Leiser v System D Rest. Holdings, Inc.

2010 NY Slip Op 32689(U)

September 13, 2010

Supreme Court, New York County

Docket Number: 102205/2010

Judge: Lucy Billings

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1] SCANNED ON 9/29/2010

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

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 102205/2010

KEISER, HEIDI RUTH

VS.

SYSTEM D. RESTAURANT HOLDINGS,

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

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 ...	1
Answering Affidavits — Exhibits	2-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

The court grants plaintiff's motion for summary judgment in lieu of a complaint pursuant to the accompanying decision. C.P.L.R. § 3213.

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/13/10

Lucy Billings J.S.C.

LUCY BILLINGS

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 46

--------------------------------------x

HEIDI RUTH LEISER,

Plaintiff

- against -

SYSTEM D RESTAURANT HOLDINGS, INC.,

Defendant

--------------------------------------x

Index No. 102205/2010

DECISION AND ORDER

APPEARANCES:

For Plaintiff
Donna G. Recant Esq.
1365 York Avenue, New York, NY 10021

For Defendant
John Napoli Esq.
Seyfarth Shaw LLP
620 8th Avenue, New York, NY 10018

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Plaintiff moves for summary judgment in lieu of a complaint against defendant for the unpaid balance of a promissory note. C.P.L.R. § 3213. Defendant opposes plaintiff's motion on the ground that the promissory note was an investment in a restaurant venture, instead of a loan. For the reasons explained below, the court grants plaintiff's motion.

To be entitled to summary judgment in lieu of a complaint on a promissory note, plaintiff must present evidence of its execution and delivery, her demand for payment, and defendant's nonpayment. C.P.L.R. § 3213; Solomon v. Langer, 66 A.D.3d 508 (1st Dep't 2009); Bonds Fin., Inc. v. Kestrel Tech., LLC, 48

A.D.3d 230, 231 (1st Dep't 2008); Warburg, Pincus Equity Partners, L.P. v. O'Neill, 11 A.D.3d 327 (1st Dep't 2004); Alard, L.L.C. v. Weiss, 1 A.D.3d 131 (1st Dep't 2003). Upon that showing, the burden shifts to defendant to demonstrate factual issues to defeat plaintiff's motion and require a trial. National Bank of N. Am. v. Alizio, 103 A.D.2d 690, 691 (1st Dep't 1984), aff'd, 65 N.Y.2d 788 (1985); Bronsnick v. Brisman, 30 A.D.3d 224 (1st Dep't 2006); Tars Uluslararasi Dis Ticaret Turzim ve Sanayi Ltd., Sirketi v. Leonard, 26 A.D.3d 298 (1st Dep't 2006); Korea First Bank of N.Y. v. Noah Enters., Ltd., 12 A.D.3d 321, 322 (1st Dep't 2004); Boland v. Indah Kiat Fin. (IV) Mauritius, 291 A.D.2d 342, 343 (1st Dep't 2002).

II. THE PARTIES' POSITIONS

Plaintiff presents and authenticates defendant's promissory note to her executed December 1, 2008, for $58,915.67. Aff. of Heidi Ruth Leiser, Ex. A. Defendant obligated itself to pay the balance in 12 quarterly installments of $5,918.79, over three years, plus interest at 12% per year. A default in payment, which the note defines as failure to pay an installment within 10 business days after a written notice to cure the nonpayment, accelerated the entire principal as due, with accrued interest. Plaintiff acknowledges in her affidavit dated February 18, 2010, that defendant made one installment payment March 12, 2009, but none further. In an authenticated letter dated September 28, 2009, plaintiff demanded payment after defendant's default. Id., Ex. B. Plaintiff's evidence thus demonstrates her entitlement to

[* 4]

summary judgment in lieu of a complaint. Solomon v. Langer, 66 A.D.3d 508; DDS Partners v. Celenza, 6 A.D.3d 347, 348 (1st Dep't 2004); Alard, L.L.C. v. Weiss, 1 A.D.3d at 132; Boland v. Indah Kiat Fin. (IV) Mauritius, 291 A.D.2d at 342.

In rebuttal, defendant maintains that the promissory note was not a loan by plaintiff to defendant, but instead her investment in defendant restaurant business, to raise capital for defendant, whose sole purpose was to hold the stock of Chez Jacqueline Restaurant, Inc., which defendant's president Frank Giraldi purchased September 25, 2008. Defendant supports these claims with defendant's shareholder agreement and the stock purchase agreement.

III. CONSIDERATION OF EVIDENCE EXTRINSIC TO THE PROMISSORY NOTE

The court may not rely on parol evidence where the promissory note's terms are clear. Solomon v. Langer, 66 A.D.3d 508; Warburg, Pincus Equity Partners, L.P. v. O'Neill, 11 A.D.3d 327; DDS Partners v. Celenza, 6 A.D.3d at 349; Alard, L.L.C. v. Weiss, 1 A.D.3d at 131. Moreover, even were the court to rely, as defendant does, on facts outside the note, they do not bar summary judgment to plaintiff. Solomon v. Langer, 66 A.D.3d 508; Alard, L.L.C. v. Weiss, 1 A.D.3d at 131; Boland v. Indah Kiat Fin. (IV) Mauritius, 291 A.D.2d at 342-43. Considering the extrinsic evidence defendant presents, that evidence does not support defendant's claim that payment of the promissory note depended on the shareholder agreement. The note does not refer to the shareholder agreement. DDS Partners v. Celenza, 6 A.D.3d

at 349; Boland v. Indah Kiat Fin. (IV) Mauritius, 291 A.D.2d at 342. The shareholder agreement does refer to the note, but does not abrogate it.

The shareholder agreement simply provides that defendant was to issue to its shareholders, including plaintiff, shares in defendant and promissory notes in equal proportion to the shares. While the agreement provides that defendant would repay the promissory notes if the purchase of Chez Jacqueline Restaurant did not close, Aff. of Frank Giraldi, Ex. A, the agreement did not limit payment of the notes on any conditions. Lyons v. Cates Consulting Analysts, 88 A.D.2d 526 (1st Dep't 1982), aff'd, 64 N.Y.2d 1025 (1985); Neuhaus v. McGovern, 293 A.D.2d 727, 728 (2d Dep't 2002). See Bonds Fin., Inc. v. Kestrel Tech., LLC, 48 A.D.3d at 231; Hirsch v. Rifkin, 166 A.D.2d 293, 294 (1st Dep't 1990); Technical Tape v. Spray Tuck, 131 A.D.2d 404, 406 (1st Dep't 1987). Once the purchase of the restaurant did close, the promissory notes' repayment schedule, stretched out in 12 quarterly installments over three years, is entirely consistent with the purpose of investing in defendant to permit the purchase and using the shareholders' notes as a financial tool to raise the necessary funds and minimize taxes. These purposes and this structure do not compromise the note's enforceability.

Nor does defendant show that payment of the note otherwise depended on the shareholder agreement: that under it plaintiff owed performance beyond her loan to entitle her to payment under the note, for example, such that her nonperformance constituted

[* 6]

lack of consideration for the note, or the note was merely consideration for a still executory shareholder or other agreement. See, e.g., Kehoe v. Abate, 62 A.D.3d 1178, 1180 (3d Dep't 2009); Neuhaus v. McGovern, 293 A.D.2d at 728; Couch White v. Kelly, 286 A.D.2d 526, 528 (3d Dep't 2001). In sum, defendant fails to demonstrate that payment of the promissory note was inextricably intertwined with the shareholder agreement. Lyons v. Cates Consulting Analysts, 88 A.D.2d 526, aff'd, 64 N.Y.2d 1025; Embraer Fin. Ltd. v. Servicios Aereos Profesionales, S.A., 42 A.D.3d 380, 381 (1st Dep't 2007); DDS Partners v. Celenza, 6 A.D.3d at 349; Boland v. Indah Kiat Fin. (IV) Mauritius, 291 A.D.2d at 342. Even if the note were subject to obligations in the shareholder agreement, none are there.

IV. FIDUCIARY DUTY

Finally, defendant claims plaintiff's action breaches her fiduciary duty to her fellow shareholders. While a majority shareholder owes a fiduciary duty to the minority shareholders, Littman v. Magee, 54 A.D.3d 14, 17 (1st Dep't 2008); Waldman v. 853 St. Nicholas Realty Corp., 64 A.D.3d 585, 587 (2d Dep't 2009), plaintiff is not the majority shareholder. A shareholder in a closely held corporation also owes a fiduciary duty to the other shareholders not to co-opt or divert a valuable corporate opportunity she became aware of in her corporate shareholder capacity. Fender v. Prescott, 101 A.D.2d 418, 422 (1st Dep't 1984), aff'd, 64 N.Y.2d 1077, 1079 (1985); Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93, 98 (1st Dep't 2006); Brunetti v.

Musallam, 11 A.D.3d 280, 281 (1st Dep't 2004). Plaintiff's status as a shareholder of defendant, a closely held corporation, required her to devote her undivided, unqualified loyalty to the corporation and not to compete with it, place her private interests in conflict with its interests, or personally profit at its expense. Fender v. Prescott, 101 A.D.2d at 422-23, aff'd, 64 N.Y.2d at 1079; Global Mins. & Metals Corp. v. Holme, 35 A.D.3d at 98. Concomitantly, this fidelity obligated her to disclose any such situation. Fender v. Prescott, 101 A.D.2d at 423, aff'd, 64 N.Y.2d at 1079. See Herman v. Feinsmith, 39 A.D.3d 327, 328 (1st Dep't 2007); Global Metals & Mins. Corp. v. Holme, 35 A.D.3d at 98-99; Brunetti v Musallam, 11 A.D.3d at 280-81.

Here, plaintiff in her individual capacity seeks to collect a debt defendant corporation owes to her, due to its breach of a promissory note by defendant to plaintiff. Herman v. Feinsmith, 39 A.D.3d at 327-28; Venizelos v. Oceania Mar. Agency, 268 A.D.2d 291, 292 (1st Dep't 2000). Although defendant alludes to a pari passu understanding among the corporation's shareholders and officers, which would permit only proportional repayment of the loans by all shareholders, none of whom have been repaid, as discussed above no provision in the shareholder agreement or note imposes any such requirement. See Herman v. Feinsmith, 39 A.D.3d 327. Thus plaintiff may be pursuing her private interests and requiring defendant to pay its obligation to her rather than retain the funds for another corporate use, but she has concealed nothing from defendant or the other shareholders, misrepresented

nothing to them, and sought only that the corporation clear its debt so she will break even, not profit at the corporation's expense. Id. at 328; Kineon v. Bluegrass Elkhorn Coal Corp., 121 A.D.2d 980, 981 (1st Dep't 1986). See Fender v. Prescott, 101 A.D.2d at 422-23, aff'd, 64 N.Y.2d at 1079; Global Mins. & Metals Corp. v. Holme, 35 A.D.3d at 98-99; Brunetti v Musallam, 11 A.D.3d at 280-81; Stevens v. Phlo Corp., 288 A.D.2d 56 (1st Dep't 2001).

In fact defendant claims no such wrongdoing by plaintiff, nor that she otherwise contributed to defendant's financial straits. Since its repayment of plaintiff is not conditioned on repayment of fellow investors equally, nor on the restaurant's production of sufficient proceeds, her insistence on enforcing the note does not breach her fiduciary duty as a shareholder.

In sum, while plaintiff is a shareholder and investor in defendant, the shareholder agreement and other corporate relationships and business do not reduce her status as creditor. Nothing in the agreement indicates plaintiff or her fellow investors do not consider themselves defendant's creditors, albeit also its investors and shareholders, particularly since the shareholders and corporation evinced its debt through a promissory note. Herman v. Feinsmith, 39 A.D.3d at 328; Kineon v. Bluegrass Elkhorn Coal Corp., 121 A.D.2d at 983. Her status as a shareholder of defendant, moreover, does not require her to satisfy any additional conditions before she enforces the note. See Herman v. Feinstein, 39 A.D.3d at 328; Stevens v. Phlo Corp.,

288 A.D.2d 56.

V. CONCLUSION

For all these reasons, the court grants plaintiff's motion for summary judgment in lieu of a complaint against defendant for the unpaid balance of the promissory note dated December 1, 2008, $54,764.35, with interest at 12% per year from December 1, 2008. C.P.L.R. § 3213. The Clerk shall calculate the interest up to the date the judgment is entered and enter the total judgment forthwith. This decision constitutes the court's order and judgment. The court will mail copies to parties' attorneys.

DATED: September 13, 2010

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).