

Gagnon v Carter

2007 NY Slip Op 32651(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0604241/2006

Judge: Richard B. Lowe

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. RICHARD B. LOWE, III

PRESENT: _____
Justice

PART 56

Segnon, Jr

INDEX NO.

60424106

MOTION DATE

6/18/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

Carter, W

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

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

ORDER IS DEIGNED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 23 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/15/07

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
NEIL GAGNON,

Plaintiff,

Index Number 604241/06

-against-

WILLIAM T. CARTER, U.S. CERTIFIED
LETTERS, LLC and FUTURE COMPUTER
SOLUTIONS, L.L.C.,

Defendants.
-----X

Hon. Richard B. Lowe, III:

Plaintiff Neil Gagnon moves for an order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint in his favor against defendants William T. Carter, U.S. Certified Letters, LLC (US Certified) and Future Computer Solutions, L.L.C. (Future Computer), jointly and severally, in the principal amount of \$849,776.48 together with unpaid interest, costs of collection, expenses, and reasonable attorneys' fees, on the ground that this is an action based upon instruments for the payment of money only, to wit, a Convertible Promissory Note executed by Future Computer (the Note) and a guaranty thereof, executed by Carter and US Certified (the Guaranty), which are now due, owing and payable to Gagnon and to which defendants have no defense and to which there are no material issues of fact requiring a trial.

Defendants oppose the motion and cross-move to dismiss the action on the grounds, inter alia, that: (a) the Note is not an instrument for the payment of money only, and therefore does not qualify for CPLR 3213 treatment; and (b) defendants were fraudulently

induced to execute the Note and the Guaranty.¹ Additionally, defendants dispute the amounts that are alleged to be due and owing on the Note and Guaranty.

BACKGROUND

US Certified is in the business of producing, sending and tracking certified mail over the internet for its clients. Future Computer is a holding company of US Certified. Carter is the president, chief executive officer, and sole or majority owner of both US Certified and Future Computer. Carter contends that he met McLeod in January 2003, at which time McLeod explained that Gagnon and McLeod were in the business of providing capital to companies, such as US Certified, that have potential to increase their business. McLeod opined that, with such an infusion of capital, US Certified's business would prosper.

In a letter, dated May 6, 2003 (May 6 Letter), from McLeod to Carter, discussing the proposed deal, McLeod stated, in pertinent part:

"I propose a \$1,000,000 six-month subordinated 'bridge' loan to US Certified Letters, 10% annual interest, paid monthly. It is assumed that loan will be paid back with funding in approximately 60 days by Needham & Co., NYC. The amount of funding Needham & Co. proposed is Five Million dollars.

From a telephone conversation with Neil Gagnon, Gagnon Securities, NYC, he indicated he wanted 50% of the "bridge" loan. The other 50% would be from my own personal funds.

Your Company will issue options to purchase 2% of US Certified at the value set for US Certified by Needham at the time for the funding. Gagnon and McLeod would split the options.

... I propose a conference with Gagnon on Tuesday May 13th to finalize our current understanding and complete the funding."

¹ Future Computer has withdrawn that aspect of its cross motion based on lack of proper service.

* 4]

On June 11, 2003, Gagnon and McLeod each loaned the sum of \$500,000 to Future Computer (a holding company of US Certified), each evidenced by an identical note. Each note sets forth the amount of the loan, the applicable interest rates, and the maturity date (June 10, 2004), as well as various default provisions. Each note also contains a provision which granted the lender the option, on specified terms, to convert the amount owed under the note into an equity position in the borrower. By its terms, the conversion option was for one year commencing on the day the note was executed and expiring on the maturity date of said note. Neither Gagnon nor McLeod exercised the option contained in the respective notes.

In conjunction with the execution of each note, Carter and US Certified each executed an identical guaranty, guarantying Future Computer's performance under the respective note. Thus, defendants executed identical notes and identical guaranties for the two sets of identical loans, i.e., one with Gagnon, and another with McLeod.

Although neither the notes nor the guaranties made any mention of the additional financing discussed in the May 6 Letter, Carter contends that defendants executed the notes and guaranties in reliance upon the assurances from McLeod and Gagnon that future equity financing from Needham & Co. would be forthcoming. Specifically, Carter asserts that his decision to enter into the financing arrangement with McLeod and Gagnon was based upon his reliance upon the representations by McLeod in the May 6 Letter to the effect that Needham & Co. would provide five million dollars in equity financing. Carter claims that, notwithstanding the "non-final" language contained in the May 6 Letter, and the fact that neither the notes nor the guarantees mention the provision of additional equity financing, the May 6 Letter evidences the parties' understanding that equity financing from Needham & Co.

was a critical component of the transaction, the terms of which were somehow incorporated into the parties' contractual relationship. Needless to say, the equity financing by Needham & Co. never occurred.

Future Computer failed to pay the amount due on the maturity date of the Note. Pursuant to the terms of the respective notes and guaranties, by letter dated June 15, 2004, counsel for Gagnon and McLeod demanded payment from defendants, of the remaining principal and interest due together with the costs of collection, expenses, and reasonable attorneys' fees incurred by Gagnon and McLeod in connection with their respective actions.

On or about December 12, 2006, Gagnon and McLeod commenced these actions by way of summons and notice of motion for summary judgment in lieu of complaint. Defendants do not deny defaulting on the respective notes and guaranties, but contend that they were fraudulently induced to enter into the transaction, and that the calculations by Gagnon and McLeod of the amount defendants owe are incorrect.

DISCUSSION

CPLR 3213 provides an accelerated procedure to recover on "an instrument for the payment of money only" eliminating the service of formal papers (Technical Tape, Inc. v Spray Tuck, Inc., 131 AD2d 404, 406 [1st Dept 1987]). To qualify for CPLR 3213, "an instrument for the payment of money only must be a written unconditional instrument. Documents which set forth more than the simple promise by the obligor to pay a sum of money may not be sued upon by way of CPLR 3213" (*id.* at 406). "[A]n action comes within the ambit of CPLR 3213 if a prima facie case for nonpayment of a debt can be made out by the terms of the debt instrument itself" (Diversified Invs. Corp. v DiversiFax, Inc., 239 AD2d

231, 233 [1st Dept 1997]; see also Seaman-Andwall Corp. v Wright Mach. Corp., 31 AD2d 136, 137 [1st Dept 1968], affd 29 NY2d 617 [1971]). To establish the sum certain that a party owes in a motion for summary judgment in lieu of complaint, a party should “refer to the underlying promissory notes to establish the amount of liability” (Manufacturers Hanover Trust Co. v Green, 95 AD2d 737, 737 [1st Dept 1983]; see also Embraer Finance Ltd. v Servicios Aereos Profesionales, S.A., __ AD3d __, 2007 WL 2127822 [1st Dept 2007]).

The court rejects defendants’ contention that the Note cannot be considered an instrument for the payment of money only due to the inclusion of the provision which permits the lender to convert the Note into shares of the borrower (see Kineon v Bluegrass Elkhorn Coal Corp., 121 AD2d 980 [1st Dept 1986]). In Kineon, as here, the promissory note contained an option allowing the plaintiff-lender to convert the monies owed into company stock. Notwithstanding the option, the First Department held that the note qualified as an instrument for the payment of money only and that the plaintiff was entitled to an award of summary judgment in lieu of complaint. Based on the holding in Kineon, and the CPLR 3213 cases cited above, the court is persuaded that the Note here likewise constitutes an instrument for the payment of money only.

It is well settled that where a plaintiff has established a prima facie case based on proof of the existence of a promissory note and nonpayment according to its terms, summary judgment is warranted unless a defendant shows by sufficient proof the existence of any bona fide defenses (see Scuderi v Aiello, 300 AD2d 1107 [4th Dept 2001]; JLB Equities, Inc. v Mind over Money, Ltd., 261 AD2d 510 [2d Dept 1999]; Mitsubishi Trust and Banking Corp. v Housing Services Assocs., 227 AD2d 305 [1st Dept 1996]; see also Gateway State Bank v

* 7]
Shangri-La Private Club for Women, Inc., 113 AD2d 791 [2d Dept 1985], affd 67 NY2d 627 [1986]). To enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty (Kensington House Co. v Oram, 293 AD2d 304 [1st Dept 2002]; City of New York v Clarose Cinema Corp., 256 AD2d 69 [1st Dept 1998]).

Here, Gagnon has established that Future Computer failed to make payments in accordance with the Note, and that Carter and US Certified, as guarantors, likewise failed to make said payments. Gagnon has therefore established a prima facie case of liability as against Future Computer on the Note, and as against Carter and US Certified on the Guaranty. Accordingly, the burden is shifted to defendants to establish, by admissible evidence, the existence of triable issues of fact or meritorious defenses (JLB Equities, Inc. v Mind over Money, Ltd., supra). Thus, it is incumbent upon defendants to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense (id.).

The court has examined each of the defenses raised by defendants and holds that they fail to demonstrate a triable issue of material fact. With respect to defendants' claims of fraudulent inducement, Carter's alleged understandings are belied by the terms of the May 6 Letter as well as the terms of the Note and Guaranty. This defense is lacking in substantiation, and is inadequate to defeat plaintiff's entitlement to summary judgment (see Gateway State Bank v Shangri-La Private Club for Women, Inc., supra; JLB Equities, Inc. v Mind over Money, Ltd., supra).

Gagnon's request for judgment in the amount of the remaining principal due

8]
under the Note, and all other items permitted by the Note (to wit, interest, costs of collection, expenses, and attorneys' fees), is granted as against defendants on the issue of liability, and severed and referred to a referee. The issue of the amounts due from defendants, including the amounts previously paid by them, is referred to a referee to hear and report as set forth below.

CONCLUSION

It is ORDERED that plaintiff's motion for summary judgment in lieu of complaint is granted; and it further is

ORDERED that the issue of how much defendants owe to plaintiff under the Note and the Guaranty for the remaining principal of the Note, unpaid interest, costs of collection, expenses, and reasonable attorneys' fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the

earliest convenient date.

Dated: August 15, 2007

ENTER:

HON. RICHARD D. LEVINE III

FILED
AUG 23 2007
NEW YORK
COUNTY CLERKS OFFICE