scan

INDEX
NO. 16080/2008

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: October 16, 2008
Submission Date: October 30, 2008
Motion Sequence No.: 001/MOT D

x

METRO COFFEE SERVICE CORP. and SOON SUL KIM,

Plaintiffs,

- against -

METRO SPRING COFFEE INC., GINA H. YANG and CHOON O. YANG,

Defendants.

x

COUNSEL FOR PLAINTIFFS
Mark I. Masini, P.C.
825 East Gate Boulevard- Suite 308
Garden City, New York 11530

COUNSEL FOR DEFENDANTS
Peter Kang, Esq.
450 Seventh Avenue- Suite 1807
New York, New York 10123

ORDER

The following papers were read on Plaintiffs' motion for summary judgment in lieu of a complaint:

Notice of Motion dated August 25, 2008;
Affidavit of Soon Sul Kim sworn to August 25, 2008;
Affirmation of Peter D. Kang, Esq. dated October 12, 2008;
Affidavit of Soon Sul Kim sworn to October 28, 2008.

Plaintiffs, Metro Coffee Service Corp. ("Metro Coffee") and Soon Sul Kim ("Kim"), move for an order pursuant to CPLR 3213 for summary judgment in lieu of a complaint.

METRO COFFEE SERVICE CORP., *et ano* v. METRO SPRING COFFEE INC., *et al.*
Index No. 16080/2008

BACKGROUND

On May 30, 2008, Metro Coffee, through its president, Kim, entered into a contract with Defendant Gina H. Yang ("Gina") for the sale of Metro Coffee's wholesale coffee business, located at 431 North Main Street, Freeport, New York. Pursuant to the contract, the purchase price was $560,000 with $30,000 paid at the time of contract as a down payment. The contract provides that the balance of the purchase price was to be paid partially by promissory notes in the sum of $260,000 and the remainder by cash or certified check.

The contract of sale also includes a restrictive covenant that Metro Coffee and all persons active or interested in the business cannot re-establish, re-open, be engaged in or become interested in a wholesale coffee business for ten years in New York City, Nassau County and Suffolk County.

On June 20, 2008, Metro Coffee transferred its business pursuant to the contract to Defendants, Metro Spring Coffee, Inc. ("Metro Spring") and Gina. Approximately half of the purchase price, $260,000, was in the form of a promissory note, executed by Metro Spring, Gina and Defendant Choon O. Yang ("Choon"). The note provided for the principal sum plus 3% interest to be repaid over a 48 month period with the first payment of $5,754.93 due on July 20, 2008. Paragraph 2 of the note stated that in the event of a default for a period in excess of six days, the unpaid principal, without demand or notice would become due with interest, collection charges and reasonable attorney's fees. Paragraph 6 defines attorney's fee as an amount to be no less than

20% of the principal and interest then owing. At the end of the note, Gina signed on behalf of Metro Spring as president, and personally. Choon also signed personally.

Plaintiffs claim that Defendants did not make any payments under the note. On August 6, 2008, Plaintiffs sent a notice of default to the Defendants demanding payment in five days. No payment was received.

Plaintiffs have moved for summary judgment in lieu of a complaint seeking judgment against the Defendants in the amount of $260,000, plus interest from July 20, 2008 and attorney's fees not less than $46,000.

In opposition, Defendants, through their attorney, maintain that, at the time of closing, they prepaid 17 months of payments under the note by delivering two checks totaling $100,000. One was made payable to Kim in the amount of $50,000 and the other to Hyung Joon Kim[1]. Defendants assert that this $100,000 payment was in addition to the $300,000 paid towards the $560,000.[2] purchase price. Defendants ask that Plaintiffs' motion be denied and that they be awarded damages for this "frivolous" motion in the amount of $25,000.

---

[1] None of the papers submitted to the Court identify Hyung Joon Kim's relationship to Metro Coffee or Kim other than Hyung Joon Kim was a person active in the business of Metro Coffee.

[2] Defendants annex copies of four checks; one dated May 29, 2008, in the amount of $30,000 made payable to Richard Pak, as attorney, representing the contract deposit and three cashier's checks, all dated June 20, 2008, for $270,000 made payable to Metro Coffee, $50,000 to Hyung Joon Kim and $50,000 to Kim.

In reply, Plaintiffs argue that the Defendants' opposition papers should not be considered since they fail to include an affidavit from a person with knowledge as the only person to submit an affirmation was Defendants' attorney who does not have personal knowledge of the facts. In the alternative, Plaintiffs argue that, if the affirmation of the Defendants' attorney is accepted, Defendants do not have a valid defense to the motion. Plaintiffs maintains that the $100,000 was not pre-payment on the note but monies owed to Kim and Hyung Joon Kim for signing restrictive covenants on June 20, 2008. Plaintiffs opine that Defendants' argument is nonsensical in that the Defendants allegedly pre-paid forty percent of the loan amount but did not seek any reduction of the interest owed and the alleged amount pre-paid on the note does not equal 17 payments.[3] Furthermore, Plaintiffs comment on the fact that the Defendants never objected to the notice of default, dated August 6, 2008.

DISCUSSION

CPLR 3213 permits a party to move for summary judgment in lieu of a complaint when the action is based upon an instrument for the payment of money only. Interman Industrial Products Ltd. v. R.S.M. Electron Power Inc., 37 N.Y.2d 151, 155 (1975); and East New York Savings Bank v. Baccaray, 214 A.D.2d 601 (2nd Dept. 1995). A promissory note is an instrument for the payment of money only for the purposes of CPLR 3213. Davis v. Lanteri, 307 A.D.2d 947 (2nd Dept. 2003).

[3] Plaintiffs calculate 17 payments to equal $97,833.81.

METRO COFFEE SERVICE CORP., *et ano* v. METRO SPRING COFFEE INC., *et al.*
Index No. 16080/2008

Under CPLR 3213, when an action is based upon an instrument for the payment of money only, the plaintiff may serve with the summons, a notice of motion for summary judgment and the supporting papers in lieu of a complaint.

In order to establish a *prima facie* case on a promissory note, plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. Two Lincoln Advisory Servs. v. Shields, 293 A.D.2d 740, 741 (2nd Dept. 2002); Mangiatordi v. Maher, 293 A.D.2d 454 (2nd Dept. 2002); and East New York Savings Bank v. Baccaray, *supra.*

Once plaintiff has established a *prima facie* case, the defendant must come forward with admissible evidence establishing the existence of triable issues of fact with respect to a *bona fide* defense. Cutter Bayview Cleaners, Inc v. Spotless Shirts, Inc., –A.D.3d–, 2008 WL 5263896 at *1 (2nd Dept. 12/16/08); Colonial Commercial Corp. v. Breskel Assoc., 238 A.D.2d 539 (2nd Dept. 1997); and Silber v. Muschel, 190 A.D.2d 727 (2nd Dept. 1993). "A defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact." Banco Popular North America v. Victory Taxi Mgmt., Inc., 1 N.Y.3d 381 (2004).

Plaintiffs have met their burden in establishing that the Defendants executed the Note and defaulted.

In opposition, the Defendants have failed to submit an affidavit from a person with knowledge. An attorney's bare affirmation not based upon personal knowledge is without evidentiary value and unavailing. Zuckerman v. City of New York, 49 N.Y.2d

557, 598 (1980). However, "the affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e. g., documents, transcripts." *Id.* See also, Cerulean Land Developers Corp. v. Colon Development Corp., 144 A.D.2d 615, 616 (2nd Dept.1988)(attorney's affirmation not based on personal knowledge is sufficient to defeat summary judgment motion if it is based on documentary evidence in the attorney's possession).

In that regard, even though no affidavit from a person with knowledge of the facts was submitted in opposition to the motion, counsel for Defendants did submit copies of four checks tendered with respect to the conveyance of the wholesale coffee business from Plaintiffs to Defendants and a copy of the contract of sale. The checks establish that an additional $100,000 was paid by Defendants on the day of transfer of the wholesale coffee business.

Plaintiffs do not deny that these four checks were received in connection with this transfer or that the two checks for the additional $100,000 were deposited. Plaintiffs only deny that the $100,000, paid in the form of two checks, one payable to Kim and one payable to Hyung Joon Kim, relate to pre-payment of the note. Kim states that the Defendants paid Kim and Hyung Joon Kim $50,000 each in exchange for the restrictive covenants they executed on June 20, 2008. Despite this claim, neither the restrictive covenants nor the contract of sale, which includes the restrictive covenant, indicate that payment was owed separate and apart from the $560,000 purchase price for the

restrictive covenant. In addition, Kim states in her affidavit that her younger son, John Seung Kim, also executed a restrictive covenant but "his only compensation, substantially less than (her) compensation or that of Hyung Joon Kim, flowed through Metro Coffee."

In light of the foregoing, a question of fact exists as to whether Defendants have a *bona fide* defense precluding summary judgment in favor of Plaintiffs.

In his opposition, counsel for Defendants suggests that Plaintiffs' motion is frivolous warranting a sanctions award of $25,000. Such request cannot be considered or granted for two reasons. Procedurally, no notice of cross-motion was served. Thus, the Court does not have jurisdiction to consider the application. CPLR 2215; Feuer v. New York City Health and Hosps. Corp., 170 Misc. 2d 838 (Sup Ct. Bronx Co. 1996). See, Blam v. Netcher, 17 A.D.3d 495 (2nd Dept. 2005).

Substantively, even if the application were properly before the Court, it would be denied. Even though Plaintiffs did not prevail on this motion, frivolous conduct, in part, is that which is "completely without merit in law and cannot be supported by a reasonable extension, modifications or reversal of existing law" as set forth in 22 NYCRR 130-1.1(c)(1). Plaintiffs' motion certainly does not fit that criteria. Since it is within the sound discretion of the Court to award sanctions (Wagner v. Goldberg, 293 A.D.2d 527 [2nd Dept. 2002]), the Court declines to exercise its discretion to award sanctions here.

METRO COFFEE SERVICE CORP., *et ano* v. METRO SPRING COFFEE INC., *et al.*
Index No. 16080/2008

That being said, counsel for Defendants is reminded that frivolously seeking sanctions is sanctionable under 22 NYCRR 130-1.1 (c).

Accordingly, it is,

ORDERED, that Plaintiffs' motion for summary judgment in lieu of a complaint is **denied**; and it is further,

ORDERED, that Defendants' request for $25,000 in damages for legal fees and costs incurred in defending against this motion is **denied**; and it is further,

ORDERED, that counsel for the parties shall appear for a preliminary conference on February 6, 2009 at 9:30 a.m. At the preliminary conference, the Court shall consider whether more formal pleadings are necessary.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 24, 2008

Hon. LEONARD B. AUSTIN, J.S.C.