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No. 8555-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 9-12-07
Submission Date: 10-9-07
Motion Sequence No.: 001/MOT D

CECIL SEEDANSINGH,

Plaintiff,

- against -

MOHENDRADAT RAGNANAN a/k/a JOHNNY RAGNANAN, STAR FIRE PROTECTION CO., INC. and INFINITI MONITORING, LLC.

Defendants.

COUNSEL FOR PLAINTIFF
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ORDER

The following papers were read on Defendant's motion for summary judgment on its counterclaim and for summary judgment dismissing the complaint or to dismiss the complaint on the grounds it fails to state a cause of action:

Notice of Motion dated August 20, 2007;
Affidavit of Steven Fulep sworn to on August 20, 2007;
Affirmation of Sean Lasky, Esq. dated August 20, 2007;
Defendants' Memorandum of Law;

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Affidavit of Michele A. Pincus, Esq. sworn to on September 21, 2007;
Affidavit of Steven Fulep sworn to on October 14, 2007;
Affirmation of Sean Lasky, Esq. sworn to on October 4, 2007.

Defendants, Star Fire Protection Co., Inc. ("Star Fire") and Infiniti Monitoring, LLC ("Infiniti") move for summary judgment on their counterclaim and for summary judgment dismissing the complaint or, in the alternative, for an order dismissing the complaint on the grounds if fails to state a cause of action.

BACKGROUND

Star Fire and Infiniti were in the business of installing, serving and monitoring fire and burglar alarms.

On August 27, 2004, Star and Infiniti entered into an asset sales agreement ("Agreement") with Plaintiff, Cecil Seedansingh ("Seedansingh"), and Co-Defendant, Mohendradat Ragnanan a/k/a Johnny Ragnanan ("Ragnanan"), pursuant to which Seedansingh and Ragnanan purchased the assets, good will, names and customer lists of Star Fire and Infiniti.

Seedansingh and Ragnanan agreed to pay $150,000 for the assets of Star Fire and Infiniti. As part of the purchase price, Seedansingh and Ragnanan made a promissory note in the principal sum of $144,000 payable to Star Fire,

Seedansingh and Ragnanan formed J&C Fire Protection and Monitoring, Inc. ("J&C") to operate their business. J&C operated the business using the trade names Star Fire and Infiniti.

By December 2004, the relationship between Seedansingh and Ragnanan had deteriorated to the point where they could not longer continue in business together. Seedansingh commenced an action against Ragnanan alleging breach of fiduciary duty and fraud. Seedansingh alleged that Ragnanan had fired all the employees of J&C, removed its customer lists and data from its computers, changed the passwords on the monitoring station and removed the money from the corporate bank accounts to force Seedansingh out of the business.

Seedansingh and Ragnanan entered into a settlement agreement dated April 29, 2005 pursuant to which they agreed to dissolve J&C.

The settlement agreement between Seedansingh and Ragnanan provided for them to use the money in the corporate bank account to pay down the note due to Star Fire. By May 2005, the principal balance due on the original promissory note had been reduced to $106,000.

Seedansingh and Ragnanan were then able to re-negotiate the note due to Star Fire. Seedansingh and Ragnanan each executed a separate promissory note payable to Star Fire in the principal sum of $53,000. The new promissory note between Seedansingh and Star Fire provided for 36 monthly payments of $1,660.83 which included interest at the rate of 8% per annum with the first payment being due on August 10, 2005. The remaining 35 payments were due on the 10th of each successive month until the entire amount had been paid in full.

While Ragnanan satisfied his note obligations in full, Seedansingh made the payment due on August 10, 2005 and made no further payments.

The note provided that in the event of default of payment which was not cured within 10 days of written notice, by regular mail, the entire balance would become due and payable. Although the note provides for notice by ordinary mail, notice of the default was sent by Federal Express. Upon default that was not cured within the grace period, interest on the unpaid balance accrued at the rate of 14% per annum. The note also provided that in the event of default, Seedansingh would pay the costs of collection including reasonable attorney's fees, costs and disbursements.

Based upon Seedansingh having made but one payment, Star Fire seeks to recover the balance due on the note, $51,339.17, together with interest at the rate of 14% per annum, reasonable attorney's fees, court costs and disbursements incurred in connection with the action.

The Agreement contains a covenant not to compete pursuant to which the Sellers, Star Fire and Infiniti, and their shareholder, Steven Fulep ("Fulep"), agreed that they would not compete with J & C within the State of New York for a period of 5 years from the date of closing. The Agreement also contained a non-solicitation provision which prohibits Star Fire, Infiniti and Fulep from soliciting or attempting to solicit business from any current or future customer of J & C for a period of 5 years from the date of closing.

The Agreement provides Seller could use the names Star Fire and Infiniti only to collect and negotiate their receivables.

Fulep testified at his deposition that after the closing under the Agreement, Star Fire and Infiniti completed the installation of a fire alarm at College Plaza for which it was paid approximately $40,000. This is an apparent violation of the Agreement and the covenant not to compete.

DISCUSSION

The holder of a promissory note establishes a *prima facie* case by submitting proof of the existence of a promissory note executed by the maker containing an unequivocal and unconditional obligations to repay and the maker's default. Constructamax, Inc. v. CBA Associates, Inc., 294 A.D.2d 460 (2nd Dept. 2002); and Colonial Commercial Corp. v. Breskel Associates, 238 A.D.2d 539 (2nd Dept. 1997). See also, Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136 (1st Dept. 1968), *aff'd*, 29 N.Y.2d 617 (1971); Chemical Bank v. Nemeroff, 233 A.D.2d 239 (1st Dept. 1996); and Key Bank v. Munkenbeck, 162 A.D.2d 503, (2nd Dept. 1990).

Once the holder of the promissory note has established a *prima facie* case, the maker must come forward with evidence establishing the existence of triable issues of fact or a *bona fide* defense. Colonial Commercial Corp. v. Breskel Associates, *supra;* and Silber v. Muschel, 190 A.D.2d 727 (2nd Dept. 1993).

Star Fire has established the existence of a promissory note containing an unconditional and unequivocal obligation to repay. Seedansingh admits that he has not

made any payment on the note beyond the first payment due on the note.

Seedansingh asserts Star Fire's violation of the covenant not to compete and Star Fire's completing a contract and collecting the money due on the contract after the closing establishes a defense to the action on the promissory note.

A violation of the restrictive covenant and covenant not to compete contained in the Agreement would be a defense to the action on a promissory note only if the promissory note was inextricably intertwined with the Agreement. De Luca v. North Shore Medical Imaging, LLP, 287 A.D. 2d 488, 731 N.Y.S. 2d 388 (2001); Vecchio v. Colangelo, 274 A.D.2d 469 (2nd Dept. 2000); and Cohen v. Marvlee, Inc., 208 A.D.2d 792 (2nd Dept. 1994).

The promissory note would be inextricably intertwined with the Agreement only if some additional performance by Star Fire was a condition precedent to the payment of the note or Star Fire's failure to perform its obligations under the Agreement altered Seedansingh's repayment obligations. Neuhaus v. McGovern, 293 A.D.2d 727 (2nd Dept. 2002); and East New York Savings Bank v. Baccaray, 214 A.D.2d 601 (2nd Dept. 1995).

Seedansingh's defense is premised upon the following language that was contained in the original promissory note which Ragnanan and he signed in connection the Agreement.

> "The Maker and Holder agree that this Note is being provided to evidence that certain indebtedness by Maker to Holder for the payment of Maker's obligations to Holder

> pursuant to that certain Asset Sales Agreement dated August, 2004. Holder agrees that Maker may offset any indemnification obligation of Holder under said Agreement."

Under the terms of Paragraph 16 of the Agreement, Star Fire, Infiniti and Fulep agreed to indemnify Seedansingh for all breaches of the Agreement. However, the above quoted language is not contained in the promissory note that is the subject of this action does not contain the same indemnification language as the original note.

A promissory note is a contract that is construed using the normal rules of contract interpretation. Arnav Industries, Inc. Employee Retirement Trust v. Westside Realty Assocs., 180 A.D.2d 463 (1st Dept. 1992).

A clear and complete written agreement should be enforced in accordance with its terms. South Road Assocs., LLC v. International Business Machines Corp., 4 N.Y.3d 272 (2005); Greenfield v. Philles Records, Inc., 98 N.Y.2d 562 (2002); and W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990). In interpreting a contract, the court must give "...practical interpretation to the language employed and the parties reasonable expectations." Slamow v. Del Col, 174 A.D.2d 725, 726 (2nd Dept. 1991) *aff'd*, 79 N.Y.2d 1016 (1992). See also, AFBT-II, LLC v. Country Village on Mooney Pond, Inc., 305 A.D.2d 340 (2nd Dept. 2003); and Del Vecchio v. Cohen 288 A.D.2d 426 (2nd Dept. 2001).

The court may not add provisions to an agreement under the guise of interpretation. Petracca v. Petracca, 302 A.D.2d 576 (2nd Dept.2003); and Tikotzky v.

New York City Transit Auth., 286 A.D.2d 493 (2nd Dept. 2001). The language upon which Seedansingh relies is not in the subject promissory note. Thus, adding this language would be adding provisions to the note under the guise of interpretation.

Since Star Fire has established a *prima facie* case on the note and Seedansingh has not established a valid defense, the Court must, therefore, grant Star Fire summary judgment. However, CPLR 2201 grants the court the discretion to stay a proceeding in the proper case.

The amount Star Fire will ultimately recover, it anything, is ultimately dependent upon the outcome of Seedansingh's cause of action against Infiniti and it for breach of the restrictive covenant and covenant not to compete. Fulep has already testified to an apparent breach of these provisions in that Star Fire completed work and collected money on account of the installation of a fire alarm system after the date of the closing.

Star Fire seeks attorney's fees and legal costs and disbursements in regard to its action on the note. The amount due will have to be established at a hearing. See, Simoni v. Time-Line, Ltd., 272 A.D.2d 537 (2nd Dept. 2000); and Borg v. Belair Ridge Development Corp., 270 A.D.2d 377 (2nd Dept. 2000). Thus, the full amount of the judgment on the note cannot be determined until such time as the court conducts a hearing on the issue of attorney's fees.

Paragraph 14(b) of the Agreement provides that Seedansingh can recover attorney's fees in connection with any action brought to enforce his rights under the restrictive covenant and covenant not to compete. Therefore, the amount of the legal

fees Star Fire can recover on its action on the note may be off-set in whole or in part by legal fees due and payable to Seedansingh should he prevail on his action for violation of those covenants.

Therefore, entry of the judgment on the promissory note is stayed pending the trial of this action.

Star Fire and Infiniti have moved for summary judgment dismissing Seedansingh's complaint. Such relief can be granted only if the court ignored Fulep's deposition testimony admitting that he completed the College Plaza job and obtained payment therefore after the closing on the Agreement. Star Fire and Infiniti have failed to establish a *prima facie* entitlement to judgment as a matter of law dismissing the complaint. Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985); Widmaier v. Master Products, Mfg., 9 A.D.3d 362 (2nd Dept. 2004); and Ron v. New York City Housing Auth., 262 A.D.2d 76 (1st Dept. 1999).

Although Star Fire and Infiniti also seek to dismiss the complaint on the grounds that it fails to state a cause of action [CPLR 3211(a)(7)], they fail to offer any argument in their papers as to how or why the complaint fails to state a cause of action. Furthermore, the fourth cause of action states a cause of action for breach of the covenant not to compete.

In determining a motion to dismiss, the court must determine whether Plaintiff has any cognizable cause of action, not whether it has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Rovello v. Orofino Realty Co., 40

N.Y.2d 633 (1976); Well v. Yeshiva Rambam, 300 A.D.2d 580 (2nd Dept. 2002); and Frank v. DaimlerChrysler Corp., 292 A.D.2d 118 (1st Dept. 2002). The complaint must be liberally construed, and Plaintiff must be given the benefit of every favorable inference. Leon v. Martinez, 84 N.Y. 2d 83 (1993); and Paterno v. CYC, LLC, 8 A.D.3d 544 (2nd Dept. 2004). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Also Enterprises, Ltd. v Premier Lincoln-Mercury, Inc., 11 A.D.3d 493 (2nd Dept. 2004).

If from the facts alleged in the complaint and the inferences which can be drawn from the facts the court determines that the pleader has a cognizable cause of action, the motion must be denied. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Stucklen v. Kabro Assocs., 18 A.D.3d 461 (2nd Dept. 2005).

Based upon this standard, the complaint states a cause of action upon which relief can be granted.

Accordingly, it is,

ORDERED, that Defendant Star Fire's motion for summary judgment on the promissory note is **granted** and Star Fire is awarded damages in the sum of $51,339.17 together with interest at the rate of 14% per annum from September 10, 2005 to the date of the entry of judgment: and it is further,

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ORDERED, that the motion of Defendants Star Fire and Infiniti for dismissal of the complaint for failure to state a cause of action or for summary judgment dismissing the complaint is **denied:** and it is further,

ORDERED, that the entry of judgment in accordance with this order is hereby stayed pending the trial of this action.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
November 14, 2007

Hon. LEONARD B. AUSTIN, J.S.C.