

Gottlib v Pravkewitz

2007 NY Slip Op 32814(U)

August 27, 2007

Supreme Court, New York County

Docket Number: 0600574/2007

Judge: Richard B. Lowe

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

PRESENT: LOWE
Justice

PART 56

GOTTLIEB

INDEX NO. 600574/07
MOTION DATE 8/15/07
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- v -

PRAV KEWITZ & RADEK

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

FILED
SEP 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/27/06

RICHARD A. LOWE JR.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 56**

-----X

AVRAHAM GOTTLIB,

Index No: 600574/07

Plaintiff

-against-

DECISION AND ORDER

DOV B. PRAVKEWITZ and
MASON WELLS RADER,

Defendants

-----X

RICHARD B. LOWE III, J:

In the instant motion, Plaintiff Avraham Gottlib (“Gottlib”) moves this Court pursuant to CPLR 3213 for an order directing Defendants Dov B. Pravkewitz (“Pravkewitz”) and Mason Wells Rader (“Rader”) (collectively, “the Defendants”) to pay him \$500,000.00. The Defendants oppose the motion, and cross-move under CPLR 3212 seeking the instant action’s dismissal.

BACKGROUND

Plaintiff Gottlib and Defendant Pravkewitz are each 50% shareholders of non-party Avidov Holding Corp. (“Avidov”). The company is organized under New York law with its principle place of business here. It is the owner of the premises known as 546 West 29th Street, New York, NY and 548 West 29th Street, New York, NY.

In March 2006, Avidov entered into an agreement with 29 West, LLC (“29 West”) to sell it

546 West 29th Street and the air rights of 548 West 29th Street. Defendants Pravkewitz and Rader are both members of 29 West.

The agreement provided that the sale was contingent on 29 West obtaining a \$5,000,000.00 mortgage from a lender. In addition to the sales agreement, the Defendants executed a Guaranty. The Guaranty provides that in the event 29 West obtains a mortgage commitment from a lender, and thereafter failed to close by July 15, 2006, the Defendants would pay Gottlib \$500,000.00 as liquidated damages.

On or about March 30, 2006, Counsel for the Defendants and 29 West sent an email to Gottlib's attorney, which read

As discussed attached please find a copy of the term sheet from Sterling National Bank to 29 West, LLC. My clients are willing to treat said term sheet as a commitment letter in connection with the agreement. . .Please contact me to further discuss this matter

(Gottlib Aff'd at page 3, ¶ 13)

In a letter dated March 31, 2006, Gottlib's counsel responded,

[T]hank you for forwarding the Sterling National Bank letter and for your confirmation that your clients are accepting the letter as a commitment for the purposes of the contract. We, too, are happy that the commitment is now in hand. . .

(Goldstein Reply Aff, Ex C)

Defense Counsel attests that he never received Gottlib Counsel's letter. *(Simon Aff'd at page 5, ¶ 15)*

29 West never closed by July 15, 2006. Gottlib avers that 29 West obtained the mortgage commitment letter by way of the term sheet, and demanded that the Defendants, as guarantors, pay him \$500,000.00 in liquidated damages. The Defendants dispute that the term sheet serves as a commitment letter, thereby arguing that the pre-condition was not satisfied.

Gottlib commenced the instant motion against the Defendants pursuant to CPLR 3213 to collect the liquidated damages. The Defendants cross-move pursuant to CPLR 3212, arguing that as a matter of law, the term sheet cannot serve as a mortgage commitment letter; therefore Gottlib has no basis to seek the Guaranty's enforcement and the instant action must be dismissed.

DISCUSSION

"When an action is based upon an instrument for the payment of money only. . . the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of the complaint." (*CPLR 3213*) It is the plaintiff's burden to establish a prima facie case by demonstrating the execution of the note and defendants' default in payment (*see Alard, L.L.C. v Weiss*, 1 AD3d 131 [1st Dept 2003]). A Guaranty Agreement is deemed an instrument for payment of money only. (*See, Judarl L.L.C. v Cycletech Inc.*, 246 AD2d 736, 737 [1st Dept 1998].)

Here, the Defendants do not dispute that they signed the Guaranty, nor do they argue that they are liable for payment when and if the pre-conditions are satisfied. Indeed, their signatures are affixed on the Guarantee Agreement, where they made the promise to pay Gottlib \$500,000.00 in liquidated damages should the stated pre-conditions occur. (*See, Goldstein Aff, Ex B*) Gottlib has therefore met his *prime facie* burden of establishing the Defendants' liability on the Guaranty.

When the plaintiff meets her/his initial burden of establishing the defendants' liability for payment, it is incumbent upon the latter to proffer evidence showing triable issues of fact with respect to a bona fide defense of the note. (*See, Judarl, supra*) Here, the Defendants dispute that 29 West obtained a mortgage commitment letter per the sales agreement's terms. They, in fact, aver conclusively that 29 West did not, and move this Court for a declaration as such, disposing the entire action. The focus of the discussion must therefore turn to the term sheet, and whether, as a matter

of law, it could be deemed a mortgage commitment letter. If so, Gottlib would prevail on his CPLR 3213 motion. If not, the Defendants would succeed on their CPLR 3212 motion.

To obtain summary judgment, the movant must establish its cause of action “sufficiently to warrant the court as a matter of law in directing judgment” in its favor (*CPLR 3212 [b]*), and it must “set forth evidence that there is no factual issue” requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). Where the parties have plainly expressed their intent in writing, the meaning of the writing is to be determined as a matter of law on the basis of it alone. (*See, Chimart Assoc. v Paul*, 66 NY2d 570, 572 [1986].) “Clear and complete writings should generally be enforced according to their terms. . .” (*Collins v E-Magine, LLC*, 291 AD2d 350 [1st Dept 2002].)

Here, the parties to the Guaranty Agreement clearly stated their intentions in a writing:

[T]he buyer has agreed to pay. . .Gottlib. . .liquidated damages in the sum of \$500,000.00 (“Liquidated Damages”) if and only if the following occurs: (I) the Buyer obtains a Commitment Letter (as defined in the Contract of Sale) from an institutional lender. . .and (II) the Closing does not occur by July 15, 2006. . .

(*Goldstein Aff, Ex A, “Guaranty”*)

The Commitment Letter shall be from an Institutional Lender pursuant to which such Institutional Lender agrees to make a mortgage loan to Buyer, at Buyer’s sole cost and expense, of a minimum of \$5,000,000.00 at the prevailing fixed or adjustable rate of interest and on other customary commitment terms. . .

(*Id, “Sales Agreement”*)

None of the terms or provisions of this Guaranty may be amended, supplemented or otherwise modified except for a written instrument executed by the Guarantors and Mr. Gottlib.

(*Id, “Guaranty”*)

This agreement provides that the customary commitment letter serve as one of the two

preconditions for the liquidated damages provision to be triggered. Indeed, a commitment letter is an official notification from a lender notifying the borrower that her/his application has been approved. A term sheet, on the other hand, is a non-binding document setting forth the basic terms and conditions on a proposed agreement. Here, Sterling National Bank provided 29 West with a term sheet, as it merely established the terms of the latter's proposed loan from the former. (*See, Id, Ex C*) According to the parties' agreement's plain meaning, the proffered term sheet cannot serve as a commitment letter.

Gottlib nevertheless avers that it does. His argument is premised on the email 29 West/Defendants' counsel sent to his attorney, which he contends was an offer to amend the agreement to treat a term sheet as a commitment letter. Indeed, counsel did aver that his clients were willing to treat the term sheet attached to the email as the commitment letter. (*See, Goldstein Aff at page 3, ¶ 13*) The email is clearly, on its face, an offer. However, an issue of fact remains as to what transpired afterwards. Gottlib's Counsel avers that she sent a letter to Defense Counsel, where she stated she was "happy that the commitment is now in hand." (*Goldstein Reply Aff, Ex C*) Gottlib contends this was an acceptance of Defense Counsel's offer. Defense Counsel attests that he never received said response. (*See, Simon Aff'd at page 5, ¶ 15*) But this Court need not analyze whether said reply constitutes an acceptance, since the agreement itself provides guidance on the procedure to amend its terms.

In order to amend the agreement, the parties - Gottlib, Pravekwitz, and Rader - must execute a written modification agreement. (*See, Goldstein Aff, Ex A, "Guaranty"*) Attorneys certainly can have the authority to bind their clients. Under other circumstances, the email-and-letter exchange between counsel could have resulted in the Guaranty Agreement's revision. But with the issues of

fact as to whether there was a “meeting of the minds” between counsel aside, these correspondences fail to meet the standards for modification contemplated by the Guaranty Agreement’s drafters. When parties clearly memorialize an agreement’s terms, they do so to ensure its orderly execution and to avoid a litigious situation as to their intentions’ meaning. Here, Gottlib and the Defendants clearly provided for the manner in which the Guaranty’s particulars could be amended: a written modification signed and executed *by them*. That method was not utilized. The term sheet does not satisfy the mortgage commitment letter requirement.

The Defendants were required to pay Gottlib \$500,000.00 in liquidated damages if 29 West obtained a commitment letter and failed to close by July 15, 2006. 29 West surely did not close by said date. But its obtainment of a term sheet does not, as a matter of law, satisfy the contractually-mandated commitment letter. Accordingly, Gottlib is not entitled to liquidated damages.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Gottlib's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the Defendants' motion for summary judgment is granted, and the Clerk of the Court is directed to enter judgment in their favor.

This shall constitute this Court's decision and order.

Date: August 27, 2007

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ENTER


RICHARD B. LOWE III

RICHARD B. LOWE III, J.S.C.

8/11/16