

KBL Deli, LLC v Galasso

2008 NY Slip Op 32037(U)

July 15, 2008

Supreme Court, Nassau County

Docket Number: 7306-08/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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KBL DELI, LLC,

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 7306/08

MOTION DATE: 5-30-08

SUBMIT DATE: 6-30-08

SEQ. NUMBER - 001

**HENRY GALASSO and PEPPINO FINE
FOODS, INC.,**

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 4-11-08.....1**
- Affirmation in Opposition, dated 6-24-08.....2**
- Reply Affirmation, dated 6-28-08.....3**

This motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is granted. Let judgment be entered against the defendant in the amount of \$152, 327.00, with interest as set forth in the note from the date of default to entry of such judgment, together with attorney's fees, as established by trial as directed in this order. Entry of such judgment shall be held in abeyance pending the outcome of such trial. Should plaintiff elect to waive such fees, however, judgment may be entered on this order alone upon a statement to the Clerk of such waiver.

The plaintiff has presented forty one unpaid promissory notes, out of a series of forty eight, made by defendant Peppino Fine foods, Inc. (hereinafter Peppino), a guaranty made by defendant Henry Galasso, and a contract for the sale of a "deli" for which the aforementioned served as consideration. The relevant part of the notes read "in the event of non-payment of any one of the said series . . . all or any part of the remaining unpaid note

shall forthwith become due and payable."

The plaintiff also presented the affidavit of one of its members, Kang Bin-Lee, who stated that he is familiar with the facts of the case. He states that the defendant has been in default since March of 2008.

The forgoing establishes the elements of plaintiff's *prima facie* showing of entitlement to the requested relief. Those are, the presence of an instrument for the payment of money only, the obligation of the defendants to pay thereunder or guarantee such payment, and a default. *See Alard, L.L.C. v. Weiss*, 1 A.D.3d 131 (1st Dept. 2003); *See also, East N.Y. Sav. Bank v. Baccaray*, 214 A.D.2d 601, 602 (2d Dept. 1995); *See also, Suffolk County Natl. Bank v. Columbia Telecom. Group, Inc.*, 38 A.D.3d 664 (2d Dept. 2007). Specifically the affidavit submitted by the plaintiff sufficiently establishes the element of default in order to construct the *prima facie* showing. *See East N.Y. Sav. Bank v. Baccaray, supra*. Moreover defendant in his affidavit concedes the establishment of the *prima facie* case including the default. That in and of itself suffices to shift the burden to defendant. *See, Seaman-Andwall Co. v. Write Machine Co.*, 31 A.D.2d 136 (1st Dept. 1968). Therefore the plaintiff succeeds in establishing its *prima facie* case and shifting the burden to the defendant to raise a genuine issue of material fact necessitating a trial. *Id.*

The defendant does not contest any of the aforementioned assertions. However it does raise several defenses. After careful consideration the Court concludes the only two worthy of discussion are that fraud in the inducement for the transaction excuses performance, and the alleged lack of standing on the plaintiff's part being a dissolved entity.

Regarding the second objection, defendant claims that because the plaintiff is a "defunct entity having been dissolved. . . [it] cannot stand as the plaintiff in this action." Specifically plaintiff claims that "the right of a corporation to sue or be sued following its dissolution is limited to obligations in existence at the time of its dissolution." The only authority the defense cites is *Delpad Realty Corp. v. Rappaport*, 119 N.Y.S. 2d 675 (Munic. Ct. of N.Y., Bronx County 1953). The facts in *Delpad* are not applicable to the instant case.

In *Delpad* the court considers the standing of a corporation that was dissolved eleven years before entering into the agreement that brought about the litigation. Moreover the corporation in question in *Delpad* was dissolved for tax delinquency. In the present case the plaintiff was dissolved as part of a wind down process, during which the transaction that eventually yielded this action occurred. This means that the plaintiff was in existence at the time the obligations at issue were undertaken. Finally, the defendant is estopped from questioning the validity of the plaintiff's corporate status because the parties have had business dealings from which the defendant benefitted. *Boslow Family Ltd. Partnership v. Glickenhau & Co.*, 7 N.Y.3d 664 (2006). To sum up, KBL has standing to bring this action to collect a debt that is owed to it as a result of events relating to dissolution.

The allegation of fraud similarly does not serve as an adequate defense to the demand of payment on the promissory note. To make out a case of fraud in the inducement, a party must demonstrate: 1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, 2) the misrepresentation was made for the purpose of

inducing the plaintiff to rely upon it, 3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and 4) injury resulting from said reliance. *See New York Univ. V. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *Channel Master Corp. V. Aluminum Ltd. Sales*, 4 N.Y.2d 403 (1995). Moreover, in addition to the standard duty to investigate, that the buyer conceded to having in the text of the contract, the facts as defendant portrays creates a heightened requirement for diligence. The defendant's affidavit recounts a chain of events that should instill a suspicion of fraud in a reasonably prudent person. Specifically, the inability for the buyer to observe the business during the "due diligence" period should have signaled foul play. Also noteworthy is that the buyer is a sophisticated party having previously owned a similar business. Furthermore defendant acknowledges that the plaintiff's conduct should have alerted him to the possibility of misrepresentation; on multiple occasion he claims to have expressed scepticism regarding the revenue reported to him. When the party to whom a misrepresentation is made has notice of its falsity, a heightened degree of diligence is required. When that party fails to make further inquiry or insert appropriate language in the agreement for its protection, it cannot later complain that it reasonably relied on the false representations, and in effect has willingly assumed the business risk that the facts may not be as represented. *Global Minerals and Metals Corp., v. Holme*, 35 A.D.3d 93 (1st Dept. 2006); *Rodas v. Manitaras*, 159 A.D.2d 341(1st Dept.1990); *88 Blue Corp. V. Reiss Plaza Associates*, 183 A.D.2d 662 (1st dept. 1992). As such the defendant has not established that he reasonably relied on the alleged misrepresentation of income that he claims induced him to sign the notes.

Furthermore even if in the absence of reasonable reliance, defendant's unsupported conclusory assertions are insufficient to defeat the plaintiff's *prima facie* showing. *MDJR Enterprises, Inc., v. LaTorre*, 268 A.D.2d 509 (2nd Dept. 2000). In the absence of proof substantiating the allegation of fraud the maker of a note is liable. *RVC Associates v. Farkas*, 261 A.D.2d 383 (2nd dept. 1999).

Finally, a legal presumption exists that signatories read and understood what they signed. *Beattie v. Brown & Wood*, 243 A.D.2d 395 (1st Dept 1997). The agreement entered into by the parties reads in part,

That in making and executing this agreement the purchaser has been afforded, and has had opportunity to examine, inspect investigate and to verify for himself all aspects of the transaction, including but not limited to the operation of the business, the income and expenses of business and assets thereof, and is not relying on, or being induced, by any statements or representation of the seller or any person with respect to the business. Unless specifically set forth in this agreement.

In addition the agreement contained a merger clause, excluding the possibility of using parol evidence to supplement the memorialized terms. Accordingly, any representation made by the seller regarding historic revenue did not survive the closing, and defendant's claim alleging fraudulent inducement cannot stand. *See, e.g., Fabozzi v. coppa*, 5 A.D.3d 722 (2004); *Crowly Mar. Assocs. v. Nyconn Assocs.*, 292 A.D.2d 334 (2000).

In sum, the defendant has not raised a material issue of genuine fact necessitating a

trial. The note holder's *prima facie* showing is un rebutted, and judgment should therefore be entered granting the motion for summary judgment.

This shall constitute the Decision and Order of this Court

ENTER

DATED: July 14, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
JUL 17 2008
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**