SHORT FORM ORDER

INDEX
NO.: 22309-06

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 12-11-06
SUBMITTED: 3-21-07
MOTION NO.: 001-MG

HARBANS LAL GERA,

Plaintiff,

-against-

ALL-PRO ATHLETICS, INCORPORATED and DERVINDER SINGH, ESQ.,

Defendants.

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Upon the following papers numbered 1 to 51 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19-38 ; Replying Affidavits and supporting papers 39-51 ; it is,

ORDERED that this motion by the plaintiff for summary judgment in his favor is granted; and it is further

ORDERED that the defendant Dervinder Singh, Esq., as pledge agent, is directed to release the defendant All-Pro Athletics' pledged certificates of membership in Baseball Heaven, LLC, to the plaintiff within 30 days after service upon him of a copy of this order with notice of entry; and it is further

ORDERED that the plaintiff's claim for attorney's fees is referred to a hearing, which shall be held on October 10, 2007 at 10:30 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901

Baseball Heaven, LLC (hereinafter "Baseball Heaven"), is a limited liability company that was formed to develop and operate baseball and softball fields and an entertainment complex located in Yaphank, New York. In 2003, the members of Baseball Heaven were Andrew Borgia, the plaintiff Harbans Lal Gera and his wife, and the defendant All-Pro Athletics (hereinafter "All-Pro"). At that time, Borgia had a 40% interest in and controlled the management of Baseball Heaven. He also served as its Chief Executive Officer. The plaintiff and his wife

collectively had a 30% interest in Baseball Heaven, and All-Pro had the remaining 30% interest.

In 2003, the plaintiff loaned Baseball Heaven approximately $2.3 million. The loan was evidenced by four promissory notes. All four notes required the payment of interest to commence on April 1, 2004, and the payment of principal to commence on January 1, 2005. When Baseball Heaven executed the loan agreement and the first promissory note on October 30, 2003, it also executed and delivered to the plaintiff a security agreement, which is not an issue in this litigation. In addition, All-Pro executed and delivered to the plaintiff a pledge agreement in which it pledged its membership interest in Baseball Heaven as security for the repayment of up to 70% of the principal and interest due under the loan agreement and the promissory notes. Accordingly, All-Pro delivered certificates representing its membership interest in Baseball Heaven to the defendant Dervinder Singh, as pledge agent. He is required to hold them in escrow until he receives a written notice of release that is not disputed within 10 days or a court order directing him to release them.

The pledge agreement provides that, if there is a default of the loan agreement that is not cured within the applicable grace and cure periods and if the plaintiff declares the notes immediately due and payable, the plaintiff may give to the pledge agent and All-Pro a written notice demanding release of the pledged certificates from escrow. The loan agreement provides that Baseball Heaven shall be in default if it fails to pay any principal amount or interest on the notes when due, which failure continues uncured for 10 days. On April 1, 2004, Baseball Heaven defaulted in the payment of interest on the notes and has not made any payments of principal or interest to the plaintiff. By letters dated April 29, May 11, and June 10, 2004, the plaintiff advised Baseball Heaven that it was in default of its interest payments, which Baseball Heaven's Chief Executive Officer Andrew Borgia acknowledged. By a letter dated July 17, 2006, the plaintiff advised Baseball Heaven that he was accelerating the notes and declaring all amounts outstanding under the notes and the loan agreement immediately due and payable. By another letter dated July 17, 2006, the plaintiff made a written demand on All-Pro and the pledge agent, Dervinder Singh, for the release of the pledged membership certificates. By a subsequent letter dated July 26, 2006, All-Pro sent a written notice of dispute to the plaintiff. This action ensued.

The complaint contains two causes of action. The first cause of action is for a judgment declaring that the plaintiff is entitled to the pledged membership certificates and for an order directing the defendant Dervinder Singh to release them to the plaintiff. The second cause of action is for attorney's fees. The plaintiff now moves for summary judgment in his favor.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see*, **Hartford Accident & Indemnity Co. v Wesolowski**, 33 NY2d 169, 172; **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see*, **Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v City of New York**, 49 NY2d 557, 562; **Sillman v Twentieth Century Fox Film Corp.**, *supra* at 404). To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see*, **Freedman v Chemical Constr. Co.**, 43 NY2d 260, 264). Mere conclusions, expressions

of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (*see*, **Zuckerman v City of New York**, *supra* at 562). Likewise, the mere hope that evidence sufficient to defeat the motion may be uncovered during further disclosure is insufficient to deny the motion (*see*, **Hess v Schwartz,** 7 Misc 3d 1011[A] [and cases cited therein).

The court finds that the plaintiff has established, prima facie, his entitlement to judgment as a matter of law on the first cause of action by submitting proof of the execution of the loan agreement, the promissory notes, and the pledge agreement and by alleging that Baseball Heaven has defaulted on the loan (*see,* **Fleet National Bank v Cove Car Care Center,** 8 AD3d 225, 226. *citing* **Seaman-Andwall Corp. v Wright Mach. Corp.,** 31 AD2d 136, *affd* 29 NY2d 617). In opposition, All-Pro has failed to raise a triable issue of fact. Although All-Pro contends that there is an issue of fact as to whether payments were made on the notes and contends that discovery is needed to resolve such issue, All-Pro does not dispute that the notes are in default and, in fact, admits that no payments were made.

All-Pro contends that discovery is needed to determine why payments were not made. All-Pro contends that the plaintiff, acting in bad faith, did not pay down the loans in order to "steal" All-Pro's membership interest in Baseball Heaven. All-Pro contends that the plaintiff did not take any steps to compel Borgia to make payments on the notes and acquiesced in Borgia's failure to make payments. All-Pro further contends that, although the plaintiff purchased Borgia's interest in Baseball Heaven in 2006 and has been in control of the business since then, no payments were made despite an infusion of almost $2 million in loans and capital contributions.

These arguments are specious. The notes have been in default since 2004. All-Pro's contentions to the contrary notwithstanding, there is no evidence in the record that the plaintiff had a role in the management of Baseball Heaven prior to 2006 when he purchased Borgia's interest therein. Moreover, the documentary evidence submitted by the plaintiff establishes that Baseball Heaven was not profitable in 2006 and that the plaintiff loaned it another $135,000 that year just to keep it afloat. All-Pro acknowledges that the plaintiff loaned an additional $1 million to Baseball Heaven and that "a controlled associate of [the] plaintiff" contributed several hundred-thousand dollars more. All-Pro contends that those sums should have been used to pay down the loans that are the subject of this action. However, that argument, in effect that the plaintiff should have used the later funds he loaned to Baseball Heaven to make the payments on his first loan to Baseball Heaven, merely supports the plaintiff's position that Baseball Heaven did not have the funds to repay the first loan.

All-Pro contends that this action is barred by a prior settlement agreement between the parties. In 2005, there was litigation pending between the plaintiff and Borgia, Baseball Heaven, and All-Pro, among others. All-Pro contends that it agreed to cooperate with the plaintiff to resolve that litigation, which resulted in the plaintiff purchasing Borgia's membership interest in Baseball Heaven and giving the plaintiff a controlling interest therein. All-Pro contends that, in exchange for its cooperation, the plaintiff agreed to settle his claims against All-Pro. The settlement included, inter alia, an agreement to reduce All-Pro's 30% membership interest in Baseball Heaven to 20%. All-Pro contends that, implicit in such an agreement, was the understanding that there would be no foreclosure pursuant to the pledge agreement. All-Pro

contends that, after the plaintiff settled with Borgia, he reneged on his agreement with All-Pro. Plaintiff contends that it never reached a settlement with All-Pro. In any event, it is undisputed that the purported settlement agreement between the plaintiff and All-Pro was never formalized in a writing signed by the parties.

Paragraph 13 of the pledge agreement provides as follows:

> This Agreement contains the entire agreement and understanding between the parties in respect of the subject matter hereof, and cannot be modified, changed, discharged, or terminated except by an instrument in writing, signed by the party against whom enforcement of any modification, change, discharge or termination is sought.

Parties to a written agreement who include a proscription against oral modification are protected by the statute of frauds (General Obligations Law § 15-301). Any contract containing such a clause cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought (General Obligations Law § 15-301[1]). Put otherwise, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls. Thus the authenticity of any amendment is ensured (see, **Rose v Spa Realty Assoc.**, 42 NY2d 338, 343). There are two exceptions to the statute of frauds: partial performance and promissory estoppel. Neither exception is available, however, unless the part performance or the acts taken in detrimental reliance are unequivocally referable to the new, oral agreement (*Id.* at 343). In order to be unequivocally referable. the conduct must be inconsistent with any other explanation (*see,* **Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.**, 304 AD2d 462, 463).

All-Pro contends that, in reliance on its purported settlement agreement with the plaintiff, it cooperated with the plaintiff's efforts to resolve the prior litigation. All-Pro is, in effect, making an estoppel argument. However, the court finds that the acts taken by All-Pro are not unequivocally referable to the parties' purported settlement agreement. The prior litigation between the plaintiff and Borgia was based on Borgia's alleged breach of his fiduciary duty to Baseball Heaven. Thus, as the plaintiff correctly contends, All-Pro's cooperation in removing Borgia as the controlling member and Chief Executive Officer of Baseball Heaven benefitted All-Pro as well as the plaintiff. Under these circumstances, there was no detrimental reliance on the alleged settlement agreement and no unconscionable injury (*see*, **Aris Indus. v 1411 Trizechahn-Swig**, 294 AD2d 107). Accordingly, the plaintiff is entitled to the pledged membership certificates, and the defendant Dervinder Singh is directed to turn them over to the plaintiff within 30 days after service upon him of a copy of this order with notice of entry.

Turning to the plaintiff's second cause of action for attorney's fees, the pledge agreement provides, in pertinent part, "In the event of any litigation or arbitration between the parties, the prevailing party shall be entitled to its reasonable attorney's fees and costs associated with such action." Since the plaintiff has prevailed on his first cause of action, he is entitled to attorney's fees, and the matter is set down for a hearing to determine the reasonable amount of such fees.

HON. ELIZABETH HAZLITT EMERSON

DATED: July 25, 2007

J. S.C.