberts is available as a witness and can be subpoenaed to produce pertinent records. Accordingly, Citibank has not shown that Requests 38-43 for litigation documents from other actions are necessary to the prosecution of this action, *see* CPLR 3101(a), and its motion in this respect is denied.

The Silvermans object to Interrogatories 2, 3, and 5-12. These Interrogatories ask whether the Silvermans signed the Original Agreement, the Original Note, the POA, the Revised Agreement and Note, and other documents pertaining to the Line of Credit.²

² The court notes that Mr. Silverman, in his affidavit, dated August 6, 2009, states, “[o]n August 27, 2007 I signed the original note upon which the subject lines of credits are based. A copy of this note is annexed hereto as Exhibit A.” Exhibit A is the Original Note. Accordingly, Mr. Silverman conceded signing the Original Note, which is partially responsive to Interrogatory 3.

The Silvermans argue that their signatures were either forged or obtained through fraud, and demand that Citibank produce the originals for a forensic examination. Citibank claims that it has offered the Silvermans to inspect the originals. Accordingly, Citibank is directed to produce the originals of the documents for inspection and to accommodate the Silvermans' request for a forensic examination. After the forensic examination takes place, the Silvermans are directed to respond to these Interrogatories.

The Silvermans claim that they have responded to Interrogatory 14, and, in reply, there is no dispute from Citibank.

The Silvermans object to Interrogatory 16, which asks whether the Silvermans or Silverman Partners have entered into any settlement or forbearance agreements with, or whether a judgment has been entered in favor of the following banks and against the Silvermans: Bank of America, Deutsche Bank, First Bank, Orion Mercantile Bank, Pacific Mercantile Bank and Wachovia Bank.

The Silvermans claim that this information is sensitive and proprietary and release of non-public information could have a detrimental impact on them.

As previously discussed, entered judgments are court records and are, therefore, freely available to Citibank. As to settlement or forbearance agreements, Citibank has failed to demonstrate how these documents are "material and necessary" to the prosecution of this action, and its motion in this respect is denied.

The Silvermans' Motion for Summary Judgment

The Silvermans moved for summary judgment after Citibank had moved for leave to amend the complaint and to compel discovery. In their motion, the Silvermans do not specify whether their motion pertains to the original complaint or to the amended complaint. The Silvermans do not address a cause of action for unjust enrichment or fraud. The Silvermans' motion appears to be directed to the original complaint.

Where an amended complaint supersedes the original complaint, a pending motion for summary judgment directed at the original complaint is rendered moot. *See e.g. Baker v. 16 Sutton Place Apt. Corp.*, 2 A.D.3d 119, 120 (1st Dept 2003); *see also Aikens Constr. of Rome, Inc. v. Simons*, 284 A.D.2d 946, 947 (4th Dept 2001). Additionally, as previously discussed, discovery in this action is still ongoing. The Silvermans have not inspected the originals of the pertinent documents as part of their claim of signature forgery. They have also not provided many relevant documents in response to Citibank's discovery demands. Depositions have not taken place yet. Accordingly, the Silvermans' motion is also premature. *See e.g. Groves v. Land's End Hous. Co.*, 80 N.Y.2d 978 (1992); *see also Ottinger v. Dempsey*, 122 A.D.2d 125, 127 (2d Dept 1986). Therefore, the Silvermans' motion for summary judgment is denied as premature and moot, without prejudice to renewal upon completion of discovery.

In light of the court's determination, Citibank's motion, pursuant to CPLR 3214 (b), for an order directing continuation of discovery while the Silvermans' motion for summary judgment is pending, is moot.

In accordance with the foregoing, it is

ORDERED that the motion of plaintiff Citibank, N.A. for leave to amend the complaint (motion sequence number 002) is granted only to the extent that plaintiff is granted leave to amend a cause of action for breach of contract and to add causes of action for unjust enrichment, fraud, and contractual indemnification as to attorney's fees and expenses, and the motion is otherwise denied; and it is further

ORDERED that the motion of plaintiff Citibank, N.A. to compel discovery (motion sequence number 003) is granted only to the extent that defendants are directed to produce non-privileged documents responsive to all of plaintiff's document requests, except document requests numbered 27, 30-33, 38-43, and interrogatories numbered 13, 14, 15, and 16, within thirty (30) days of service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff Citibank, N.A. is to produce the originals of all pertinent documents for examination by defendants within thirty (30) days of the service of a copy of this order with notice of entry, and defendants are to respond to interrogatories numbered 2, 3, 5-12 within 45 days of the examination; and it is further

ORDERED that the motion of defendant Harvey Silverman and Karen Silverman for summary judgment (motion sequence number 004) is denied, without prejudice to renew upon completion of discovery; and it is further

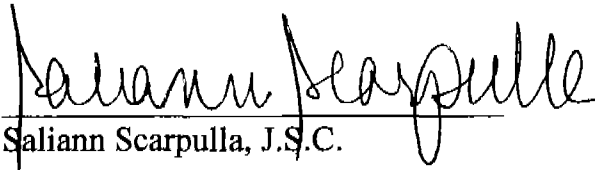
ORDERED that the motion of plaintiff Citibank to direct continuation of discovery while defendants' motion for summary judgment is pending (motion sequence number 005) is denied as moot; and it is further

ORDERED that the parties are directed to appear for a compliance conference on March 30, 2011, at 2:15 pm, 80 Centre Street, Room 2791.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 6, 2010

ENTER:


Saliann Scarpulla, J.S.C.

FILED

DEC 13 2010

NEW YORK
COUNTY CLERK'S OFFICE