

Lawson v Patrick Henry Hotel Associates, L.P.

2006 NY Slip Op 30094(U)

July 13, 2006

Supreme Court, New York County

Docket Number: 0060082/2006

Judge: Richard B. Lowe

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

PRESENT: RICHARD B. LOWE III

PART 76

Justice

Index Number : 600829/2006

LAWSON, CHARLES R.

vs

PATRICK HENRY HOTEL

C

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JUL 25 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/13/06

RICHARD B. LOWE III J.S.C.

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: IAS PART 56

-----X
CHARLES R. LAWSON, as he is Trustee of Trust
55547-09, Trust 12572-90, and Trust 9932-90,

Plaintiff,

– against –

Index No. 600829-06

PATRICK HENRY HOTEL ASSOCIATES, L.P.,

Defendant.

-----X
RICHARD B. LOWE, III, J.:

Pursuant to CPLR 3213, Plaintiff Charles R. Lawson moves for summary judgment in lieu of the complaint on a promissory note executed by Defendant Patrick Henry Hotel Associates, L.P.

JUL 25 2006
COUNTY CLERK'S OFFICE
NEW YORK

Background

On July 11, 1997, Defendant issued a promissory note – the Demand Note (“the Note”) – for value received to the Republican National Bank, now known as HSBC, in which Defendant promised to pay on demand the principal sum of \$2,500,000.00 plus interest on the unpaid principal from the date of the Note until paid in full. Should any principal or interest not be paid, the Note states that Defendant will be held liable “for all costs of enforcement and collection of this Note incurred by Bank or any other holder of this Note, including but not limited to reasonable attorneys’ fees, disbursements and court costs” (Lawson Aff, Ex A at 2).

Interest payments at fluctuating rates under the Note are due and payable on the last day of each month (*id.*). Before a demand for payment of the principal is made, the “Contract Rate”

[* 3]

of interest is equal to 1.5 percent per annum above LIBOR on the date of the advance (Lawson Aff, Ex B). According to the Demand Note Rider:

As used herein, "LIBOR" means the rate per annum, rounded upward to the nearest 1/8th of 1%, quoted at approximately 11:00 A.M. London time by [HSBC's] principal branch in London, England, for offering to leading banks in the London Interbank Market for United States Dollar deposits in an amount comparable to the principal amount of the [sic] this Note for periods of up to 90 days ("Time Period"). (*Id.*)

Once a demand for payment is made, the unpaid principal becomes due and a new fluctuating interest rate applies. This "Default Rate" is equal to two percent per annum above the greater of either (i) the Contract Rate in effect on the date the principal became due, or (ii) the Contract Rate that would have been in effect from time to time if the principal had not become due (Lawson Aff, Ex A).

Prior to the issuance of the Note, on or about July 13, 1994, Trust 55547-90, Trust 12572-90 and Trust 9932-90 ("the Trusts") entered into a Guaranty and Security Agreement with HSBC in which each trust guaranteed the prompt and complete payment to HSBC of all indebtedness, obligation and liability of all claims of HSBC against Patrick Henry Hotels Associates, L.P. (Lawson Aff, ¶ 4). Pursuant to this agreement, the Trusts created the Trust Custody Accounts at HSBC as security for the guarantees (Lawson Aff, ¶ 5).

On January 4, 2006, HSBC sent a demand letter to Defendant requesting immediate payment of the principal in the amount of \$2,500,000.00 plus the accrued interest at a Default Rate of 7.83 percent per annum (based on the then Contract Rate of 5.83 percent), amounting to a total of \$2,514,054.97 (Lawson Aff, Ex B). Defendant paid only the interest accrued through January 31, 2006, which prompted HSBC to send a second demand letter on February 10, 2006, asking for payment of the principal plus interest accrued through February 9, 2006, totaling

\$2,504,132.64 (*id.*). Defendant has not disputed that it has not paid the entire principal amount or the interest accrued since February 1, 2006.

Pursuant to the Guaranty and Security Agreement with the Trusts, HSBC demanded and recovered payment from the Trust Custody Accounts on February 16, 2006 of the unpaid principal and the unpaid interest accrued from February 1, 2006 to February 16, 2006, totaling \$2,506,661.81. At that time, HSBC also indorsed and assigned all its rights under the Note to the Trusts (Lawson Aff, Ex C). Plaintiff, as trustee to the assignees of the Note, filed this motion for summary judgment in lieu of the complaint on March 10, 2006.

Discussion

Plaintiff's motion seeks to enforce the obligations of Defendant under the terms of the Demand Note entered into by assignor HSBC. Plaintiff claims the Trusts are entitled to receive payment of the principal, interest due and owed, all expenses incurred through enforcement and collection of the Note, including reasonable attorneys' fees, and any other relief the court deems proper to award.

A *prima facie* case of default on a promissory note is established by proof of the valid note, that a demand for payment of the note was made and of Defendant's failure to make payment in accordance with the terms of the note, and in the absence of any meritorious defenses raised by Defendant. (*See Cavendish Traders v Nice Skate Shoes, Ltd.*, 117 F Supp 2d 394, 400 [SD NY 2000]; *Community Natl. Bank & Trust Co. v IMF Trading, Inc.*, 167 AD2d 193, 194-5 [1st Dept 1990]; *Bank Leumi Trust Co. of New York v Rattet & Liebman*, 182 AD2d 541, 542 [1st Dept 1992]).

The terms of the Note contain an unconditional promise of payment and state that the full amount of the unpaid principal becomes immediately due upon demand of the holder. The

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record shows and Defendant does not dispute that HSBC made a proper demand for payment on January 4, 2006, at which time the Note became due and Defendant's duty to immediately pay the full principal amount plus interest arose. (Lawson Aff, Ex A). However, as the parties do not dispute, Defendant has not paid any part of the principal and has only paid interest accrued through January 31, 2006.

In opposition, Defendant requests that the motion be denied on the grounds that the motion is incurably flawed and that Plaintiff has failed to meet his burden of establishing a *prima facie* case for summary judgment. Defendant alleges that three fatal defects defeat the motion: 1) the misspelling of a trust named in the caption; 2) a purported failure to state a sum certain sought to be recovered; and 3) the failure to allege that the Note was assignable or properly assigned to the Trusts. Defendant also argues that a factual issue exists as to whether the Trusts are entitled, under the terms of the Note, to seek recovery of attorney's fees and expenses.

For the following reasons, Defendant's arguments fail to defeat Plaintiff's motion for summary judgment in lieu of the complaint, which this court hereby grants in favor of Plaintiff.

A. Misspelling of a Trust Named in the Caption

The caption of Plaintiff's motion papers names, in error, Charles R. Lawson as "Trustee of Trust 55547-09," instead of the correct "Trust 55547-90" (emphasis added). Due to this transposition, Defendant contends that any determination by this Court "could potentially be a legal nullity, as it would be between the wrong parties" (Jubelt Aff, ¶ 6). Should this not be found to defeat the motion outright, Defendant urges the Court at least to require Plaintiff to make a motion to correct the caption.

Defendant's argument is unavailing because CPLR 2001 provides that, "[a]t any stage of an action, the court may permit a mistake, omission, defect or irregularity to be *corrected*, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be *disregarded*" (emphasis added). As the First Department held in *Albilis v Hillcrest General Hospital*, CPLR 2001 grants New York courts "[t]he power to correct, *sua sponte*, any defect [in a caption], provided any substantial right of a party is not prejudiced . . . Inasmuch as [the affected party] was aware all along of the complaint, and his potential liability" (124 AD2d 499, 500 [1st Dept 1986] [citations omitted]).

Accordingly, the proper, two-pronged test is whether the misnamed party was "fairly apprised" of its intended involvement in the suit and whether a right of any party was prejudiced by the mistake. (See *e.g.*, *Stuyvesant v Weil*, 167 NY 421, 426 [1901]; *Pinto v House*, 79 AD2d 361, 365 [1st Dept 1981]; *Bank of Suffolk County v All Shores Wholesale Foods, Inc.*, 90 AD2d 530, 531 [2d Dept 1982] [amending the captions after the courts found the parties were fairly apprised and suffered no prejudice on account of the mistakes]). Furthermore, the court in *Schwartzberg v State of New York* placed the burden upon the defendant to claim and prove any prejudice against him or herself (121 Misc 2d 1095, 1098-9 [NY Ct Cl 1983] [disregarding a failure to name the State in the caption]).

In the present case, Defendant is fully apprised of its potential liability to Trust 55547-90 because the Trust is properly named in all moving papers and submitted documents, including Plaintiff's initial moving papers, the indorsement of the Demand Note and assignment instrument. These repeated correct references serve to clarify any confusion that may have been created by the error in the caption. Second, Defendant has not, nor does the court believe it could, pleaded or proven that the *de minimus* defect has prejudiced any significant right of

* 7]
Defendant. Thus, the two-pronged test is satisfied and the court *sua sponte* orders the caption amended to reflect the correct name of Trust 55547-90. (See e.g., *Stuyvesant*, 167 NY 421; *Pinto*, 79 AD2d 361; *Bank of Suffolk County*, 90 AD2d 530).

B. Interest Amount

Defendant's second argument is that Plaintiff failed to claim a "readily calculable sum certain" owed (Jubelt Aff, ¶ 8). Defendant points to three purported sources of uncertainty as to the amount claimed and owed: 1) a remaining choice of a Default Rate of interest set at 7.83 percent or some unspecified greater amount; 2) "a date apparently picked out of the air" to mark the beginning of the period of default; and 3) the alleged inconsistencies between the amounts demanded in the two demand letters sent by HSBC (Jubelt Aff, ¶ 11).

CPLR 3213 permits recovery of interest based on an outside, fluctuating reference rate and set at a different rate for the period after the principal becomes due. (See *Bank Leumi Trust*, 182 AD2d at 542; *Community Natl. Bank*, 167 AD2d at 194-5; *Schwartz v Turner Holdings, Inc.*, 139 AD2d 458 [1st Dept 1988]). Where a note at issue establishes a discrete obligation to pay and clearly states the principal amount and a "readily ascertainable" interest, the courts will permit the use of outside benchmarks, such as the LIBOR rate (as defined above) used to determine the Contract Rate here. (See *Swartz*, 139 AD2d at 459).

Alternatively, the New York Uniform Commercial Code ("NYUCC") applies to this case because the Note constitutes a negotiable instrument under section 3-104 (1) (*see infra*). Section 3-106 (1) provides that a "sum certain" can be paid "(a) with a stated rate of interest or by stated installments; or (b) with stated different rates of interest before and after default or a specified date; or . . . (e) with costs of collection or an attorney's fee or both upon default." Section 3-106 (2) further permits that "'a stated rate of interest' shall also include a rate of interest that cannot

be calculated by looking only to the instrument but which is readily ascertainable by a reference in the instrument to a . . . generally accepted commercial or financial index.” Here, the Note uses the common LIBOR benchmark, which is permissible under these sections. (*See First City Fed. Sav. Bank v Bhogaonker*, 715 F Supp 1216, 1219 [SD NY 1989]).

In response to Defendant’s allegations, Plaintiff argues that his claim articulates that he is seeking interest accrued at a permissible interest rate under the Note from the date marking the beginning of the period for which Defendant has not paid interest. However, the terms of the Note provide that the Default Rate is to be set at two percent above the greater of either the Contract Rate at the time of default, which HSBC stated was 5.83, or the Contract Rate from time to time. Here, Plaintiff has unilaterally chosen the first option, but it is unclear if this is the greater rate as provided by the terms.

Addressing the different amounts demanded in the January 4, 2006 and February 10, 2006 letters, Plaintiff explains that the January letter states a higher amount than the February letter because Defendant paid the interest due only for the period ending on January 31, 2006, and no further. Plaintiff credits Defendant with this payment and is only seeking recovery of unpaid interest accrued since February 1, 2006.

Notwithstanding any purported factual questions regarding the date and rate of interest, Defendant would still be liable for at least the principal amount of the Note (*Community Natl. Bank*, 167 AD2d at 193). Furthermore, as it is clear that February 1, 2006 is not an arbitrary date and because the Note contains provisions for setting the Default Rate and calculating a “sum certain,” Defendant’s arguments fail to prevent the court from holding Defendant liable for default on the Note.

C. The Assignment

The third alleged incurable defect asserted by Defendant is that Plaintiff has failed to assert “that this assignment was valid and authorized by the terms of the Note” (Jubelt Aff, ¶ 14). However, Plaintiff states that HSBC “endorsed over and assigned its entire and complete interest in the Note to the Trusts” (Lawson Aff, ¶ 13) and attached the assignment document to the motion (Lawson Aff, Ex C). Therefore, the burden is upon Defendant to establish the invalidity of the assignment to defeat this motion.

Defendant cannot meet this burden. Due to the uncontested fact that the Note contains no express prohibition on its transfer, both NYUCC and New York common law dictate that HSBC’s entire interest in the Note can be and was properly transferred to the Trusts, including the right to enforce Defendant’s duties under the instrument.

1. New York Uniform Commercial Code

The Note constitutes a negotiable instrument under NYUCC § 3-104 (1) because it was signed by the maker, Defendant Patrick Henry Hotel Associates, L.P.; contains an unconditional promise made by Defendant to pay a “sum certain” and no other promise or obligation; and is payable on demand to order or bearer (*see Cavendish Traders*, 117 F Supp 2d at 399).

A negotiable instrument can be transferred, or “negotiated,” by mere indorsement and delivery, even without giving notice to the maker of the Note (NYUCC § 3-202 [1]). The subsequent “holder” – the person in possession of an instrument indorsed to him (NYUCC § 1-201 [20]) – has the power “to enforce payment in [his or her] own name” (NYUCC § 3-301). Therefore, under NYUCC, HSBC could and properly did transfer its interests in the negotiable instrument – the Note – to the Trusts.

2. New York Common Law

Alternatively, general common law principles provide that “any claim or demand can be transferred,” unless expressly and clearly prohibited by the terms of the instrument (NY Gen. Oblig. Law § 13-101 [McKinney 1989]; *Allhusen v Caristo Construction Corp.*, 303 NY 446 [1952]; *State Bank v Central Mercantile Bank*, 248 NY 428 [1928]; *Macklowe v 42nd Street Dev. Corp.*, 170 AD2d 388 [1st Dept 1991]).

Where a transfer is not expressly precluded, it will pass an interest to the transferee that he and she may enforce by any action that may have been asserted by the transferor (NY Gen. Oblig. Law § 13-105; *Cavendish Traders*, 117 F Supp 2d at 399), including claims or demands for damages (NY Gen. Oblig. Law § 13-107). Generally, an effective assignment does not require the assent of the obligor (*see Restatement [Second] of Contracts* § 323, comment a) and does not need consideration where the assignment is in writing and signed by the assignor (*see* NY Gen. Oblig. Law § 5-1107; *Cavendish Traders*, 117 F Supp 2d at 399).

The Note executed by Defendant contains no “clear, definite and appropriate language” expressly prohibiting its assignment; indeed, it contains no explicit references to transfers at all (*Allhusen*, 303 NY at 452; *State Bank*, 248 NY at 435; *Macklowe*, 170 AD2d at 389; *see* Lawson Aff, Ex A). To the contrary, the terms of the Note are not limited “the Maker” and “the Bank,” but repeatedly refer to the liability of “any indorser” to “the holder.” (Lawson Aff, Ex A [emphasis added]). Accordingly, HSBC was permitted to assign freely its interests under the Note to the Trusts, which it properly accomplished through the written and signed February 16, 2006 assignment instrument.

As shown above, pursuant to both the NYUCC and under New York common law, HSBC was free to transfer its interests in the Note to the Trusts. Further, as proper indorsees and

assignees of the Note, the Trusts are entitled to enforce payment in their own name and to bring this motion against Defendant. Thus, Defendant has not met its burden of proof and its third allegation is not a meritorious defense to overcome its liability to the Trusts for the default.

D. Recovery of Attorney's Fees

The last purported issue raised by Defendant is whether Plaintiff is entitled to seek recovery of reasonable attorney's fees and expenses incurred through enforcement of the Note. Defendant argues that this is an unresolved question of fact because there is "no attorney's fees provision that I am aware of in the Note or any other applicable document" (Jubelt Aff, ¶ 16).

This improper representation of the terms of the Note is frivolous and disingenuous to the court. Had Defendant and its counsel read the terms, it would immediately be clear that, should Defendant fail to pay the principal amount or interest on the Note when due, it will be "liable for *all costs of enforcement and collection* of this Note incurred by Bank or any other holder of this Note, including but not limited to *reasonable attorneys' fees, disbursement and court costs*" (Lawson Aff, Ex A at 2 [emphasis added]).

Furthermore, several New York courts have found the reasonable value of attorneys' fees to be recoverable in motions for summary judgment in lieu of the complaint pursuant to CPLR 3213 (see e.g., *Community Natl. Bank*, 167 AD2d 193; *Chemical Bank v Nattin Realty, Inc.*, 61 AD2d 921 [1st Dept 1978]). In the present case, since Defendant's liability to the Trusts has been established, the issue of these expenses shall be severed and referred to a Special Referee for determination.

In summary, Plaintiff has established a *prima facie* case of Defendant's default and liability, while Defendant has failed to present a single meritorious defense or to raise a material

issue of fact. HSBC's valid assignment of its rights under the Demand Note to the Trusts entitles the assignees to enforce the Note.

Conclusion

Accordingly, it is

ORDERED that the motion is granted in part and denied in part, as follows:

- (1) Plaintiff is granted partial summary judgment against Defendant in the amount of \$2,500,000.00 plus interest since February 1, 2006;
- (2) Plaintiff's request for a 7.83 percent per annum Default Rate is denied; and it is further

ORDERED that the issues of:

- (1) the proper Default Rate and (2) the amount of costs and expenses, including but not limited to reasonable attorneys' fees, disbursements and court costs due to the Plaintiff, are referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that the caption be amended to state the correct name of Trust 55547-90; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support office (Room 311) to arrange a date for the reference to a Special Referee.

The foregoing constitutes the decision and order of the court.

Dated: July 13, 2006.

FILED
 JUL 25 2006
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:

[Handwritten Signature]
RICHARD B. LOWE III