KeyBank National Association, Plaintiff, vs. Correct Custom Drywall, Inc., et al., Defendants.

Case No. 09-CV-016408

STATE OF OHIO, COURT OF COMMON PLEAS, FRANKLIN COUNTY, CIVIL DIVISION

2015 Ohio Misc. LEXIS 22227

December 2, 2015, Decided
December 2, 2015, Filed

JUDGES: [*1] JUDGE KIM BROWN.

OPINION BY: KIM BROWN

OPINION

Category - H (Other Civil)

DECISION AND ENTRY

DENYING PLAINTIFF KEYBANK NATIONAL ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT, FILED MAY 1, 2015 and GRANTING DEFENDANT MARK L. WILKIE REVOCABLE TRUST'S MOTION FOR SUMMARY JUDGMENT, FILED MAY 14, 2015 and DENYING RENEWED MOTION OF DEFENDANT MARK L. WILKIE REVOCABLE TRUST FOR DISCOVERY SANCTIONS, FILED APRIL 22, 2015 and DENYING AS MOOT PLAINTIFF KEYBANK NATIONAL ASSOCIATION'S MOTION TO STRIKE JURY DEMAND, FILED MAY 13, 2015 and DENYING AS MOOT DEFENDANT MARK L. WILKIE REVOCABLE TRUST'S MOTION FOR LEAVE TO FILE AMENDED ANSWER, *INSTANTER*, FILED MAY 29, 2015 and DENYING AS MOOT REMAINING MOTIONS IN LIMINE, FILED BY KEYBANK NATIONAL ASSOCIATION ON JUNE 1, 2015

This matter is before the Court upon the following: Renewed Motion of Defendant Mark L. Wilkie Revocable Trust (hereinafter, the "Trust") for Discovery Sanctions, filed April 22, 2015; Plaintiff KeyBank National Association's (hereinafter, "KeyBank") Motion for Summary Judgment, filed May 1, 2015; the Trust's Motion for Summary Judgment, filed May 14, 2015; KeyBank's Motion to Strike Jury Demand, filed May 13, 2015; the Trust's Motion for Leave to File Amended Answer, [*2] *Instanter*, filed May 29, 2015; and KeyBank's 15 separate Motions in Limine, filed June 1, 2015. The parties have filed their respective memoranda in opposition to and reply memoranda in support of these motions. The issues are ripe for consideration of the Court.

MOTIONS FOR SUMMARY JUDGMENT

Statement of Facts

On or about November 1997, Mark Wilkie (hereinafter, "Wilkie") and Third-Party Defendant James Wade (hereinafter, "Wade") became business associates in a drywall supply business that later became known as B.K.W. Drywall Supply, Inc. (hereinafter, "BKW"). (Wilkie Aff. P3, Trust MSJ Ex. 1; Wade Aff. P3, Trust MSJ Ex. 2.) On December 23, 1997, the Trust formally acquired a fifty percent (50%) interest in BKW, with Wilkie becoming its President and Treasurer, and with Wade becoming its Vice President and Secretary. (Id.)

Prior to the Trust's acquisition of its interest in BKW, on April 17, 1997, Wade as then President of BKW Drywall Enterprises, Inc., executed a Commercial Guaranty by which BKW Drywall Enterprises, Inc. guaranteed the performance and prompt payment of current and future indebtedness of Correct Custom Drywall, Inc. (Spirakus Aff. P4, KeyBank MSJ, Ex. 1.)

In November and [*3] December 1997, Wilkie and Wade sought from KeyBank a $600,000.00 secured line of credit as well as a $165,000.00 term loan. (Wilkie Aff. P5 and Exs. A and B thereto; Wade Aff. P5 and Exs. A and B thereto.) The Trust and Wade both personally guaranteed those two credit facilities, resulting in the December 23, 1997 Commercial Guaranty of the Trust (hereinafter, the "Trust Guaranty"), upon which KeyBank's claims in this case are based. (Wilkie Aff. P7; Wade Aff. P7; Amended Compl. Ex. D.)

Pursuant to the Trust Guaranty, the Trust absolutely and unconditionally guaranteed the prompt payment when due of any indebtedness owed by BKW to KeyBank (hereinafter, the "BKW Obligations"). Specifically, the Trust guaranteed all of BKW's debt on which BKW was liable "primarily or secondarily, or as a guarantor or surety. . . ." (Amended Compl. Ex. D.) The Trust Guaranty further included an express waiver by the Trust (hereinafter, the "Waiver of Defenses" provision), which stated that "Guarantor also waives any and all rights or defenses arising by reasons of . . . any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." (Id.) An additional [*4] provision of the Trust Guaranty stated that KeyBank "shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by [KeyBank] . . . No . . . course of dealing between [KeyBank] and [the Trust] shall constitute a waiver of any of [KeyBank's] rights or any of [the Trust's] obligations as to any future transactions." (Id.) Finally, the Trust Guaranty required mailed, written notice of revocation from the Trust to KeyBank. (Id.)

In or around October 2001, Wilkie and Wade had a falling out, and it was decided that BKW would purchase the Trust's shares of BKW for $741,460.46. (Wilkie Aff. P11 and Ex. C. thereto; Wade Aff. P9 and 12.) On or around October 11, 2001, Wade discussed his decision to buy the Trust out of BKW with Charles M. Wharton (hereinafter, "Wharton), Wade's KeyBank Relationship Manager at the time, and KeyBank Senior Vice President. (Wade Aff. P10 and Ex. E thereto; Wharton Aff. P6, Trust MSJ Ex. 3.) Wharton agreed with Wade that buying out the Trust would not be a bad decision, and agreed for KeyBank to loan Wade the appropriate funds for a buyout of Wilkie and the Trust. (Wade Aff. P10 and 11 and Ex. E and F thereto; [*5] Wharton Aff. P6.) The buyout required that Wade buy Wilkie out personally of a real estate deal they had together with B&L Land LLC, and also required that Wade replace a business line of credit with Wilkie's bank with a completely new $800,000.00 line of credit with KeyBank. (Wade Aff. P10 and 11; Wharton Aff. P7.)

Wade believes he gave the parties' Redemption Agreement and Covenant Not to Compete relating to the stock redemption to Wharton, which required Wade to exercise his best efforts to remove the Trust and Wilkie from all personal guarantees to KeyBank. (Wade Aff. P13 and 14; Wharton Aff. P9.) Wade believes that he gave the agreement to Wharton because that would have made sense at the time, and he would have done so to convey that Wade's guaranty revocation obligations were part of the buyout. (Id.) Wharton understood that the stock redemption was a complete severing of ties with Wilkie and the Trust, including removal of their guarantor obligations to KeyBank. (Wharton Aff. P11.) The Trust has not produced an executed copy of the Redemption Agreement and KeyBank claims to have no copy of the Redemption Agreement in its files. (Spirakus Aff. P15, 18-22.)

The closing for the [*6] restructuring of BKW, Correct Custom Drywall, and B&L Land LLC credit facilities took place on December 31, 2001. (Wade Aff. P16 and Ex. I thereto; Wharton Aff. P13.) A new loan covenant package was established in the loan agreement dated December 31, 2001, in which KeyBank advanced new money to BKW, Correct Custom Drywall, Inc. and B&L Land LLC. (Id.) There were a total of twelve (12) credit facilities involved in the restructuring of the BKW, Correct Custom Drywall, Inc. and B&L Land LLC obligations to KeyBank following the redemption of the Trust's stock. (Wade Aff. P17 and Ex. J thereto; Wharton Aff. P15.) The assets of the Trust were not listed as collateral for these new, restructured facilities in KeyBank's Collateral Analysis for these loans, nor is the Trust identified in KeyBank's Guarantor Analysis for these restructured facilities. (Wade Aff. P27-29; Trust MSJ Ex. J, KEYBANK 000519-000521; Wharton Aff. P27-29.) Moreover, the Trust is not identified in the new Covenants applicable to these restructured facilities and the yearly financial statements of the Trust were no longer being required by KeyBank. (Id.) KeyBank closed these loans after concluding that BKW and Correct [*7] Custom Drywall, on a newly combined basis, could "readily service existing plus new debt." (Wade Aff. 32; Trust MSJ Ex. J; Wharton Aff. P30.)

After the December 2001 redemption of the Trust's shares in BKW, Wade and Wilkie never did business together again and neither heard from the other again. (Wilkie Aff. P12; Wade Aff. 33.) Also, after that time KeyBank never mentioned Wilkie to Wade, never inquired about the Trust, and never required Wilkie or the Trust to provide financial or asset information to complete any post December 31, 2001 loan. (Wilkie Aff. P8; Wade Aff. P47; Wharton Aff. 31.) Moreover, per Wharton, the Trust Guaranty was released by KeyBank on December 31, 2001. (Wharton Aff. P11, 12, 14, and 32.)

On January 2, 2002, Wilkie emailed Jeff Hughes, KeyBank portfolio monitor/manager, notifying Hughes

that Wilkie would not be giving KeyBank any further financial information, as his personal interest in B&L Land LLC had been purchased by Wade and the Trust's stock in BKW had been redeemed by BKW. Wilkie further expressed his expectation that Wade would have Wilkie and the Trust removed from their respective guaranty obligations. (Wilkie Aff. P14, KEYBANK 000682, Ex. D thereto.) [*8] Hughes confirmed receipt of Wilkie's email and copied the loan officers involved in the redemption transaction. (Wilkie Aff. P16-17.) Further, Hughes copied Wharton on a subsequent email regarding BKW Drwall (sic) Supply stating in pertinent part that "[w]e have obtained approval and documents to release the guaranty of Mark Wilkie have been delivered to James Wade for signature and review. We expect to have the documents returned today for booking." (Id.)

On April 8, 2005, Custom Correct Drywall, Inc. executed a $3,000,000.00 promissory note to KeyBank, and BKW executed a $1,000,000.00 promissory note to KeyBank. Both April 8, 2005 notes were renewals of prior promissory notes that were part of the December 31, 2001 restructuring of the BKW, Correct Custom Drywall, and B&L Land LLC credit facilities. (Wade Aff. P37-38.) The April 8, 2005 Correct Custom Drywall, Inc. note shows no guarantor. (Wade Aff. P37-38; Trust MSJ Ex. L, KEYBANK 000023.) The April 8, 2005 BKW note shows only Correct Custom Drywall, Inc. as a guarantor. (Wade Aff. P38; Trust MSJ Ex. N, KEYBANK 000017; Trust MSJ Ex. O, KEYBANK 000623.) The Trust never had any ownership interest in Correct Custom Drywall, Inc. (Wilkie [*9] Aff. P10; Wade Aff. P35-36.)

On July 11, 2006, Gulf Coast Drywall/CCD, LLC executed a $1,000,000.00 promissory note to KeyBank. On that same date, Wade as President of BKW executed separate Commercial Guaranties by which BKW guaranteed the performance and prompt payment of current and future indebtedness of Correct Custom Drywall, Inc. and Gulf Coast Drywall/CCD, LLC. The July 11, 2006 note was a new loan and Correct Custom Drywall, Inc. and BKW are shown as the guarantors. (Wade Aff. P39; Trust MSJ Ex. Q, KEYBANK 001020.) The Trust never had any ownership interest in Gulf Coast Drywall/CCD LLC. (Wilkie Aff. P10; Wade Aff. P35-36.)

The April 8, 2005 and July 11, 2006 loans are in default.

In this action, KeyBank asserts a claim for breach of a written guaranty against the Trust for failing to pay KeyBank for the loan amounts that the Trust guaranteed. Specifically, KeyBank alleges that the Trust guaranteed the following: the April 8, 2005 $3,000,000.00 Promissory Note of Correct Custom Drywall (hereinafter "CCD") by virtue of the Trust Guaranty and the July 11, 2006 BKW Commercial Guaranty of CCD; the July 11, 2006 $1,000,000.00 Promissory Notice of Gulf Coast Drywall (hereinafter "Gulf [*10] Coast") by virtue of the Trust Guaranty and the April 8, 2005 BKW Commercial Guaranty of Gulf Coast; and the July 11, 2006 $1,000,000.00 Promissory Note of BKW by virtue of the Trust Guaranty. KeyBank argues that because the Trust has admitted that it executed the Trust Guaranty, KeyBank advanced substantial funds to the borrowers in reliance on the Trust Guaranty, and the Trust never revoked the Trust Guaranty pursuant to the revocation provision contained in the Trust Guaranty, KeyBank is entitled to summary judgment. KeyBank seeks damages in the amount of $5,905,499.22 against the Trust.

In support of its motion for summary judgment, KeyBank argues that pursuant to the express language of the Trust Guaranty, the Trust provided a broad waiver to KeyBank of virtually all of the Trust's defenses. KeyBank further argues that in addition to waiving any such defenses, the Trust's asserted defenses lack merit. Specifically, KeyBank argues that the Trust cannot show any of the following: that the Trust was fraudulently induced to enter into any contract/agreement/obligation with KeyBank; that the Trust Guaranty was revoked before the debt at issue was incurred; or that the obligation for [*11] which KeyBank purports to hold the Trust liable has been satisfied in whole or in part.

In support of its motion for summary judgment, the Trust argues that KeyBank's only fact witness, Scott Spirakus (hereinafter "Spirakus"), KeyBank's Vice President, has no first-hand knowledge of the loan transactions at issue and, accordingly, his affidavit testimony should be stricken or severely discounted by the Court in light of the Trusts' contrary first-hand testimony of Wilkie and Wharton, a KeyBank Vice President at the time, both of whom were integrally involved in the relevant transactions. The Trust further argues that KeyBank ignores Ohio case law regarding revocation and waiver by estoppel, the application of which in this case precludes summary judgment in KeyBank's favor and instead requires summary judgment in favor of the Trust.

KeyBank counters that Spirakus is a competent witness pursuant to *Ohio Rules of Evidence 602* and *803(6)*, and that the testimony of Wilkie and Wharton is parol evidence. KeyBank further counters that the waiver of defenses in the Trust Guaranty is valid and enforceable. Finally, KeyBank denies any novation of the Trust Guaranty occurred.

Law and Analysis

In order to prevail upon a motion for [*12] summary judgment, the moving party must inform the court of the basis for the motion and identify those portions of

the record that demonstrate the absence of a genuine issue of material fact. In *Dresher v. Burt, 75 Ohio St. 3d 280, 1996 Ohio 107, 662 N.E.2d 264 (1996)*, the Ohio Supreme Court explained:

> the movant must be able to point to evidentiary materials of the type listed in *Civ.R.56(C)* that a court is to consider in rendering summary judgment . . . . These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. . . . If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. (emphasis added).
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> *Id. at 292, 293*.

Additionally, it is well-established that the party responding to a motion for summary judgment has some burden to provide the Court with evidence as to their reasons for opposition. "A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media, 59 Ohio St. 3d 108, 570 N.E.2d 1095 (1991)*. "It should be noted that placing the above-mentioned requirements on the moving party does not mean the nonmoving party bears no burden. Requiring that the moving party provide specific reasons [*13] and evidence gives rise to a reciprocal burden of specificity for the nonmoving party." *Harless v. Willis Day Warehousing Co., 54 Ohio St. 2d 64, 375 N.E.2d 46 (1978)*.

Unlimited personal guarantees in Ohio can be revoked by the guarantor by clearly communicating an intent to revoke and no longer be bound by the guaranty. *Huntington Nat'l Bank v. Symetics Group, Inc., 1977 Ohio App. LEXIS 9110, *3-4 (10th Dist.)*; *Fifth Third Bank v. Jarrell, 2005-Ohio-1260, P18-19 (10th Dist.)*; *Jae Co. v. Heitmeyer Builders, Inc., 2009-Ohio-2851, P11, P18 (10th Dist.)*.

The issue presented in this case is whether such guarantees can be released by the creditor when the creditor's conduct is inconsistent with an intent to enforce a personal guaranty, under a waiver by estoppel theory, where anti-waiver and waiver of defenses language exists in an instrument. While none of the cases cited by either party speaks to this exact issue, the Court finds the case law relating to cognovit defense waiver language instructive.

> Ohio courts have noted that, "'by definition, cognovit notes cut off every defense, except payment, which the maker of the note may have against enforcement of the note.'" *First Natl. Bank of Pandora v. Freed, Hancock App. No. 5-03-36, 2004 Ohio 3554, at P9*, quoting *Advanced Clinical Mgmt., Inc. v. Salem Chiropractic Ctr., Inc., Stark App. No. 2003CA00108, 2004 Ohio 120, at P18*. While the defense of non-default "is not the only meritorious defense recognized by courts as being available to a cognovit judgment debtor seeking *Civ.R. 60(B)* relief, in general, a judgment on a cognovit note will 'not be vacated for reasons which do not encompass [*14] such matters of integrity and validity.'" *First Merit Bank v. NEBS Financial Servs., Inc., Cuyahoga App. No. 87632, 2006 Ohio 5260, at P18*, quoting *Mervis v. Rothstein, Cuyahoga App. No. 86090, 2005 Ohio 6381, at P9*. In addition to non-default, other defenses involving the integrity and validity of a cognovit note include "improper conduct in obtaining the debtor's signature on the note; deviation from proper procedures in confessing judgment on the note; and miscalculation of the amount remaining due on the note at the time of confession of judgment." *Freed, supra, at P9*.
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> *Shuford v. Owens, 2008-Ohio-6220, P18 (10th Dist.)*.[1]
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> 1 Ohio courts have recognized many different defenses or claims, all relating to the integrity or validity of the agreement, in order to justify relief from a cognovit judgment. *See Fiedler v. Bigelow, 25 Ohio App. 456, 458, 5 Ohio Law Abs. 803, 159 N.E. 131 (1926)* (want of consideration); *Natl. City Bank v. Rini, 162 Ohio App. 3d 662, 2005 Ohio 4041, 834 N.E.2d 836* (waiver by estoppel)*; Davidson v. Hayes, 69 Ohio App.3d 28, 31-32, 590 N.E.2d 18, 6 Anderson's Ohio App. Cas. 273 (1990)* (fraud in the inducement); *Your Financial Community of Ohio, Inc. v. Emerick, 123 Ohio App.3d 601, 605, 704 N.E.2d 1265 (1997)* (incorrect amounts due, oral modification of the contract, and payment or partial payment); *FirstMerit Bank, N.A. v. Reliable Auto Body Co., 169 Ohio App.3d 50, 2006-Ohio-5056, P14, 861 N.E.2d 887* (forgery); *First Natl. Bank of Pandora v. Freed, supra, P9* ("improper con-

duct in obtaining the debtor's signature on the note; deviation from proper procedures in confessing judgment on the note; and miscalculation of the amount remaining due on the note at the time of confession of judgment"); *BancOhio Natl. Bank v. Schiesswohl, 51 Ohio App.3d 130, 131-32, 554 N.E.2d 1362 (1988)* (satisfaction of judgment or commercially unreasonable disposition of collateral); *Public Finance Corp. of Toledo v. Chappell, 16 Ohio Misc. 116, 119, 241 N.E.2d 181 (C.P.1967)* (judgment taken against the wrong defendant); *Bank One, NA v. SKRL Tool & Die, Inc., 11th Dist. No. 2003-L-048, 2004-Ohio-2602, P23* (equitable [*15] estoppel); *Cadillac Music Corp. v. Kristosik, 1st Dist. Nos. 92677, 92678, 2009-Ohio-5830, P16, 17* (novation or implied novation).

Based upon such reasoning, Ohio courts have found that unlimited personal guarantees can be released by the creditor when the creditor's conduct is inconsistent with an intent to enforce a personal guaranty, under a waiver by estoppel theory, even where cognovit defense waiver language exists in an instrument. *Nat'l Bank v. Rini, 162 Ohio App. 3d at 668-69 (11th Dist. 2005)*; *PHH Mortg. Corp. v. Ramsey, 2014-Ohio-3519, P19, 17 N.E.3d 629 (10th Dist.)*. Waiver by estoppel in such a situation goes to the integrity and validity of the unlimited personal guaranty and, accordingly, is recognized as a meritorious defense despite cognovit defense waiver language.

Similar to a cognovit defense waiver, the anti-waiver and defense waiver language argued by KeyBank attempts to cut-off every defense the Trust might have, except payment or performance. The Court finds that if defenses relating to the validity and integrity of the underlying agreement are recognized as meritorious defenses to an agreement including a cognovit defense waiver, then such defenses also should be recognized as meritorious defenses to an agreement including anti-waiver and defense waiver language, which similarly seek to cut-off every defense a party might [*16] have, except payment of performance. Accordingly, the Court finds that an unlimited personal guaranty can be released by the creditor when the creditor's conduct is inconsistent with an intent to enforce a personal guaranty, under a waiver by estoppel theory, even where anti-waiver and waiver of defenses language exists in the guaranty.

To establish a defense of waiver by estoppel, a defendant must provide evidence that "the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it." *Nat'l City Bank v. Rini, 162 Ohio App. 3d at 668*.

In this case, KeyBank's former Senior Vice President, Wharton, admits that KeyBank (1) knew that removing the Trust from the Trust Guaranty was "part of the deal" when KeyBank refinanced the redemption of the Trust's stock in BKW; (2) acknowledged the Trust's intention to revoke the Trust Guaranty by Wilkie's January 2, 2002 email to KeyBank's loan officers; (3) intended to acknowledge that revocation by formally releasing the Trust Guaranty by sending Wade documents to do just that; (4) was not relying on the assets of the Trust in the December 31, 2001 [*17] complete restructuring of the BKW credit facilities; (5) intended to release the Trust from the Trust Guaranty on December 31, 2001, based upon the personal negotiations between KeyBank and Wade; (6) received $1,630,000.00 of new loans to BKW and to B&L on that date which formed the consideration for the release of the Trust Guaranty; and (7) after that date acted consistent with the Trust Guaranty having been released. (Wharton Aff. P7, 11-14, 16-17, 19, 31-32.)

The Court agrees with Wilkie that Wharton's testimony is not barred by the parol evidence rule. The parol evidence rule does not apply to evidence of subsequent modifications of a written agreement or to the waiver of an agreement's terms by language or conduct. *Star Leasing Co. v. G&S Metal Consultants, Inc., 2009-Ohio-1269, P29 (10th Dist.)*; *Ayres v. Burnett, 2014-Ohio-4404 (2nd Dist.)*. Accordingly, the parol evidence rule does not bar Wharton's testimony with respect to the alleged modification and/or waiver of the revocation terms of the Trust Guaranty.

The Court further agrees with Wilkie that Wharton's affidavit testimony is not "highly speculative", but rather is rationally based on his own perceptions and helpful in determining critical issues of fact in this case. For approximately 21 years, Wharton was a KeyBank Senior Vice President responsible [*18] for the management of corporate loan portfolios, and the delivery of banking solutions including, but not limited to, new loan transactions, debt restructuring, and credit services. Wharton was the KeyBank Relationship Manager for the relevant businesses owned, all or in part, by Wade in 2001 and 2002, the time of the purported release of the Trust Guaranty. Wharton's testimony is admissible pursuant to *Civ. R. 56(E)*; *Evid. R. 701*; *Graham v. Szuch, 2014-Ohio-1727 (8th Dist.)* (finding a KeyBank Vice President and Trust Officer was permitted to give opinion testimony regarding the management of a family trust, by affidavit on summary judgment, as such opinions were rationally based on her own perceptions and were helpful in determining critical issues of fact in the case); *Akron-Canton Waste Oil v. Safety-Kleen Oil Servs., 81 Ohio App. 3d 591, 611 N.E.2d 955 (9th Dist. 1992)* (affirming admission of testimony of a secretary

who testified about the intention of her corporate employer as testimony was based on her personal knowledge); and *Dublin City Sch. Dist. Bd. of Educ. v. Franklin Cty. Bd. of Revision, 80 Ohio St. 3d 450, 1997 Ohio 327, 687 N.E.2d 422 (1997)* (affirming admission of testimony of a corporation's Vice President of Administration regarding his employer's strategy in purchasing commercial properties and in allocating the purchase amount to them).

The Court also agrees with Wilkie that KeyBank has not challenged, disputed or contradicted Wharton's admissions with [*19] any evidence or testimony of its own. KeyBank has produced no evidence that it did not intend to release the Trust from the Trust Guaranty, or that KeyBank did not, by its conduct, act inconsistent with an intent to enforce the Trust Guaranty for more than a decade, such that waiver by estoppel should not apply here. Spirakus' affidavit testimony that he found no written revocation in KeyBank's files does not dispute or contradict Wharton's admissions.

Finally, the Court finds that KeyBank has provided no evidence that disputes or contradicts the testimony of Wilkie regarding his intent to revoke the Trust Guaranty and his reasonable, detrimental reliance upon the actions of KeyBank consistent with the revocation of the Trust Guaranty. Specifically, KeyBank provides no evidence contrary to Wilkie's testimony that he reasonably believed, given Hughes' confirming email, together with twelve years of inaction and no communication from KeyBank, that the Trust Guaranty was effectively revoked. (Wilkie Aff. P17-18.) Further, based on that reasonable reliance, from December of 2001 forward, Wilkie treated the assets of the Trust as no longer encumbered by KeyBank to his detriment by (1) pledging [*20] them as security for millions of dollars of subsequent business loans, (2) never listing the Trust Guaranty as creating potential contingent liabilities on any subsequent loan application or financial statements with any subsequent lender, and (3) entering into hundreds of subsequent business transactions in total disregard of keeping any reserve toward a potential BKW contingent liability to KeyBank. (Id.)

For the above reasons, the Court finds the Trust is entitled to summary judgment based on revocation of the Trust Guaranty and KeyBank's conduct inconsistent with an intent to enforce the Trust Guaranty to the Trust's detriment. As the Court finds these issues dispositive of the parties' motions for summary judgment, the Court need not reach any remaining issues raised by the parties in those motions.

MOTION FOR SANCTIONS

The Trust seeks discovery sanctions against KeyBank and its counsel for the following: (1) knowingly concealing favorable (to Wilkie) evidence directly relevant to Wilkie's defense of KeyBank's Motion for Summary Judgment against him; (2) continuing to withhold documents from production on the basis of relevance, in direct violation of this Court's Order; and/or (3) [*21] for continuing to withhold documents in violation of KeyBank's *Rule 26(E)(2)* independent duty to supplement its discovery responses. The Trust seeks the following sanctions against KeyBank: (1) reimbursement for all of the Trusts' attorneys' fees in defending this action or, at least, for the Trusts' attorneys' fees relating to the Trusts' Motion to Compel, KeyBank's Motion for Summary Judgment, and the Trusts' Motion for Sanctions; (2) revocation of New Jersey counsel's *pro hac vice* status in this case; and (3) the fact that KeyBank released Wilkie from his personal guaranty obligations for BKW Drywall Supply, Inc.'s debts to KeyBank be taken as established in this case, and the action be accordingly dismissed.

KeyBank responds as follows: (1) KeyBank has complied with the Court's November 14, 2014 Order Compelling Discovery; (2) KeyBank has responded to the Trusts' Discovery Requests in Good Faith; and (3) the discovery sanctions against KeyBank are wholly inappropriate.

The Court finds financial sanctions against KeyBank are inappropriate at this time. Specifically, the Court finds that KeyBank appears to have complied with the Court's November 14, 2014 Order Compelling Discovery. As the Court [*22] previously sanctioned KeyBank for its prior failures to provide relevant discovery in that Order and the Court finds no additional discovery violations by KeyBank since that Order, the Court denies the Trust's request for additional financial sanctions.

The Court further finds the Trust's requests to revoke the *pro hac vice* status of KeyBank's co-counsel and to make certain factual findings against KeyBank to be moot given the Court's above decision on summary judgment.

For the above reasons, the Court finds the Trust's motion for sanctions to not be well taken.

MOTION TO STRIKE JURY DEMAND, MOTION FOR LEAVE TO FILE AMENDED ANSWER, AND REMAINING MOTIONS IN LIMINE

The Court finds KeyBank's Motion to Strike Jury Demand; the Trust's Motion for Leave to File Amended Answer, *Instanter*; and KeyBank's remaining Motions in Limine[2] to be moot given the Court's above decision on summary judgment.

2 On June 17, 2015, the parties entered into a stipulation granting KeyBank's motions in limine to exclude evidence regarding the Trust's affirmative defense that: (1) the Trust's written guaranty to KeyBank was substantively and procedurally unconscionable; (2) KeyBank's claims are barred by laches and/or [*23] the applicable statute of limitations; and (3) the Trust was fraudulently induced to enter into any agreement with KeyBank. (June 17, 2015 Joint Stipulation and Order Regarding KeyBank's Motions in Limine on the Affirmative Defenses of Unconscionability, Fraud and Statute of Limitations/Laches.)

CONCLUSION

Accordingly, the Trust's Renewed Motion for Discovery Sanctions, filed April 22, 2015, is **DENIED**; KeyBank's Motion for Summary Judgment, filed May 1, 2015, is **DENIED**; the Trust's Motion for Summary Judgment, filed May 14, 2015, is **GRANTED**; KeyBank's Motion to Strike Jury Demand, filed May 13, 2015 is **DENIED** as moot; the Trust's Motion for Leave to File Amended Answer, *Instanter*, filed May 29, 2015, is **DENIED** as moot; KeyBank's Motions in Limine, filed June 1, 2015, are **DENIED** as moot. KeyBank's claims against the Trust are hereby **DISMISSED**.

IT IS SO ORDERED.

JUDGE KIM BROWN