

Ferrara v Tersigni

2008 NY Slip Op 32477(U)

September 4, 2008

Supreme Court, Nassau County

Docket Number:

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

STEVEN FERRARA and ERIN FERRARA,

Plaintiffs,

- against -

ERNESTO TERSIGNI,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 127/07

Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiffs move for an order pursuant to CPLR 2221 granting leave to reargue and renew the plaintiffs' motion for summary judgment in lieu of complaint on the ground the Court did not address the issue of whether the order of confirmation in the bankruptcy proceeding, in the matter of *In Re Carlton Concrete Corp.*, confirming the first amended liquidating plan of reorganization enjoined the plaintiff Erin Ferrara from proceeding with an action on the promissory note. The plaintiffs' attorney points out, in a supporting affirmation dated June 5, 2008, the Court rendered a decision on August 2, 2007, denying the defense cross motion for summary judgment, and stated the Court was

bound to accept the confirmation by the U.S. Bankruptcy Court, Eastern District of New York. The plaintiffs' attorney submits the Court failed to address the issue of the plaintiff Erin Ferrara regarding preclusion from obtaining relief from the defendant, and notes, as pointed out the sur-reply, the plaintiff Erin Ferrara was not a listed creditor in the bankruptcy proceeding, in the matter of *In Re Carlton Concrete Corp.*, and is not bound by the bankruptcy determination.

The defendant opposes the instant motion. The defense attorney states, in an opposing affirmation dated June 13, 2008, this motion is untimely under the CPLR 2221 (d) (3) requirement that the motion should be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry. The defense attorney points out the plaintiffs made the motion approximately 308 days after the August 2, 2007 court order. The defense attorney also asserts the Court did address the issue raised by the movants, and indicates, in the defendant's affidavit dated April 3, 2007, submitted in support of the defense opposition to the plaintiffs' motion for summary judgment, the defendant stated "this debt was released against me personally pursuant to Section 12.1 of the Plan, and the plaintiffs, amongst others, were enjoined from pursuing any guarantee actions against myself." The defense attorney also contends, notwithstanding the defendant's denial of any debt to the plaintiff Erin Ferrara, that particular plaintiff failed to submit an affidavit in support of the plaintiffs' motion for summary judgment disputing the defendant's denial, so a genuine issue of material fact

was created.

The plaintiffs' attorney states, in a reply affirmation dated June 20, 2008, the plaintiffs' law office never received written notice of the entry of the August 2, 2007 court order granting the defense cross motion for summary judgment. The plaintiffs' attorney asserts the CPLR 2221 (d) (3) did not begin to run.

This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to the instant motion. CPLR 2221 (d) provides:

A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

CPLR 2221 (e) provides:

A motion for leave to renew: 1. shall be identified specifically as such; 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

CPLR 2221 (f) provides:

A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

The Second Department holds: "The Supreme Court had jurisdiction to reconsider its prior order "[r]egardless of statutory time limits concerning motions to reargue"

(*Itzkowitz v. King Kullen Grocery Co., Inc.*, 22 A.D.3d 636, 638, 804 N.Y.S.2d 350 [2nd Dept., 2005]; *also see Williams v. Church of Transfiguration*, 7 Misc.3d 553, 794 N.Y.S.2d 781). This Court determines, as of the time this instant was made, the defense had not served a copy of the August 2, 2007 court order granting the defense cross motion for summary judgment and written notice of its entry. Under that circumstance, this Court is not bound to deny the plaintiffs' motion to reargue merely because the CPLR 2221 motion was made beyond the 30-day limit (*Itzkowitz v. King Kullen Grocery Co., Inc.*, 22 A.D.3d, at 638).

CPLR 3213 provides:

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. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The June 12, 2003 promissory note was signed by the defendant obligating the defendant as to both plaintiffs. The plaintiffs submit the signed promissory note and the defendant's default, but the defendant denies the plaintiffs' claim. The underlying action is based

upon an instrument for the payment of money only, and the papers served by the plaintiffs were properly done pursuant to CPLR 3213. The summary judgment relief awarded to the defendant in the prior motion is granted solely as to the plaintiff Steven Ferrara, but denied as to the plaintiff Erin Ferrara since the order of confirmation in the bankruptcy proceeding, in the matter of *In Re Carlton Concrete Corp.*, confirming the first amended liquidating plan of reorganization did not enjoin the plaintiff Erin Ferrara from proceeding with an action on the promissory note. Moreover, the defendant's denial is insufficient as a matter of law to counter the *prima facie* showing by the plaintiff Erin Ferrara in the plaintiffs' motion for summary judgment. The plaintiff Erin Ferrara has established the defendant's execution of the note and the default in payment, the plaintiff Erin Ferrara made out a *prima facie* case which defendant has not rebutted (*Davis v. Lanteri*, 307 A.D.2d 947, 763 N.Y.S.2d 470 [2nd Dept., 2003]).

In addition, the promissory note provides: "In the event any expenses are incurred to recover any balance remaining unpaid hereunder, maker agrees to reimburse payee's or holder for all cost thereof including attorney's fees." The plaintiffs' attorney states, in an affirmation dated December 27, 2006, the \$2,400.00 attorney fees include an initial conference with the client; a review of the promissory note; preparation of the summons, notice of motion for summary judgment in lieu of complaint, and supporting affidavits; and research of the law, including a review of the plaintiffs attorney's time sheets showing eight hours at \$300.00 an hour. The Court finds this attorney fee to be

reasonable and permitted as agreed in the promissory note.

Accordingly, the motion is granted. The plaintiff Erin Ferrara is awarded summary judgment in the amount of \$32,000.00, with interest from August 29, 2006, to date of entry, and reasonable attorneys fees in the sum of \$2,400.00, together with costs and disbursements clerk. Submit judgment.

So ordered.

Dated: September 4, 2008

ENTER:

J. S. C.

ANTONIO L. BRANDVEEN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

SEP 08 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE