

Awan v Whittle

2010 NY Slip Op 31879(U)

July 12, 2010

Supreme Court, New York County

Docket Number: 115400/2009

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____ J.S.C. Justice

PART 2

Index Number : 115400/2009

AWAN, AYAZ

VS.

WHITTLE, DANA

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JUL 16 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/12/10

LOY
LOUIS B. YORK 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 2

-----x

AYAZ AWAN

Plaintiff,

Index No. 115400/2009

-against-

DANA WHITTLE, MARK MAHERAS,
CHRISTINA KELSEY and ADRIAN SOLOMON,

Defendants.

-----x

LOUIS B. YORK, J.:

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213, Plaintiff Ayaz Awan ("Awan") requests relief against the Defendants jointly and severally for money damages. Pro se Defendants Dana Whittle, Mark Maheras, Christina Kelsey and Adrian Solomon request a continuance under CPLR § 3212(f) and cross-move for reimbursement of their payments. For the reasons below, the Court grants Plaintiff's motion and denies Defendants' cross-motion.

Defendants contracted with Plaintiff's company, New York Best Development, Inc., to have renovations performed on Defendants' residential property located at 261 West 137th Street, New York, New York 10030; Defendants intended to renovate the property in order to rent or sell it. After several months of work, Defendants informed Plaintiff that they did not have sufficient funds to complete the renovation project. Plaintiff's affidavit alleges that he agreed to lend them the funds provided that Defendants sign a Promissory Note setting forth their agreement for repayment. However, Defendants' affidavit alleges that Plaintiff refused to procure the Certificate of Occupancy unless Defendants signed the Promissory Note and Agreement. Defendants claim that Plaintiff knew that without a Certificate of Occupancy, Defendants would still be required to pay their mortgage on the unoccupied building.

On October 30, 2008, Defendants signed a Promissory Note and Agreement, where Defendants would repay Plaintiff the sum of \$73,850 jointly and severally. Defendants made payments to Plaintiff

totaling \$12,000. Defendants' affidavit alleges that they ceased making payments due to the negligent renovation work done by Plaintiff's company, much of which had to be redone, and have submitted photos and an inspection report detailing these alleged problems. Additionally, Defendants claim that Plaintiff never transferred the loaned amount to them. After Defendants refused to pay, Plaintiff filed this motion for summary judgment in lieu of complaint on October 22, 2009, based on the promissory note.

ANALYSIS

Under CPLR 3213, "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." A promissory note qualifies as an instrument for the payment of money under CPLR 3213 if the plaintiff provides evidence of the note and a defendant's default on the payments (*see* CPLR § 3213; *e.g. Machidera Inc. v. Toms*, 258 AD2d 418, 418, 685 NYS2d 719, 719 [1st Dept 1999]). As with any motion to obtain summary judgment, the burden rests with the moving party to establish its claim sufficiently to enable a court to conclude that it is entitled to judgment as a matter of law (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 2008 NY Slip Op 28069, *3 [1st Dept 2008]). If the moving party has made a prima facie showing of entitlement to such judgment, the burden shifts to the opposing party to provide evidence of material issues of fact (*see Banque Indozuez v. Pandeff*, 193 AD2d 265, 269, 603 NYS2d 300, 302 [1st Dept 1993]).

Plaintiff has met his initial burden by proffering a copy of the promissory note signed by the Defendants as well as evidence that the Defendants were in default under the terms. The burden then shifts to Defendants to establish the existence of triable issues of fact. Defendants must provide admissible evidence of "a bona fide defense against the note [or guarantee] to defeat the motion" (*see Banesto Banking Corp. v. Teitler*, 172 AD2d 469, 469, 568 NYS2d 811, 812 [1st Dept 1991]).

As bona fide defenses, Defendants assert several arguments. Among others, they allege economic duress and fraud. However, Defendants have not provided a sufficient evidentiary basis to support their contentions and have not explained their legal arguments adequately. In fact, the only legal

[* 4]

argument they raise is that the motion should be denied because Plaintiff has brought this suit as an individual and not on behalf of his company, New York Best Development. However, as Plaintiff points out, this argument has no merit because New York Best Development is not a party to the promissory note; Plaintiff is the only holder. (see *Ranger v. Thalmann*, 84 AD 341, 346, 82 NYS 846, 846 [1st Dept 1903], e.g. *Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 228-230, 413 NYS2d 141, 143-145 [Ct App 1978]). Moreover, Defendants have not cross-moved to add New York Best Development as a party or otherwise attempted to proceed against it in this or a separate action. Defendants suggest that Plaintiff's position at New York Best Department raises the issue of piercing the corporate veil, which allows courts to disregard the corporate form in order to prevent fraud and hold corporate owners liable for the corporation's obligations (see *Morris v. State Dep't of Taxation & Fin.*, 82 NY2d 135, 140-141, 603 NYS2d 807, 810-811 [Ct App 1993]). Here, too, they have not clearly laid out their argument and have not provided a sufficient factual basis. (See *Fantazia Int'l Corp. v. CPL Furs N.Y., Inc.*, 2009 NY Slip Op 8165, *29-*30, 67 AD3d 511, 512-513 [1st Dept 2009]).

In addition, Defendants argue fraud. Defendants' arguments relating to fraud also have no merit. To state a cause of action for fraudulent inducement, the claim must allege a material representation, known to be false, made with the intention of inducing reliance upon which the victim actually relies, consequently sustaining a detriment (see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 AD3d 273, 275, 798 NYS2d 14, 16 [1st Dept 2005]). Defendants assert that Plaintiff made false statements regarding the renovation and delays in obtaining the Certificate of Occupancy. However, Defendants do not provide sufficient evidence that they entered into the Promissory Note based on Plaintiff's alleged false statements. (See *Bank Leumi Trust Co. v. D'Evori Int'l, Inc.*, 163 AD2d 26, 31-32, 558 NYS2d 909, 914-915 [1st Dept 2005]).

Furthermore, Defendants' assertions of economic duress are also insufficient to defeat the motion. While the Court is not unsympathetic to the situation Defendants find themselves in, that does not change the underlying law governing contract formation which binds this Court. "Even if it be assured that Defendants' allegations established a meritorious claim that [Plaintiff] executed the promissory note

through economic duress, [Defendants] waived such claim of duress since [they] failed to promptly repudiate the promissory note and, instead, made payments due thereunder..." (see *Francis v Allain*, 21 Misc 3d 142[A], 2008 NY Slip Op 52386[U], *2 [2d Dept 2003]). For this reason, the Court also dismisses Defendant's request for a continuance.

The Court is not without sympathy to the Defendants, whose allegations include procedural error, duress and fraud, and who raise potentially serious challenges to Plaintiff's company's work. To oppose this motion successfully, however, they must present legal arguments with a sufficient factual basis, which they have not done. Their challenges relating to the quality of the work, which appear to be supported by Defendants' photographic evidence, exist against the company and not the individual plaintiff who loaned them money. Defendants have not presented a case with sufficient evidentiary support, the type of legal challenge necessary to defeat a CPLR 3213 motion.

Based on the above, therefore it is

ORDERED that the motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of Plaintiff and against Defendant in the amount of \$61,850, together with interest at the rate of 15% per annum from the date of February 1, 2009 until the date of the entry of judgment, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 7/12/10

FILED
JUL 16 2010
NEW YORK
COUNTY CLERK'S OFFICE
ENTER: Ley
LOUIS B. YORK, J.S.C.

LOUIS B. YORK