

Mitchell v Abrams

2008 NY Slip Op 32609(U)

September 25, 2008

Supreme Court, New York County

Docket Number: 0110403/2008

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

DAVID MITCHELL

- v -

STEVEN ABRAMS

INDEX NO. 110403/08
MOTION DATE _____
MOTION SEC. NO. 001
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/26/08

WALTER B. TOLUB /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
DAVID MITCHELL

Plaintiff,

-against-

STEVEN ABRAMS,

Defendant.

Index No. 110403/08
Mtn Seq. 001

FILED

SEP 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is a motion by the Plaintiff for summary judgment in lieu of the complaint for payment on a guarantee (CPLR §3213).

Facts

This action arises out of construction work performed at Plaintiff's penthouse apartment located at 45 East 66th Street, New York, NY (the "Premises"). Plaintiff hired non-party Fountainhead Construction, LLC ("Fountainhead") to perform the necessary work (the "Project"). Defendant Steven Abrams is the principal owner and managing member of Fountainhead.

Fountainhead and Plaintiff entered into an agreement for work on Plaintiff's residence on June 29, 2007 ("Agreement"). In order to perform the work under the Agreement, Fountainhead required that a deposit of \$750,000 be pre-funded ("Deposit"). Plaintiff agreed to pre-fund the Deposit by entering into a separate agreement with the Defendant. Defendant and Plaintiff signed a guarantee for the Project ("Guarantee"). The Guarantee states in relevant part that:

This will confirm that we have agreed to amend the *Owner-Contractor Agreement between David Mitchell and Fountainhead Construction, LLC*, dated June 29, 2007 ("Agreement") as follows (abbreviated terms used herein in the same manner as in the Agreement):

The Owner (David Mitchell) will pre-fund a deposit of Seven hundred and Fifty Thousand Dollars (\$750,000) ("Deposit") to the contractor (Fountainhead Construction, LLC), which deposit will be used by Contractor to pay deposits on subcontracts and materials, and to fund Contractor's startup General Condition Costs. . .

As a material inducement for the Owner to agree to this amendment of the Agreement, and by executing this letter agreement in the space provided below, Steve Abrams ("Guarantor") hereby grants a personal financial guarantee that the Deposit will be used solely for the benefit of the Project and that the Deposit will be fully credited to the Owner as described in the preceding paragraph. Without limitation, in the event that the Deposit is misused by Contractor, **Contractor defaults under the Agreement or this letter agreement**, any portion of the Deposit is paid to a Subcontractor that subsequently defaults, or the Owner is not credited with the full amount of the Deposit or does not otherwise receive the full benefit of the Deposit, and notwithstanding anything to the contrary in the Agreement, **Guarantor** (in addition to the Contractor) **shall be personally liable to the Owner for the full amount of the Deposit. . .**

(Guarantee, p.1 [*bold emphasis added*]).

Plaintiff claims, and Defendant does not deny, that is now out of business or is rapidly going out of business and fired its employees. Plaintiff submitted the Affidavit of Allen Bloom, a

minority owner of Fountainhead and a participant of the day to day construction activities of the company. Mr. Bloom stated in his affidavit that Fountainhead abandoned the Project, is currently out of business and fired its employees. As a result, Plaintiff had to hire new employees to complete the Project. Plaintiff claims that by virtue of going out of business and abandoning the Project, Defendant is liable under the Guarantee for full payment of the Deposit.

Additionally, Plaintiff cites the Bloom Affidavit for the claim that the Deposit was diverted to other endeavors constituting a misuse of the funds. Plaintiff argues that the use of the Deposit for purposes other than the Project constitutes a breach of the Guarantee entitling him to full repayment of the \$750,000.

Defendant argues that the Guarantee obligates him personally *only* in the event that the non-party contractor, Fountainhead, misused the Deposit. As evidence that neither Defendant nor Fountainhead misused funds, Defendant submits Exhibits 2 and 3. Exhibit 2 purports to be an "Application and Certification for Payment" by Fountainhead indicating how Plaintiff's full Deposit was used. However, this exhibit is unsigned by Fountainhead and the Architect, fails to state by whom it was created and how it was created. Defendant also submits Exhibit 3, 11 forms entitled "Waiver of Lien and General Release" which Defendant

claims were provided to the subcontractors upon payment by Fountainhead. However, even if Fountainhead was to be credited with the full amount of the waivers it claims, \$497,053.35 remains unaccounted for.

Defendant argues that ultimately, whether or not Fountainhead misused the funds is a question of fact and is impossible to prove by the terms of the Guarantee and therefore impermissible to decide under CPLR §3213. Defendant also argues that Plaintiff's new contractor, who was hired to complete Fountainhead's work, was made up of former Fountainhead employees who credited Plaintiff the full amount of the Deposit. Defendant submits that there was no misuse of funds and therefore no breach of the Guarantee.

Discussion

CPLR §3213 is a motion for summary judgment in lieu of the complaint. 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 the complaint (CPLR §3213). A Plaintiff moving under CPLR §3213 must demonstrate: (1) the existence of a guarantee; (2) a default on the underlying obligation secured by the guarantee; and (3) the defendant's failure to honor that guarantee (Dell'Anno v. Molinari, 19 Misc.3d 1117(A) [Sup. Ct. NY County 2008]; SCP (Bermuda), Inc. v.

Bermudatel Ltd., 224 AD2d 214 [1st dept 1996]).

"The justification for this expedited procedure is that such obligations are presumptively valid, and holders of them, in the absence of questions of fact as to authenticity or default, should not be subject to the delay occasioned by formal pleading'" (Dresdner Bank AG v. Morse/Diesel, Inc., 115 AD2d 64, 67 [1st Dept 1986] *citing* Logan v. Williamson & Co., 64 Ad2d 466,469 [4th Dept 1978])). The question of what constitutes an instrument for the payment of money only has spawned "'a plethora of irreconcilable caselaw'" (Dresdner Bank AG v. Morse/Diesel, Inc., 115 AD2d 64, 67 [1st Dept 1986] *citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:3, p 829).

Generally, the cases permitting the use of CPLR §3213 have dealt with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness (Dresdner Bank AG v. Morse/Diesel, Inc., 115 AD2d 64, 67 [1st Dept 1986] *citing* Interman Indus. Prods. v. RSM Electron Power, 37 NY2d 151, 154).

Where CPLR §3213 treatment has been denied, the document in questions requires something in addition to the payment of money (Dresdner Bank AG v. Morse/Diesel, Inc., 115 AD2d 64, 67 [1st Dept 1986])). Courts have been emphatic that "'when the instrument itself calls for something more than the payment of

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money. . . the 3213 motion for summary judgment will be denied and the parties directed to plead'" (Id., citing Logan v. Williamson & Co., 64 Ad2d 466,469 [4th Dept 1978]).

At the same time, if it is only "simple proof" that is needed outside of the instrument itself to make a case of nonpayment, the instrument will still qualify for CPLR §3213 treatment (Seaman-Andwall Corp. v. Wright Mach. Corp., 31 AD2d 136 [1st Dept 1968] citing Channel Excavators v. Amato Trucking Corp., 48 Misc.2d 429 [Sup Ct, Nassau Cty 1965]). Moreover, an agreement to pay money may meet the statutory criterion even though it is part of a larger transaction and the obligor has covenanted to perform other acts under a separate but contemporaneous contract executed as part of the same general transaction (Dresdner Bank AG v. Morse/Diesel, Inc., 115 AD2d 64, 67 [1st Dept 1986], citing Logan v. Williamson & Co., 64 Ad2d 466,469 [4th Dept 1978]).

In the instant matter, Plaintiff seeks summary judgment pursuant to CPLR §3213, arguing that the Guarantee is to be viewed as separate agreement from the underlying Agreement. Plaintiff claims that it did not get the full benefit of the Deposit, as the terms of the Guarantee require, by virtue of Fountainhead going out of business and abandoning the Project. Plaintiff asserts that the abandonment makes Defendant liable under the Guarantee.

Defendant argues that Plaintiff's motion must be denied because there is a question of fact as to whether the Deposit was misused and that extrinsic evidence is necessary to determine misuse.

Plaintiff has made out a prima facie case against the Defendant: (1) Plaintiff has provided the court with proof of a Guarantee and Defendant concedes that there is a personal guarantee; (2) a default on the underlying obligation secured by the Guarantee, namely abandonment of the project by virtue of Fountainhead going out of business; and (3) Defendant's failure to honor the Guarantee and return the Deposit.

This case is appropriate for an accelerated judgment because Plaintiff has demonstrated, by "simple proof" that Defendant has breached the Guarantee and has not returned the Deposit. There is no need to look at the underlying agreement to determine the parties rights and obligations under the Guarantee. In this case, the Guarantee stands on its own and can be enforced separate and apart from an underlying agreement (Dresdner Bank AG v. Morse Diesel, Inc., 115 AD2d 64[1st Dept 1986]).

Moreover, the Defendant has not raised any material issues of fact that would require a trial on this matter. Once Plaintiff has made a prima facie case by proof of the agreement and a failure to make the payments called for in the agreement, it is incumbent upon the Defendant to establish, by admissible

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evidence, that a triable issue of fact exists (SCP (Bermuda), Inc. v. BermudaTel Ltd., 224 AD2d 214 [1st dept 1996]). Here, Defendant has failed to establish that a triable issue of fact exists as to its abandonment of the Project, fails to sufficiently call into question Mr. Bloom's Affidavit stating that Fountainhead did in fact misuse the Deposit. Defendant's proof consists of conclusory, self-serving statements and unsigned documents concerning the alleged use of the Deposit and mentions nothing about abandoning the Project.

It follows that Plaintiff's motion for summary judgment in lieu of the complaint is granted. Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is granted as against the Defendant; and it is further

ORDERED that the Clerk of the court award Plaintiff the principal sum of \$750,000 plus interest from July 27, 2007; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: *9/25/08*

FILED *W*
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. WALTER B. TOLUB, J.S.C.