

**Corwin v Globalwires Holdings LLC**

2007 NY Slip Op 31117(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0604471/2005

Judge: Sherry Klein Heitler

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

PRESENT: SHERRY KLEIN HEITLER  
*Justice*

PART 30

RONALD D. CORWIN

INDEX NO. 604471/05

Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 004

GLOBALWIRES HOLDINGS LLC  
and DAVID GOULD,

MOTION CAL. NO. \_\_\_\_\_

Defendants.

The following papers, numbered 1 to \_\_\_\_\_ were read on this 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 hereby

ORDERED that this motion is decided in accordance with Memorandum / Decision

dated 5-1-07

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5-1-07

  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 30

-----X  
RONALD D. CORWIN

Plaintiff,

-against-

GLOBALWIRES HOLDINGS LLC  
and DAVID GOULD,

Defendants.  
-----X

Index No. 604471/05

**DECISION & ORDER**

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

SIHERRY KLEIN HEITLER, J.:

In this breach of contract case, the defendant David Gould (hereinafter Gould) who is pro se, moves, under motion sequence 004, for an order to dismiss the complaint pursuant to CPLR §§§ 3211(a)(5), (7), and (8), respectively, for the alleged expiration of the applicable statute of limitations and for failure to state a cause of action.<sup>1</sup> Further, defendant seeks, under motion sequence 005, a default judgment pursuant to CPLR § 3215 and/or summary judgment pursuant to CPLR § 3212 on his alleged counterclaims.<sup>2</sup> Plaintiff, Ronald D. Corwin (hereinafter Corwin), cross-moves for an order granting a default judgment against defendant Globalwires Holdings LLC (hereinafter Globalwires); a default judgment against Gould, and/or partial summary judgment in the amount of \$50,000 against Gould. These motions are consolidated for disposition.

<sup>1</sup> Defendants' objection to personal jurisdiction has been resolved per stipulation.

<sup>2</sup> The court notes, however, that the defendant has only recently served an answer and same does not contain any counterclaims. As a counterclaim may only be interposed through service of an answer to a complaint (see, 2 N.Y. Practice, Com. Litig. in New York State Courts §7:112 [2d ed.]), defendants' application must be denied (see, White v. National Bondgolders Corp., 191 Misc.536, 536 [Sup. Ct. Sp. Term., 1948]).

Corwin, seeks judgment from defendants, Globalwires and Gould, jointly and severally, for three separate monetary amounts related to a written promissory note and two alleged oral promises. Corwin contends that he lent money to Globalwires and that Gould acted as a personal guarantor of the loans on behalf of Globalwires. The first transaction between the parties took the form of a written promissory note from Globalwires to Corwin in the amount of \$50,000 to become due six months after the execution of the note dated on May 21, 2001. On the same day, Gould executed a signed guarantor agreement for the \$50,000. According to the verified complaint, plaintiff alleges that on or about July 27, 2001, Corwin loaned Globalwires the sum of \$10,000 upon an oral promise to repay the same without interest six months after the money was lent, on or about January 27, 2002. Corwin further maintains that Gould guaranteed repayment of said loan. Plaintiff additionally alleges that on or about October 5, 2001, he loaned Globalwires the sum of \$30,000 at its request and upon the oral promise to repay the same without interest six months after the date the money was lent, on or about April 5, 2002. Corwin seeks repayment, along with a judgment, for costs and disbursements.

Gould seeks dismissal of the complaint pursuant to CPLR § 3211(a)(5), arguing that the applicable statute of limitations on the cause of action has expired. He claims that this matter is governed by a four year statute of limitations that begins to run upon the making of the loan. As these loans were made prior to December, 2001, he contends that the commencement date of December of 2005 is beyond the applicable statute of limitations.

Defendant's argument is misplaced. According to CPLR § 213, there is a six year statute of limitations on contract claims. Further, the statute of limitations on promissory notes begins to run on the date payment becomes due. See In Re Brill, 318 B.R. 49 (2004)(stating that "[t]he statute

of limitation applicable to an action on a note accrues on the date final payment became due on the subject debt.”). Here, payment was due on the promissory note on or about November 20, 2001. Therefore, the statute of limitations on plaintiff’s cause of action, with respect to the promissory note, did not expire until on or about November 20, 2007. Corwin filed the complaint on or about December 16, 2005 and, thus, was well within the limitation period. Accordingly, defendant Gould’s motion to dismiss pursuant to CPLR § 3211(a)(5) is denied.

The defendant also seeks to dismiss the complaint for failure to state a claim, pursuant to CPLR § 3211(a)(7). With respect to the two oral promises, the defendant denies ever guaranteeing the alleged amounts loaned to Globalwires on both July 27, 2001 and October 5, 2001. Gould further argues that even if such promises were made, they are unenforceable under the Statute of Frauds.

Under General Obligations Law § 5-701(a)(2) suretyship contracts must be in writing to be enforceable under the law. Plaintiff alleges that Gould orally agreed to guarantee the loans made by the plaintiff to defendant Globalwires. However, there is no written documentation naming Gould the guarantor of the alleged amounts. Without any writings of the alleged suretyship relationship between the parties, the cause of action against defendant Gould with respect to the oral promises must be dismissed. (See New York Produce Trade Association Inc. v. Mazzilli, 49 A.D.2d 729 [1st Dept., 1975]).

Defendant contends, with respect to the May 21, 2001 promissory note, that there are at least five conditions precedent that plaintiff must satisfy under the terms of the contract before any claim may be brought. Therefore, defendant argues that plaintiff’s claim under the written promissory note and guarantee is premature. As plaintiff cross-moves for summary judgment on the note in question,

defendant's arguments with regard to same will be addressed in said context.

With respect to the cross-motion, Corwin requests a default judgment against Globalwires, pursuant to CPLR § 3215(a), for failure to appear. Plaintiff served the summons and verified complaint by delivery to the Delaware Secretary of State on January 9, 2006. Globalwires never answered the complaint nor appeared in order to respond to the allegations. Accordingly, plaintiff's motion for a default judgment against Globalwires is granted.

Plaintiff's request for a default judgment against defendant David Gould, for failure to answer is denied. Pursuant to a direction by this court on December 4, 2006, David Gould answered the verified complaint, which the court, in its discretion, will accept nunc pro tunc.

Plaintiff requests partial summary judgment, pursuant to CPLR § 3212, for \$50,000 on the promissory note against David Gould. Gould maintains that the action on the note is not ripe as there are five unmet conditions precedent to collection of the amount due. Specifically he claims that plaintiff failed to meet the following conditions: (1) demand payment from Globalwires, (2) provide Globalwires with a notice of default, (3) provide Globalwires with time to cure, (4) provide defendant Gould notice of the default by certified mail with return receipt requested (hereinafter "RRR"), and (5) provide defendant Gould with a sixty-day grace period and time to cure.

Plaintiff argues that the note has an acceleration debt clause that usurps the first three alleged conditions precedent. Plaintiff concedes that the guaranty does require sixty days notice of a default by certified mail, return receipt requested, and argues that he complied with same by mailing such letter on or about October 14, 2005 to Gould's home address because he had vacated the office address set forth in the guaranty. The action was commenced more than 60 days following the mailing of the demand letter.

Plaintiff's application is granted. The defendant does not deny that the note was accelerated or that the notice was mailed to his home. The note in question states:

Upon acceleration, the note shall have matured and become then and there fully payable without demand, grace period, notice, presentment for payment, notice and protest, each of which is waived by all parties to the Note. Failure by the Holder to exercise rights of acceleration shall not operate as a waiver of acceleration rights at such other time as Holder may elect.

It is well settled that once a party has made a prima facie showing for an entitlement of summary judgment, the burden shifts to the opposing party to produce evidence in admissible form sufficient to raise a material issue of fact (see, Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). The conclusory assertions by defendant that this action is premature are insufficient to defeat the plaintiff's request for partial summary judgment.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint, pursuant to CPLR §3211(a)(5), is denied; and it is further

ORDERED that defendants' motion to dismiss the complaint, pursuant to CPLR §3211(a)(7), with respect to the two oral promises, is granted. The Clerk is directed to enter a judgment dismissing the second and third causes of action against the defendant, David Gould; and it is further

ORDERED that defendants' motion for a default judgment against plaintiff is denied; and it is further

ORDERED that defendants' motion for summary judgment against plaintiff is denied; and it is further

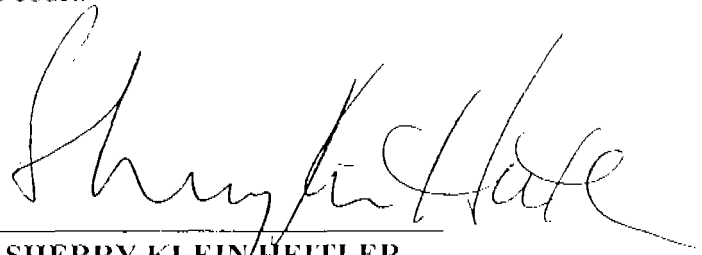
ORDERED that plaintiff's motion for a default judgment against defendant, Globalwires Holdings LLC, is granted. The Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion for a default judgment against defendant, David Gould, is denied; and it is further

ORDERED that plaintiff's motion for partial summary judgment is granted and the Clerk is directed to enter a judgment in plaintiff's favor against defendants Globalwires Holdings LLC and David Gould in the amount of \$50,000, together with costs and disbursements.

This shall constitute the decision and order of the court.

DATED: MAY 1, 2007

  
\_\_\_\_\_  
SHERRY KLEIN HEITLER  
J.S.C.

**FILED**  
MAY 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE