

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

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|-------------------------|---|------------------------|
| Bank of America, N.A. , |) | November 16, 2009 |
| |) | |
| Plaintiff, |) | Cause No. 09SL-CC00460 |
| vs. |) | |
| |) | Division 4 |
| Deborah M. Nelms, |) | |
| |) | |
| Defendant. |) | |

Order and Judgment

This matter is before the Court on Defendant’s Motion for Summary Judgment. The Motion was called, heard and taken under submission on October 20, 2009. Being now fully advised, the Court enters the following Order and Judgment.

It is undisputed that on March 2, 2000, the parties entered into a Guaranty Agreement in which Defendant personally guaranteed payment of \$666,000.00 in connection with a Promissory Note executed by Nelms Donham Manufacturing (“Nelms Donham”). The Note and Guaranty provide that Texas law shall govern the validity, construction, enforcement and interpretation of the Note and Guaranty. Pursuant to the Guaranty, Defendant, as guarantor, is obligated to pay under the following circumstances:

“If all or any of the Obligations are not timely paid when due, whether at original maturity, accelerated maturity or otherwise, Guarantor shall, immediately *upon demand by Bank*, and without presentment, protest, notice of protest, notice of nonpayment, or any other notice whatsoever, pay ... the amount due on the Obligations to Bank at Bank’s address.” (Emphasis added.)

Nelms Donham subsequently defaulted under the terms of the Note. On November 5, 2001, Defendant was notified of the default of Nelms Donham by a letter from Plaintiff to Nelms Donham with a copy to Defendant.

Under the terms of the Guaranty, Plaintiff's cause of action did not accrue until the date of demand made upon Defendant. The issue for the Court's determination is the date of demand. Under Texas law, the statute of limitations on a suit on guaranty is four years. See, Tex. Civ. Prac.&Rem. Code §16.004(a)(3). Defendant argues that demand to pay pursuant to the Guaranty was made on her by Plaintiff pursuant to the November 5, 2001 letter, and that Plaintiff's Suit on Guaranty, filed January 30, 2009, is barred under the Texas statute of limitations. Plaintiff contends it made demand on Defendant by letter dated June 14, 2006, and that this action therefore was timely filed.

The November 5, 2001 letter references "Loan Agreement dated March 2, 2000, as may be amended or modified, the ("Agreement") executed by and between Nelms-Donham Manufacturing, Inc., Deborah M. Nelms, Julie L. Headrick and Michael R. Donham (together "Borrower") and Bank of America, N.A. ("Bank") *and any and all other documents, instruments and agreements executed and/or delivered by Nelms-Donham, any guarantor or third party in connection with the Agreement* (collectively, the "Loan Documents") (emphasis added). In pertinent part, the letter states: "*Demand is hereby made for payment of all amounts due to the Bank under the Loan Documents.* Please contact the undersigned for the amount due and owing." (Emphasis added).

The Court finds that Plaintiff's November 5, 2001 letter made demand on Defendant to pay pursuant to the Guaranty. Therefore, Plaintiff's cause of action against Defendant accrued on November 5, 2001 and expired on November 5, 2005.

Accordingly, Defendant's Motion for Summary Judgment is GRANTED.
Judgment on Plaintiff's Suit on Guaranty is entered in favor of Defendant and against
Plaintiff. Costs assessed against Plaintiff.

SO ORDERED:

Thomas J. Prebil
Judge, Division 4

cc: Jennifer Chierek Znosko
Jennifer L. Geshke