

Mohammed v Will James Equity Partners, Inc.

2007 NY Slip Op 30217(U)

March 12, 2007

Supreme Court, Queens County

Docket Number: 0026358

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

ZORINA MOHAMMED	x	INDEX NO. 26358/05
- against -		BY: ELLIOT, J.
WILL JAMES EQUITY PARTNERS, INC., et al.		DATED: March 12, 2007
	x	MOTION DATE: September 26, 2006

In this action, plaintiff moves for summary judgment on a promissory note dated September 12, 2005, to recover the amount of \$100,000.00 together with interest at a rate of 20% per annum from the default date of October 20, 2005, as against defendant Will James Equity Partners, Inc. Plaintiff also seeks summary judgment as against defendant Wilson J. Baston to enforce said defendant's personal guarantee on the note.

In an order dated February 17, 2006, plaintiff's prior motion for summary judgment in lieu of complaint pursuant to CPLR 3213 was granted as against defendant Will James Equity Partners, Inc. and denied as against defendant Baston. In said order, the court noted that defendant Baston "may avail himself of a defense of usury." In an order dated April 26, 2006, that branch of the February 17, 2006 order which granted plaintiff summary judgment in lieu of complaint as against defendant Will James Equity Partners, Inc. was vacated. The court noted that there was a

triable issue as to the calculation of the principal and interest on the note based on the note's description of the principal amount as "one hundred thousand (\$60,000.00) dollars" and the interest thereon as "twenty percent per annum." Thereafter, plaintiff served a verified complaint and defendants served an answer thereto. Said answer is unverified and merely sets forth that defendants deny any knowledge or information sufficient to form a belief as to the truth of all the material allegations in the verified complaint.

Plaintiff sustained his initial burden of demonstrating his entitlement to summary judgment as a matter of law by submitting proof of the existence of an underlying note, a guarantee and the failure to make payment in accordance with their terms. (See Famolaro v Crest Offset, Inc., 24 AD3d 604 [2005]; see also Sacco v Sutera, 266 AD2d 446 [1999]; E.D.S. Security Systems, Inc. v Allyn, 262 AD2d 351 [1999].) Although in the note there is a conflict between the principal amount as stated in words and the amount as stated in numerals, because there is no ambiguity in the amount as stated in words, the principal amount payable is controlled by the words. (See UCC 3-118[c]; see generally Matter of Campbell, 163 Misc 2d 651 [1994].) Thus, plaintiff established that the principal amount of the note is \$100,000.00.

Defendants, in opposition to plaintiff's motion, failed to establish by admissible evidence the existence of a triable

issue of fact in order to avoid enforcement of the subject note and guarantee. Defendants merely submit the affirmation of their attorney which lacks evidentiary value since the attorney has no personal knowledge of the facts. (See Zuckerman v City of New York, 49 NY2d 557 [1980].) Moreover, to the extent that defendants' attorney argues that the motion must be denied based on the prior orders in this action dated February 17, 2006 and April 26, 2006, such argument is without merit. Although the February 17, 2006 order provided that defendant Baston may avail himself of a defense of usury, defendant Baston did not assert said defense in his answer. In any event, even if defendant Baston had asserted a defense of usury, it would be without merit. Except for a limited exception not applicable in this case, the defense of usury is not available to a corporate defendant (see General Obligations Law § 5-521), and is not available to an individual guarantor of the corporate obligation. (See Schneider v Phelps, 41 NY2d 238 [1977]; see also Tower Funding, Ltd. v David Berry Realty, Inc., 302 AD2d 513 [2003]; Simoni v Time-Line, Ltd., 272 AD2d 537 [2000].) The court's finding in the April 26, 2006 order that the note on its face was unclear regarding the principal amount merely sets forth the rationale for the court's holding that there was an issue of fact. It did not constitute the law of the case or preclude the making of this motion for summary judgment after joinder of issue. (See generally Lavelle v Urbach, Kahn & Werlin, P.C., 198

AD2d 751 [1993]; see also Siegel, NY Prac § 448, at 679 [2d ed].)

Plaintiff presented competent evidence establishing that the principal amount of the note was \$100,000.00 and defendants do not dispute said amount.

Accordingly, the branch of plaintiff's motion for summary judgment in his favor and against defendant Will James Equity Partners, Inc. is granted in the amount of \$100,000.00 plus interest at a rate of 20% per annum from October 20, 2005. Inasmuch as the language in the guarantee limited defendant Baston's personal liability to \$100,000.00, the branch of plaintiff's motion for summary judgment in his favor and against defendant Baston is granted in the amount of \$100,000.00. Plaintiff is also entitled to reasonable counsel fees from defendant Baston as the guarantee provided for same. A hearing on the amount of counsel fees shall occur at a date, time and place to be fixed in the judgment to be entered hereon.

Settle judgment.

J.S.C.