

Singotiko v Kenealy

2010 NY Slip Op 30167(U)

January 20, 2010

Supreme Court, Nassau County

Docket Number: 14880/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JACQUELINE SINGOTIKO,

Plaintiff,

- against -

J. BRADFORD KENEALY,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 14880/09

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Responent's	_____

The plaintiff moves pursuant to CPLR 3213 directing the entry of judgment for the plaintiff in the amount of \$247,733.34 with interest on two promissory notes on the ground this action is based upon an instrument for the payment of money only which is now due and payable, all costs and disbursements of this action, including but not limited to attorney's fees. The defendant opposes this motion on the ground the two notes which form the basis of the plaintiff's causes of action are for amounts more than offset by debts due to the defendant from the plaintiff. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to this motion.

This motion is supported by the plaintiff's July 16, 2009 affidavit, the plaintiff counsel's July 16, 2009 supporting affirmation and November 11, 2009 reply affirmation together with other supporting papers. The plaintiff's counsel initially points to the plaintiff's July 16, 2009 affidavit; states the plaintiff manifestly met the burden of establishing the defendant executed the two promissory notes, to wit October 7, 2005 and November 10, 2005, and the defendant defaulted in making payment. The plaintiff states she is the holder of the October 7, 2005 and November 10, 2005 two promissory notes which detail the terms regarding payments and interest. The plaintiff's attorney contends there is no triable issue of fact. The plaintiff states the defendant continued to make interest payments under both instruments until August 1, 2007, however the defendant ceased payment despite due demand by the plaintiff. The plaintiff submits the parties did not enter into a modification agreement nor other arrangement which impacted the express obligation to pay under both promissory notes.

The defense opposition is submitted by the defendant's November 4, 2009 affidavit together with other opposition papers. The defendant asserts the plaintiff is a licensed real estate broker, who routinely purchased and sold financially distressed property, and the defendant lent money to the plaintiff on many properties for development by the plaintiff for resale. The defendant claims these loans were based upon an interest rate of 12% per annum plus three points. The defendant points out the defendant is the sole member of two limited liability companies, to wit Celtic Ventures,

LLC and Londonderry Holdings, LLC, doing businesses for the sale and purchase of real property and lending money to third persons who were also engaged in the development for sale of real property primarily located on Long Island. The defendant maintains Celtic Ventures, LLC and Londonderry Holdings, LLC assigned certain contracts between Celtic Ventures, LLC and the plaintiff to the defendant. The defendant points to The defendant contends summary judgment is only appropriate where there are genuine material issues of fact in dispute. The defendant provides deals with respect to several specific properties to support the defense position regarding the assertion the plaintiff failed to credit the defendant with certain payments made to the plaintiff on account of the loans the plaintiff claims are due to the plaintiff. The defendant avers discovery is necessary because of the plaintiff's exclusive knowledge of how the plaintiff reported income or failed to report it on income tax returns. The defendant contends the plaintiff should be required to produce 2005 and 2006 income tax returns reflecting those payments, and the payment set forth in the 2006 form 1099. The defendant asserts the plaintiff is a debtor rather than a creditor for a principal of \$321,183.52, and if plaintiff's \$247,733.34 claim is accepted as true, which the defendant disputes, the plaintiff owes the defendant \$83,450.18 exclusive of interest. The defendant claims the plaintiff instructed the defendant on October 7, 2005, to make a \$13,239.49 payment which represented a return of principal on the note, and the plaintiff instructed the defendant on January 19, 2007, to make a \$10,000.00 payment of principal by a check to Kensington

Realty Corp., which the defendant states is an entity owned or controlled by the plaintiff. The defendant notes the plaintiff concedes in the plaintiff's July 16, 2009 affidavit, interest payments were made past the periods for the two payments of interest, however the plaintiff does not appear to give any credit for the payments of principal. The defendant notes the plaintiff also observes the plaintiff's July 16, 2009 affidavit fails to detail the date and amount of the payments of interest where the plaintiff concedes payment. The defendant argues it is impossible to know whether the basis of the plaintiff's calculations correctly reflect those interest payments. The defendant further points to other specific quarterly interest payments by check by the defendant to the plaintiff. The defendant alleges making verbal demands of the plaintiff for repayment of the sums due to the plaintiff as set forth in spread sheets, which the defendant provided to the plaintiff, but the plaintiff did not pay, and instead commenced improper debt collection. The defendant avers there are sufficient issues of fact which warrant a denial of this motion, and the defendant should be given the opportunity to file an answer, and to assert counterclaims against the plaintiff for the money due to the defendant including any reasonable attorney's fees concerning the amount due for the collection related to certain premises which the plaintiff agreed, in writing to pay the defendant. The defendant notes the notice of motion is unsigned, and believes the unsigned notice of motion violates 22 NYCRR 130-1.1-a (a), so without a timely cure of this defect the Court can strike the notice of motion.

The plaintiff's counsel replies to the defense opposition, and states the motion must be granted because the defendant fails to raise a triable issue of fact. The plaintiff's counsel notes the defendant does not dispute the validity of both promissory notes. The plaintiff's counsel states the defense counterclaims pertaining to certain premises are independent defenses claims wholly unrelated to the plaintiff's underlying cause of action, and do not constitute a valid defense to the plaintiff's claims. The plaintiff's counsel maintains, without conceding a foundation for the defense proposed counterclaims, the defendant must assert those claims in a separate action.

CPLR 3213 provides:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

CPLR 3212 is silent on whether a defendant can counterclaim in a motion for accelerated judgment in lieu of complaint.

The Second Department holds:

A plaintiff moving for summary judgment in lieu of complaint pursuant to CPLR 3213 based on a promissory note establishes prima facie entitlement to judgment as a matter of law by submitting proof of the defendant's execution of the note and the defendant's default in making payments pursuant to the note (*see Two Lincoln Advisory Servs. v Shields*, 293 AD2d 740, 741 [2002]; *A. Bella Food Corp. v Luigi's Italian Deli*, 243 AD2d 592 [1997]). Once the plaintiff establishes its prima facie entitlement to judgment as a matter of law, the burden shifts to the defendant to establish, by admissible evidence, "the existence of a triable issue with respect to a bona fide defense" (*Brennan v Shapiro*, 12 AD3d 547, 549 [2004], quoting *Colonial Commercial Corp. v Breskel Assoc.*, 238 AD2d 539 [1997]) *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708, 709-710, 870 N.Y.S.2d 395 [2nd Dept., 2008]; *see also Gelmin v. Sequa Capital Corp.*, 269 A.D.2d 492, 707 N.Y.S.2d 108 [2nd Dept., 2000].

The First Department holds:

It is well established that an unconditional guarantee such as the one involved here is an instrument for the payment of money only within the meaning of CPLR 3213. (*Manufacturers Hanover Trust Company v. Green*, 95 A.D.2d 737, 464 N.Y.S.2d 474). Consequently, plaintiff's failure to attach copies of the underlying obligations, consisting of several promissory notes, was not fatal to plaintiff's motion for summary judgment in lieu of complaint. In that regard, it was sufficient for plaintiff to submit the instrument sued upon along with the affidavit of nonpayment. (*See Kornfeld v. NRX Technologies, Inc.*, 93 A.D.2d 772, 461 N.Y.S.2d 342, aff'd 62 N.Y.2d 686, 476 N.Y.S.2d 523, 465 N.E.2d 30; *Council Commerce Corporation v. Paschalides*, 92 A.D.2d 579, 459 N.Y.S.2d 463). Moreover, defendant does not dispute the clear documentary evidence. The unsupported allegations contained in his affidavit in opposition certainly do not raise any defenses such as can defeat the motion for summary judgment *European American Bank & Trust Co. v. Schirripa*, 108 A.D.2d 684, 684-685, 485 N.Y.S.2d 763 [1st Dept., 1985].

The Second Department also holds

“[I]f defendant’s claim is not as clear and liquidated as one based on a judgment or instrument, it should not be interposable in response to a [CPLR] 3213 motion-action” (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3213:17, at 842). There is an exception to this general rule where it appears that the transactions upon which the counterclaim is based are inseparable from and may constitute a defense to the main claim (*see, e.g., Lackmann Food Serv. v. E & S Vending Co.*, 125 AD2d 366; *Beninati v. Hanley*, 95 AD2d 816). However, even where the proposed counterclaim arises out of the “same general transaction” but would not constitute a defense to the main claim, the plaintiff should not be deprived of his right to summary judgment on the note (*see, Logan v. Williamson & Co.*, 64 AD2d 466, 470; *see also, Maglich v. Saxe, Bacon & Bolan*, 97 AD2d 19, 23-24) *Harris v. Miller*, 136 A.D.2d 603, 523 N.Y.S.2d 586 [2nd Dept., 1988].

Here, the proposed counterclaims by this defendant do not appear to spring up from the same general transactions, and the proposed counterclaims do not constitute defenses to the plaintiff’s claims, hence the plaintiff should not be deprived of the right to accelerated judgment under CPLR 3213 on both notes. The Court finds the plaintiff has established a *prima facie* entitlement to judgment as a matter of law. In opposition, the defendant has not shown the existence of a triable issue with respect to a bona fide defense. The issue of reasonable attorney’s fees with respect to the plaintiff’s contentions is not addressed in the promissory notes, so the Court does not award this request.

22 NYCRR 130-1.1-a (a) provides:

Every pleading, written motion, and other paper, served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party.

Here, the signature omission pointed out by the defense was promptly corrected by plaintiff's counsel.

It is ORDERED that a summary judgment is granted in lieu of a complaint against the defendant. The plaintiff has judgment against the defendant for \$247,733.34, with interest from August 1, 2007, plus the costs and disbursements. This decision shall constitute the order and judgment of the Court. The Clerk is directed to enter judgment pursuant to CPLR 5016 upon submission of a proposed judgment which complies with the mandates of CPLR 5018.

So ordered.

Dated: **January 20, 2010**

ENTER:



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED
JAN 25 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE