

Reifler v Janey

2010 NY Slip Op 31628(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 100508/10

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling-Cohan
Lustina

PART 36

Index Number : 100508/2010
REIFLER, BRADLEY
VS.
JANEY, DERRELLE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for Summary judgment
in lieu of complaint
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1, 2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment
in lieu of complaint is granted in accordance
with the attached memorandum decision.

FILED

JUN 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/21/10

[Signature]
JUDGE DORIS LING-COHAN *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: IAS PART 36

-----X
BRADLEY REIFLER,

Plaintiff,

Index No.: 100508/10
DECISION/ORDER

-against-

DERELLE JANEY.

Defendant.

Motion Seq. No.: 001

FILED

JUN 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. DORIS LING-COHAN, J.S.C.:

In this action on a monetary instrument, plaintiff moves for summary judgment in lieu of a complaint pursuant to CPLR 3213 (motion sequence number 001). For the following reasons, this motion is granted.

BACKGROUND

Plaintiff Bradley Reifler (Reifler) and defendant Derelle Janey (Janey) are both residents of New York State. See Notice of Motion, Small Affirmation, ¶¶ 2-3. Reifler alleges that, on May 14, 2008, he lent Janey \$50,000.00 pursuant to a promissory note (the note) with a one-year maturity date - i.e., May 14, 2009. Id., ¶¶ 5-6; Exhibit A. The note contains a confession of judgment clause that states, in pertinent part, as follows:

Borrower irrevocably ... empowers any Clerk of Court ... or any attorney...to appear for the borrower in such court at any time and to confess judgment against the borrower for all or any part of the obligations hereunder and all such costs, expenses and interest together with an attorney's commission of five (5) percent of the amount so confessed. ... All confessions of judgment shall be with release of errors, waiver of appeals, without stay of execution and borrower waives all relief from any and all claims arising from this promissory note herein.

Id.; Exhibit A. Reifler alleges that Janey did not make payment on the note by the maturity date, and still has not made payment thereon. Id.; Small Affirmation, ¶ 7. As a result, Reifler alleges

that he is entitled to summary judgment against Janey for \$50,000.00, 9% interest thereon and \$5,000.00 in attorney's fees.

Janey states that, prior to the execution of the note, he and Reifler were both employed by related non-party companies, Pali Capital, Inc. and Pali Holdings, Inc. (collectively, Pali). *See* Janey Affidavit in Opposition, ¶ 6. Reifler was Pali's CEO, and Janey was Pali's Executive Vice President of Operations and Strategy. *Id.* Janey states that, before his employment with Pali began on February 5, 2007, he had been employed at another company which was then a defendant in a Federal Trade Commission (FTC) action. *Id.*, ¶ 8. Janey alleges that he, too, was named as a defendant in the FTC action in a derivative capacity, and that, as a result, he was forced to incur sizable, personal legal bills. *Id.* Janey further alleges that Reifler pressed him to take out the loan that was secured by the note in order to pay those legal bills. *Id.*, ¶¶ 9-11. However, Janey also alleges that Reifler was, at that time, engaging in a variety of illegal financial misconduct at Pali, and that Reifler's real motive in urging Janey to take the loan was to obtain leverage over him. *Id.*, ¶¶ 12-47. Janey claims that he was placed in charge of Pali's internal investigation of Reifler's purported misdeeds, and that Reifler used Janey's liability pursuant to the note, among other means, to coerce Janey to issue false reports to Pali's board. *Id.* Janey next claims that Pali's board came to believe that he was involved in Reifler's misdeeds, with the result that Pali declined to pay Janey a salary bonus in 2008. *Id.*, ¶¶ 48-55. Janey finally claims that, as a result of his non-receipt of the expected bonus, he was unable to meet his obligations under the note, and that Reifler commenced this action to punish him. *Id.*, ¶¶ 64-69. Janey has submitted a quantity of e-mail correspondence to substantiate his allegations. *Id.*; Exhibits A-L. Janey does not deny, however, that he both executed the note and

failed to make payment on it when it became due.

As previously mentioned, Reifler commenced this action on February 19, 2010 via a motion for summary judgment in lieu of a complaint. In his opposition papers, Janey raises several of what he terms “affirmative defenses,” including illegality, release, fraudulent inducement and failure of consideration. Janey also asserts that he has rights to a set-off and a hearing on the reasonableness of legal fees.

DISCUSSION

The proponent of a motion for summary judgment in lieu of a complaint on a promissory note establishes a prima facie case by demonstrating “execution, delivery, demand and failure to pay.” *Solomon v Langer*, 66 AD3d 508, 508 (1st Dept 2009), citing *Israel Discount Bank of N.Y. v 500 Fifth Ave. Assoc.*, 167 AD2d 203 (1st Dept 1990). Thereafter, the burden of proof shifts to the opposing party to come forward with evidence of the existence of triable issues of fact with respect to bona fide defenses. *See e.g. Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985), *aff’d* 67 NY2d 627 (1986). Here, Reifler has presented proof of the execution and delivery of the note. *See* Notice of Motion, Exhibits A-C. Further, Janey has acknowledged both Reifler’s demand and his own failure to pay. *See* Janey Affidavit in Opposition, ¶ 64; Exhibits M, N. As a result, Reifler has established a prima facie case that he is entitled to summary judgment on the note. The court now turns to Janey’s defenses.

In his opposition papers, Janey first claims that “the court has already found that the alleged confession of judgment contained in the note was deficient and refused to enter judgment on the note.” *Id.*, ¶ 3. However, Janey neither presents a copy of a court order that contains such

a finding, nor do the court's records reflect that such an order was ever issued. Thus, the court concludes that Janey's allegation is an unsubstantiated, conclusory statement. It is well settled that "'averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment [citations omitted].'" *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383-384 (2004). Therefore, the court rejects Janey's first opposition argument as it raises no triable issue of fact.

Janey next argues that Reifler cannot collect on the note because of illegality. *See* Defendant's Memorandum of Law, at 15-17. His evidence of such illegality consists of the e-mail correspondence between himself and Reifler that is attached to his opposition papers. *See* Janey Affidavit in Opposition, Exhibits A-L. However, as Reifler correctly points out, "[i]t is settled that 'invocation of defenses based on facts extrinsic to an instrument for the payment of money only do not preclude CPLR 3213 consideration.'" *Alard, L.L.C. v Weiss*, 1 AD3d 131, 131 (1st Dept 2003), quoting *Judarl L.L.C. v Cycletech, Inc.*, 246 AD2d 736, 737 (3d Dept 1998). Because all of Janey's proof regarding his "illegality" defense consists of just such extrinsic evidence, Janey's second opposition argument raises no triable issue of fact, and therefore it is rejected.

Janey next argues that he has been released from his payment obligation under the note. *See* Defendant's Memorandum of Law, at 17. He specifically refers to a release that he executed when he terminated his employment with Pali on September 22, 2009. *Id.* Janey does not produce a copy of this release, however, nor does he allege that it is effective as against the note, which he and Reifler executed in their personal capacities. Because Janey did not produce any evidence to support this argument, Janey has not raised a factual issues, and therefore, such

argument is rejected.

Janey's next arguments are that there was fraud in the inducement in the execution of the note, and that the note fails for lack of consideration. *Id.* at 17-19. However, it is clear that both of these defenses are "based on facts extrinsic to [the] instrument," and, as such, "do not preclude CPLR 3213 consideration." *Alard, L.L.C. v Weiss*, 1 AD3d at 131. Further, Janey fails to present evidence that Reifler misrepresented a material fact (*see Channel Master Corp. v. Aluminium Ltd.*, 4 NY2d 403 [958]); thus, Janey's fourth and fifth opposition arguments do not raise triable issues of fact.

Janey next argues that he has a right to a set-off. *See* Defendant's Memorandum of Law, at 19-20. This argument is based on the assertion that he has a valid claim against Reifler for tortious interference with business relations which he has not waived. *Id.* However, Reifler correctly points out that the note specifically states that the "borrower waives all relief from any and all claims arising from this promissory note herein." *See* Reifler Reply Affirmation, ¶ 15; Exhibit A. Because Janey clearly *has* waived his right to proceed against Reifler for tortious interference with business relations, he also clearly has no right to seek a set-off in this action pursuant to the note. Therefore, Janey's sixth opposition argument raises no triable issue of fact, and is rejected.

Finally, Janey argues that he has a right to a hearing on the reasonableness of the five percent legal fees that the note obligates him to pay. *See* Defendant's Memorandum of Law, at 20. However, in the case that Janey cites as authority, *Community Natl. Bank & Trust Co. of N.Y. v I.M.F. Trading, Inc.* (167 AD2d 193, 195 [1st Dept 1990]), the Appellate Division, First Department, specifically held that "agreements ... liquidating attorneys' fees as a percentage of

the amount to be collected, are common in promissory notes, and have never been held to disqualify a note from CPLR 3213 treatment [internal citation omitted].” Therefore, the court rejects Janey’s final opposition argument, as baseless. Accordingly, Reifler’s motion for summary judgment in lieu of complaint is granted.

DECISION

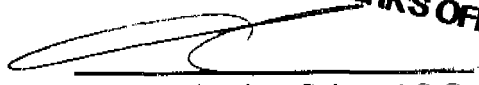
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3213, of plaintiff Bradley Reifler is granted and, upon proof of service of a copy of this order with notice of entry, the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant Derelle Janey in the amount of \$50,000.00, together with interest as prayed for allowable by law (at the rate of 9% per annum from the date of May 14, 2009), until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with a judgment for attorney’s fees in the amount of \$5,000.00, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Dated: New York, New York
June 21, 2010

FILED
JUN 29 2010
NEW YORK
COUNTY CLERK'S OFFICE


Hon. Doris Ling-Cohan, J.S.C.