

**3D Paron, Inc. v CBK Enters. of NY, LLC**

2009 NY Slip Op 32020(U)

August 18, 2009

Supreme Court, Nassau County

Docket Number: 020334/2006

Judge: Ira B. Warshawsky

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MEMORANDUMSUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

## PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 9

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3D PARON, INC. and DAVID SESSA,

Plaintiffs,

INDEX NO.: 020334/2006

-against-

CBK ENTERPRISES OF NY, LLC and  
MARK H. KAPLAN a/k/a CHAIM KAPLAN,Defendants.  

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DECISION AFTER TRIAL

Plaintiffs, 3D Paron, Inc. and David Sessa, seek to recover on a default of a promissory note from the Defendants, CBK Enterprises of NY, LLC and Mark H. Kaplan a/k/a Chaim Kaplan, arising out of a Contract of Sale in which Plaintiffs sold their business to the Defendants. Defendants claim that their surrender of the business collateral was sufficient as a means of settling the default, and, that if the court should find otherwise, then the Plaintiffs failed to dispose of the collateral in a commercially appropriate manner.

*Facts*

On August 16, 2005, Plaintiffs entered into a contract of sale to sell its business to Defendants (Plaintiffs' Exhibit 1). Plaintiffs had previously done business as Jinil Au Chocolat, which sold chocolates and gift baskets at two retail and confectionary stores and through a catalog and website. These stores were included in the sale and were located at 428 Central Avenue, Cedarhurst, New York, and 1371 Coney Island Avenue,

Brooklyn, New York. The sale also included the business's manufacturing and wholesale facility at 32 Railroad Avenue, Valley Stream, New York. All three properties were leased. In addition to the facilities, the business consisted of "supplier lists, customer lists, customer related information, computers, computer equipment, furniture, fixtures, equipment, leasehold improvements, supplies, inventory, the goodwill, the telephone numbers and fax numbers, the website www.jinil.com and a van" and the sale included the right to use the trade name "Jinil Au Chocolat" (Plaintiffs' Exhibits 1 and 2).

The total purchase price for the Business and Facilities was \$560,000.00 and \$250,000.00 was paid at or before the closing (Plaintiffs' Exhibit 1). Defendants executed a promissory note for the \$310,000.00 balance which was to be payable to Plaintiffs over five years with interest at 8.25 percent (Plaintiffs' Exhibit 3). The note provided for 58 consecutive monthly installments each in the sum of \$6,459.00 beginning October 17, 2005, and payable monthly thereafter, with one final payments of \$5,354.99. Defendants, Kaplan, personally guaranteed the payment of the note. The sale closed on August 24, 2005.

As security for the payment of the purchased price, Plaintiffs received a security interest in the business (Plaintiffs' Exhibit 4). The security interest expressly covered "all property, goods, chattels of the same class as those scheduled, acquired by the Debtor subsequent to the execution of this agreement and prior to its termination." *Id.* Plaintiffs also received as additional security the assignments of the leases of the facilities to be held in escrow pending payment of the purchase price. Defendants made the payments due through September 17, 2006, but defaulted on the payment due October 17, 2006.

Plaintiffs sent notice to the Defendants on October 31, 2006 stating that if the default was not cured in ten (10) days, the Plaintiffs were going to exercise their option to declare the entire balance due under the promissory note to be accelerated, as well as all other remedies provided in the Agreement (Plaintiffs' Exhibit 5). Defendants failed to cure the default and also failed to pay the installment due on November 17, 2006.

Plaintiffs sent another notice of default on December 1, 2006 accelerating the

entire balance due under the promissory note, which was \$257,883.33 together with interest thereon from September 17, 2006 (Plaintiffs' Exhibit 7) . Plaintiffs also included in the notice that if the Defendants were to fail to make the payment, the Plaintiffs would demand immediate possession of all collateral given to Plaintiffs to secure payment of the obligation.

Plaintiffs filed an order to show cause on December 6, 2006 to move the court to award Plaintiffs immediate exclusive possession of the collateral. Defendants cross-moved for an order compelling arbitration (Plaintiffs' Exhibit 8). On December 19, 2006, this Court granted the Defendants' cross-motion to compel arbitration, stayed the action, and pending the arbitration, required the Defendants to make certain payments to the Plaintiffs. The order included a provision that stated in the event that:

defendants or either of them should be in any further default of any obligation under said Promissory Note, the Security Agreement of even date, and the Contract of Sale dated August 16, 2005, and such default shall continue for a period of ten (10) days after notice to the defendants as provided in the Promissory Note, then upon notice to the Defendants, the Plaintiffs shall be entitled to an order awarding Plaintiffs immediate, exclusive possession of the collateral in which the defendants have granted a security interest to the Plaintiffs, with immediate rights to enter the premises... [list of premises] and to take possession thereof, and to seize and to hold immediate possession of all other collateral, with all the rights and obligations to repossession, retention and disposition of the collateral as are accorded under UCC Article 9 or otherwise by law or agreement.

Defendants failed to make the payment due on January 17, 2007.

Plaintiffs sent notice to the Defendants regarding the January default on January 31, 2007 (Plaintiffs' Exhibit 9). The notice stated that "You are hereby notified that if such default shall continue for a period of ten (10) days after this notice, then upon notice to the defendants in the above entitled proceedings, the Plaintiffs shall be entitled to an Order awarding Plaintiffs immediate, exclusive possession of the collateral in which the defendants have granted a security interest to the Plaintiffs."

On February 12, 2007, Defendants emailed Plaintiffs the following email, "We are surrendering the collateral to you as demanded in Mr. Cahn's letter. The key to

Cedarhurst store is at the locksmith... The key to the Valley Stream Store is with the landlord. Please contact the Flatbrush landlord to pick up the assets there" (Plaintiffs' Exhibit 10 (O)). At the time of this email, the Cedarhurst store was in arrears for January 2007 and the Valley Stream store was in arrears for December, 2006, January 2007, and February, 2007 (Plaintiffs' Exhibit 10 (B)). The Cedarhurst landlord had filed an eviction proceeding in which a judgment of possession was granted on default on January 30, 2007. A warrant of eviction was ultimately issued for this facility on February 16, 2007 and the Notice to Vacate was dated March 8, 2007 (Plaintiffs' Exhibit 10 (T)).

Plaintiffs responded that "the surrender of collateral is not in lieu of foreclosure," that the obligations of the Defendants are not forgiven, and that the appropriate stipulation will be arranged (Plaintiffs' Exhibit 10 (P)). The Defendants responded that the "collateral has been available to be repossessed for some time now. The delay has been and is on 3D Paron's account. I don't see the need for a stipulation." Id. Defendants also mention in this February 13, 2007 chain of emails that "As far as CBK is concerned we have complied with your demand and have returned the collateral. Please advise as to what 3D Paron further requests to complete the surrender."

Plaintiffs emailed Defendants on February 16, 2007 stating the intention to "work out the steps necessary to obtain, store and auction the collateral" (Plaintiffs' Exhibit 10 (R)). An email was sent to David Harheimer, an expert in distressed assets liquidation, at ClearBid, Inc., giving the locations of the facilities and the contact numbers to be able to access them (Plaintiffs' Exhibit 10 (S)). Mr. Harheimer emailed the Plaintiffs on March 13, 2007 to say that the contact for the Valley Stream premises "would not let him into the facility and that someone needs to call the landlords and let them know what is going on before we contact them."

Moreover, Plaintiffs tried to work out an onsite sale at the Valley Stream premises by making arrangements with Barton HYTE, an auctioneer, sending notice to Mr. Minerva, attorney for the owner of the Valley Stream facility, to arrange for an auction (Plaintiffs' Exhibit 10 (X)). Plaintiffs contend that there was never a response from Mr. Minerva.

It is undisputed that the Plaintiffs never entered any of the stores, nor assessed what type of collateral was left behind in them.

*Discussion*

The questions for the Court are whether the Defendants' voluntary surrender of the collateral was sufficient to settle the default, whether Plaintiffs were ever in possession of the collateral and if they were in possession, did they act in a commercially reasonable manner pursuant to UCC § 9-610.

*Was Surrender Sufficient and Were The Plaintiffs Ever in Possession of the Collateral?*

Defendants argue that 3D effectively took possession of the collateral. They claim that Plaintiffs' demand for all of the collateral, including the return of the business facilities, and the defendants' surrender of this collateral is tantamount to possession by the Plaintiffs of the collateral. However, this is not necessarily true. Since the UCC allows for a creditor to simultaneously exercise his rights to obtain a money judgment and proceed against the collateral, mere verbal insistence of the surrender of the collateral cannot possibly be the equivalent of possession or else the statute would be rendered void. Furthermore, surrender by the Defendants is not enough because "the debtor cannot unilaterally cause an acceptance of collateral." U.C.C. UCC § 9-620, official commentary #5. Thus, this argument is not accepted by the court.

Plaintiffs claim that they did not repossess any of the collateral and argue that they neither removed whatever collateral may have existed, rendered it unusable, nor disposed of it on the defendants' premises. They rely on the Court of Appeals interpretation of UCC § 9-609 (formerly § 9-503) which states "that a creditor may take possession of collateral either by removing it or by rendering it unusable or disposing of it on the debtor's premises." *Industrial Equipment Credit Corp. v. Green*, 62 NY2d 903,906 (1984). While the defendants try to distinguish this case by differentiating the nature of the collateral sought (the collateral in *Industrial* was only equipment that remained on the premise of the debtor and was used by him after the default), this difference has no effect on the Court of Appeal's interpretation of the UCC. Here, the collateral left by the defendants was never removed nor did Plaintiffs render it to be

unusable by the defendants. In fact, defendants did not give them the ability to do so. The evidence shows the Plaintiffs never received keys to the stores or the facility and therefore never physically occupied the premises. The Valley Stream landlord did not want to get involved in the "surrender" and the Cedarhurst store required that the key be picked up at the locksmith because the locks had to be changed. Defendants may claim that they surrendered the collateral, but they certainly never surrendered it "to" the Plaintiffs.

Defendants contend that the "Plaintiffs cannot just walk away after taking back CBK's business." However, without having access to the facilities and the equipment inside of them, it cannot be said that 3D "took back the business" because it did not have the ability to run the business without those assets.

Other courts have used the standard where "a repossession of collateral occurs when the creditor reacquires possession with the intent to deprive the debtor of any control over the collateral." Lindberg v. Williston Indus. Supply. Corp., 411 NW2d 368 (N.D. 1987). 3D never had the ability to deprive CBK Enterprises of the collateral. Without physical access to the premises, 3D would not have been able to deprive CBK of any control over the facilities and their contents. Thus, the collateral was never officially repossessed.

If the court were to have reached the issue of commercial reasonableness, considering the costs involved in selling the property, the Court would find that the Plaintiffs acted in a commercially reasonable manner. According to UCC 9-627(b) "A disposition of collateral is made in a commercially reasonable manner if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." Additionally, "New York courts have determined commercial reasonableness by whether the secured party 'acted in good faith and to the parties' mutual best advantage.'" Coxall v. Clover Commercial Corp., 4 Misc.3d 654, 781 N.Y.S.2d 567 N.Y. City Civ. Ct., 2004. Plaintiffs contacted a consultant from ClearBid, Inc. to assess the collateral. This consultant was unable to access the facilities. They

attempted to arrange for an onsite sale and never received a response. Given that the Plaintiffs' attempts to dispose of the collateral were thwarted by obstacles that were the results of the manner in which the Defendants chose to surrender the collateral, the Court finds that the Plaintiffs' actions and ultimate decision not to pursue the disposition of the collateral were commercially reasonable and made in good faith.

Collateral exists as a means of security against a debt. Given that the UCC allows for a creditor to simultaneously exercise his rights to obtain a money judgment and proceed against the collateral and the evidence shows that 3D was never in possession of the collateral, Plaintiffs are able to recover for the defendants' default. The Court awards the Plaintiffs the balance of \$257,883.33 plus statutory interest from September 17, 2006.

The Plaintiffs are awarded reasonable counsel fees and costs to be determined by Court Attorney/Referee Thomas Dana (Room 206, Second Floor, Telephone 516-571-1476) on October 1, 2009, at 10:00 A.M.

Dated: August 18, 2009

  
J.S.C.

**ENTERED**  
AUG 28 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE