

American Reliable Ins. Co. v Evangelista

2009 NY Slip Op 32712(U)

October 19, 2009

Supreme Court, Suffolk County

Docket Number: 11999-08

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

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AMERICAN RELIABLE INSURANCE COMPANY and
SURETY CORPORATION OF AMERICA NEW YORK,
INC.

Plaintiffs,

-against-

THOMAS J. EVANGELISTA and FLORENCE J.
EVANGELISTA,

Defendants.

-----x

CALENDAR DATE: May 13, 2009
MNEMONIC: Mot D; XMD.

PLTF'S/PET'S ATTORNEY:

Dustin Bowman, Esq.
125-10 Queens Blvd.
Kew Gardens, NY 11415

DEFT'S/RESP ATTORNEY:

Christopher J. Cassar, P.C.
Atty for Florence Evangelista
13 E. Carver St.
Huntington, NY 11743

Upon the following papers numbered 1 to 32 read on this motion for summary judgment ;
Notice of Motion/Order to Show Cause and supporting papers 1-19 ; Notice of Cross-Motion and
supporting papers 20-29 ; Answering Affidavits and supporting papers 30-32 ; Replying
Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the plaintiffs, American Reliable Insurance Company and Surety Corporation of America New York, Inc. (hereinafter Surety), for a default judgment pursuant to CPLR §3215 as to the non-answering defendant, Thomas J. Evangelista; partial summary judgment pursuant to CPLR §3212 as to defendant, Florence J. Evangelista on a confession of judgment and contingent promissory note in the amount of \$100,000 executed by both defendants and to amend its complaint to address a typographical error in which the complaint alleges the confession of judgment and promissory note were executed in 2007 when it should have read 2004 and to amend the addendum clause to increase the damages; and the cross-motion of the defendant Florence J. Evangelista to disqualify Dustin Bowman, Esq., Surety's counsel (hereinafter Bowman) for a conflict of interest, which appears to have been withdrawn, at oral argument, are hereby decided as follows.

Surety entered into a contract, dated May 7, 2003, with the defendant, Thomas J. Evangelista, d/b/a All City Inc. Bail Bonds as an agent in New York for soliciting and executing bail bonds. This agreement also listed both Thomas J. Evangelista and Florence J. Evangelista as "agent indemnitors" and was signed by both Thomas J. Evangelista and Florence J. Evangelista. Surety alleges that the defendants breached the agreement, inter alia, by failing to sufficiently collateralize the bail bonds and the parties reached a settlement wherein, on January 14, 2004, the two defendants executed a confession of judgment in the amount of \$100,000.00 and an accompanying contingent promissory note in the amount of \$100,000.00 signed by both Thomas J. Evangelista and Florence J. Evangelista which

became due and payable upon a "default in covering any forfeiture of bond". Surety alleges the defendants defaulted on December 16, 2007 wherein thirteen (13) forfeitures amounting to \$126,000 were open along with five judgments in the amount of \$88,000. As alleged in its complaint, Surety seeks enforcement under the terms of the note and the confession of judgment and damages in excess of \$820,000. The defendant Thomas J. Evangelista has not appeared or answered the complaint and is in default. The defendant Florence J. Evangelista has appeared.

Surety now moves for a default judgment pursuant to CPLR §3215 as against Thomas J. Evangelista and partial summary judgment pursuant to CPLR §3212 as against Florence J. Evangelista as well as leave to amend its complaint as indicated above as well as an increase in its claim of damages. Florence J. Evangelista opposes the requested relief and cross-moves for an order disqualifying Bowman for conflict of interest. Surety opposes this requested relief.

For the following reasons, Surety's motion for a default judgment pursuant to CPLR §3215 as against Thomas J. Evangelista is granted without opposition in its entirety and Surety is awarded judgment as against him on the issue of liability and an inquest on the issue of assessment of damages will be held, since damages are not liquidated, after the trial of the severed action as to the co-defendant Florence J. Evangelista. Surety's motion for summary judgment pursuant to CPLR §3212 on its complaint as against Florence J. Evangelista is denied as there are numerous issues of fact requiring a trial. The cross-motion by Florence J. Evangelista seeking to disqualify Bowman for alleged conflict of interest is denied. Surety's additional requested relief for leave of Court to amend its complaint to address a typographical error in the complaint and increase its claim of damages is granted. Surety is directed to serve an amended complaint within twenty (20) days of service of a copy of this order.

Surety's motion for a default judgment as against Thomas J. Evangelista is unopposed. The proof and documentation submitted are sufficient to satisfy the requirements of CPLR §3215(f). **Muhlhahn v. Triple Cee Bar and Restaurant Supply Co.**, 122 AD2d 996, 521 NYS2d 146 (3rd Dept. 1987). Surety is directed to serve a copy of this Court's order upon all parties, by certified mail, return receipt requested, within thirty (30) days of receipt of a copy of this order.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. **Elzer v. Nassau County**, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); **Steven v. Parker**, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); **Gaeta v. New York News, Inc.**, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in **Sillman v. Twentieth Century Fox**, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*DiMenna & Sons v. City of New York*, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App. Div. 1019), or where the issue is `arguable' (*Barnett v. Jacobs*, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727)."

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, *Thomas v. Drake*, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. *S.J. Capelin Assoc., v. Globe*, 34 NY2d 338, 357 NYS2d 478 (1974). In this case, Thomas J. Evangelista is both the owner of All City Inc. Bail Bonds and an agent of Surety and sold All City Inc. Bail Bonds on August 8, 2007 apparently with the permission of Surety as the parties entered into an assignment of the proceeds of the sale to Surety. Surety's action as against Florence J. Evangelista is merely as a guarantor of the corporate debt. However, as a result of marital discord, Florence J. Evangelista alleges that she separated from her husband, Thomas J. Evangelista, that she was unaware of a proposed sale or assignment of the proceeds of the sale to Surety in satisfaction of debts of co-defendant Thomas J. Evangelista and that she was not notified of a failure to perform, a default on the debt or notices of monies due and owing. Since the Court must consider the facts in their most favorable light to the defendant Florence J. Evangelista, sufficient issues of fact have been identified to warrant denial of summary disposition.

Surety's request for summary disposition as against the co-defendant Florence J. Evangelista is denied. After looking at the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [*Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact that warrant denial of summary judgment and require a trial. Florence J. Evangelista alleges in her papers that she and Thomas J. Evangelista were separated in May 2005 and that she was excluded from any contact with All City, Inc. Bail Bonds and claims she was not a principal or agent with it but merely was an indemnitor or obligor under the contract of May 7, 2003. She contests the validity of a copy of the confession of judgment of January 14, 2004 and raises issues of fact as to the validity and whereabouts of the original. In particular, she points out that on August 8, 2007 without her participation, knowledge or consent, there was an assignment of the proceeds of All City, Inc. Bail Bonds in an asset purchase agreement wherein Thomas J. Evangelista acknowledged he was the principal of All City, Inc. Bail Bonds, that there were internal thefts by employees and financial considerations and that he agreed to the sale of All City, Inc. Bail Bonds to a new entity, Affordable Bail Bonds, Inc. and this asset purchase agreement was entered with the consent of Surety. Florence J. Evangelista argues that the terms of this sale with the consent of Surety by her estranged husband Thomas J. Evangelista for \$1,000,000 to Affordable Bail

Bonds, Inc. raises many issues about the sale and the amounts both collected and owed due to employee theft and the basis upon which she is being held liable on a contingent promissory note. The fact that the defendant Thomas J. Evangelista is or was an employee of Affordable Bail Bonds, Inc. supports the argument for discovery and that this motion is premature.

Further, the confession of judgment itself raises additional issues of fact inasmuch as Surety does not have the original confession of judgment and seeks to hold the co-defendant Florence J. Evangelista liable with only an unfiled copy of the original confession of judgment. Also the confession of judgment was never filed pursuant to CPLR §3218 and there are issues raised about satisfaction since the original confession of judgment is no longer available. Professor David D. Siegel in his commentaries to CPLR §3218 on confessions of judgment noted that "it is well established, the court reminds us in **Matter of Boudreau**, Surr.Ct, Richmond County (2006 NY Slip op 52022[U] (Oct. 24, 2006) that confessions of judgment are always closely scrutinized and that courts should adopt a liberal attitude towards vacating a judgment of confession." CPLR §3218:16, Vacating the Confessed Judgment. While there are a paucity of cases dealing with this issue, the Court in **Scheckter v. Ryan**, 161 AD2d 344, 555 NYS2d 99 (1st Dept. 1990) reminds us that "sharply contested issues of fact should not be resolved upon affidavits, but rather by trial in a plenary action."

Finally, Florence J. Evangelista argues that discovery is still outstanding and depositions have not been conducted. In particular, she claims that there is another lawsuit involving the same or similar allegations about Thomas J. Evangelista's mishandling and/or secreting collateral used to secure bail bonds issued. Where facts essential to justify opposition to this motion for summary judgment are exclusively within the knowledge of Thomas J. Evangelista and Florence J. Evangelista did not have reasonable opportunity for disclosure prior to Surety's motion for summary judgment, the motion should be denied. See, CPLR §3212 [f]; **Ramos v DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH**, 37 AD3d 802, 830 NYS2d 769 (2nd Dept 2007); **Stevens v. Grody**, 297 AD2d 372, 746 NYS2d 510 (2nd Dept. 2002); **Campbell v. City of New York**, 220 AD2d 476, 631 NYS2d 932 (2nd Dept. 1995); **Baron v. Incorporated Village of Freeport**, 143 AD2d 792, 533 NYS2d 143 (2nd Dept. 1988). Courts have on many occasions cautioned litigants against the rush to dispositive motions where discovery has not been completed as it wastes judicial time and resources better used when a complete record is presented to the Court and the Courts have made clear that successive motions for summary judgment should be discouraged in the absence of newly discovered evidence. **Ralston Purina Company v. Arthur G. McKee & Company**, 174 AD2d 1060, 572 NYS2d 125 (4th Dept. 1991).

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. **VanNoy v. Corinth Central School District**, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985).

Accordingly, Surety's motion for summary judgment on its complaint pursuant to CPLR §3212 as against co-defendant Florence J. Evangelista is denied.

Florence J. Evangelista also cross-moves seeking to disqualify Bowman because he represents Surety in an additional action under index No. 10488-08 which Surety has brought against the defendants Persinger d/b/a All States Bail Bonds for similar charges of not properly collateralizing bail bonds. The Court's notes from the oral argument of this motion that Florence J. Evangelista's counsel withdrew the cross-motion at oral argument but to the extent that the cross-motion was not withdrawn, the motion is denied.

In ***Lopez v. Precision Papers, Inc.***, 99 AD2d 507, 470 NYS2d 678 (2nd Dept. 1984) the Court stated:

" Balanced against [a party's] interest in retaining counsel of their own personal choice is the ...[adverse party's]...right to be free of apprehension that its interests will be prejudiced in consequence of the prior association..."

Bowman represents the interests of Surety and did not represent the co-defendant Thomas J. Evangelista in an action. In ***Jamaica Public Service Co. V. AIU Insurance Co.***, 92 NY2d 631, 684 NYS2d 459 (1998) the Court of Appeals in addressing the issue of attorney disqualification provided a three (3) prong test that (1) an attorney-client relationship must have existed between the moving party and opposing counsel; (2) a substantial relationship exists or existed; and (3) that the interests of the present client and the former client were material and adverse. The three (3) pronged test for disqualification has not been met. Further, there has been no showing that Bowman "represented another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" Code of Professional Responsibility DR 5-108(a)(1); 22 NYCRR 1200.27(a). Bowman representation of Surety's interests does not translate into representation of Thomas J. Evangelista because their interests were similarly protected in a related case. The motion to disqualify Bowman, Surety's counsel, is denied.

The foregoing constitutes the decision of the Court.

Dated: October 19, 2009



J.S.C.