

Faden v Faden

2008 NY Slip Op 30785(U)

March 4, 2008

Supreme Court, Nassau County

Docket Number: 3943-07/

Judge: Daniel Martin

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

MORTON FADEN and BARBARA FADEN.

Plaintiffs.

Sequence No.: 001
Index No.: 013943/07

- against -

BRAD FADEN and BARBARA FADEN.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	

Plaintiffs' motion for summary judgment in lieu of complaint pursuant to CPLR §3213 is granted as set forth below.

A motion for summary judgment in lieu of complaint may be maintained "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment..." CPLR §3213. The instant action is based upon defendants' alleged failure to pay on a purported promissory note. A promissory note qualifies as an instrument for the payment of money only. Seaman-Andwall Corporation v. Wright Machine Corporation, 31 A.D.2d 136 (1st Dep't 1968).

Plaintiffs must prove the existence of the note and each defendant's failure to make payments pursuant to its terms. Marshall v. Colvin Motor Parts of Long Island, Inc., 140 A.D.2d 822, 528 N.Y.S.2d 1007 (2nd Dep't 1988); Bank of New York v. Realty Group Consultants, 186 A.D.2d 618, 588 N.Y.S.2d 602 (2nd Dep't 1992) and Bosio v. Selig, 165 A.D.2d 822, 560 N.Y.S.2d 196 (2nd Dep't 1990).

Plaintiffs prove the existence of the note by annexing a copy of it as an exhibit. Said note requires payment to plaintiffs of the sum of \$200,000 at the expiration of ten years from the note's date, July 15, 1995. Plaintiffs prove defendants' failure to pay the note pursuant to its

terms through the affidavit of plaintiff Morton Faden.

Where, as here, plaintiffs meet their *prima facie* burden of demonstrating entitlement to summary judgment in lieu of complaint, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. See, e.g., Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In opposition defendant Barbara Faden avers that:

- 1) after the sale of their home in 1995 defendants, who were then married, gave \$564,240 of \$567,00 net profit from said sale to plaintiffs, defendant Brad Faden's parents, to hold until defendants closed title on their new home which they were in the process of purchasing;
- 2) said funds were not provided to plaintiffs in satisfaction of any debt;
- 3) on June 14, 1995 plaintiffs wired \$375,000 of said funds to defendants' account and held \$189,000 of the aforementioned sale proceeds;
- 4) on that date defendants closed title on their new home and paid the entire amount due through their downpayment in the sum of \$41,300, a check payable to the existing mortgagee in the sum of \$70,564.40 and a check payable to the sellers in the sum of \$301,135.60;
- 5) in July, 1995 defendant Brad Faden presented Barbara Faden with a promissory note that he had received from his father, plaintiff Morton Faden;
- 6) defendant Brad Faden informed defendant Barbara Faden that due to certain problems at the family business which included Brad Faden's personal use of client funds, Morton Faden had repaid said client funds spent by Brad Faden;
- 7) Barbara Faden executed said note in the "belief that plaintiff Morton Faden was using it to keep his son in line at work and to prevent him from stealing money from the customers";
- 8) at the time Barbara Faden executed the note it was "completely blank and incomplete" and "[t]here was no handwriting on the note";
- 9) specifically, said note did not reflect that it was payable to plaintiffs, did not require payment of \$200,000 within ten years and the amount due was blank;
- 10) despite plaintiff Morton Faden's claim in his affidavit, said \$200,000 was never provided to defendants to purchase the home and, in fact, \$200,000 was never provided to defendants by plaintiffs at all;
- 11) in 2002 when Barbara Faden filed an action for divorce against defendant Brad Faden, her husband never recorded a debt of \$200,000 owned to plaintiffs in the statement of net worth filed therein;
- 12) on several occasions defendant Barbara Faden met with plaintiff Morton Faden during the divorce proceeding at which Mr. Faden "acknowledged that [money given to defendants during the course of their marriage] had been given with no expectation that it be repaid;
- 13) at a hearing in Family Court, Nassau County defendant Brad Faden testified that in January, 2007 he had paid his father, plaintiff Morton Faden \$60,000 of a debt owed to his father;
- 14) in July, 2007 after defendant Brad Faden was directed to pay \$15,000 in child

support, plaintiffs paid same on behalf of their son and defendant Barbara Faden thereafter received a demand letter from plaintiffs' attorney seeking the \$200,000 on the subject note; and 15) said demand was made two years after the due date of July 15, 2005 as set forth in the note.

Defendant Barbara Faden first asserts that there is an issue of fact on the issue of whether she authorized plaintiffs to hold her liable for the sum of \$200,000. While UCC §3-115(1) provides that a note will be effective only if it is completed in accordance with the authority given by the maker, the fact remains, that as set forth above, Ms. Faden knew why she signed the note, and that at the time it was signed that same was blank. The court will not now hear Ms. Faden claim that she did not authorize the amount inserted where she admits to knowingly executing the note with the amount payable left blank.

The court also finds unavailing this defendant's position that an issue of fact exists as to whether any funds were extended to this defendant. Ms. Faden denies receiving said funds and further asserts that same were not required for defendants to purchase their home as alleged by plaintiffs. Even accepting Ms. Faden's position, the fact remains that she averred that she agreed to execute the note along with her husband and that the funds extended pursuant to the note would be used to repay his customers. Under these circumstances, those customers who were repaid would see the consideration provided by plaintiffs as opposed to Ms. Faden herself. Further, Ms. Faden offers nothing in admissible form which would lead the court to conclude that said funds were not in fact used to repay the customers.

Also unavailing is Ms. Faden's position that plaintiffs forgave all or part of the note or that at least part of the note had been satisfied by defendant Brad Faden. First, Ms. Faden avers that she had met plaintiff Morton Faden in 2004 and at that meeting Mr. Faden allegedly acknowledged that he had given money to defendants over the course of their marriage and, further, that "the money had been given with the no expectation that it be repaid." The note at issue unambiguously provides that defendants are obligated to pay plaintiffs the sum of \$200,000.00. To say that payment in satisfaction of said written instrument was not expected would require the introduction of parole evidence as to the parties' intent.

The interpretation of a contract is a matter of law and as such is within the province of the court and is properly determined by motion for summary judgment. W.A. Olson Enterprises, Inc. v. Agway, Inc., 55 N.Y.2d 659 (1981); Automotive Management Group, Ltd. v. SRB Management Co., Inc., 239 A.D.2d 450 (2nd Dep't 1997).

The contract is "...to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." Automotive Management Group, Ltd., supra at 55.; Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 (1960). "[C]lear, complete writings should generally be enforced according to their terms." Automotive Management Group, Ltd., supra at 55; Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995).

When the contract is ambiguous and "...determination of the parties' intent depends upon

the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact.” Amusement Business Underwriters v. American International Group, Inc., 66 N.Y.2d 878 (1985). See, also, Icon Motors, Inc. v. Empire State Datsun, Inc., 178 A.D.2d 463 (2nd Dep’t 1991). Whether the contract is ambiguous is to be determined by the court. Amusement Business Underwriters, supra.

The note at issue is unambiguous on its face and the court shall not permit Ms. Faden to introduce parole evidence as to the parties’ intentions at the time the agreement was executed.

Ms. Faden also contends that an issue of fact exists as to whether the note was partially satisfied by a \$60,000.00 payment made by defendant Brad Faden to plaintiffs. Same is reflected in the order of disposition of Tejindar S. Kahlon, Support Magistrate in the Nassau County Family Court in which it was stated that Brad Faden, instead of using the \$60,000.00 proceeds from a personal injury action to pay child support “paid another debt to his father.” To accept plaintiff’s position that said payment was made in partial satisfaction of the note at issue here would be to accept a conclusory assertion in opposition to the motion which this court is not willing to do. See, Orr v. Miner, 220 A.D.2d 567 (2nd Dep’t 1995).

Lastly, Ms. Faden attempts to raise an issue of fact on the issue of whether plaintiffs made a timely demand for payment on the note. Pursuant to UCC §3-503(a), “where an instrument is payable at or a fixed period after a stated date, presentation for acceptance must be made on or before the date it is payable.” UCC §3-503(1)(a). It has been held, however, that “presentment for payment is not necessary to charge the maker of a demand note (citations omitted).” Gross v. Fruchter, 230 A.D.2d 710 (2nd Dep’t 1996). See, also, Naitonal Park Bank v. Saitta, 127 A.D. 624 (1st Dep’t 1908).

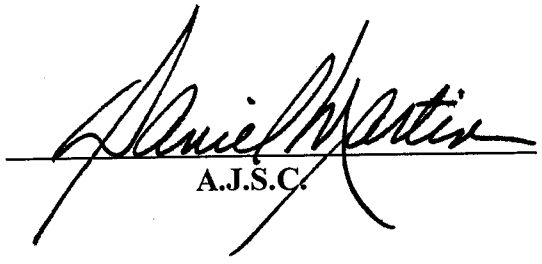
Defendant Barbara Faden having failed to raise a triable issue of fact which precludes summary judgment, the court grants plaintiffs’ motion as against this defendant.

Defendant Brad Faden has failed to oppose the motion or otherwise appear herein. Based upon defendant Brad Faden’s failure to oppose the motion or otherwise appear, the court hereby grants plaintiffs a default against this defendant pursuant to CPLR §3215(a). Plaintiffs prove jurisdiction by providing copies of the affidavits of service of the summons, notice of motion and request for judicial intervention upon the defendants. As defendant Brad Faden has failed to respond to the motion, he has defaulted.

Where a default judgment is sought against a “natural person” in an action based upon defendant’s failure to pay pursuant to a contract, “...an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first class mail to the defendant at his place of residence...” CPLR §3215(g)(3)(i). Plaintiffs have not provided the court with a copy of such an affidavit as to defendant Brad Faden and the plaintiffs are accordingly directed to provide this defendant with such notice as required by this section 20 days prior to entry of judgment.

Plaintiffs are directed to submit judgment against defendants to the clerk in the sum of \$200,000 plus interest.

So Ordered.


A.J.S.C.

Dated: March 4, 2008

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE