

Block v McCaffree

2010 NY Slip Op 31059(U)

April 20, 2010

Supreme Court, Nassau County

Docket Number: 001684-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
ALLAN HOWARD BLOCK,

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Plaintiff,

-against-

**Index No: 001684-09
Motion Seq. Nos: 2 & 3
Submission Date: 3/2/10**

BENEDICT BRADFORD MCCAFFREE,

Defendant.

-----x

The following papers have been read on these motions:

- Notice of Motion, Amended Affirmation in Support and Exhibits.....x**
- Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits....x**
- Plaintiff's Memorandum of Law in Support/Opposition.....x**
- Reply to Cross Motion.....x**
- Reply Affirmation in Further Support of Cross Motion and Exhibits.....x**

This matter is before the Court for decision on 1) the motion filed by Defendant Benedict Bradford McCaffree ("McCaffree" or "Defendant") on January 13, 2010, and 2) the cross motion filed by Plaintiff Allan Howard Block ("Block" or "Plaintiff") on February 2, 2010,¹ both of which were submitted on March 2, 2010. For the reasons set forth below, the Court 1) denies Defendant's motion in its entirety; and 2) grants Plaintiff's cross motion in part and denies it in part in that the Court a) grants Plaintiff's cross motion to dismiss the sixth and seventh affirmative defenses; and b) otherwise denies the cross motion.

¹ In his cross motion, Plaintiff makes reference to his pending Motion for Default Judgment. The Court denied that motion (motion sequence number 1) on the record on March 10, 2010.

BACKGROUND

A. Relief Sought

Defendant moves for an Order 1) dismissing all aspects of Plaintiff's action that address Okland Holdings; 2) dismissing all aspects of Plaintiff's action that address the Block Loan; and 3) dismissing all remaining portions of Plaintiff's suit with prejudice or, in the alternative, granting summary judgment for Defendant regarding the terms of the applicable promissory note ("Note"). Plaintiff opposes Defendant's motion.

Plaintiff moves for an Order, pursuant to CPLR § 3211(b), dismissing the Second, Third, Sixth and Seventh Affirmative Defenses in the Amended Answer ("Answer") dated December 12, 2009. Defendant opposes Plaintiff's motion.

B. The Parties' History

The Verified Amended Complaint ("Complaint") (Ex. A to P's motion) alleges as follows:

Plaintiff and Defendant were the sole principals, directors and managing members of Okland Holdings, LLC, d/b/a MacLean Services ("Okland"), a limited liability company.² Plaintiff and Defendant became jointly, severally and personally liable for certain debts to creditors including the State of New York ("New York"), Banco Popular, and the United States Internal Revenue Service ("Joint Debt"). Included in the Joint Debt was the sum of \$310,464.00 in New York Sales Tax ("Sales Tax Debt").

On February 9, 2006, Plaintiff refinanced the home that was his primary residence, located at One Kathy Drive, Muttontown, New York ("Plaintiff's Residence"), and paid off the Sales Tax Debt. Plaintiff alleges that Defendant is liable to Plaintiff for one-half of the Sales Tax Debt.

On or about March 10, 2007, Plaintiff and Defendant executed a promissory note ("Note") to satisfy and resolve their obligations relative to the Joint Debt which was "unliquidated" (Complaint at ¶ 11) as a result of the execution of the Note. The Note required Plaintiff and Defendant to sell the real property that each owned and satisfy the Joint Debt on an equally proportional basis. The Note further provided that whichever party sold his property

² Although the Complaint alleges that the spelling of the LLC is "Oakland," the correct spelling is "Okland" as reflected in relevant documentation including the Operating Agreement.

first to satisfy the Joint Debt would be compensated by the other party for one-half of the value of the Joint Debt paid by the first party.

Plaintiff sold his property first and at the closing on his Residence paid \$324,700.25 to satisfy a loan with Banco Popular for which both parties were liable as guarantors. Plaintiff alleges that he "paid an amount of the Joint Debt to others totaling \$635,165.34" (Complaint at ¶ 20). Plaintiff alleges that, "[p]ursuant to the terms of the Note and other legal obligations of Defendant, on March 14, 2007 Defendant owed Plaintiff one-half of the Joint Debt, totaling \$317,582.67" (Complaint at ¶ 21). On or about October 2, 2008, Defendant paid Plaintiff the sum of \$100,000 towards the Joint Debt. Plaintiff alleges that Defendant still owes Plaintiff the sum of \$217,582.67 which he has not paid Plaintiff.

The Complaint contains three causes of action: 1) breach of fiduciary duty for which Plaintiff seeks damages in the sum of \$870,330.68, consisting of compensatory damages in the sum of \$217,582.67 and punitive damages of \$652,748.01, 2) breach of contract, specifically the Note, for which Plaintiff seeks compensatory damages of \$217,582.67 and counsel fees, and 3) *quantum meruit* for which Plaintiff seeks compensatory damages of \$217,582.67.

In his Answer (Ex. B to Plaintiff's motion), Defendant disputes many of the allegations in the Complaint and refers to certain documentary evidence in support of his defenses, specifically 1) the parties' Operating Agreement, 2) a confession of judgment ("Confession of Judgment") in the sum of \$309,000 (Ex. 2A to D's motion) that Okland signed in connection with the portion of New York Sales Tax debt that Plaintiff liquidated upon the refinancing of his Residence ("Block Loan Judgment"), 3) the contract of sale ("Contract of Sale") that the parties executed on or about March 31, 2006 in connection with their sale of Okland, and 4) the Note.

In his Answer, Defendant asserts eight defenses: 1) Plaintiff failed to state a cause of action for breach of contract; 2) Plaintiff is collaterally estopped from pursuing the instant action; 3) Plaintiff has no privity with Defendant; 4) Defendant has no fiduciary relationship with Plaintiff; 5) Plaintiff breached his fiduciary duty to Okland; 6) Defendant complied with the terms of the Note; 7) Block is required to arbitrate this dispute; and 8) Block has no valid *quantum meruit* claim.

Pursuant to the Contract of Sale (Ex. 2B to D's motion), Defendant, who is an attorney, and Plaintiff conveyed Okland and their respective interests in Okland to Vincente Garcia and

Edward Pedrero, for the “base sum” of \$4,000.00. Section IV of the Contract of Sale, titled “Mutual Disclosures,” included the following information about Okland: 1) it had a negative worth and little value apart from its Service Contracts; and 2) its debts exceeded \$1,889,683, due in part to a sales tax arrearage owed to the New York Department of Taxation and Finance. The Contract of Sale also contained an arbitration clause at Section VIII, paragraph (e) which provided, *inter alia*, that “any dispute or difference between the parties hereto arising out of or relating to the Agreement shall be finally settled by arbitration...”

After the Okland sale, certain Okland debts for which both Plaintiff and Defendant were jointly and personally liable were still outstanding and unpaid, including: (1) a New York State tax liability of \$310,464.99, and (2) a \$309,000.00 debt owed to Banco Popular which had been collateralized and secured by the parties’ personal residences. Additionally, the State of New York had placed certain liens on Plaintiff’s home as a consequence of the tax debts that were due and owing.

The \$309,000.00 Confession of Judgment, which lists Plaintiff’s wife as sole plaintiff, recites that the parties had entered into a binding Promissory Note dated December 9, 2005. The Confession of Judgment further provides that Okland “expressly authorizes the Plaintiff [Amy Ellen Block] to file the current Confession of Judgment in New York County.” Notably, Defendant was not a party to the Confession of Judgment which, Plaintiff affirms, “contain[s] no waiver or satisfaction regarding McCaffree or Okland” (Block Aff. at ¶ 9), suggesting that it remains unpaid.

Although Plaintiff does not elaborate upon the foregoing tax loan/judgment arrangement, Defendant alleges that in December of 2005, he and Plaintiff had instructed their accountants to list the tax payment made by Plaintiff “on the Company books” as a loan to Okland (A. Ans., ¶¶ 33-36). The Confession of Judgment was allegedly proposed by Plaintiff’s attorney and was intended to insure that the Block Loan would be first in time before any other judgment could be entered against Okland, in consideration of the fact that a federal action had been commenced against Okland by a local Union. According to Defendant, Plaintiff received undescribed tax benefits in 2007 because of the loan, and will continue to receive benefits in future tax filings.

In March of 2007, the parties executed the Note which was to govern the precise manner in which existing Okland debts would be discharged. The Note refers to debts that were

“personally guaranteed or collateralized” by the parties as Okland’s former principals, and/or debts which could “otherwise bind [them] through the operation of law” (Note at p. 1).

The Note lists various debts totaling \$401,800, including a \$309,000.00 joint debt attributed to the “Banco Popular Loan” (Note at p.1). The previously discharged State tax debt is not, however, included as an enumerated liability although there is a reference to a “NY Sales Tax Levy” in the sum of \$29,000 (Note at p.1).

In an effort to resolve their debts expeditiously, the parties agreed to sell their respective residences and then share and allocate the debt. Section 2(d) of the Note states that “[t]he purpose of the current Note is to ensure that Block and McCaffree shall each have borne half of the enumerated debt.” Paragraph 3 of the Note provides that the first of the parties to sell his property, designated the “Beneficiary,” shall have the right upon the extinguishing of the Debt to file a mortgage, in a designated form purportedly attached as Attachment A, against the property of the other party before the sale of his property in an amount equal to the Note Amount, representing half of the debt. Paragraph 4 of the Note provides, *inter alia*, that “this Note and Mortgage comprise the entire agreement between the parties relating to the rights herein granted” and “completely supersedes any and all prior written or oral agreement and representations.” Pursuant to paragraph 1(b) of the Note, upon the sale of the first property and extinguishing of the Banco Popular Loan debt, the second party would immediately be bound by the terms of the Note.

Although there is no Attachment “A” annexed to the Note representing the form of the mortgage to be filed, the record does contain an already executed, \$100,000.00 Mortgage Note (“Mortgage Note”) (Ex. 2D to D’s motion) encumbering Defendant’s residence, which bears the same date as the underlying Note, March 10, 2007. The Mortgage Note recites, *inter alia*, that: (1) McCaffree promised to pay Block the sum of \$100,000.00; and (2) “[a]dditionally, the Maker [McCaffree] also promises to pay the Holder [Block] such further monies as will make the Holder’s contribution to the elimination of the enumerated debt set forth in the Promissory Note no more than half of the total debt.”

Within days after the Note was executed, Plaintiff sold his family home and used the proceeds to pay off the parties’ Banco Popular debt in the principal amount of \$324,700.25, thereby allegedly triggering Defendant’s duty under the Note to reimburse Plaintiff for one half

of that sum. Plaintiff alleges that, although he obtained a mortgage on Defendant's home pursuant to the Note, Defendant declined to execute a mortgage in the full amount he owed to Plaintiff.

In October of 2008, Defendant sold his home and a satisfaction ("Satisfaction") (Ex. 2-E to D's motion) of the March, 2007 mortgage was filed. Plaintiff alleges that the Satisfaction related solely to the mortgage amount and did not discharge Defendant's full debt under the parties' 2007 Note. The Satisfaction states in part that Block "does hereby certify that [the subject, \$100,000.00 mortgage] Is Paid," but then recites that "[t]his Satisfaction of Mortgage is limited to the above referenced Mortgage only." Plaintiff alleges that, while Defendant did pay him the sum of \$100,000.00 at the time of the house sale, he has refused to pay the balance of the joint Note debt due at that time, which is \$217,582.67.

C. The Parties' Positions

Defendant moves to dismiss the Complaint, styling his application as, *inter alia*, one to dismiss "all portions of Plaintiffs suit touching on Okland Holdings" and/or "the *res* of the Block Loan" (D's Notice of Motion). Although Defendant does not identify the statutory basis for his motion, the Court will assume that he is moving in the first instance pursuant to CPLR § 3211, as he refers to summary judgment relief as an alternative remedy.

Plaintiff opposes Defendant's motion and cross moves pursuant to CPLR § 3211(b) for dismissal of the second, third, sixth and seventh affirmative defenses which sound in, *inter alia*, collateral estoppel, lack of privity, and arbitration.

RULING OF THE COURT

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Dismissal Standards

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

C. Sufficiency of Complaint

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The elements of a claim for breach of fiduciary duty are: (1) existence of a fiduciary relationship, (2) misconduct, and (3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

To state a claim in *quantum meruit*, a claimant must establish 1) the performance of the services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) an expectation of compensation therefor, and 4) the reasonable value of the services. *Geraldi v. Melamid*, 212 A.D.2d 575, 576 (2d Dept. 1995). Where an express agreement exists between the parties, the rights and liabilities, as between them, should be determined based on a breach of

contract theory. *Apfel v. Prudential-Bache Sec., Inc.*, 81 N.Y.2d 470, 479 (1993). Therefore, if a service is required by the terms of an express contract, there can be no recovery in *quantum meruit*. *Mary Matthews Interiors, Inc. v. Levis*, 208 A.D.2d 504, 506 (2nd Dept. 1994).

The Court denies that branch of the Defendant's motion which is to dismiss based upon the "Block Loan" and the related, 2005 Okland Confession of Judgment based on its conclusion that the Complaint sufficiently alleges that the parties entered into an agreement pursuant to which each would pay one-half of Okland's debts and that Defendant breached that agreement. Moreover, should an issue arise as to whether the written agreements of the parties satisfactorily establishes their obligations, a cause of action for *quantum meruit* might lie. Finally, because Defendant has not made an argument, much less cited any authority, to support dismissal of the claim for breach of fiduciary duty, that claim must survive at this time as well.

D. Second and Third Affirmative Defenses

Plaintiff moves to dismiss the second and third affirmative defenses, collateral estoppel and lack of privity, at least insofar as based upon the Block Loan claim and Confession of Judgment. McCaffree submits that, as the foregoing loan now exists exclusively as an Okland corporate debt reduced to judgment, Block is collaterally estopped from pursuing an individual claim as against him based on the payment.

Although the entry of an unsatisfied judgment as against Okland would not necessarily estop Block from pursuing other, nonconfessing, jointly liable obligors, *see* CPLR § 3218(d) (confession of judgment by some joint debtors not bar to action against other joint debtors), Defendant has effectively argued that the Block Loan transaction represented the parties' final resolution of the tax debt matter, as further evidenced by 1) the related Confession of Judgment entered upon Okland's consent in December of 2005, and 2) the parties' failure to include this outstanding liability among those listed in the 2007 Note. The Block Loan debt was listed as an outstanding Okland liability in Section IV of the Contract of Sale titled "Mutual Disclosures."

The Court notes that Plaintiff's opposing submissions fail to elaborate fully as to why the parties elected to deal with his advance by creating, *inter alia*, a corresponding Okland loan obligation. Nor does the record contain any contemporaneously generated documentation which addresses the seemingly gross disparity in the parties' payment contributions toward this debt. Further, while the stated and express purpose of the March 2007 Note was to ensure that the

parties contributed equally to any residual Okland debts for which the parties might be held personally and jointly liable, the state tax debt, paid exclusively by Plaintiff, has for some reason been omitted from the Note's list of outstanding obligations to be adjusted.

In light of these unresolved factual issues, which bear on the precise agreement between the parties, the Court denies Plaintiff's motion to dismiss the second and third affirmative defenses.

E. Sixth Affirmative Defense

The sixth affirmative defense avers, *inter alia*, that Defendant did not breach the terms of the Note in light of the facts that 1) Plaintiff filed the Satisfaction relating to the \$100,000.00 Mortgage Note; and 2) Defendant concededly paid Plaintiff the sum of \$100,000.00 towards his Note debt. Defendant does not, however, dispute that upon the sale of his home, Plaintiff paid approximately \$324,700.25 in order to discharge the Banco Popular debt, which had been secured and collateralized by the parties' personal residences. Nor does Defendant allege that he actually paid "such further monies" as would make Block's Banco Popular payment equal to no more "than half the total debt" (Mortgage Note, 2nd decretal ¶).

Contrary to Defendant's contentions, neither the mortgage nor the Note itself states that the \$100,000.00 payment he made would result in a complete discharge of his reimbursement duty under the Note. Further, while the Mortgage Note does obligate Defendant to pay Plaintiff the sum of \$100,000.00, the immediately following paragraph thereof also states that he was "to pay the Holder [Block] such *further* monies as will make the Holder's contribution to the elimination of the enumerated debt set forth in the Promissory Note *no more than half of the total debt*" (Mortgage Note, 2nd and 3rd Decretal ¶¶) (emphases added). Further, Plaintiff's filing of the Satisfaction does not constitute a release of Defendant's payment obligation as imposed by the Note which was to reimburse the selling party for one half of the debt amount paid. Indeed, there is a caveat in the Satisfaction which expressly provides that "[t]his Satisfaction of Mortgage is limited to the above referenced Mortgage only."

In light of the foregoing, the Court grants that branch of the Plaintiff's cross motion which seeks to strike the sixth affirmative defense.

F. Seventh Affirmative Defense

With respect to Defendant's seventh affirmative defense, based on arbitration, while

arbitration is certainly favored in New York State, *Matter of Smith Barney Shearson v. Sacharow*, 91 N.Y.2d 39, 49 (1984), a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. *Matter of Waldron (Goddess)*, 61 N.Y.2d 181, 183, quoting *Schubtex, Inc. v. Allen Snyder, Inc.*, 49 N.Y.2d 1, 6 (1979). See also *Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144 (2008), *rearg. den.*, 11 N.Y.3d 801 (2008). An agreement to arbitrate must be clear, explicit and unequivocal and must not depend upon implication or subtlety. *Matter of Waldron (Goddess)*, *supra*, at 183-184. See *Thomas Crimmins Contracting Co., Inc. v. City of New York*, 74 N.Y.2d 166, 171-172 (1989). Courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 72 (1978).

With these principles in mind, and liberally construing the defendant's arbitration defense as the Court must, *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721 (2d Dept. 2008), the Court agrees that the documentary evidence submitted belies any claim that the parties agreed to arbitrate the subject, joint-debt dispute. Significantly, there is no arbitration provision in the March 2007 Note, which is fully integrated and self-standing with respect to the issues it addresses. *Cf. Harris v. Hallberg*, 36 A.D.3d 857 (2d Dept. 2007) (parol evidence inadmissible where release was complete and integrated agreement). The parties, one of whom was an attorney, were meticulous in detailing their respective rights and obligations under the Note, referring to various contingencies in the event of a default and/or potential legal proceedings, without mentioning any duty to arbitrate. Nor is there anything in the Note which suggests that the parties intended to apply the Okland arbitration clause to the parties' 2007 Note whose purpose was to address and equitably allocate the parties' remaining Okland-based personal debts. Indeed, the Note itself states that it "completely supercedes" any and all prior agreements.

In contrast, the objective of the 2006 Okland Contract of Sale, as demonstrated by its terms, was to memorialize the sales transaction and detail the respective rights, obligations and duties of the sellers and purchasers. In this context, it is plain that the Okland arbitration provision was intended to apply to disputes between the sellers and the buyers arising out of the involved conveyance, not to internal disagreements between the two sellers relating to their own personal obligations and liabilities. Finally, while the Answer makes reference to the original,

2001 Okland Operating Agreement as allegedly requiring arbitration, Defendant does not refer to or rely upon this document in making his arbitration arguments and claims.

In light of the foregoing, the Court grants that branch of Plaintiff's cross motion which seeks to strike the seventh affirmative defense sounding in arbitration; and 2) denies the corresponding branch of the Defendant's motion to dismiss on this ground.

The Court has considered the parties' remaining contentions and concludes that they do not support an award of relief beyond that granted above.

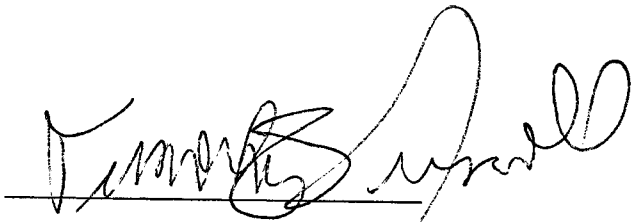
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on June 15, 2010 at 11:00 a.m.

ENTER

DATED: Mineola, NY
April 20, 2010



HON. TIMOTHY S. DRISCOLL
J.S.C.

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