

CTI of Long Is., Inc. v Feingold

2009 NY Slip Op 32128(U)

January 7, 2009

Supreme Court, New York County

Docket Number: 602446/2008

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

CTI OF LONG ISLAND, INC.

INDEX NO. 602446 /08

Plaintiff,

MOTION DATE Oct. 31, 2008

-against-

MOTION SEQ. NO. 001

CRAIG FEINGOLD,

MOTION CAL. NO. 21

Defendant.

The following papers, numbered 1 to 8 were read on this motion for summary judgment in lieu of complaint pursuant to CPLR 3213

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7-8</u>

Cross-Motion: Yes No

Upon the foregoing papers, the plaintiffs' motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is decided in accordance with the accompanying decision and order.

FILED

JAN 09 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/7/09

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
CTI OF LONG ISLAND, INC.,

DECISION AND
ORDER

Plaintiff,

Index No. 602446/2008

-against-

CRAIG FEINGOLD,

Defendant.

-----X
O. PETER SHERWOOD, J.:

FILED
JAN 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this action for the recovery of money due on a promissory note, plaintiff CTI of Long Island, Inc. ("CTI-LI") moves for an order pursuant to CPLR § 3213 for summary judgment in lieu of complaint. Defendant Craig Feingold ("defendant" or "Feingold") cross moves for an order pursuant to CPLR § 602 consolidating this action with two other actions pending in this court, namely, *Gotham Personnel, LLC v CTI of Long Island, Inc., et al.* (Index No. 602052/08) ("Action No. 1") and *SSM Consulting LLC v Craig Feingold* (Index No. 602447/08) ("Action No. 2").

The court has considered the following papers upon plaintiff's motion and defendants' cross motion: notice of motion and summons, dated August 21, 2008; affidavit of Steven Tucker, CEO of CTI-LI, in support of the motion, sworn to August 20, 2008, with exhibit "A"; plaintiff's memorandum of law in support of the motion; notice of cross motion, dated October 16, 2008; affidavit of defendant Craig Feingold, sworn to October 16, 2008, with exhibits "A" through "E" in support of the cross motion and in opposition to the motion; defendant's memorandum of law in opposition to the motion and in support of the cross motion; plaintiff's reply affidavit of Steven Tucker, sworn to October 23, 2008, with exhibits "A" through "E"; plaintiff's reply memorandum of law in support of its motion and in opposition to defendant's cross motion. The affidavit of defendant Feingold in reply to plaintiff's opposition to his cross motion and in further support of the cross motion and defendant's reply memorandum of law have not been considered as such documents are in the nature of a sur-reply which is not permitted by CPLR § 2214, and defendant has failed to demonstrate "good cause" sufficient to warrant the Court's consideration of these additional documents. Moreover, the Court does not find sufficient cause to warrant oral argument

on the motion and cross motion as the papers appear to sufficiently set forth the parties' respective arguments.

Background

The following facts are undisputed. Plaintiff CTI-LI and non-party CTI Staffing Inc. ("CTI-SI") are companies owned by the same shareholders and were engaged in the business of providing temporary employees in the hospitality industry. Non-party Steven Tucker ("Tucker") is CTI-LI's CEO and one of the shareholders of CTI-LI and CTI-SI, as well as a shareholder in CTI Professionals, Inc. ("CTI-Pro"), an affiliate of CTI-LI and CTI-SI. Non-party Gotham Personnel LLC ("Gotham") is a company also engaged in the business of providing temporary employees to the hospitality industry. Defendant Feingold is Gotham's President and sole member. On April 11, 2007, CTI-LI and CTI-SI entered into a written agreement with Gotham and Feingold, individually, whereby CTI-LI and CTI-SI sold the assets and goodwill of their hospitality division to Gotham ("the Agreement"). The purchase price was \$180,000. The Agreement provided that at the closing Gotham and Feingold would execute a promissory note in the amount of the purchase price.

In connection with the Agreement and on the same day as the Agreement was executed, Gotham and Feingold, individually, executed a promissory note in favor of CTI-LI in the principal sum of \$180,000 ("the Note"). It obligates defendant to pay plaintiff the principal sum of \$180,000, without interest, in 39 equal installments of \$4,615.38, commencing on July 2, 2007, with acceleration of the balance due on default and late fees of 5.00% of the installment accruing on payments overdue in excess of ten (10) days. The Note also provides that: "If this note shall be in default, the undersigned [Gotham and Feingold] further agree to pay reasonable attorneys' fees and other costs of collection." The Note did not reference the Agreement.

Simultaneously with the execution with the Agreement and Note, CTI-LI, CTI-SI and Tucker executed written covenants not to compete with Gotham which provided in paragraph 4 of each of the non-compete agreements that they would not for a period of forty-two (42) months from the date of the non-compete agreements (*i.e.*, the date of closing on the Agreement) perform any services for any company engaged in the business of hospitality staffing in the City of New York and the surrounding counties of Nassau, Suffolk and Westchester, solicit or hire any of Gotham's employees or solicit any of Gotham's clients ("the Non-Compete Covenants").

Tucker and the other shareholders of CTI-LI and CTI-SI formed non-party SSM Consulting LLC ("SSM") for the purpose of acting as consultants to Gotham in connection with the sale. On the same date as the Agreement, Note and Non-Compete Covenants were executed, SSM and Feingold as individual guarantor entered into a consulting Agreement with Gotham whereby SSM agreed to provide consulting services to Gotham commencing on April 12, 2007, and continuing through September 30, 2010, for which Gotham would pay the sum of \$221,538.45 per year for each year of the Consulting Agreement in monthly installments of \$18,461.54 ("the Consulting Agreement"). In connection with the execution of the Consulting Agreement, SSM and Tucker, among others, executed written covenants not to compete with Gotham, the terms of which are essentially identical to the Non-Compete Agreements executed as part of the Purchase Agreement.

Following the closing, Gotham made payments in the amount of \$55,384.56 on the Note and \$221,538.45 pursuant to the Consulting Agreement. However, on or about July 11, 2008, Gotham stopped making payments on the Note and sent written notification to SSM terminating the Consulting Agreement after it allegedly learned that Tucker had referred a Gotham client to Metropolitan Hospitality, a competing company located in the geographic area prohibited under the terms of the Non-Compete Covenants. That same day, Gotham commenced Action No.1 in this Court against CTI-LI, CTI-SI, SSM and Tucker alleging seven causes of action: (1) breach of the Purchase Agreement and the Non-Compete Covenants; (2) breach of the Consulting Agreement and the Consulting Non-Compete Covenants; (3) and (5) unjust enrichment with respect to the payments made on the Note and Consulting Agreement; (4) and (6) declaratory judgment with respect to the Note, Purchase Agreement and Consulting Agreement; and (7) permanent injunction restraining any further violations of the agreements. CTI-LI, CTI-SI, SSM and Tucker answered and counterclaimed to recover the amounts due on the Note and pursuant to the Consulting Agreement.

On or about August 21, 2008, plaintiff commenced the instant action by moving pursuant to CPLR § 3213 for summary judgment in lieu of complaint to recover \$124,615.44 outstanding on the Note, together with costs, disbursements and attorneys' fees. Plaintiff submits the Note and the affidavit of its CEO in support of its motion. Plaintiff contends that the express terms of the Note make defendant's obligation to pay unconditional and that the defendant's claims raised in Action No. 1 concerning plaintiff's alleged breach of the Non-Compete Covenants do not justify

nonpayment of the Note or raise any genuine material issues of fact in this action. On that same date, SSM (who is represented by the same attorney as plaintiff CTI-LI) commenced Action No. 2 against Feingold seeking to recover money damages of \$498,461.58 for breach of the Consulting Agreement.

Defendant opposes the motion and cross moves to consolidate the instant action with Action Nos. 1 and 2. Defendant contends that the Note is inextricably intertwined with the Agreement and the Non-Compete Covenants and that a questions of fact exist as to whether plaintiff: (1) fraudulently induced Gotham and Feingold to execute the Agreement and Note; and/or (2) breached the Non-Compete Covenant.

In reply, plaintiff argues that defendant has failed to demonstrate the existence of a triable issue of fact or a meritorious defense to its demand for payment of the Note. Plaintiff contends that defendant's claim that it breached the Non-Compete Covenants is supported by nothing more than vague and conclusory allegations which are not sufficient to rebut its prima facie case.

Discussion

It is well settled that as a general rule instruments for the payment of money only can be enforced separate and apart from an underlying agreement and that an alleged breach of such contract will not defeat a motion for summary judgment on a promissory note (*see, e.g., Dresdner Bank AG v Morse/Diesel*, 115 AD2d 64, 67 [1st Dept. 1986]; *Fopeco v General Coatings Technologies*, 107 AD2d 609 [1st Dept. 1985]). However, that rule does not apply where a defense has been asserted, namely a breach of the underlying agreement, and the obligation to pay on the note is inextricably intertwined with, as opposed to separate and distinct from the underlying agreement (*see, e.g., A + Assocs. v Naughton*, 236 AD2d 655 [3d Dept. 1997]; *Eurotech Dev. v Adirondack Pennysaver*, 224 AD2d 738, 739 [3d Dept. 1996]). Thus, where a fundamental question exists as to whether an agreement between the parties can be viewed as separate and distinct from the note, summary judgment must be denied (*see, River Bank America v Daniel Equities Corp.*, 205 AD2d 476 [1st Dept. 1994]; *Ssangyong (U.S.A.) Inc. v Sung Ae Yoo*, 88 AD2d 572, 573 [1st Dept. 1982]; *see also, Fopeco v General Coatings Technologies, supra* at 609-610).

Here, although the Note makes no reference to the Purchase Agreement, the Non-Compete Covenants or the Consulting Agreement, the Purchase Agreement specifically refers to the Note, the amount of the Note, which was the same as the purchase price, and the terms of repayment. In

fact, a copy of the Note was annexed to the Agreement. Moreover, it appears that a significant portion of the consideration that Gotham and Feingold were to receive in exchange for the purchase price was the Non-Compete Covenants and the Consulting Agreement. It is also worth noting that plaintiff raised the nonpayment of the Note as a counterclaim in Action No. 1. Accordingly, the Court concludes that the rights and obligations in the Note, the Agreement, the Non-Compete Covenants and the Consulting Agreement are inextricably intertwined and render the grant of summary judgment at this juncture premature (*see, Ingalsube v Mueller*, 257 AD2d 894, 895 [3d Dept. 1999]; *A+ Assocs. v Naughter*, *supra*; *Eurotech Dev. v Adirondack Pennysaver*, *supra*).

Since plaintiff has failed to meet its burden of establishing its prima facie case for purposes of CPLR § 3213, the burden does not shift to defendant to raise a triable issue of fact or a meritorious defense and it is not necessary to consider the sufficiency of the opposing papers (*see, Interman Indus. Prods. Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]; *Meyer v La Barbera*, 35 AD3d 554 [2d Dept. 2006]).

Turning then to defendant's cross motion, because the instant action relates to the same underlying Agreement together with the associated Non-Compete Covenants and Consulting Agreement as are the subject of Action Nos. 1 and 2, such actions should be consolidated for trial (CPLR § 602).

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 is denied; and is further

ORDERED, that defendant's cross motion for consolidation is granted to the extent that the above-captioned action is consolidated for purposes of discovery and for joint trial in this Court with *Gotham Personnel, LLC v CTI of Long Island, Inc., et al.* (Index No. 602052/08) ("Action No. 1") and *SSM Consulting LLC v Craig Feingold* (Index No. 602447/08) ("Action No. 2"), each action shall retain its own index number, requests for judicial intervention, notes of issue and judgments shall be separately filed, and the order in which the parties open and close shall be determined by the Justice presiding over the joint trial; and it is further

ORDERED, that a copy of this order with notice of entry shall be served upon the Clerk of the Court who shall mark the records to reflect the consolidation for purposes of joint trial; and it

is further

ORDERED, that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158) who is hereby directed to mark the Court's records to reflect the consolidation for joint trial;

ORDERED, that counsel for the parties on all of the cases consolidated for joint trial are directed to appear for a preliminary conference on March 4, 2009, at 9:30 a.m., in Room 341, at 60 Centre Street.

This constitutes the decision and order of the court.

DATED: 1/7/09

ENTER,

O. P. Sherwood
O. PETER SHERWOOD
J.S.C.

FILED 1

JAN 09 2009

COUNTY CLERK'S OFFICE
NEW YORK