

SK Global Mkts., LLC v Lotal Enters., LLC

2007 NY Slip Op 32874(U)

September 5, 2007

Supreme Court, New York County

Docket Number: 0118580/2006

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

SK GLOBAL MARKETS, LLC,
Plaintiff,
- v -
LOTAL ENTERPRISES, LLC,
Defendant.

Index No.: 118580/06
Motion Date: 05/22/07
Motion Seq. No.: 01
Motion Cal. No.: 117

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1, 2
3, 4
5, 6

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant plaintiff's motion for summary judgment on liability and direct an inquest to determine damages.

The court notes that the procedural posture of this action at the time this motion was brought seems to be a matter of confusion between the parties. Plaintiff's motion sought both a default judgment, alleging that the answer was a nullity under CPLR 321 (a) because the defendant did not appear by an attorney, and summary judgment apparently asserting that the defective answer constituted joinder of issue and that there is no issue of fact precluding judgment in plaintiff's favor. In response the

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):

FILED
SEP 17 2007
NEW YORK COUNTY CLERK'S OFFICE

defendant, now represented by counsel, has submitted a verified answer with a counterclaim. Plaintiff's reply acknowledges the verified answer and presses plaintiff's entitlement to summary judgment.

Based upon the parties submissions and oral argument, the court procedurally shall treat defendant's verified answer submitted in opposition to the motion as the responsive pleading in this action and shall treat plaintiff's motion as one for summary judgment based upon the joinder of issue by the verified answer. The court shall deny plaintiff's motion to the extent it seeks a default judgment under CPLR 3215 because defendant has provided a valid excuse for the delay, the need to obtain counsel (see Michael Reilly Design, Inc. v Houraney, 40 AD3d 592, 593-594 [2d Dept 2007] ["LLC may only be represented by an attorney" and appeal held in abeyance to allow representation to be obtained]), and a meritorious defense, that the contract was obtained by duress.

Having determined that issue in this action has been joined and the parties having fully briefed plaintiff's summary judgment application, the court shall proceed to decide the motion under CPLR 3212. There is no dispute that the parties entered into the Agreement dated July 15, 2006, that is attached to the verified complaint and that the Agreement provided for the return of contributions plaintiff made to the defendant pursuant to a Term

Sheet dated March 1, 2006. It is also agreed that the defendant hired an attorney to draft the Agreement. Plaintiff alleges that defendant has defaulted in its payment obligations under the Agreement. Defendant asserts defenses of duress and misrepresentation in seeking to avoid its obligations under the Agreement.

The court holds that even viewing the evidence in the light most favorable to the defendant, the defendant has failed to raise any triable issue of fact as to its liability under the Agreement. With respect to the claims of economic duress, defendant claims that plaintiff's principal stated that he had suffered financial reversals and threatened to sue defendant for the return of his investment. However, under the circumstances presented here, "neither the threat of a civil lawsuit nor plaintiff's insistence upon the execution of the promissory note or other loan documents . . . constituted economic duress."

Societe Financiere de Banque v Bitter-Larkin, 248 AD2d 298 (1st Dept 1998). As the Court has stated

The modern doctrine of economic duress has been invoked where there is an unjustified threat to injure or withhold property of the promisor, or a threat to withhold rights of the promisor or invoke process available to the promisee with respect to a transaction or property which is not the subject matter of the agreement induced by the threat, or in equally extraordinary coercive situations not justified by the immediate relationship of the parties. Even in its furthest extension, the doctrine has not been applied to a threat of process or suit, not otherwise oppressive.

limited to the subject matter of the agreement, attacked for duress.

Oleet v Pennsylvania Exchange Bank, 285 AD 411, 414 -415 (1st Dept 1955). In this case, defendant makes no allegation that plaintiff made any threat outside of the parties' contractual relationship and therefore the counterclaim for economic duress must fail.

Defendant's defense of misrepresentation also fails because even assuming the truth of defendant's allegations, reasonable reliance cannot be demonstrated on the facts asserted. As stated by the Court, "[h]ere, the [party], who was represented by counsel, decided to proceed with the transaction, despite knowing that it had not received full information concerning the transaction; thus its reliance cannot be considered reasonable or justifiable." KNK Enterprises, Inc. v Harriman Enterprises, Inc., 33 AD3d 872 (2d Dept 2006).

Accordingly, it is

ORDERED that the plaintiff's motion for a default judgment is DENIED; and it is further

ORDERED that plaintiff's motion for summary judgment is GRANTED and defendant's counterclaims are DISMISSED and the plaintiff is GRANTED judgment on liability; and it is further

ORDERED that plaintiff is directed to file a note of issue to place this action on the trial calendar for a damages inquest; and it is further

ORDERED that the parties are directed to attend a pre-trial/inquest conference on October 16, 2007, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set an inquest date.

This is the decision and order of the court.

Dated: September 5, 2007

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.
J.S.C.

FILED
SEP 17 2007
NEW YORK
COUNTY CLERKS OFFICE