

Zackson v On the Beach Entertainment, LLC

2006 NY Slip Op 30435(U)

March 3, 2006

Supreme Court, New York County

Docket Number: 602745/05

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49M

Brad Jackson

INDEX NO. 602745/05

MOTION DATE 11/7/05

MOTION SEQ. NO. 001

MOTION CAL. NO. 23

- v -

On The Beach Entertainment LLC & Kathy Wallach

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| |
| |
| |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
MAR 08 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/3/06 A. Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: JAS PART 49

-----x
BRAD ZACKSON,

Plaintiff,

-against-

Index No. 602745/05

ON THE BEACH ENTERTAINMENT, LLC and
KATHY WALLACH,

Defendants.

-----x
CAHN, J.

This is a plenary action to set aside three judgments by confession. CPLR 3218.

Plaintiff commenced this action by summons and complaint.¹ Plaintiff moved to vacate three judgments entered against him in this court, in favor of defendant On the Beach Entertainment, LLC (“OTB”), on three confessions of judgment.

Defendants cross-move to dismiss the complaint based on a failure to state a cause of action and failure to join necessary parties. CPLR 3211 (a) (7) and (10). Defendants also seek a change of venue. CPLR 510 (c).

The complaint alleges five causes of action, each of which arises out of the same operative facts: defendant OTB is alleged to have entered judgment on three confessions of judgment before the debts identified in the underlying affidavits had matured. With

¹ The court notes that the law firm representing plaintiff is apparently a New Jersey firm. The documents submitted herein in some technical respects do not seem to comply with the requirements set forth in the CPLR. The court will nevertheless consider them on this motion in the interests of justice.

the focus on these facts, plaintiff attempts to plead claims for breach of contract, fraud, breach of fiduciary duties, “lender liability,” and breach of the implied covenant of good faith.

Plaintiff Brad Zackson (Zackson) alleges that he and OTB entered into an agreement by which OTB was to loan money to a company “jointly owned,” known as Hampton Retreats, LLC. The agreement was entered into “[c]ommencing in or about the Winter of 2003 and lasting until Spring of 2004” (Complaint ¶ 3). A series of promissory notes was also entered into.

As part of the understanding between the parties, Plaintiff executed a Judgement by Confession which document was to be held in escrow pending a potential default under the terms of the document and the adjoining Note agreement.

Complaint, ¶ 4.

Zackson claims that defendants obtained judgment on the notes prematurely, in breach of the “agreements,” without prior notice, and before the due dates stated in the various notes. Hampton Retreats is alleged to have failed as a direct result of defendants’ wrongfully obtained judgments, causing the capital expended by OTB and Zackson to have been lost. Additionally, plaintiff claims that he was unable to complete other projects, and lost the ability to refinance his residence, causing it to be lost through foreclosure.

Defendants allege that Zackson first approached defendant Wallach for the

purpose of borrowing money, in April 2003. Defendants assert that Wallach was never an officer of Hampton Retreats, and never entered into an arrangement to jointly pursue the Hampton Retreats venture.

Wallach allegedly loaned money to Hampton Retreats, and a related company Dynamic Worldwide Properties, LLC (Dynamic). OTB and Dynamic executed four separate promissory notes between April 14, 2003 and March 14, 2004. Payment of the notes was guaranteed by Zackson. The March 14, 2004 note, in the amount of \$50,000, and two other notes, both of which were entered on December 13, 2003, are the subject of the judgments here sought to be set aside. All of the loans were made by OTB. Zackson, in addition to guaranteeing payment of each of the notes, executed three confessions of judgment.

The two affidavits confessing judgment, which relate to the December 13, 2003 notes, stated that the borrower had agreed to pay the amounts stated, to the lender, on or before December 13, 2005. The affidavit relating to the March 15, 2004 loan stated that the borrower had agreed to pay the lender on or before May 15, 2004. Zackson claims that this due date was extended to December 15, 2004.

Defendants claim that the December 15, 2003 notes provided that the maker, or guarantor's, failure to generally pay his debts when due constituted a default under the notes. Zackson was allegedly in default on the mortgage on his residence when he approached Wallach for the further loans, in December 2003, and Zackson knew, at that

time, that he would not be able to repay the money he was borrowing. Further, Zackson's default under his mortgage loan is also alleged to have constituted a default under the December 13, 2003 notes.

Defendants also claim that Zackson defaulted on the final loan from OTB, in the amount of \$50,000, that the maturity date for this note was never extended beyond the original date of May 15, 2004, and that Zackson's failure to repay this note when it was due constituted a default under the December 13, 2003 obligation to generally pay all debts when due.

On June 16, 2004, a judgment was entered against Zackson based on one of the December 13, 2003 confessions of judgment, in the amount of \$156,314.92. On August 20, 2004, two more judgments were entered, one in the sum of \$263,908.84, based on the \$250,000 confession of judgment executed on December 13, 2003, and the other in the sum of \$50,265.00, based on the confession of judgment executed on March 13, 2004.

Defendants claim that the complaint fails to state a cause of action, with respect to the first cause of action, for breach of contract, since no contract to promote Hampton Retreats existed. A confession of judgment is not a contract, argue defendants.

With respect to the claim for fraud, in the second cause of action, defendants argue that plaintiff has failed to satisfy the minimal pleading requirements of a fraud claim, and has failed to plead fraud with specificity: plaintiff has failed to identify the defendants' alleged material misrepresentation. *Orbit Holding Corp. v Anthony Hotel Corp.*, 121

AD2d 311 (1st Dept 1986).

With respect to the claim for breach of fiduciary duty owed to Hampton Retreats, alleged in the third cause of action, defendants claim that Wallach was merely a lender, and never an officer of Hampton Retreats, and that Wallach's status as a lender in no way imposed a fiduciary duty upon the defendants. Defendants also claim that plaintiff has failed to allege the actual breach of the fiduciary duty in the complaint.

Further, defendants claim that Hampton Retreats and Dynamic are named in the complaint as having been damaged by defendants' alleged breach of fiduciary duty, and "lender liability," and are, therefore, necessary parties to this action. Plaintiff's failure to join these parties is asserted as an alternative ground for dismissing this action.

On a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2^d Dept 1999).

CPLR 3218 (a) (1) and (2) provide for the entry of judgment upon an affidavit, without an action, where the party to be charged has executed an affidavit:

1. stating the sum for which judgment may be entered, authorizing the entry of judgment, and stating the county ...in which entry is authorized.
3. ... stating concisely the facts constituting the liability and showing that the sum confessed does not exceed the amount of the liability....

A judgment by confession is, among other things, a security device, or a shortcut

to judgment where a party concedes liability. *Siegel, Practice Commentaries*, McKinney's Cons. Laws of NY, Book 7B, C3218:1.

“[S]uch a judgment has all of the qualities, incidents and attributes of a judgment on a verdict, including a presumption as to its validity.” *Girylyuk v Girylyuk*, 30 AD2d 22, 23 (1st 1968), *affd* 23 NY2d 894 (1969). Entry of judgment upon an affidavit may be contested by the judgment debtor in a plenary action. *Burtner v Burtner*, 144 AD2d 417 (2^d Dept 1988). Courts adopt a liberal attitude in vacating such judgments. *Girylyuk*, *supra*.

Defendants claim that plaintiff was in default under the guarantees of the promissory notes before the maturity dates were reached, based on his failure to keep current on all of his financial obligations, as required under the terms of the promissory notes.

Viewing the complaint liberally, the court finds that plaintiff has adequately pleaded a claim to set aside the three judgments entered on the affidavits of confession, and the branch of the motion which seeks dismissal based on a failure to state a cause of action is denied. Although the complaint inartfully pleads claims for breach of contract, fraud, breach of fiduciary duty, implied covenants and lender liability, plaintiff's supporting affidavit sufficiently alleges that the confessions of judgment granted defendants authority to enter judgment only on the happening of a default in the payment of notes, which notes had not yet matured when the judgments were entered. Where

plaintiff adequately alleges that a judgment was entered on a confession without authorization, the complaint sufficiently pleads a claim to set those judgments aside. *See Rae v Kestenberg*, 16 NY2d 1023 (1965).

However, notwithstanding the denial of that branch of the motion, plaintiff is directed to serve and file a verified complaint separately setting forth the details of each cause of action.

That branch of the motion which seeks a dismissal based on plaintiff's failure to join necessary parties is denied. The claims in this plenary action all arise out of defendants' alleged entry of judgment before they were authorized to do so by the confessions of judgments. Although the debts underlying the affidavits of confession had been extended to entities who have not been named as parties to this action, it does not appear to be necessary to join those entities in order to grant complete relief to the plaintiff. *Pascuzzi v Car & General Ins. Corp.*, 270 App Div 976 (4th Dept 1946). Apparently, the only damage was suffered by plaintiff-guarantor, and not by the borrowers. Further, the judgments were only entered against the plaintiff. Should it appear that any third-party needs to be joined at a later stage of these proceedings, defendants may move for such relief at that time. CPLR 1003.

The application for a change of venue is also denied. The record has not been developed enough to substantiate defendants' argument that these claims "should" be pursued in Suffolk County. Although defendants claim that the causes of action and the

convenience of witnesses would be better served by transferring this action, plaintiff's first choice to pursue his claim in the county in which he resides, and the county in which defendant Wallach resides, will be given precedence over generalized claims that a transfer would be more convenient to witnesses who have not yet been identified, and other non-parties to this action. CPLR 503 (a). Further, the court notes that Suffolk County is well within commuting distance of New York County.

The court has reviewed the motion to vacate the judgments, and finds that there are sufficient issues of fact to warrant denying that relief at this time.

Accordingly it is

ORDERED that plaintiff's motion to restrain defendants from enforcing judgments obtained based on affidavits of confession is denied; and it is further

ORDERED that, within 20 days from the date of service of a copy of this order with notice of entry, plaintiff shall serve a verified amended complaint; and it is further

ORDERED that defendants' motion to dismiss the complaint is otherwise denied.

Dated: March 3, 2006

ENTER:

[Handwritten Signature]

J.S.C.

FILED
MAR 08 2006
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