

Carlin v Jemal

2009 NY Slip Op 32350(U)

October 6, 2009

Supreme Court, New York County

Docket Number: 113396/07

Judge: Charles E. Ramos

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

Index Number : 113396/2007

CARLIN, MARTIN
 vs.
JEMAL, STEPHEN

SEQUENCE NUMBER : 007
 REARGUMENT/RECONSIDERATION

CE Ramos

PART 53

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with
 accompanying memorandum decision and order.*

FILED
 OCT 14 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10/6/09

[Signature]

HON. CHARLES E. RAMOS J.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: COMMERCIAL DIVISION

-----X
MARTIN CARLIN,

Plaintiff,

-against-

Index No. 113396/07

STEPHAN JEMAL, individually, and as Member
or Manager of SSJ DEVELOPMENT, LLC and SSJ
DEVELOPMENT, LLC,

Defendants.

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Charles Edward Ramos, J.S.C.:

This action arises out of a promissory note executed on February 27, 2007, between the defendants Stephan Jemal and SSJ Development, LLC (collectively, "SSJ") and non-party Nellie Mendez in the amount of \$1 million (the "Note"). On March 2, 2007, Mendez assigned the Note to the plaintiff Martin Carlin. On October 4, 2007, Carlin commenced this action to recover for SSJ's alleged default under the Note. On January 21, 2009, Carlin moved in motion sequence 005 for summary judgment as to liability on his complaint.

On May 28, 2009, this Court filed a decision and order denying Carlin's motion (the "Decision"). In the Decision, the Court determined that issues of fact remained as to the whether the Note was orally modified and the sufficiency of consideration for the Note, that warranted the denial of summary judgment. For a full recitation of the facts, please refer to this Court's Decision.

In motion sequence 007, Carlin moves for leave to reargue the Decision, pursuant to CPLR 2221(d)(2).

Discussion

Carlin seeks reargument on the basis that the Court erred in determining that issues of fact remained with respect to an oral modification of the Note and the sufficiency of consideration for the Note.

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotations and citations omitted]). The motion "is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided" (*id.*).

Oral Modification

Carlin argues that the Court erred in finding an issue of fact as to whether the parties agreed to an oral modification of the Note because the Note contains a no oral modification clause and SSJ failed to present sufficient evidence to bar the requirement of a written agreement pursuant to Gen Oblig § 15-301(1).

Pursuant to Gen Oblig § 15-301(1): "a written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is

sought or by his agent" (Gen Oblig § 15-301 [1]). Evidence of partial performance or substantial reliance may be presented to establish a waiver of a no oral modification clause and nullifies the requirement for a written agreement for an oral modification pursuant to Gen Oblig § 15-301. However, the partial performance or substantial reliance must be "unequivocally referable to the oral modification." (*Rose v Spa Realty Associates*, 42 NY2d 338, 343-4 [1977]).

In the Decision, the Court determined that there was sufficient evidence of an oral modification to the Note to substantiate SSJ's defense of oral modification and preclude the granting of summary judgment. Both parties agreed in their respective affidavits that there was an oral modification of the Note, but disagreed as to whether the modification fixed a new repayment date beginning September 25, 2007 or conditioned the repayment on obtaining financing for the Mill Basin II project (Decision, p. 4).

Furthermore, Carlin's own conduct raised an issue of fact as to the alleged oral modification. As alleged in the complaint, the parties agreed to a new payment schedule subsequent to the original due date of June 1, 2007 (Complaint ¶ 19). The purported oral modification fixed a new payment schedule for repayment of the Note whereby one-half would be paid on September 25, 2007 and the remaining one-half would be paid on October 2, 2007. Carlin swears that he made a demand on SSJ for payment on September 25, 2007 (Notice of Motion, Exhibit 2, Carlin Aff., ¶

9). Carlin's demand after the original due date is evidence of partial performance of the oral modification that is incompatible with the original terms of the Note. (*Chemical Bank v Broadway 55-56th St. Assocs.*, 220 AD2d 308, 310 [1st Dept 1995]). Therefore, Carlin by his own performance, effectuated a waiver of the no oral modification clause of the Note and nullified the requirement for a modification to be in writing. SSJ does not dispute that there was an oral modification of the Note, but asserts that the modification was to condition the repayment of the Note on obtaining financing.

Consequently, the Court correctly determined that there was an oral modification of the Note, but that a triable issue of fact remained as to the terms of the oral modification, which must be resolved at trial.

Consideration

Carlin argues that the Court erred in finding an issue of fact as to whether the Note was ever fully funded. He contends that the Court should not have considered SSJ's vague and conclusory allegations in light of the fact that he established his *prima facie* entitlement to the repayment of the Note.

Generally, "the adequacy of consideration is not a proper subject for judicial scrutiny" (*Laham v Bahia Mehmet Bin Chambi*, 299 AD2d 151 [1st Dept 2002]). "It is enough that something of real value in the eye of the law was exchanged" (*Apfel v Prudential-Bache Sec., Inc.*, 81 NY2d 470, 476 [1993][internal quotations omitted]).

Nevertheless, the Court determined that the issues of fact were raised by affidavits previously submitted by Carlin in support of his prior motion for preliminary injunction (Motion Seq. 001). In Carlin's affidavit, dated September 27, 2009, he swears that the Note was "funded by [Carlin] through wire transfers on February 28th, and March 8th, 2007..." (Notice of Motion, Exhibit J, Carlin Aff., ¶ 8). In Mendez's affidavit, dated October 2, 2007, she swears that "[o]n or about February 27, 2007, I did loan the sum of \$1,000,000.00 to...[SSJ]" (Order to Show Cause, Mendez Aff. ¶ 3). Mendez then states in her deposition testimony that Carlin not her loaned SSJ the \$1 million (Exhibit 5-B, 19:9-19:22). The assignment was executed by Mendez on March 2, 2007.

Numerous issues of fact and questions of credibility are raised by these conflicting statements. It is unclear from the record if and when the Note was fully funded. Additionally, it is unclear to this Court how an assignment of the Note can be effectuated for a partially funded loan that appears to have been made with insufficient consideration. Furthermore, Carlin has failed to submit evidence demonstrating that the Note was fully funded.

Issues of fact necessitating credibility determinations are clearly appropriate for resolution at a trial and not summary judgment (*Gaspari v Sadeh*, 61 AD3d 405 [1st Dept 2009]; *Abco Refrigeration Supply Corp. v T.G.S. Corner Enterprises, Inc.*, 161 AD2d 414 [1st Dept 1990] [completion of discovery warranted when

validity of the note is challenged}). Carlin has failed to demonstrate that the Court overlooked any facts or misapprehended any laws to warrant reargument of his motion for summary judgment.


Accordingly, it is

ORDERED that the plaintiff Martin Carlin's motion for leave to reargue his motion for summary judgment is denied in its entirety, and it is further

ORDERED that the parties are directed to continue with discovery.

This constitutes the decision and order of the Court.

Dated: October 6, 2009



J.S.C.
HON. CHARLES E. RAMOS

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