

804 N.Y.S.2d 99  
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08275

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Supreme Court, Appellate Division,  
Second Department, New York.

FLEET NATIONAL BANK, appellant,  
v.

Frank MARRAZZO, Jr., et al., defendants,  
Ralph Perone, respondent.

Nov. 7, 2005.

**Background:** Creditor brought action to recover on note and guaranties. The Supreme Court, Suffolk County, Molia, J., stayed proceedings during the pendency of a corporate debtor's bankruptcy proceeding, and creditor appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

(1) pending bankruptcy proceeding did not affect guarantor's liability, and

(2) bankruptcy proceeding did not require stay of state proceeding to recover on guaranty.

Reversed.

West Headnotes

**[1] Bankruptcy ↔2361**

[51k2361](#)

**[1] Guaranty ↔50**

[195k50](#)

Pending federal bankruptcy proceeding involving corporation which defaulted on underlying note did not affect guarantor's liability on the guaranty.

**[2] Bankruptcy ↔2396**

[51k2396](#)

Pending federal bankruptcy proceeding involving corporation which defaulted on underlying note did not require stay of state proceeding to recover on guaranty, where terms of the guaranty permitted

the creditor to enforce its rights against guarantor without resorting first to the corporate debtor, and state action and the bankruptcy proceeding did not share a complete identity of parties, cause of action, and judgment sought. [McKinney's CPLR 2201](#).

**\*100** Moritt Hock Hamroff & Horowitz, LLP, Garden City, N.Y. (Marc L. Hamroff, Michael S. Re, and Kimberly A. Luckey of counsel), for appellant.

Raice, Paykin, Greenblatt, Lesser & Krieg, LLP, New York, N.Y. (Robert I. Lesser of counsel), for defendants Frank Marrazzo, Jr., and Maria Belen Carrasco-Millan.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York, N.Y. (Scott A. Steinberg of counsel), for respondent Ralph Perone (no brief filed).

GLORIA GOLDSTEIN, J.P., PETER B. SKELOS, STEVEN W. FISHER, and ROBERT J. LUNN, JJ.

In an action, inter alia, to recover on a note and certain guaranties, the plaintiff appeals, as limited by its letter dated May 17, 2005, and a stipulation of settlement dated May 5, 2005, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), entered May 4, 2004, as denied those branches of its motion which were for summary judgment on the fifth and sixth causes of action in the complaint and summary judgment dismissing the affirmative defenses asserted by the defendant Ralph Perone, and granted that branch of the cross motion of the defendant Ralph Perone which was to stay all proceedings in the action pursuant to [CPLR 2201](#) during the pendency of a bankruptcy proceeding commenced in the United States Bankruptcy Court for the Southern District of New York.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, those branches of the plaintiff's motion which were for summary judgment on the fifth and sixth causes of action and summary judgment dismissing the affirmative defenses asserted by the defendant Ralph Perone are granted, that branch of the cross motion of the defendant Ralph Perone which was to stay all proceedings in the action pursuant to [CPLR 2201](#) is denied, and the matter is remitted to the Supreme Court, Suffolk County, to determine the costs, expenses, and reasonable attorney's fees incurred by the plaintiff in enforcing its rights under the guaranty executed by the defendant Ralph Perone, and for the entry of an appropriate judgment \*101 in favor of the plaintiff on the fifth and sixth causes of action.

[1] The plaintiff established its entitlement to judgment as a matter of law with respect to the fifth cause of action by submitting proof of the existence of an underlying note, a guaranty executed by the defendant Ralph Perone, and Perone's failure to make payment in accordance with the terms of those documents (see [E.D.S. Sec. Sys. v. Allyn](#), 262 A.D.2d 351, 691 N.Y.S.2d 567; [Constructamax, Inc. v. CBA Assoc.](#), 294 A.D.2d 460, 742 N.Y.S.2d 555; [North Fork Bank v. Hamptons Mist Mgt. Corp.](#), 225 A.D.2d 595, 639 N.Y.S.2d 452). The plaintiff also established its entitlement to summary judgment with respect to the sixth cause of action by demonstrating that the guaranty provided for the recovery of court costs and an award of an attorney's fee incurred in enforcing its rights under the guaranty and on the underlying note against Perone. In opposition, Perone failed to raise a triable issue of fact. A bankruptcy proceeding pending in the United States Bankruptcy Court for the Southern District of New York (hereinafter the bankruptcy proceeding) involving the corporation which defaulted on the underlying note did not affect Perone's

liability on the guaranty (see [Mel Wood Prods. v. Kores](#), 81 A.D.2d 830, 438 N.Y.S.2d 829; [Seidenberg v. Ostojic](#), 79 A.D.2d 1020, 435 N.Y.S.2d 56).

[2] Since the terms of the guaranty permitted the plaintiff to enforce its rights against Perone without resorting first to the corporate debtor, and since this action and the bankruptcy proceeding did not share a "complete identity of parties, cause of action and judgment sought" ([Pierre Assoc. v. Citizens Cas. Co. of N.Y.](#), 32 A.D.2d 495, 497, 304 N.Y.S.2d 158), the Supreme Court improvidently exercised its discretion in granting that branch of Perone's cross motion which was to stay all proceedings in this action pursuant to [CPLR 2201](#) during the pendency of the bankruptcy proceeding (see [CPLR 2201](#); [Bennell Hanover Assoc. v. Neilson](#), 215 A.D.2d 710, 627 N.Y.S.2d 439; [Estate of Salerno v. Estate of Salerno](#), 154 A.D.2d 430, 546 N.Y.S.2d 8; [Hope's Windows v. Albro Metal Prods. Corp.](#), 93 A.D.2d 711, 460 N.Y.S.2d 580).

The parties' remaining contentions are without merit.

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