

Citibank, N.A. v Ferrara
2010 NY Slip Op 31851(U)
June 24, 2010
Supreme Court, New York County
Docket Number: 108920/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 1

F

Index Number : 108920/2009

CITIBANK N.A.

vs.

FERRARA, RALPH

SEQUENCE NUMBER : 001

SUMMARY JUDGEMENT LIEU COMPLAINT

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INDEX NO. _____

MOTION DATE 11-12-09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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 the attached Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 4, 2010

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
CITIBANK, N.A.,

Index No. 108920/09

Plaintiff,

-against-

RALPH FERRARA and WOLF BLOCK LLP,

Defendants.

-----X
JOAN A. MADDEN, J.:

Plaintiff Citibank, N.A. ("Citibank") moves pursuant to CPLR 3213 for an order granting summary judgment in lieu of complaint against defendant Ralph Ferrara ("Ferrara").¹ Defendant Wolf Block, LLP ("Wolf Block") asserts cross-claims against Ferrara and seeks judgment in its favor on such claims. For the reasons set forth below, Citibank's motion for summary judgment in lieu of complaint against Ferrara is granted, and the cross-claims asserted by Wolf Block are dismissed without prejudice to assert such claims in a plenary action.

Background

Ferrara made a promissory note ("Note") in the amount of \$50,000 to Citibank on January 27, 2009. Wolf Block guaranteed the Note by a Guaranty Agreement dated February 3, 2009. The Note was made for the purpose of financing Ferrara's capital contribution as a partner of Wolf Block.

¹ The motion initially sought relief against Wolf Block but, as indicated herein, Citibank and Wolf Block agreed to settle their dispute after the motion was submitted.

On March 23, 2009, the partners of Wolf Block, voted to adopt a plan to wind down the business affairs of the law firm. Ferrara was a partner of Wolf Block until just prior to the wind down vote, withdrawing from the firm on March 13, 2009.

The Note required interest payments to be made monthly and the first payment to be made on February 28, 2009. Wolf Block paid \$24,260.00 against the principal balance on February 18, 2009, which reduced the principal balance to \$25,740.00. Citibank did not receive any interest payments by February 28, 2009, which triggered a default. Citibank notified Ferrara that he was in default on the Note on May 4, 2009. On June 1, 2009, demand was made upon Ferrara by Citibank's lawyer for payment in accordance with the Note. To date, Ferrara has not made any payments on the Note. Ferrara has ended his relationship with Wolf Block and is now a partner at another law firm. Wolf Block subsequently settled its portion of the case with Citibank for \$15,000, a sum less than the \$26,071.21 sought by Citibank in this action, consisting of \$25,740 in unpaid principal and \$331.21 in unpaid interest.

Citibank has filed a motion for summary judgment in lieu of complaint. Ferrara opposes this motion, arguing that there are triable issues of fact, including that the Note in question lacked consideration, the Note may have been satisfied by Wolf Block, and that Citibank and Wolf Block conspired to defraud him.

Wolf Block has filed three cross-claims against Ferrara. The first cross-claim alleges that it is entitled to recover the moneys it paid under the Guaranty of the Note by offsetting amounts otherwise payable to Ferrara under Wolf Block's Amended and Revised Partnership Agreement. The second cross-claim alleges that Ferrara owes Wolf Block \$91,780.00, comprised of (1) \$50,000 advanced by Wolf Block and (2)

distributions in excess of income in the amount of \$40,780, and also seeks interest, costs and attorneys' fees. The third cross-claim alleges that Ferrara breached the covenant of good faith and dealing and seeks to recover any amount paid by Wolf Block to Citibank in the event of a default judgment entered against Wolf Block, with interest and costs and attorneys' fees and the sum of \$91,780.

Discussion

CPLR 3213 provides that, "[w]hen 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." Here, there is no dispute that the Note constitutes an instrument for payment of money only for the purposes of CPLR 3213. Moreover, Citibank has established a prima facie entitlement to judgment as a matter of law by submitting the Note executed by Ferrara and by demonstrating through an affidavit of Citibank's employee that Ferrara has failed to pay the full amount under the Note despite demand for payment. See Israel Discount Bank of NY v. 500 Fifth Ave. Associates, 167 AD2d 203 (1st Dept 1990); Gateway State Bank v. Shangri-La Private Club for Women, Inc., 113 AD2d 791 (2d Dept 1985), aff'd, 67 NY2d 627 (1986). Accordingly, the burden shifts to Ferrara to demonstrate, by admissible evidence, the existence of a triable issue of fact. Id. As set forth below, Ferrara has not met this burden.

In his opposition, Ferrara argues that plaintiff's motion should not be granted because the Note lacked consideration. In support of this position, Ferrara notes that the loan proceeds went directly into Wolf Block's account when the monies should have first been credited to his checking account for subsequent payment to Wolf Block. Ferrara

alleges that the Note functioned as a direct loan to Wolf Block. Citibank argues that the Note is supported by consideration because Citibank disbursed funds for the purpose of funding Ferrara's capital contribution to Wolf Block. Citibank contends that Ferrara is not making an argument against consideration so much as he is arguing that he did not receive a good bargain by making the Note.

Consideration is defined as a benefit to the promisor or a detriment to the promisee. Holt v. Feigenbaum, 52 N.Y.2d 291, 299 (1981). Here, Ferrara, by making the Note, obtained the benefit of having funds to make his capital contribution to Wolf Block and Citibank suffered the detriment of lending Ferrara \$50,000. Ferrara's letter to Citibank that accompanied his Note, made clear that all the funds were to be ultimately credited to Wolf Block's account. Citibank's failure to credit Ferrara's account first before transferring the funds to Wolf Block does not affect the issue of consideration, i.e., the detriment suffered by Citibank and the benefit gained by Ferrara.

Furthermore, even though Ferrara did not receive the bargain he had hoped for, Citibank is entitled to recover against Ferrara. "A promisee who has incurred a specific, bargained-for legal detriment may enforce a promise against the promisor" even if the promisor gained no concrete benefit as a result of the bargain. Anand v. Wilson, 32 A.D.3d 808 (2nd Dep't 2006). Courts do not weigh the quantum of consideration and will enforce a contract when the slightest consideration supports the most onerous obligation. Mencher v. Weiss, 306 N.Y.1, 8 (1953). The inadequacy of consideration is for parties to consider when the contract has been made and not for the court to consider when the contract is sought to be enforced. Id. At the time the Note was made, there existed a real, bargained-for benefit and detriment, satisfying the requirements for consideration.

Ferrara next argues that Wolf Block may have paid the amounts due under the Note and in support of this argument, submits a letter sent to him by Wolf Block in which Wolf Block seeks reimbursement for the \$25,740 claimed by Citibank as due and owing toward the principal balance of the Note. At that time, Wolf Block had not settled its portion of the case with Citibank for \$15,000, a sum less than the amount sought by Citibank. The stipulation discontinuing the action between Wolf Block and Citibank states that “this discontinuance affects only Citibank, N.A.’s action against Wolf Block LLP and does not affect either Citibank, N.A.’s action against defendant Ralph Ferrara or Wolf Block LLP’s claims against Ralph Ferrara . . .” The Note, therefore, has not been satisfied in full as to defendant Ferrara. Wolf Block has paid a total of \$39,260 on the Note, leaving a principal balance of \$10,740, plus interest and attorney’s fees.

Ferrara also contends that Citibank and Wolf Block conspired to defraud him. In support of his position, Ferrara states that Wolf Block and Citibank were involved in a conspiracy to infuse capital into Wolf Block with minimal financial risk to Citibank. Ferrara claims that in this alleged conspiracy, Wolf Block would receive a needed infusion of cash to aid its dire financial situation and Citibank would look to Ferrara to recover, minimizing the financial risk. Ferrara also contends that his signing of the loan documents was effectively coerced as no reasonable or fully informed shareholder would voluntarily contribute capital to an enterprise on the verge of winding down. Ferrara states that he was threatened with a zero year-end distribution if he did not proceed with the Note.

Citibank counters that Ferrara has not offered any evidence to substantiate his claim of conspiracy and coercion, and that if it had known that Wolf Block would dissolve, it would be far better to not make a loan to Wolf Block at all.

Ferrara's allegations of a conspiracy between Wolf Block and Citibank to defraud him are only supported by his own affidavit, which provides no substantiation beyond speculation regarding any conspiracy to defraud him. Accordingly, this argument is insufficient to preclude the grant of summary judgment in lieu of complaint. See Seaman-Andwall Corp. v. Wright Machine Corp., 31 A.D.2d 136, 138 (1st Dep't 1968), aff'd, 29 NY2d 617 (1971)(proof tendered is fatally deficient as affidavit submitted is from attorney who is without knowledge or facts); Compare Magi Communications, Inc. v. Jac-Lu Associates, 65 A.D.2d 727, 729 (1st Dep't 1978)(defendants submitted affidavit of company president who was intimately involved in the transaction and was present when alleged misrepresentations were made); Slavin v. Victor, 168 A.D.2d 399 (1st Dep't 1990)(in alleging fraud, defendant appropriately offered the affidavit of the president of the two companies, who discovered the financial misdeeds and could speak from first-hand knowledge as to the nature of the misrepresentations).

Ferrara's request for additional discovery is also denied as Ferrara has not demonstrated that further discovery would lead to additional evidence. J.P.Morgan Chase Bank, N.A. v. Agnello, 62 A.D.3d 662 (2nd Dep't 2009)(a mere hope that discovery will yield evidence of a triable issue of fact will not prevent summary judgment); Bailey v. New York City Transit Authority, 270 A.D.2d 156 (1st Dep't 2000)(grant of summary judgment cannot be avoided by a claimed need for discovery without submission of an evidentiary basis to show that the requested discovery would lead to relevant evidence).

With respect to Wolf Block's cross claims against Ferrara, since they are based on not only the guaranty but an agreement that is "not [an] instrument for payment only," the merit of such cross claims cannot be determined in connection with with this motion for summary judgment in lieu of complaint. See Paine Webber Jackson & Curtis, Inc. v. Aronson, 115 AD2d 355, 356 (1st Dept 1985), appeal dismissed, 69 NY2d 706 (1986). Accordingly, the cross claims are dismissed without prejudice to pursuing them as claims in a plenary action.

Conclusion

In view of the above, it is

ORDERED that Citibank's motion for summary judgment in lieu of complaint is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff Citibank, N.A. and against defendant Ralph Ferrara in the amount of \$11,071.21 (consisting of \$10,740 in principal and \$331.21 in interest to June 1, 2009), together with interest at the rate of \$2.64 per day from the date June 1, 2009 until the date of entry of judgment as calculated by the Clerk, and thereafter at the statutory rate; and it is further

ORDERED that Citibank's claim for attorneys' fees, costs, and expenses is severed for trial; and it is further


ORDERED that on or before June 18, 2010, Citibank shall file with the Clerk of Trial Support (room 158) a note of issue and statement of readiness and shall pay any appropriate fees and said Clerk is directed to assign this matter to Part 11 for trial; and it is further

ORDERED that Citibank's failure to timely comply with the immediately preceding paragraph shall result in the dismissal of its claim for attorneys' fees, costs, and expenses; and it is further

ORDERED that Wolf Block's cross-claims are dismissed without prejudice to commencing a plenary action to recover on such cross-claims.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED June 24, 2010
~~May~~, 2010



J.S.C.

FILED
JUL 07 2010
NEW YORK
COUNTY CLERK'S OFFICE