

Unity Bank v Koronios

2009 NY Slip Op 31484(U)

July 6, 2009

Supreme Court, Nassau County

Docket Number: 13834/08

Judge: Stephen A. Bucaria

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MEMORANDUM DECISION

Supreme Court, Nassau County, IAS Part 3

HON. STEPHEN A. BUCARIA, J.S.C.

UNITY BANK,

Plaintiff,

INDEX NO. 13834/08

MOTION SUBMISSION DATE:

April 8, 2009

NIKOLAOS KORONIOS a/k/a NIKOLAOS L. KORONIOS, IRENE KASTOUGRAKIS a/k/a IRENE KORONIOS, KINGS BKL INC., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NASSAU COUNTY TREASURER, TOWN OF NORTH HEMPSTEAD RECEIVER OF TAXES and JOHN DOES 1 - 10 being fictitious and unknown to plaintiff, the person or parties intended, being those having or claiming an interest in or lien upon the mortgaged premises described in the Verified Complaint, including but not limited to, tenants, occupants, persons or corporations, if any,

MOTION SEQUENCE # 001

Defendants.

This motion, by plaintiff, for an order:

- (a) Declaring the defendants Irene Kastougrakis a/k/a Irene Koronios, Kings BKL Inc., New York State Department of Taxation and Finance, Nassau County Treasurer and the Town of North Hempstead Receiver of Taxes, in default for failure to plead to the Verified Complaint;
- (b) Granting plaintiff Judgment against defendants Kings BKL Inc., as to liability under the Note and as to liability against defendant Nikolaos Koronios a/k/a Nikolaos L. Koronios, on the Unconditional Guarantee and Mortgage, all as referred to in the Complaint;
- (c) Discontinuing the action as to defendants John Doe Nos. 1 through 10;
- (d) Granting plaintiff Judgment against all of the defendants herein declaring any lien or interest of any defendant herein in the Premises to be subject and subordinate to plaintiff's lien and foreclosed thereby;

- (e) Appointing a Referee to compute the amount due under said Note, Guarantee and Mortgage, including principal, interest, water and sewer rents, if any, insurance premiums, taxes, plaintiff's reasonable attorneys' fees and other costs of collections and any other charges secured by the Mortgage, and to report whether the Mortgaged Premises can be sold as one parcel;
- (f) Awarding plaintiff costs and disbursements as provided by statute; and
- (g) Awarding plaintiff such other and further relief in the Premises as just and proper,

is determined as hereinafter set forth.

I. FACTS

On June 20, 2006, for valid consideration, Kings BKL Inc. ("Kings"), executed, and delivered a promissory note ("Note") to Unity Bank ("Unity" or "Plaintiff") for the sum of six hundred thousand dollars (\$600,000.00). Subsequently, Kings executed an allonge (endorsement) to the Note, modifying its payment to allow for eight payments consisting only of interest.

As a security for the obligations under the Note, Nikolaos Koronios ("Koronios") executed and delivered to Plaintiff an unconditional guarantee ("Guarantee"), whereby Koronios guaranteed the punctual payment of amounts due under the Note to Unity. As collateral for the payment of the guarantee, Koronios, as mortgagor, also executed, acknowledged, and delivered to Unity, as mortgagee a collateral Mortgage and Security Agreement ("Mortgage"). Under this agreement, dated June 20, 2006, Koronios mortgaged to Unity, *inter alia*, his rights in and to the property at 15 North Drive, Westbury, New York 11590 (which is his personal residence). The Mortgage was duly recorded in the office of the county clerk of Nassau County on July 12, 2006, as a lien against the mortgaged premises.

The Note's terms provided for Kings to pay Plaintiff, in regular monthly installment payments, the principal sum with interest at an initial rate of 10% (which was adjustable to 2% above the prime rate on the first calendar day of each charge period). The Note also provided that if any payment was more than ten (10) days late, the lender may charge borrower a late fee of up to 5% of the unpaid portion of the regularly scheduled payment. In event of Kings' default, the note provided that Unity could require immediate payment of all amounts due under the Note, collect all amounts owing from any borrower *or guarantor*, and take possession of any collateral.

On February 1, 2007, and every month thereafter, Kings failed to make required payments to Unity, thereby defaulting on its obligation under the Note. All defendants have not tendered any payment of the amounts due under the Note.

Unity, therefore, filed a complaint in Nassau County Supreme Court on July 25, 2008. Subsequently, Unity made the instant motion for summary judgment.

II. DEFENDANTS' ARGUMENTS

Of all listed defendants, only one responded to Plaintiff's motion for summary judgment. Koronios filed a timely reply responding only to Plaintiff's summary judgment motion subsection (b).

Koronios set forth three defenses to Plaintiff's motion for summary judgment. First, he claims to be the victim of constructive adhesion contract. Second, Koronios notes that at the time of the loan, interest rates for residential dwellings were approximately 6%. He argues, therefore, that the 4% premium over the going rate was a predatory amount. Lastly, Koronios claimed that "There are issues of fact which surround this loan which need to be determined at trial and therefore summary judgment is not appropriate". Koronios failed to mention any specific facts which he disputes.

III. UNITY'S ARGUMENTS

Unity contends that there are two reasons it did not violate any predatory loaning statutes. First, Koronios claims that the loan is a home loan is inaccurate as Koronios admits to being subject to a small business finance loan and to attempting to operate a business along with his partners. Second, even should the loan be classified as a home loan, Unity maintains that this loan can not be a violation of predatory loaning laws because such a violation can only occur if the loan is at least 8% above the yield on treasury securities which is inapplicable to this case.

Plaintiff contends that once Defendant has admitted to executing and delivering the Mortgage and the Guarantee and to defaulting on them, the burden shifts to the defendant to produce contrary evidence in admissible form, sufficient to require a trial of material issues of fact. Once the Defendant admits to the loan's commercial nature, his arguments in opposition to the motion – regarding interest rates on "residential dwellings" and the value of his home – are irrelevant.

IV. DISCUSSION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651, 1994):

"It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d

607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

As none of the defendants responded to Plaintiff’s motions parts (a) and (c) – (f), those parts of the motion are **granted**. As one defendant, Koronios, responded to part (b), such claims and counterclaims must be examined.

a. Predatory Loan Claim

Under New York law, Defendant’s Guarantee and Mortgage are not a home loan and therefore not subject to predatory loan law for home loans. New York statutory Law requires, *inter alia*, two elements for a loan to reach the definition of a home loan: (1) that the “borrower is a natural person” and (2) that the “debt is incurred by the borrower primarily for personal, family, or household purposes.” N.Y. BANKING LAW § (6l)(e). As Defendant acknowledges that Kings is a corporation and the debt was for business purposes, this loan is not subject to such predatory lending laws for home loans. Even should the guarantee of a commercial loan be considered a home loan, in order for a loan to be deemed excessive, it must, at a minimum, “exceed eight percentage points over the yield on treasury securities.” *See* N.Y. BANKING LAW § 6-l (1)(g). Therefore, Defendant failed to set forth facts that can allege that the loan was in violation of NY law.

b. Disputed Material Facts Claim

Although Koronios also moved to dismiss the motion because “[t]here are issues of fact which surround this loan which need to be determined at trial,” Koronios did not in fact dispute any of the material facts. (*See id.* ¶ 13).

c. Contract of Adhesion Claim

In the alternative, Koronios seeks to nullify the contract because he is a victim of constructive adhesion. Presumably, Koronios seeks to rely on the unconscionability doctrine.

A general rule in contract law is that no matter how hard the bargain, a court will not deprive it of its validity without evidence of fraud or deception. An exception to this general rule has been developed [for contracts of adhesion].

Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.

Blake v. Biscard, 62 A.D.2d 975, 976-77 (App. Div. 2d Dep't, 1978). A "determination of unconscionability generally requires a showing that the contract was *both procedurally and substantively unconscionable* when made." (**Gillman v. Chase Manhattan Bank**, 73 N.Y.2d 1, 10, 1988). (emphasis added).

Koronios claims to be a party to an adhesive contract and therefore seeks court protection from the terms that he agreed to. What Koronios fails to claim, let alone submit evidence for, is that he had "little or no knowledge of [the contract's] terms." (**Blake**, 62 A.d.2d at 977). Koronios does not claim that the contract exceeded his reasonable expectations. In fact, Koronios clearly had a thorough understanding of the contract; in his *pro se* reply, he detailed the pertinent contract terms. Moreover, the contract term that Koronios asks this Court to consider unconscionable – the 10% interest rate – is unambiguously set forth in the Note's payment terms. (Ex.1.); see also **Gillman**, 73 NY2d at 10-11 (finding "the use of fine print in the contract" and "decepti[ion]" to be important factors in determining whether a contract contains the "procedural element of unconscionability").

Similarly, Koronios has not claimed a lack of meaningful choice with regards to signing the Guarantee and Mortgage. Such procedural unconscionability is required for a court to find a contract unconscionable. (See **Gillman**, 73 N.Y.2d at 10). Although Koronios claims that Unity "insisted" that he guarantee the payments, such alleged insistence does not challenge the fact that Koronios had a "meaningful choice." (**Gillman**, 73 N.Y.2d at 10). In fact, Unity's insistence of Koronios' guarantee was only to allow Kings to be exempt from making payments on the principal of the loan for eight months. Therefore, Koronios does not meet the burden of proving procedural unconscionability.

Koronios also does not substantiate his argument for substantive unconscionability. The loan, even were it to be a home loan, is not considered predatory under New York law. (see N.Y. Banking Law, §6-1(1)(g)). Therefore, the loan does not meet the threshold required for a contract to be substantively unconscionable.

V. CONCLUSION

Defendant has admitted to executing and delivering the Mortgage and the Guarantee and to

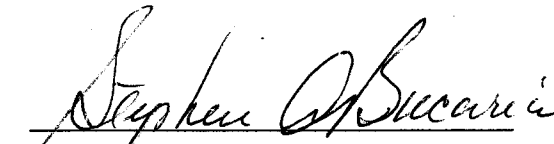
defaulting on them. As these facts – when standing unopposed - warrant summary judgment for Plaintiff, the burden shifts to Defendant to produce contrary evidence sufficient to require a trial of material issues of fact. Alternatively, Defendant can produce pertinent law that prevents judgment in favor of the Plaintiff. Defendant's contentions that he is a victim of an adhesive contract and predatory loan are inapposite for the reasons stated above. Similarly, Defendant, despite claiming to do so, has not in fact challenged any material facts. Defendant has therefore not met his threshold to rebut Plaintiff's *prima facie* claim for summary judgment.

Therefore, for the reasons stated above, Plaintiff's motion for summary judgment is **granted** for all parts.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

Submit Judgment on notice.

Dated JUL 06 2009


XXX J.S.C.