

Empire Purveyors, Inc. v Weinberg

2008 NY Slip Op 31392(U)

May 12, 2008

Supreme Court, New York County

Docket Number: 0603282/2006

Judge: Helen E. Freedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN
Justice

PART 39

EMPIRE PURVEYORS, INC., and THE ESTATE OF ANTONIO PINTO,

Plaintiffs,

603282/06

INDEX NO.
MOTION DATE

603282/06
4,5

- v

EILEEN DIANE WEINBERG

Defendants.

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed on this motion to/for _____

FILED

MAY 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED

Cross-Motion: Yes No

Motion sequence 4 and 5 are consolidated for disposition.

Motions sequence 004 and 005 are consolidated for disposition. In motion sequence 004, defendant seeks summary judgment and in motion sequence 005, plaintiffs seek to strike defendant's request for a jury trial.

Plaintiffs sue on two Notes both made on November 24, 1987, a promissory Note for \$40,000 made by defendant and one Martin Yerdon and a guarantee on a Note for \$80,000 made by My Jet, Inc. ("My Jet",) whose sole business was a restaurant called Carolina. Defendant, Eileen Diane Weinberg, and her then partner, Martin Yerdon, as the principals of My Jet, both signed as guarantors on the \$80,000 Note. The notes were due in 1988 and 1990 respectively, Plaintiff Empire Purveyors, Inc, ("Empire") is a meat and poultry business which was owned and operated by the late Antonio Pinto. Pinto died in 1999, and the Estate owns the business. My Jet had made substantial purchases of meat and poultry from Empire and owed Empire significant sums that were covered by the \$80,000 Note. The \$40,000 note represented a loan to the restaurateurs. Neither "My Jet" nor Yerdon have been sued. Carolina closed in 1991. Nothing was paid on the notes prior to the closing of the restaurant.

In or about 1989, Weinberg formed another corporation, EDW Restaurant Corp.,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

which operated an establishment named "Good 'n Plenty to Go" (Good 'n Plenty), which she manages and in which she owns 50% of the capital stock. In or around 1992 or 1993, Antonio Pinto apparently asked for moneys owed from the My Jet-the Carolina business- and, according to defendant, agreed to take half since Yerdon was long gone. Defendant gave Pinto diamond jewelry as collateral for the debt, which he later returned. Starting in 1993, moneys were paid to Empire Purveyor's adding sums to invoices issued to Good 'n Plenty. An additional \$100 or \$200 was added to the invoices, some of which contained the notation a/c. There was nothing specifically indicating what the additional moneys were for, but Good 'n Plenty continued making the additional payments up through 2003. A few checks were paid on Eileen Diane Weinberg's personal account.

This arrangement continued until 2003, or as plaintiffs contend into 2004, although Antonio Pinto died in 1999. It appears that neither party has apparently kept a record of the total amount paid. However, defendant stopped making any payments in either 2003 or 2004 when she figured that she had paid over \$52,000 by January of 2002 by adding payments to the Good 'n Plenty invoices and that all of her debts to Empire had been satisfied. In 2006, plaintiffs made a demand on the 1987 promissory note and guarantee and then sued.

Defendant moves for summary judgment on the ground that the statute of limitations has long expired with reference to the Notes. She avers that the Good 'n Plenty payments were in no way referable to the Notes; rather they were an affirmation that she or her previous business owed Empire money even though no demand had ever been made on the Notes. Because she wanted to continue doing business with Empire, she asserts that she reached an agreement with Antonio Pinto to pay half of the moneys that My Jet owed back by making additional weekly payments through her other business, Good 'n Plenty.

Plaintiffs, on the other hand, through the testimony of Antonio Pinto's children, Toni and Richard Pinto, aver that defendant on several occasions acknowledged orally and in writing that she owed money on the Notes and that the Good 'n Plenty extra payments were based on reaffirmation of the debt specifically referable to the Notes. In support of their contention, plaintiffs offer a February 16, 2001 letter written by Toni Pinto, decedent's daughter, to Weinberg stating that the \$100 weekly account refers to the two 1987 promissory notes. Defendant denies ever having received that letter, and there is no record that she ever acknowledged it. In 2003, Toni Pinto drafted a letter to Weinberg, approved and signed by Empire's accountant Jeff Garyn, that Weinberg signed. The letter, dated August 19, 2003 requested that Weinberg acknowledge that the \$100 additional weekly payments by Good 'n Plenty do not relate to

merchandise or sales to Good 'n Plenty. Plaintiffs contend that this amounted to a reaffirmation of the Notes, but defendant denies that the admission that the \$100 per week additional related back to the Notes. On September 16, 2003, Garyn faxed a letter to Weinberg that stated as follows:

I have been asked by Empire Purveyors to prepare an accounting verifying the payments you have made against an outstanding loan. The payments, commencing in 1993, were billed and paid as weekly entries of \$100 included on the invoices for Good N Plenty.

So that I may exclude these payments from the Good N Plenty account and properly classify them as repayments against the outstanding loans, I would appreciate your acknowledgment by signing a copy of this letter....

As soon as I receive this confirmation, I will recall the invoices from storage and calculate the total remitted against the loans so that you may review it for accuracy.

Weinberg signed and faxed that letter back. However, Garyn did not prepare an accounting based on the advice of counsel. Weinberg did mark her last payment to Good 'n Plenty dated April 24, 2004 "Paid in Full", and that check was cashed. Plaintiffs say they cashed it because in fact Good 'n Plenty did not owe them anything more.

Defendant moves for summary judgment contending that none of her actions concerning payment of moneys owed related to the promissory note or guarantee. To the contrary, she acknowledges that Good 'n Plenty paid additional amounts to account for prior debt but denies any specific reference to the to old Notes.

Since a cause of action on a note accrues on the date of maturity (U.C.C. § 3-122(1)(b) and the \$80,000 Note matured on October 23, 1990 and the \$ 40,000 Note matured on May 31, 1988, an action commenced in 2006 would ordinarily be time barred by the six year statute of limitations contained in CPLR §213(2). However, either a reaffirmation of a debt or partial payment on the debt may toll the statute of limitations. General Obligations Law § 17-101 provides that a signed written acknowledgment of an existing debt which contains nothing inconsistent with an intention on the part of the debtor to pay the debt will toll the Statute of Limitations and start it running anew. See *Lew Morris Demolition Co. v. Board of Educ. of City of N.Y.*, 40 N.Y.2d 516, 387 N.Y.S.2d 409 (1976). Alternatively, partial payment of the debt may toll the statute if it is shown that the payment was a portion of an admitted debt with a clearly demonstrated intention to pay the balance. See *Crow v. Gleason*, 141 N.Y. 489 (1894).

Defendant contends that none of her actions indicates that she either acknowledged the existence of a continuing debt on the notes or indicated an intention to pay a future debt relating to the notes. She denies receiving the purported 2001 letter from Toni Pinto, and contends that her lack of response or Toni's failure to follow up is consistent with that denial. As far as the later countersigned letters are concerned, defendant contends that they are at best equivocal. First, the reference

* 4]
to an "Outstanding loan" or "outstanding loan[s]" could easily be referable to the 1993 arrangement with Antonio Pinto as to any Notes or to "unrelated matters dating back before 2000-2002." Second, the letters were signed in response to an audit inquiry letter that was designed to assure that payments made by Good 'n Plenty were not payments made for current goods. Finally, Good 'n Plenty as the party paying was not responsible for the debts of My Jet or Eileen Diane Weinberg. It appears that the \$100 payments were made on various checking accounts.

In order to reaffirm an otherwise time barred debt pursuant to section 17-101 of the General Obligations Law, there must be a signed written acknowledgment of the debt that contains nothing inconsistent with an intention on the part of the debtor to pay it. *Lew Morris Demolition Co. v. Board of Educ. of the City of New York*, 40 N.Y.2d 516, 387 N.Y.S. 2d 409 (1976). See also *Crow v. Gleason*, 141 N.Y. 489, 36 N.E. 497 (1894); and *Banco Do Brasil S.A. v. State of Antigua and Barbuda*, 268 A.D.2d 75, 707 N.Y.S.2d 151 (1st Dept. 2000). Although there are various writings proffered here, there is nothing indicating an unequivocal intention to reaffirm the obligations under the long time barred notes. At most there is evidence that defendant intended to make a deal to pay some antecedent debt. There is no evidence that Antonio Pinto, the late owner of Empire, ever specifically asked for payments on the notes.

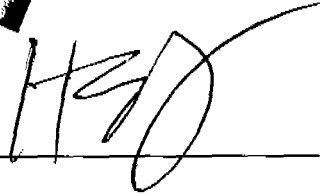
With respect to the contention that what plaintiffs opine were partial payments on the Notes, the plaintiffs have at least a semblance of a claim. By making payments of \$100 a week based on inflated invoices to Good 'n Plenty together with alleged statements by defendant that these were designed to satisfy the notes, plaintiffs have raised an issue of fact as to Weinberg's intent. In *Bernstein v. Kaplan*, 67 A.D.2d 89, 413 N.Y.S.2d (2d Dept. 1979), the Second Department found that a part payment from a third party, while not providing evidence of reaffirmation under G.O.L. § 17-101, could possibly be an indication of an intent to repay a specific loan.

Plaintiffs' motion to strike the jury trial as to the guarantee on the \$80,000 note is granted inasmuch as the note provides for waiver of the right to a jury. The motion on the \$40,000 note is denied at this time.

Based on the foregoing, the motion for summary judgment is denied, and
 the parties are directed to appear on June 2, 2008 at 9:30 a.m. in Room 208 for a non-jury trial on the issue of whether Eileen Diane Weinberg ever specifically reaffirmed her intention to make payment in full on the otherwise time barred guarantee.

May 12, 2008

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 MAY 16 2008
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J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST