SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

FLOORING TECHNOLOGIES, INC.,

Plaintiff,

INDEX No. 019073/07

MOTION DATE: Feb. 11, 2008
Motion Sequence # 001

-against-

ANDRE BELARGE,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation X

This motion, by plaintiff, for an order pursuant to CPLR 3213 directing the entry of judgment for the plaintiff and against the defendant in the amount of $282,628.04, with interest from January 1, 2007, on the ground that this action is based upon an instrument for the payment of money only which is now due and payable, and for such other and further relief as to this Court may seem just and proper, is determined as hereinafter set forth.

FACTS

On June 28, 2006, the plaintiff entered into an agreement (hereinafter "Note") with the defendant whereas the defendant promised to pay the plaintiff the sum of $282,629.04

on or before December 30, 2006. The paragraph titled "promise to pay" recites that the defendant shall be responsible for the whole debt or remaining balance in the event that Flooring Tec Systems (company owned by the defendant) has not paid by the due date.

PLAINTIFFS' CONTENTIONS

The plaintiff maintains that the defendant is in breach of the Note for services rendered to Floor Tec Systems, a company owned by the defendant. The defendant signed the Note in his personal capacity and is therefore liable for the outstanding balance. The defendant has made no payments on the Note and is therefore liable for the balance of $282,629.04, and additionally for $10,000 in reasonable legal fees associated with this matter.

DEFENDANT'S CONTENTIONS

The defendant argues that the Note must fail against him for two reasons. First, defendant argues, there is a lack of consideration, both actual and recited, in that he did not receive any benefit from the Note and that nowhere on the document's face is consideration recited. He asserts that the motion must fail for lack of consideration because a new agreement, amending an old one, needs new consideration to be valid, i.e., that since Flooring Tec Systems still owes the plaintiff the debt, the debt was not discharged before the Note was signed and therefore there has to be new consideration for the Note to be valid. The Note must fail because he is not personally liable, he did not know what he was signing and just signed it to appease the plaintiff. Defendant argues that he never personally guaranteed the debt. Defendant further avers that payments were made, and continue to be made by Flooring Tec Systems. These payments are claimed to have totaled $45,000.

PLAINTIFF'S REPLY

The plaintiff replies that neither defendant nor Floor Tec Systems have paid $45,000. Plaintiff maintains that the initial amount of the debt was $299,636.99. A check in the amount of $17,007.95 was given by the defendant to the plaintiff as inducement for the plaintiff to accept the Note. This check subsequently was returned by the bank for insufficient funds. Criminal charges were pursued and later withdrawn under the stipulation that the defendant pay five installments of $3,401.59 to satisfy the $17,007.95 amount. The plaintiff maintains that the first two installments were paid timely and made without issue,

but the third installment "bounced" twice, and thereafter the plaintiff did not deposit the last two payments.

The plaintiff argues that there was consideration for the Note and that the defendant is personally liable to the obligations, citing case law to support his assertions.

DECISION

Initially, the Court addresses the defendant's assertion that he did not know what he was signing and that such lack of intent exhibits a concomitant lack of consideration. The law is well-settled that one is bound by the terms of the document unless there is fraud or duress. (**Pimpinello v Swift & Co.**, 253 N.Y. 159; **Dunkin Donuts of America, Inc. v Liberatore**, 138 AD2d 559, 2nd Dept., 1988). The defendant has not demonstrated, to any extent, any wrongful act which would vitiate or eliminate his consent pursuant to the settled case law.

There is evidence that the defendant is a sophisticated businessman, and there is no showing that a valid excuse exists for having failed to read the Note. The defendant is therefore bound by the Note.

In applying the case law it becomes apparent that the "entirety" of the writing supports the conclusion that there is valid consideration. It is well-established that a benefit conferred on a third party is sufficient consideration. (**Mencher v Weiss**, 306 N.Y. 1, 8, 1953). It has been held that an employee or shareholder of a corporation can bind the principal to an obligation even though the benefit runs to the corporation. Consideration may consist of a benefit to the promisor or a detriment to the promisee. (**Holt v Feigenbaum**), 52 N.Y.2d 299. Here, the defendant received a benefit in the fact that the money or services was given to a third party, i.e. Floor Systems Tec, by the plaintiff. In return for this benefit, the defendant promised to pay the obligation when due to the plaintiff. GOL §5-1105 is thereby satisfied by the recital of consideration taking the document in account in its "entirety". This necessitates the conclusion that since there is valid consideration that was bargained for in the writing, the writing will be held enforceable as per GOL §5-1105 (**supra**).

Additionally, UCC§3-408 provides, in pertinent part,

> "A person signing a negotiable instrument
> without indicating that his signature is made

> in a representative capacity will be obligated on the instrument.
>
> (2) an authorized representative who signs his own name to an instrument (a) is personally obligated if the instrument neither names the person represented **nor shows that the representative signed in a representative capacity**
>
> (b) except as otherwise established between the immediate parties, **is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity**, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity".

The defendant's signature on the Note does not state that he was signing as an agent for the corporation. The only reference to the corporation in the Note specifically indicates that the defendant will be personally liable in the event that Floor Tec Systems does not pay. This separates the two, and demonstrates that the defendant was acting in his personal capacity and not acting as an agent for the corporation. Further, the Note states that the defendant will be liable on the due date for any outstanding remainder of the debt of Floor Tec Systems.

An unconditioned promise to pay a certain sum by a certain date that is signed by the parties, amounts to a prima facie showing for the plaintiff. (**UCC §3-104(1)**). The burden then shifts to the defendant to establish a defense. (**Formica Construction v Mills**, 801 NYS2d 713 (NYC Civ ct. 2005)).

The defendant maintains there was no consideration for the Note. UCC §3-408 states "no consideration is necessary for an instrument or obligation thereon given in payment of or **as security** for an antecedent obligation of any kind." (**See also, Friends of Lumber, Inc. v Cornell Development Corp.**, 243 A.D.2d 886, 3rd Dept., 1997). It is evident on the clear and unambiguous language in the Note, that the defendant was obligating himself to the

plaintiff as security for the debt owed by Floor Tec Systems. Even though this debt existed before the parties entered into the Note, there need not be any new consideration, pursuant to UCC§3-408 . Notwithstanding that fact, there was a new promise to pay, which serves as consideration from the defendant to the plaintiff, and a promise to continue the debt which serves as consideration from the plaintiff to the defendant. The continuation of the debt furnishes a benefit to Floor Tec Systems, a third party, which is sufficient to support consideration. There is no showing that the consideration was either illusory or nominal, therefore, the Note is binding.

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint pursuant to CPLR 3213.
In the case at bar, the plaintiff has met its burden. "A document comes within CPLR 3213 if a **prima facie** case would be made out by the instrument and a failure to make the payments called for by its terms." (**Weissman v Sinorm Deli**, 88 N.Y.2d 437,444, 1996). "The instrument does not qualify if outside proof is needed other than simple proof of nonpayment or a similar ***de minimis*** deviation from the faces of the document." (**Id.**) There remains no triable issue of fact that would preclude judgment as a matter of law for the plaintiff. The defendant does not demonstrate proof of the payments that he alleges were made. The plaintiff however admits to being paid a sum of $6,803.18, but this payment came from Floor Tec Systems, and not the defendant, and the amount is reflected in the complaint and moving papers. This does not relieve the defendant of his obligations under the Note. The Note is clear and unambiguous.

In conclusion the plaintiff's motion is **granted** in the sum of $275,825.86, plus reasonable attorney's fees of $9,625, as documented by counsel's affirmation.

Plaintiff's counsel may obtain a Clerk's judgment.

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

So Ordered.

Dated APR 0 4 2008

Stephen A. DeLuca

XXX