

Prif Murray St. LLC v Daly

2007 NY Slip Op 31522(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0603278/2006

Judge: Herman Cahn

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

HERMAN CAHN

PRESENT:

PART 49

Index Number : 603278/2006

PRIF MURRAY STREET LLC,

vs

J. CHRISTOPHER DALY

Sequence Number : 002

DISMISS

C

INDEX NO. _____

MOTION DATE

2/2/07

MOTION SEQ. NO.

002

MOTION CAL. NO.

8

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 ordered that this motion

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/9/07

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X

PRIF MURRAY STREET LLC,

Plaintiff,

Index No. 603278/06

-against-

J. CHRISTOPHER DALY; EASTMAN & BIXBY
MANAGER LLC; NORTONA MANAGER LLC;
HATHORN MANAGER, LLC; BOURNE & KENNEY
MANAGER, LLC; SHELDRAKE MANAGEMENT, LLC;
SHELDRAKE ORGANIZATION, INC.,

Defendants.

-----X

HERMAN CAHN, J.:

Defendants move to dismiss plaintiff's causes of action for fraud and constructive trust, and to dismiss plaintiff's demand for punitive damages. Plaintiff cross-moves for summary judgment on the first (breach of loan agreement), third (seeking immediate possession of all pledged collateral), fourth (seeking imposition of a constructive trust), and fifth (holding the guarantors liable) causes of action, and for a preliminary injunction requiring defendants to provide to PRIF the books, records and other relevant documentation and information relating to each of the entities in which Daly pledged interests to PRIF as security; requiring defendant J. Christopher Daly to appear for a deposition; and restraining defendants from dissipating, transferring and/or encumbering PRIF's collateral.

Although issue has not yet been joined, the parties were all on notice that the motions would be treated as seeking summary judgment, pursuant to CPLR 3211 (c).

FACTS

On April 6, 2006, plaintiff PRIF Murray Street LLC (PRIF) entered into an agreement with defendant Daly to lend him up to \$10,000,000 in connection with development expenses and closing costs for real property located at 89 Murray Street, New York, New York. Daly pledged his ownership interest in certain other entities, and his financial interest in other entities, some of which are the other defendants in this action. The pledged shares and stock power of those entities are being held by an escrow agent.

At the time that the loan closed, there was an outstanding judgment against Daly in the amount of \$5,125,415.69, in favor of one Merkourious Angeliades (Angeliades judgment). Plaintiff contends that Daly represented to it that the judgment was a "friendly" judgment, resulting from a corporate maneuver to protect assets, and that it could be easily satisfied. PRIF agreed to close on the loan, and to disburse an initial sum of \$6,600,000, but required that Daly satisfy the judgment within one week of the closing of the loan. Daly signed a post-closing agreement by which he agreed that a failure to timely satisfy the judgment would result in an immediate Event of Default. The loan

agreement also required Daly to cause his companies to enter into an Account Control Agreement and an Account Deposit Agreement within 30 days of the closing date.

PRIF perfected its security interest in the various entities that were pledged as collateral by filing UCC-1 Financing Statements with the (New York) Secretary of State.

Daly did not satisfy the judgment and the parties met on May 8, 2006 to discuss the matter. On May 12, 2006, PRIF wrote Daly a follow-up letter in which it stated that at the meeting, Daly advised it that the situation with the Angeliades judgment had become contentious. PRIF agreed, at Daly's request, not to formally declare a default for 90 days, on condition that, during that time, there would be no further advances on the loan, that Daly would satisfy the remaining post-closing items and would repay the loan no later than 90 days from the date of the letter. The letter explicitly reserved all PRIF's rights and remedies under the loan agreements.

Daly responded by letter dated May 23, 2006. He stated that PRIF was aware of the Angeliades judgment prior to closing and acknowledged that the loan agreement specifically provided that further loan advances were contingent upon satisfaction of that judgment. Notice of Cross Motion, Ex. O. In August, 2006, when Daly had still not satisfied the judgment, had not paid the loan and had still failed to comply with certain other terms of the

agreement, PRIF declared the loan to be in default and accelerated the debt, making it due and payable immediately.

Id., Ex. P.

PRIF sought release of the stock certificates and stock powers held in escrow. *Id.*, Ex. R. However, Daly sent the escrow agent a Counter Notice asserting that the events of default did not occur and directing the escrow agent not to release any collateral. *Id.*, Ex. S. As a result, the escrow agent is still holding the escrowed collateral.

The pledge agreements provide that, in the event of a default, all cash dividends or other distributions received by the pledgor and paid or distributed on account of the pledged shares, which are received by the pledgor after the occurrence of an event of default, are to be held in trust for the secured party. *Id.*, Ex. F, ¶ 9 (a); Ex. I, ¶ 2 (b); Ex. K, ¶ 2 (b).

DISCUSSION

MOTION TO DISMISS

Fraud

The complaint pleads a cause of action for fraud based on two separate representations allegedly made by Daly. The first is that Daly represented to PRIF that the Angeliades judgment was not really a monetary obligation and had been entered merely as a formality in connection with a corporate maneuver. PRIF maintains that this representation was false when made and that

Daly knew it was false. In addition, PRIF contends that Daly represented in his financial statement that he had cash on hand and in accounts in the amount of \$5,550,000. That representation was allegedly also false. PRIF relied on Daly's representations in making the loan.

Daly contends that the cause of action for fraud should be dismissed. He asserts that, although plaintiff states in the complaint that it was unaware that the judgment was for monetary relief, such information was readily available. Therefore, PRIF cannot maintain a cause of action based upon reliance on the allegedly false information.

As to the issue of the \$5,500,000 shown on his financial statement, Daly maintains that PRIF has failed to reveal any due diligence that it performed with respect to ascertaining the nature of the \$5,550,000 recorded on the financial statement. He argues that the reason that PRIF did not investigate further is that the amount was not a significant factor in PRIF's decision to lend the money, because the value of the collateral is in excess of \$124,000,000. Therefore, \$5.5 million was insubstantial.

Daly mischaracterizes PRIF's assertions regarding the judgment. PRIF does not suggest that the judgment was not a money judgment, or that it did not know that it was a money judgment. Rather, PRIF contends that it did not know that it was

a genuine obligation, because of Daly's representations. However, even if that is true, PRIF will not be heard to complain of fraud when it was fully aware of the judgment and was, in effect, told that Daly was involved in questionable or fraudulent machinations involving that judgment. Under the circumstances, PRIF has not demonstrated a reasonable reliance on the representations relating to the Angeliades judgment.

With respect to the \$5,500,000 entry on the financial statement, Daly's argument is not compelling. The court cannot determine, as a matter of law, that a representation that the borrower had \$5,500,000 in cash on hand is insignificant in a determination to make a loan, especially when the other liquid assets were relatively minimal. Further, in light of the outstanding Angeliades judgment of \$5,100,000, it cannot be said that PRIF was not influenced in reaching its decision to make the Daly loan by the statement regarding his having cash on hand. Therefore, defendants' motion to dismiss so much of the fraud cause of action as is based upon the representations in the financial documents is denied.

Constructive Trust

Defendants seek dismissal of the fourth cause of action, for a constructive trust because plaintiff does not have a confidential or fiduciary relationship with defendants, nor did it have any interest in the property prior to obtaining a promise

that such an interest would be given to it.

The elements of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance on the promise and unjust enrichment. *Mendel v Hewitt*, 161 AD2d 849, 850 (3d Dept 1990). These elements are not rigid, but are flexibly applied. *Id.* While defendants argue that there was no confidential or fiduciary relationship between PRIF and them, they ignore the pledge agreements, which provide that any profit, dividends and distributions received after an Event of Default are to be held by the pledgor in trust for the secured party. Since the parties agreed that the pledgors would hold those funds in trust, the pledgors are contractually created trustees. Similarly, recent law takes a less restrictive view of the elements for a constructive trust with regard to the element of prior interest in the property, and places more emphasis on the transfer made in reliance on the promise. See *Hira v Bajaj*, 182 AD2d 435, 436 (1st Dept 1992). Here, a clear precondition to the loan was delivery of the collateral that Daly was required to provide, which included the pledged assets. Under these circumstances, it would be improper to dismiss the cause of action for a constructive trust.

Punitive Damages

The complaint seeks punitive damages in connection with its fraud cause of action. Defendants seek dismissal of that demand,

because their claimed actions were not aimed at the public at large. Plaintiff does not address this issue.

"[W]here [a] breach of contract also involves a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations', punitive damages are recoverable if the conduct was 'aimed at the public generally' (see, *Walker v Sheldon*, 10 NY2d 401, 404-405 [1961])." *Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 308, (1st Dept 1995). Here, plaintiff has failed to allege that Daly's actions were aimed at the public generally. In the absence of any factual assertions to support such a conclusion, the demand for punitive damages is dismissed.

CROSS MOTION FOR SUMMARY JUDGMENT

Breach of Loan Agreement

Plaintiff alleges that Daly breached the Post-Closing and Loan Agreements and that he is in default in paying the Note, which was duly accelerated by PRIF. It bases its claim of default upon: Daly's failure to satisfy the Angeliades judgment against him despite his obligation to have done so by April 13, 2006; his failure to cause each of the entities specified in the Loan Agreement to enter into an Account Control Agreement with their depository bank and PRIF, pursuant to which the contents of a certain depository bank account were to be pledged to PRIF as

collateral for Daly's obligations under the loan; his failure to provide a signed opinion letter to PRIF by April 21, 2006; and his failure to provide to PRIF the loan documents relating to other loans previously made to entities in which Daly pledged his interest.

Daly bases his defense on an alleged oral modification of the Loan Agreement and Post-Closing Agreement. He claims that PRIF knew about the judgment, and knew that it could take Daly more than one week to straighten out that issue. Daly maintains that PRIF agreed to give him "whatever time he needed to take care of it," and further states that PRIF agreed to allow him to use the remaining portion of the \$10,000,000 loan (\$3,400,000) to pay off the judgment, but then refused to advance that money to him. Daly's argument is not compelling.

The loan documents unequivocally state that the terms of the agreement are solely those contained in the written documents, that any prior verbal agreements are void and that any modifications must be made in writing. Under these circumstances, courts have long held that parol evidence, in the form of allegations of verbal modifications, are insufficient to defeat a motion for summary judgment. See *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 (1990); *Prudential Sec. Credit Corp., LLC v Teevee Toons, Inc.*, 5 AD3d 226 (1st Dept 2004); *ABS Partnership v Air Tran Airways, Inc.*, 1 AD3d 24, 29 (1st Dept

2003). Thus, Daly's admitted failure to satisfy the Angeliades judgment is an "Event of Default" on the loan, and no other inquiry is needed. Nonetheless, the court will briefly address Daly's other arguments.

Daly maintains that he has been paying the default rate of interest on the loan, and is not in any monetary default. That, however, is of no moment. A party can be in default of its loan obligations, resulting in the acceleration of the debt obligation, even if the default is not monetary. See *Prudential Sec. Credit Corp. LLC v Teevee Toons, Inc.*, 2003 WL 346440 (Sup Ct, NY County 2003). The loan documents expressly make the failure to abide by any of the non-monetary obligations events of default that could result in the loan's acceleration.

One of the terms with which Daly allegedly failed to comply was the obligation to have the entities he controls enter into Account Control Agreements. He contends that the reason those agreements were not entered into is that PRIF failed to negotiate in good faith regarding their terms; however, he has not presented any evidence, or even allegations, of either the terms of the agreements that PRIF required or of the terms that Daly preferred. Thus, the allegations of bad faith negotiation are mere conclusory assertions, which do not suffice to defeat a motion for summary judgment. *DePodwin & Murphy v Fonvil*, 38 AD3d 827 (2d Dept 2007). In any event, as stated above, PRIF need not

demonstrate more than one default in order to obtain summary judgment on its breach of loan agreement cause of action.

Summary judgement is granted plaintiff on the first cause of action.

Immediate Possession of Levister and Sheldrake Developer Interests

PRIF seeks immediate possession of Levister and Sheldrake Developer interests that were pledged as collateral for the loan. Daly objects, saying that before there can be any transfer, there must be consent by various agencies. He also argues that if PRIF is permitted to take over the companies, hundreds of low-income and elderly residents will be adversely affected and will be deprived of electricity and heat. PRIF responds that there is no reason that the residents will be affected and states that without the immediate possession it seeks, its succession to Daly's ownership in the pledged companies is worthless and the collateral becomes illusory.

Daly pledged his interests in Lavisher and Sheldrake Developer to PRIF. In doing so, he represented that he had the authority to do so and that he would cooperate in obtaining any consents that were necessary. He cannot now object to turning over the possession of those interests based on denying the veracity of his representations made in the loan and pledge agreements. Further, there is no basis on which to assume that

the companies that manage the buildings will fail to do so in the future, regardless of any transfer of ownership. Further, new managers can be put in place, which would manage the property. The income stream that PRIF was promised as collateral does not interfere with the continued management of the buildings. Rather, the money it seeks is that which the pledged companies receive in excess of the amounts that they must expend to run the buildings.

Defendants have failed to demonstrate any basis upon which PRIF is not entitled to the collateral pledged. Therefore, summary judgment is granted on the third cause of action.

Constructive Trust

The issues surrounding the question of constructive trust were discussed above. PRIF has demonstrated that the pledgors have a contractual obligation to hold their income, distributions and profits in trust for its benefit. Defendants have not raised any material question of fact that negates that obligation. However, in order to ensure that the proceeds are properly used, and that an appropriate portion of the cash flow received by the entities is used for the maintenance of the buildings involved, a receiver will be appointed to administer the trust pending final resolution of this action.

Corporate Guarantors

PRIF contends that since Daly defaulted on the loan, the

corporate guarantors are responsible on their guarantees. Defendants' sole opposition to this cause of action is based upon their contention that there was no default. Inasmuch as the court has already determined that there was a default, and is granting summary judgment to plaintiff on the first cause of action, the corporate guarantors are obligated to honor their guarantees.

Plaintiff will have summary judgment on the fifth cause of action.

Preliminary Injunction

PRIF seeks a preliminary injunction requiring defendants to provide it with the books and records of each and all the entities, to require Daly to appear for deposition regarding the status, content and whereabouts of the collateral and restraining defendants from dissipating, transferring or encumbering the collateral.

In order to obtain a preliminary injunction, a party must establish a likelihood of success on the merits; irreparable injury absent a grant of injunctive relief; and a balancing of the equities in its favor. *Bishop v Rubin*, 228 AD2d 222 (1st Dept 1996).

Here, plaintiff has amply demonstrated its likelihood of success on the merits and has, in fact, succeeded in obtaining summary judgment on four of its five causes of action. In the

absence of a preliminary injunction, it could lose the bargained-for security to which it is entitled. Especially in view of the Angeliades judgment, the concern that plaintiff professes for its security is well founded. Therefore, plaintiff has demonstrated the remaining elements needed for a preliminary injunction as well.

Defendants' argument that the value of the collateral far exceeds the amount that has been drawn on the loan does not negate plaintiff's right to the security for which it bargained, even if the argument is found to be true. Defendants agreed to provide that security in the event of a default. The failure to satisfy the judgment was explicitly stated to be an event of default. Therefore, there is nothing inequitable in requiring defendants to comply with the terms of their agreements.

CONCLUSION

Accordingly, the court grants plaintiff's cross motion and plaintiff is granted summary judgment on the first, third, fourth and fifth causes of action.

With respect to the fourth cause of action, for a constructive trust, a receiver shall be appointed.

Defendants' motion is denied except to the extent that the court dismisses so much of the second cause of action as bases its allegation of fraud on defendants' representations concerning the Angeliades judgment.

The court further grants plaintiff a preliminary injunction requiring defendants to permit it to inspect and copy the books and records of each and all the entities, requiring Daly to appear for deposition regarding the status, content and whereabouts of the collateral, and restraining defendants from dissipating, transferring or encumbering the collateral. The preliminary injunction shall be considered a temporary restraining order and be in full force and effect immediately upon service of a copy of this decision on defendants' attorneys. Counsel should arrange among themselves for an expeditious inspection of books and records and Daly's deposition.

Settle order.

Dated: May 9, 2007

ENTER:



J.S.C.