

Sun SPA Group LLC v Metropolitan Tanning Inc.

2011 NY Slip Op 30068(U)

January 10, 2011

Supreme Court, New York County

Docket Number: 601213/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHÉ

PART 10

Index Number : 601213/2010
SUNSPA GROUP, LLC
 VS.
METROPOLITAN TANNING INC.
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

JAN 12 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

*And PC scheduled 2/3/11 @ 2:30 pm
in Part 10 Rm 232*

JAN 10 2011

JAN 10 2011

Dated: _____


HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

**,SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----x
SUN SPA GROUP LLC,

Plaintiff,

-against-

METROPOLITAN TANNING INC., THOMAS
GRECO and FRANK MAZZARA,

Defendants
-----x

DECISION/ORDER

Index No.: 601213/10

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

FILED

JAN 12 2011

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s).¹

NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Pltf n/m (CPLR 3213) w/ HA affid, LJS affirm, exhs	1
Def's TG affid in opp, exhs	2
LJS reply affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff against the defendants Metropolitan Tanning, Inc. ("MTI"), Thomas Greco and Frank Mazzara (the "individual defendants") arising from an alleged default under a promissory note and personal guaranty. Plaintiff now moves for summary judgment in lieu of a complaint. CPLR § 3213. The defendants oppose the motion. For the reasons that follow, the motion must be denied.

On or about April 28, 2004, the parties to this action entered into a Contract of Sale ("Agreement"), a copy of which has been provided to the court. Therein, MTI

¹ The defendants submitted an additional affidavit by Frank Mazzara dated August 25, 2010. However, this affidavit was subsequently withdrawn by a so-ordered stipulation dated September 1, 2010 and therefore was not considered by the court.

agreed to purchase a tanning salon business located at 215 West 76th Street, New York, New York, including the Lease and all trade fixtures at that venue for the sum of \$240,000, together with reimbursement of a security deposit in the sum of \$20,000. On January 27, 2005, the parties executed, *inter alia*, a Third Amendment to the Contract of Sale (the "Third Amendment"), which provided that the purchase price was increased from the original price of \$240,000 to \$263,386.91 which was to be paid as follows:

- A. \$80,000 at closing by certified check. Said payment was made on January 31, 2005.
- B. Credit to Purchaser of \$145,000 acknowledged as having been received by Escrow Agents of Seller
- C. \$74,386.91, consisting of the balance of the Purchase Price of \$43,386.91 and the Security Deposit in the amount of \$30,000, to be paid pursuant to the terms of the Promissory Note.

In connection with the Third Amendment and the Agreement, the individual defendants executed a Guaranty of Promissory Note in the sum of \$73,386.91, wherein they jointly, individually and severally absolutely and unconditionally guaranteed the payment of all amounts due under the Promissory Note. A copy of the Promissory Note and Guaranty of Promissory Note ("Guaranty") has also been provided to the court.

Plaintiff alleges that despite closing on the Agreement, Metropolitan defaulted thereunder by failing to make the payment due on April 1, 2005. Plaintiff claims that despite due demand, neither of the individual defendants have made any payments to plaintiff. Plaintiff therefore seeks a judgment in its favor and against each of the defendants in the sum of \$60,886.81, joint and severally, together with interest from April 1, 2005 at a rate of 10% per annum.

In opposition, the defendants maintain that the Agreement contains a condition

precedent to MTI's obligation to pay plaintiff, to wit: the transfer of the plaintiff's assets to Metropolitan, which never occurred. Therefore, the defendants argue that the Agreement, Promissory Note, Guaranty and Management Agreement are all inextricably intertwined and the instant motion, based on the promissory note and guaranty only, must be denied.

Paragraph 5 of the Agreement provides that "the Parties shall execute, acknowledge where necessary and deliver the following documents:

...

(c) Seller as Assignor and Purchaser, as assignee, shall execute an assignment and assumption agreement transferring seller's right title and interest in and to the Lease as Purchaser.

On June 29, 2004, in a Letter Agreement executed by the parties which operated as an amendment (second amendment) to the Contract of Sale, plaintiff's counsel represented that:

On or about March 10, 2004, we obtained the consent of Ashley Corporation to the Transaction between our clients for the sale of the Sun Spa business, including the Assignment of the Premises 2160 Broadway (a/k/a 215 W. 75th Street), Second Floor, New York, New York.

Ashley Corporation is the landlord and owner of the Premises located at 2160 Broadway, Second Floor, New York, New York.

The Third Amendment provided that upon payment of the \$80,000 payment set forth above, the sale would be closed but that the Seller's attorney would hold the closing documents in escrow, pending the final payment due on the promissory note.

Paragraph 1 (d) of the Third Amendment provided as follows:

Paragraph 5 of the Contract of Sale shall be deemed amended to add the following sub-section(s) and additional provision:

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(a) Seller and Purchaser shall execute all documents required by Ashley Corporation in connection with its grant of consent to the assignment of the Lease and the extension of the term of the Lease requested by Purchaser.

All documents enumerated above shall be deposited into escrow with the attorney for Seller, Leonara C. Seid, Esq. to be held by her as Escrow Agent pursuant to the terms of an escrow agreement which shall provide that upon Purchaser's satisfaction of the obligations under the Contract of Sale and to the note, and the delivery of the additional security deposit in the amount of \$24,000 required by Ashley Corporation in connection with its consent to the assignment of the Lease to Purchaser, Escrow Agent shall be authorized to deliver to Seller's attorney the Bill of Sale, Secretary's Certificate, Member's Resolution and Covenant Not To Compete, and to deliver to Ashley Corporation, the Assignment and Assumption Agreement (of Lease), the Amendment to Lease, *the Consent of Assignment* (of Lease), and the Guaranties of Lease executed by Thomas Greco and Frank Mazzara, together with the additional security deposit (emphasis added).

The parties also executed a Management Agreement on January 27, 2005, wherein they agreed that until MTI performed all of its payment obligations under the Contract of Sale, MTI would provide "all of the management services necessary to operate the Sun Spa Business on a temporary basis."

However, on June, 6, 2006, Ashley Corporation sent a letter to the plaintiff which stated in pertinent part:

Please be advised that our consideration of potential Consent to Assignment of your existing Lease to and by Metropolitan Tanning, Inc. is hereby terminated. As you know, this scenario has been discussed for over a year and market conditions no longer allow us to consider your proposal.

As you are aware, we have never agreed to the Assignment but only discussed the proposed terms that would be required for consideration of such assignment. Any discussion regarding modification of the Lease, including without limitation, any extensions of the term are hereby revoked, null and void and of no further force and effect.

On June 16, 2005, the Landlord sent an email to the defendants' attorney

stating: "... we have not consented and will not consent to any assignment of the Lease..."

As a result of Ashley Corporations refusal to consent to the assignment of the Lease, the defendants insisted that the plaintiff file a declaratory judgment action seeking a declaration that the Landlord's refusal to consent was unreasonable. The defendants also insisted that plaintiff exercise its unilateral right to renew for the first option period, which the Lease required to be sent via written notice not later than September 30, 2006.

Plaintiff refused both of the defendants' requests, and instead notified the defendants that they were in default under the Agreement and Managing Agreement for failure to make a scheduled payment pursuant to the terms of the Promissory Note. In turn, the defendants contend that it was the Plaintiff who breached the terms of the Agreement, and that they did not breach the Promissory Note since the payment of the Note contained a condition precedent, to wit: the Landlord's consent to the assignment of the Lease, which was not satisfied.

In reply, plaintiff paints a very different picture of the events that transpired after the operative contracts were executed, including the Promissory Note and Guaranty upon which this motion is premised. Plaintiff claims that the Landlord commenced three separate non-payment proceedings against the defendants. Also, plaintiff commenced an action in the Supreme Court, New York County bearing Index Number 601129/05 arising from the defendants' alleged unauthorized renovations. That action was resolved by the parties via stipulation. Plaintiff was also the defendant in a holdover proceeding commenced by the Landlord as a result of the defendants' alleged failure to

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vacate the Premises upon the expiration of the Lease (Civil Court Index No. 65457/07).

Plaintiff also has provided a copy of a decision and order by the Hon. Arlene Bluth dated June 26, 2007. This decision/order was rendered in connection with MTI's motion for the court to find that the Lease was renewed and assigned to MTI and thus force Ashley Corporation to accept MTI as its tenant. Based upon this decision, plaintiff argues that the defendants are collaterally estopped from arguing that plaintiff breached the subject contracts between the parties, and that it is law of this case that the Landlord's refusal to consent had nothing to do with any acts by plaintiff, but rather, were caused by the defendants' own conduct.

Discussion

Where an action is commenced under CPLR § 3213, the instrument upon which it is based must be for the payment of money only. If a *prima facie* case would be made out just by proof of the instrument "and a failure to make the payments called for by its terms", it satisfies CPLR § 3213 (Seaman-Andwall Corp. v. Wright Machine Corp., 31 AD2d 136 [1st Dept 1968], *aff'd* 29 NY2d 617 [1971]). The fact that defenses may be asserted against it does not deprive it of §3213 treatment (*id.*).

Here, the court finds that the Promissory Note is an instrument for the payment of money only. The Promissory Note contains an unconditional promise by MTI to pay to plaintiff a sum certain: "[MTI]... promises to pay to the order of [plaintiff]... the principal sum of \$73,386.91." The fact that references are made to other agreements, i.e. the Agreement and Management Agreement, in the Promissory Note does not alter the unconditional promise to pay made by MTI therein. Rather, those references merely set forth certain conditions, which if met (specifically in the case of MTI's default under

either the Agreement or the Management Agreement), entitled plaintiff to accelerate the unpaid portion of MTI's indebtedness under the Promissory Note.

The defendants also argue that based upon the explicit language of the Guaranty, their obligation to pay pursuant to the Guaranty cannot be ascertained without referring to the Contract of Sale and amendments thereto to determine whether the underlying consideration expressed therein, i.e. the assignment of the Lease, was met.

That portion of the Guaranty upon which the defendants rely provides as follows:

In consideration of the execution by [plaintiff] of the Third Amendment to Contract of Sale of even date herewith (the "Amendment"), between [plaintiff] and [MTI], agreeing to the acceptance of a Promissory Note from [MTI], in the principal amount of \$73,386.91,... and for other good and valuable consideration, [the individual defendants], [their] successors, and assigns, do jointly, individually and severally hereby absolutely and unconditionally guarantee the payment of all amounts due under the Note and the performance of all of the covenants, terms, conditions, agreements and undertakings contained and set forth in said Note and in any other agreements by and between [plaintiff] and [MTI] in connection with the Note.

It is black letter law that an unconditional guarantee is an instrument for the payment of money under CPLR 3213 (European American Bank & Trust Co. v. Schirripa, 108 AD2d 684 [1st Dept 1985]; see also Chase Manhattan Bank, N.A. v. Marcovitz, 56 A.D.2d 763, 392 N.Y.S.2d 435 [1st Dept 1977]). Consideration, which is something that is bargained for and received by a promisor from a promisee, is necessary for an agreement to be enforceable (see Black's Law Dictionary 707 [8th ed 2004]). Here, it was plaintiff who bargained for and received the personal guaranty by the individual defendants in exchange for plaintiff's acceptance of a Promissory Note from MTI, in lieu of cash or some other form of payment. The defendants' attempts to

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twist the meaning behind the term consideration as it is used in the Guaranty into something that would otherwise incorporate a promise by the plaintiff to perform according to any or all of the other subject agreements would ascribe a meaning that this court cannot possibly read into the otherwise plain meaning of the language employed in the Guaranty. Nor does the court find that the Agreement, Third Amendment, Management Agreement, or any other agreements are incorporated by reference via this passage of the Guaranty, or anywhere else therein. Accordingly, these arguments are rejected.

However, while plaintiff has demonstrated a *prima facie* case of proof of the Promissory Note "and a failure to make the payments called for by its terms", the defendants have raised factual issues regarding their right to an offset of funds pursuant to other terms in the various agreements between the parties identified herein. It is because the Promissory Note and the Guaranty are inextricably intertwined that plaintiff cannot simply prevail by showing proof of the defendants' nonpayment (see i.e. Fine v. Di Stantj, 79 AD2d 673 [2d Dept 1980]; cf Harris v. Miller, 136 AD2d 603 [2d Dept 1988]).

Accordingly, this case will be treated as an ordinary action. Plaintiff's moving papers are deemed a complaint and the defendants opposition is deemed an answer. The court hereby schedules a preliminary conference in this matter to be held on February 3, 2011 at 9:30 a.m. in Part 10.

Conclusion

Plaintiff's motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213 is denied for the reasons stated herein. This case is converted to an ordinary

action. The preliminary conference will be held on **February 3, 2011 at 9:30 a.m. in**


Part 10.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 10, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED

JAN 12 2011

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