

Fiumera v Kamp

2008 NY Slip Op 32495(U)

September 12, 2008

Supreme Court, Broome County

Docket Number: 0009272/0081

Judge: Ferris D. Lebus

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York, on the 25th day of July, 2008.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

FRANK G. FIUMERA,

Plaintiff,

-vs-

GERARD KAMP,

Defendant.

GERARD KAMP, as Trustee for the
FRANK X. KAMP TRUST,

Plaintiff,

-vs-

FRANK G. FIUMERA, Individually and d/b/a
FGF STABLES, and
FGF REALTY HOLDINGS, LLC,

Defendant.

DECISION AND ORDER

Index No. 2008-0927
RJI No. 2008-0469-M

Index No. 2008-0790
RJI No. 2008-0820-M

APPEARANCES:

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FERRIS D. LEBOUS, J.S.C.

This Decision & Order addresses two separate motions in two separate actions.

With respect to Index No. 2008-0927, plaintiff Frank G. Fiumera moves for summary judgment in lieu of a complaint (CPLR § 3213). Defendant Gerard Kamp opposes the motion.

With respect to Index No. 2008-0790, plaintiff Gerard Kamp, as Trustee for the Frank X. Kamp Trust, moves for summary judgment against defendant Frank G. Fiumera individually only (CPLR § 3212). Defendant Frank G. Fiumera opposes the motion.

BACKGROUND**ACTION #1 (Index No. 2008-0927)**

Plaintiff Frank G. Fiumera and defendant Gerard Kamp signed four agreements on January 1, 2006.

First, defendant Kamp signed a Non-Negotiable Promissory Note to pay plaintiff Fiumera the sum of \$175,000 at 7% interest (hereinafter "Note #1"). The terms of Note #1 state, among other things, that the sum was to be paid in sixty monthly payments of \$3,465.21. Defendant Kamp borrowed this sum to purchase plaintiff Fiumera's stock in a corporation named American-Sino Processing, Inc. (hereinafter "ASP") as next described.

Second, plaintiff Fiumera and defendant Kamp signed a Stock Purchase Agreement in

which plaintiff Fiumera sold his fifty shares in ASP to defendant Kamp (hereinafter "Stock Purchase Agreement #1"). Plaintiff Fiumera and defendant Kamp were the sole shareholders of ASP, a corporation involved in the import and export of goods from China. Plaintiff Fiumera transferred his fifty shares in ASP to defendant Kamp in exchange for defendant Kamp's promise to pay the agreed-upon purchase price of \$175,000 as evidenced by Note #1.

Third, plaintiff Fiumera and defendant Kamp signed a Stock Purchase Agreement involving a separate corporation in which they were stockholders named Deposit Computer Services, Inc. (hereinafter "DCSI"). DCSI had three shareholders, plaintiff Fiumera, defendant Kamp, and non-party Xian Sun. By way of this agreement, defendant Kamp agreed to sell his 88 shares in DCSI to plaintiff Fiumera for the amount of \$500,000 (hereinafter "Stock Purchase Agreement #2"). Plaintiff Fiumera paid the full amount of \$500,000 in cash to defendant Kamp (without any set-off for the debt evidenced by Note #1). According to defendant Kamp, plaintiff Fiumera still owes him a dividend cash payment equivalent to the corporation's 2005 income tax liability, approximately \$100,000, under the terms of Stock Purchase Agreement #2.

Fourth, the parties signed an agreement regarding an apartment in Beijing, China - which the court will refer to as the "China Agreement." The China Agreement outlined a formula by which plaintiff Fiumera would buy out defendant Kamp's interest in said apartment. According to plaintiff Fiumera, the parties had originally envisioned an equal partnership in ownership of the apartment and each contributed \$16,000 to that end in 2004. However, due to circumstances not pertinent here, plaintiff Fiumera claims he contributed another \$50,000, half of which was

defendant Kamp's obligation. In June 2007, the apartment was sold at a loss. Plaintiff Fiumera claims that defendant Kamp owes him \$25,000 in connection with the China Agreement.

In October 2006, it is undisputed that defendant Kamp stopped making monthly payments on Note #1 and that there remains today an unpaid balance of approximately \$155,779.22. On December 19, 2007, plaintiff Fiumera sent defendant Kamp a written Notice of Default dated November 30, 2007. Defendant Kamp alleges that he in turn is owed monies from plaintiff Fiumera in connection with the parties' remaining agreements.

ACTION #2

The second action is captioned "Gerard Kamp, as Trustee for the Frank X. Kamp Trust vs. Frank G. Fiumera, individually, and d/b/a FGF Stables, and FGF Realty Holdings, LLC." Gerard Kamp is the trustee for the Frank X. Kamp Trust pursuant to a Testamentary Trust dated December 13, 1994. The court will refer to Gerard Kamp in Action #2 as "Trustee Kamp" to distinguish him from his role as the named defendant in Action #1 in his individual capacity.

On February 15, 2006, defendant Fiumera executed a Non-Negotiable Promissory Note in the amount of \$50,000 promising to repay the Trust at 7% interest payable in sixty equal monthly installments of \$990.06 (hereinafter the "Note #2"). Trustee Kamp alleges that defendant Fiumera is in default in the payment of Note #2 and seeks summary judgment in the amount of \$43,565.77.

In opposition, defendant Fiumera alleges Note #2 was not a loan, but rather a security interest for Kamp's personal obligation under Note #1. More specifically, defendant Fiumera contends that Kamp (individually) "[d]id not have the funds personally to put up the security, took the \$50,000 from the Frank X. Kamp Trust, and requested of Mr. Fiumera that he sign a promissory note running to the Trust so that Mr. Kamp could avoid questions with respect to his use of Trust's funds for his personal business" (Letter of Dennis Sheehan, Esq. dated July 21, 2008).

DISCUSSION

I. ACTION #1

CPLR § 3213 is a motion device available in actions based upon any judgment *or upon an instrument for the payment of money only* which permits the plaintiff to serve with the summons, a notice of motion for summary judgment and the supporting papers in lieu of a complaint. A *note* qualifies as "[a]n instrument for the payment of money only, if the plaintiff can establish a prima facie case via 'proof of the note and a failure to make the payments called for by its terms'" (*Manufacturers Hanover Trust Co. v Hixon*, 124 AD2d 488 [1986] quoting *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1968], *affd* 29 NY2d 617 [1971]). Plaintiff establishes "[a] prima facie case by submitting proof indicating that defendant executed the promissory note and defaulted in its payment to plaintiff [in which case the burden shifts] to defendant to submit 'proof demonstrating the existence of a triable issue of fact with respect to a bona fide defense' [citations omitted]" (*Mastro v Carroll*, 296 AD2d 802 [2002] quoting *Friends Lbr. v Cornell Dev. Corp.*, 243 AD2d 886, 887 [1997]).

Plaintiff Fiumera asserts that Note #1 qualifies as an instrument for the payment of money only and that the existence of Stock Purchase Agreement #1, Stock Purchase Agreement #2, and the China Agreement do not render CPLR § 3213 inapplicable. For his part, defendant Kamp argues that Note #1 does not qualify as an instrument for the payment of money only because it is inextricably intertwined with Stock Purchase Agreement #1, Stock Purchase Agreement #2, and the China Agreement.

With respect to Note #1 itself, the court is mindful that it clearly states that "[t]his Note is *made and delivered pursuant to that Stock Purchase Agreement* entered into between Lender [plaintiff Fiumera] and Maker [defendant Kamp] in connection with the sale of Lender's stock in American-Sino Processing, Inc. (the "Company") to Maker" (Note #1, p 1; emphasis added).

With respect to Stock Purchase Agreement #1, plaintiff Fiumera argues that there is nothing in Stock Purchase Agreement #1 which in any way makes defendant Kamp's obligations under Note #1 dependent, contingent or even connected to the parties' obligations under Stock Purchase Agreement #2, and/or the China Agreement. This court disagrees. A review of Stock Purchase Agreement #1 reveals three significant references to Note #1 and Stock Purchase Agreement #2. First, Stock Purchase Agreement #1 confirms that the stock transfer is in exchange for the \$175,000 "[t]o be paid by Buyer [Kamp] *pursuant to a Promissory Note* in favor of Seller [Fiumera] in the amount of One Hundred Seventy Five Thousand Dollars and no cents (\$175,000.00), as set forth in the form attached hereto as Exhibit 'A', which shall be delivered by Buyer at the closing" (Stock Purchase Agreement #1, ¶ 1; emphasis added).

Second, Stock Purchase Agreement #1 contains a three year non-compete agreement in which plaintiff Fiumera agrees not to engage in any business dealings involving imports/exports between China and U.S.; "**provided, however**, that Seller [Fiumera] may ...continue to operate *Deposit Computer Services, Inc....*" (Stock Purchase Agreement #1, ¶ 8; emphasis in italics added). Third, Stock Purchase Agreement #1 requires that "[t]he transaction contemplated by this Agreement shall be deemed to close simultaneously with the transaction contemplated by that certain Stock Purchase Agreement dated January 1, 2006 between Seller and Buyer regarding *Deposit Computer Services, Inc.*" (Stock Purchase Agreement #1, ¶ 14; emphasis added). Additionally, the court notes that Stock Purchase Agreement #2 contains a similar notation that "[t]he transaction contemplated by this Agreement shall be deemed to close simultaneously with the transaction contemplated by that certain Stock Purchase Agreement dated January 1, 2006 between Seller and Buyer regarding *American-Sino Processing, Inc.*" (Stock Purchase Agreement #2, ¶ 13; emphasis added).

In this court's view, Note #1 does not qualify as instrument for payment only, since it was issued in conjunction with Stock Purchase Agreement #1 which in turn is related to Stock Purchase Agreement #2 and the China Agreement (*Technical Tape Inc. v Spray Tuck, Inc.*, 131 AD2d 404, 406 [1987]). The stream of correspondence between the parties by way of letters and/or e-mail confirms these deals were all interlinked and interdependent. For example, in a letter dated January 26, 2006 the parties state that "DCSI and ASPI agree to work together to insure a smooth transition of all matters pertaining to the separation of the two companies.....This letter is contingent upon the successful closing of the DCSI and ASPI Stock Purchase agreements

dated as of January, 1, 2006" (Exhibit P to Kamp Affidavit sworn to June 11, 2008). Obviously, the acknowledgment that these companies were separating presupposes that they involved interrelated business dealings in the first instance. Further, this court finds that "[t]he fact that the [four] instruments were executed simultaneously is further evidence that these [four] instruments must be viewed as interdependent [citation omitted]" (*Hirsch v Rifkin*, 166 AD2d 293, 294 [1990]). In sum, the court finds that Note #1 cannot be viewed as an instrument for the payment of money only for purposes of CPLR § 3213. Accordingly, plaintiff Fiumera's motion for summary judgment in lieu of a complaint must be denied.

Finally, when a motion for summary judgment in lieu of a complaint is denied the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise (CPLR § 3213). The court shall exercise its discretion and deem the moving papers as the complaint and the answering papers as the answer in Action #1.

II. ACTION #2

Plaintiff Trustee Kamp seeks summary judgment against defendant Fiumera on Note #2. Defendant Fiumera contends that Note #2 was not a loan, but rather served as a security interest for Kamp's personal obligation under Note #1. Trustee Kamp disputes this contention and asserts that the sole purpose behind Note #2 was defendant Fiumera's need for quick cash to buy an unnamed business (Kamp Affidavit sworn to July 24, 2008, ¶ 11).

In support of their respective positions, the parties have raised the legal requirements for

security agreements, as well as the applicability of the Statute of Frauds.¹ Trustee Kamp asserts that oral security agreements are not enforceable pursuant to the Statute of Frauds. Defendant Fiumera argues that his possession of the \$50,000 collateral negates the application of the Statute of Frauds and there is no need for a written security agreement.

Generally, it is true that a claim based upon on oral security agreement is barred by the Statute of Frauds (*Oksner v Murphy*, 89 AD2d 995 [1982]). However, "[p]arol evidence is admissible where, as here, a party is asserting that what purports to be a binding contract is, in fact, no contract at all [citations omitted]" (*Jurkiewicz v Zechewytz*, 15 AD3d 721 [2005]; *W.L. Christopher, Inc. v Seamen's Bank for Sav.*, 144 AD2d 809, 810-811 [1988]). Quite simply, in this court's view, defendant Fiumera has submitted sufficient evidence in the form of affidavits and exhibits raising questions as to whether Note #2 was ever intended to be a binding agreement or rather an accommodation for Kamp (*Cole v Macklowe*, 40 AD3d 396 [2007]; *Adirondack Bank v Simmons*, 210 AD2d 651 [1994]). The court finds the case of *In re Pandeff*, 201 B.R. 865 (Bkrctcy S.D.N.Y., 1996) distinguishable on the facts for the reasons set forth in defendant Fiumera's brief.

¹Trustee Kamp also asserted that the concept of mutual debts prohibited the debts in Action #1 and Action #2 from being set-off against each other. Trustee Kamp argues the debt he owes Fiumera in Action #1 is in his capacity as an individual, compared to Action #2 which he serves in the capacity as trustee of the Frank X. Kamp Trust. Generally, offsets for mutual debts require that the debts run to and from the same persons in the same capacity (*In re Midland Ins. Co.*, 79 NY2d 253, 259 [1992]). However, in light of the allegations that Trustee Kamp was actually acting in his individual capacity with respect to Note #2, the court finds this argument premature.

CONCLUSION

For the reasons stated, the court finds as follows:

- (1) With respect to Index No. 2008-0927, plaintiff Fiumera's motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213 is DENIED; and the moving and opposing papers are hereby deemed the complaint and the answer, respectively; and

- (2) With respect to Index No. 2008-0790, plaintiff Gerard Kamp, as Trustee for the Frank X. Kamp Trust's, motion for summary judgment against defendant Fiumera individually only pursuant to CPLR § 3212 is DENIED.

This decision constitutes an order of the court. The mailing of a copy of this Decision and Order by this court shall not constitute notice of entry.

It is so ordered.

Dated: September 12, 2008
Binghamton, New York

s/ Ferris D. Lebous _____
Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE DELAWARE COUNTY CLERK