

Horizons Invs. Corp. v Emerging Vision, Inc.

2007 NY Slip Op 33597(U)

October 31, 2007

Supreme Court, Nassau County

Docket Number: 1754-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

HORIZONS INVESTORS CORP.,

Plaintiff,

-against-

EMERGING VISION, INC.,

Defendant.

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 011754/07

MOTION DATE: Sept. 21, 2007
Motion Sequence # 001, 002

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affidavit in Opposition..... X
- Reply Affirmation/Affidavit..... XX
- Memorandum of Law..... XX

This motion, by plaintiffs, for an order:

1. Pursuant to CPLR Section 3213 granting summary judgment against defendant Emerging Vision, Inc., and awarding plaintiff the sum of \$88,252.17, which represents interest due from April 14, 2003 to April 24, 2007, on the ground that said defendant failed to pay said interest in accordance with a duly executed note, and

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2. Granting judgment against defendant for the amount of reasonable attorney fees and expenses incurred by plaintiff in connection with the enforcement or its rights in this action, and
3. Granting plaintiff such other and further relief as to this Court may seem just and proper;

and a cross-motion, by defendant, for an order: (a) pursuant to 22 N.Y.C.R.R. §130-1.1(a), awarding defendant Emerging Vision, Inc. all reasonable costs, expenses and attorneys' fees as a result of plaintiff's frivolous action; and (b) such other, further and different relief as to this Court may seem just, proper and equitable, are **both** determined as hereinafter set forth.

FACTS

This is an action in which the plaintiff, Horizon Investors Corp (hereinafter "Horizon") alleges that the defendant, Emerging Vision, Inc. ("EVI") failed to pay interest in accordance with a duly executed note and therefore owes the plaintiff the sum of \$88, 252.17.

EVI commenced a shareholder's Rights Offering in 2003. After EVI's stock had been purchased, it was discovered that the purchase of these shares had inadvertently resulted in an ownership change of EVI. The plaintiff, Horizon, and its principal Benito Fernandez ("Fernandez), had been one of the record holders who participated in the Rights Offering. In order to remedy the situation, those who purchased shares, including the plaintiff, agreed to rescind the exercise of their respective subscription rights, in an effort to avoid the ownership change. A Recission Agreement was created between the parties which then led to the execution of the Note at issue in this action

On or about April 14, 2003, the plaintiff and defendant entered into a loan agreement as evidenced by a Promissory Note that was duly executed by the defendant's Chief Operating Officer, Christopher Payan ("Payan"). Pursuant to the terms of the Note, the defendant was under an obligation to repay the plaintiff the sum of \$272,846.40 (the subscription price paid by Horizons in connection with the Rights Offering) together with interest accruing on the unpaid portion of the Principal Amount at a rate of six percent annum. All said sums were due on April 14, 2007, making the loan a one installment

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loan. The note itself was solely drafted by the defendant.

The defendant failed to pay the Note on the maturity date of April 14, 2007. The note contained a provision that stated, "After the maturity of the Principal Amount, stated or accelerated, interest shall accrue at the maximum rate permitted by law, but this provision shall not be deemed to constitute an extension of time for payment of the Principal Amount."

On April 24, 2007 the defendant wired the plaintiff payment in the amount of \$338,329.52. This represented the amount originally due plus the six percent interest. The plaintiff informed the defendant that this payment was in default and the sixteen percent default interest rate was to be applied to the Note. The defendant then sent a check for \$1196.04 to the plaintiff, representing the sixteen percent interest applied to the 10 days to which the payment was late. The plaintiff asserts that the provision in the Note intended the default rate of sixteen percent to be applied to the entire outstanding principal balance.

PLAINTIFF'S CONTENTIONS

The plaintiff contends that the defendant was in default of payment for failing to apply the sixteen percent interest rate to the entire outstanding principal balance. As a result, the plaintiff asserts that the defendant owes \$88, 252.17. This amount represents the total past interest due of \$89,448.21 minus the \$1196.04 already paid by the defendant.

The plaintiff claims that in order to obtain summary judgment on a contract for the payment of money only, such as the Note at issue in this action, the lender only needs to show that a contract exists, it was duly executed and that there is a default by reason of nonpayment. The plaintiff contends that it is the duty of the defendant to present evidence of a triable issue in order to prevent summary judgment.

The plaintiff asserts that any ambiguity in the language of the note agreement must be held against the defendant as the defendant was the sole drafter of the note. The plaintiff also asserts that the defendant, as maker of the note, is responsible for all costs and expenses of collection that includes all reasonable attorney fees. Based on the foregoing, the plaintiff argues that the motion for summary judgment should be granted in its entirety.

DEFENDANT'S CONTENTIONS AND CROSS-MOTION

The defendant contends that the plaintiff's motion for summary judgment should be denied and its action dismissed because it has fully satisfied its obligations under the Note. The defendant asserts that the maximum interest rate was to be applied only on unpaid amounts after maturity not on the entire outstanding Principal Amount. When notified of default of payment, EVI sent full payment of the post-maturity sum of \$1196.04. On May 10, 2007, the defendant mailed a letter to the plaintiff stating that Horizon was not entitled to post-maturity interest for the entire period of the Note. The defendant argues that the plaintiff had more than enough time to seek the advice of counsel on this issue at this point and avoid litigation. The defendant argues that the dictionary meanings of the terms "after" and "accrue" clearly establish that post maturity interest accrues after maturity only, and not for the entire period of the Note; and that contract interpretation requires that words and phrases be given their plain meaning, i.e., a court may not add into a contract conditions that the parties themselves did not insert, nor may it construe the language in such a way that would change the apparent meaning of the contract. It contends that if the parties had intended for the "post-maturity" to accrue for the entire period of the Note they would have expressly put that language into the Note.

The defendant argues the applicability of case law which holds that where a note provides for pre-fault interest at one rate and post-default interest at the maximum interest provided by law, the higher interest rate applies after the default.

The defendant contends that if the court does find the Note is ambiguous, any such ambiguity should not be construed against EVI. It is stated in the Agreement that, "...This Agreement shall be deemed the product of each party hereto, and no ambiguity shall be constructed (sic) in favor or against any party." The defendant argues that the Note and the Recission Agreement should be read together because the execution of the Note was directly related to and conditioned upon the execution of the Recission Agreement and both documents were part of the same transaction to rescind the subscription Rights Offering. This rule can be applied specifically to promissory notes that are executed in connection with other agreements. In reference to the cross-motion, the defendant claims that the filing of this action constitutes a misuse and abuse of the justice system for the inappropriate purpose of exacting revenge for past grievances and disputes between the parties. The defendant believes this action was brought in order to harass EVI and force EVI to incur substantial attorney's fees and costs.

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Finally, the defendant asserts that EVI is entitled to an award of sanctions against Horizons for reimbursement of EVI's attorney's fees. The defendant also asserts that the plaintiff's interpretation of the Note ignores the plain meaning of the express terms as an attempt to improperly extract money from EVI.

PLAINTIFF'S REPLY AND OPPOSITION

The plaintiff asserts that this action was commenced in good faith; that the default rate applies to the entire balance of the note since it is a single installment note; and that this action was not commenced in order to exact revenge on the defendant. The plaintiff argues that the motion for summary judgment should be granted and the defendant's cross-motion for sanctions should be denied.

DEFENDANT'S REPLY

The defendant contends that the plaintiff fails to show that this action was commenced in good faith based on a reasonable interpretation of the Note. The defendant asserts that the plaintiff's own understanding of the terms of the Note is irrelevant since the post-maturity interest provision is clear, express and unambiguous. The plaintiff suggests he may have made an improvident deal when he entered into the Recission Agreement and the Note. However, case law holds that the Court will not make an artificial interpretation of the language merely because the plaintiff made an improvident bargain. The defendant notes that the plaintiff has been unable to cite any legal authority which supports its frivolous interpretation of the Note. Based on the foregoing, the plaintiff's motion for summary judgment should be denied and the defendant's cross-motion for sanctions should be granted.

DECISION

To decide the instant motion for summary judgment, the court must use the rules of contract interpretation and "[W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (**T.M. Bier & Assoc. v Pirano**, 16 AD3d 578, 579, 790 NYS2d 884, 2nd Dept., 2005). "A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect" (**supra**), and the court, "should not, under the guise of contract interpretation 'imply a term which the

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parties themselves failed to insert' or otherwise rewrite the contract" (**Lui v Park Ridge at Terryville Assn.**, 196 AD2d 579, 581, 601 NYS2d 496, 2nd Dept., 1993 quoting **Mitchell v Mitchell**, 82 AD2d 849).

In applying the above legal principles to the facts of the case at bar, this Court has thoroughly examined the entire record, as presented, in the context of the applicable case law and statutory law. In view of that, this motion by the plaintiffs for an order pursuant to CPLR § 3213 granting summary judgment against the defendant and awarding the plaintiff the sum of \$88,252.17 is **denied** and **granted** in favor of the defendant to the extent hereinafter set forth.

The language of the Note at issue, with its words and phrases being given their plain meaning, requires that the default interest rate of sixteen percent only be applied to unpaid amounts after maturity not on the entire outstanding Principal Amount. The plain dictionary meaning of the word "after" is "following in time or place; afterward, behind, later..." (Webster's Ninth New Collegiate Dictionary 1987, p. 62). The Court's perusal of the Note, without inserting additional terms, results in a finding in favor of the defendant, and the plaintiff therefore has not established entitlement to summary judgment under CPLR § 3213.

Consequently, given that the plain meaning of the Note is in favor of the defendant, the Court must **grant** summary judgment in favor of the defendant. CPLR § 3213 states, "If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders **otherwise**." It has been held that, "If papers filed in connection with motion for summary judgment in lieu of complaint reflect that the plaintiff substantively lacks a cause of action, the court may search the record and award summary judgment to the defendant" (**Schulz v Barrows**, 263 AD2d 565, 571, 693 NYS2d 658, 3rd Dept., 1999, **aff'd** 94 NY2d 624, 709 NYS2d 148, 2000; see also, **Weissman v Sinorm Deli, Inc.**, 88 NY2d 242, 646 NYS2d 308, 312, 1996).

This cross-motion by the defendants for an order pursuant to 22 NYCRR § 130-1.1(a) awarding the defendant all reasonable costs, expenses and attorney's fees as a result of plaintiff's alleged frivolous action is **denied**. 22 NYCRR § 130.1.1 states the Court may only award sanctions for frivolous conduct which is defined as conduct that, "...is completely without merit in law and cannot be supported by a reasonable argument

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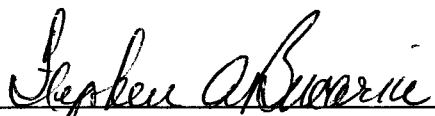
for an extension, modification, or reversal of existing law [or if] it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another...". That burden has not been met herein.

Accordingly, the plaintiff's motion for summary judgment is **denied** and **granted** in favor of the defendant and the defendant's cross-motion for sanctions is **denied**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated OCT 31 2007


~~XXX~~ J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE