Fleet National Bank v. Robert Tuckman and Progressive International, Inc. and Nathan Tropp

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3442-03T2

FLEET NATIONAL BANK,Plaintiff-Respondent,
V.
ROBERT TUCKMAN, Defendant-Appellant,
and
PROGRESSIVE INTERNATIONAL, INC. and NATHAN TROPP, Defendants.

Submitted: January 26, 2005 - Decided: FEB 0? 2005

Before Judges Newman, Axelrad and Holston, Jr.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, C122-03.

Stein, Riso sand Mantel, attorneys for appellant (Roger K. Marion, on the brief).

Riker, Danzig, Scherer, Hyland & Perretti, attorneys for respondent (Gerald A. Liioia, of counsel; Matthew H. Lewis, on the brief).

PER CURIAM

Defendant Robert Tuckman, one of the guarantors on a note executed to plaintiff Fleet National Bank, appeals from summary judgment to Fleet on its suit on the note against the corporate entity, Progressive International, Inc., and its principals-guarantors, Tuckman and Nathan Tropp. Neither Progressive nor Tropp appeal. We affirm

substantially for the reasons articulated by Judge MacKenzie in his comprehensive twenty-four page written decision appended to the December 16, 2003 order.

On April 19, 2002, Fleet and Progressive entered into a loan and security agreement for a $1,000,000 line of credit, which Fleet was given a security interest in Progressive's assets, including inventory. The note required payment by April 18, 2003. The agreement prohibited cash advances in excess of $25,000. Progressive's principals, Tuckman and Tropp, executed guarantees providing for absolute and unconditional liability for payment of the obligation, including a waiver of a defense involving impairment of collateral. More specifically, this provision stated:

> Section 3. Waiver. The Guarantor hereby waives promptness, diligence, notice of acceptance and any other notice with respect to any of the obligations and this Guaranty and any requirement that (plaintiff] exhaust any right or take any action against [Progressive) or any other person or entity or any collateral.

In the fall of 2002, Fleet learned that Progressive had used the line of credit to advance $342,000 to Tuckman for use in his business in return for relinquishment of his shares in Progressive, which was in violation of the terms of the agreement with Fleet. Progressive then failed to make the April 18, 2003 payment to Fleet. The principal balance at that time was $983,734.72.

In July 2003, Progressive was evicted from its warehouse. Shortly thereafter, Fleet's appraiser Joseph Meddings conducted a visual inspection of Progressive's warehouse inventory. He filed a certification with the court in support of Fleet's order to show cause for temporary restraints and complaint against Progressive and the guarantors for payment of the. note, indicating the meager inventory at the warehouse consisted mostly of perishables and racks to hold computer disks and miscellaneous items, which had a market value of about $15,000. Tuckman made no effort to inspect or value the inventory or to contact his co-guarantor Tropp or the landlord regarding any effort to purchase or sell the inventory to reduce his obligation as a guarantor to Fleet.

About three months later, Progressive's inventory was again inspected and the perishable items were poured out of open boxes and jars, thus making the inventory virtually worthless. The remaining items consisted of several pallets of old and unsaleable property which had a nominal, if any, auction value. This information was conveyed to Tuckman and the other defendants and they were advised if they wished to purchase the inventory that Fleet would relnquish its interest to the landlord within the next two days, which Fleet did.

On December 16, 2003, Judge MacKenzie issued a written decision and order granting summary judgment to Fleet. On January 30, 2004, the court issued an order holding defendants jointly and severally liable to Fleet in the amount $1,134,859.80, which included the loan balance, collection costs and default interest. The court found no material issue of fact as to the existence of a valid agreement with Progressive and the guaranties executed by Tuckman and

Tropp. The guarantors did not allege fraud or that the document was ambiguous or not otherwise invalid. The basic defense, again raised by Tuckman on appeal, was that the strict liability section of the guarantee was void as against public policy and that Fleet's alleged wasting of Progressive's inventory either discharged or reduced the amount of the guarantors' obligation and that a hearing was required to determine the amount of the reduction. Moreover, defendants urged that summary judgment was premature because discovery had not been completed and Tuckman had not had the opportunity to subpoena one of the inspectors and appraisers retained by Fleet.

Judge MacKenzie applied appropriate law and made proper determinations as a matter of law. rejected Tuckman's argument that a genuine issue of material fact existed as to whether Fleet impaired the collateral to Tuckman's detriment. Fleet advised defendants of its intent to relinquish to the landlord any interest in the inventory, which it described and indicated had nominal value, and gave Tuckman the opportunity to purchase and sell the inventory to reduce his obligation as a guarantor to Fleet. Tuckman did not do so. The cases of *Lenape State Bank v. Winslow Corp.* , 216 *N.J. Super.* 115 (App. Div. 1987) and *National Westminster Bank v. Lomker,* 277 *N.J. Super.* 491 (App. Div. 1994) are inapposite. In these cases, bad faith could be asserted against the lender because the lender, in effect, prevented the debtor from selling the collateral. Here, nothing of that sort existed. Fleet merely abandoned its interest in the inventory and left it in the warehouse where it was located. It did not dispose of or waste the collateral or interfere in any way with Tuckman's ability to make an agreement with the landlord for the items to be sold. Moreover, the security agreement did not require Fleet to pursue the collateral as a condition precedent to pursuing defendants.

Even if there were an impairment of the collateral, Tucker expressly and unequivocally waived it as a collateral defense in the guaranty. The judge correctly found the challenged guaranty language did not violate public policy. This type of waiver is expressly permitted under *N.J.S.A.* 12A:3-605i of the Uniform Commercial Code, "Discharge of Endorsers and Accommodation Parties," which provides that a party is not discharged if a separate agreement of the party provides for waiver of discharge defenses based on suretyship or impairment of collateral. The subpoena would not produce any evidence relevant to the issues before the court based on the above legal finding, thus summary judgment was appropriate.

Affirmed.

Attorney:

Gerald A. Liloia