

Watson Productions, LLC v De Cesare

2011 NY Slip Op 32788(U)

October 17, 2011

Supreme Court, Suffolk County

Docket Number: 0206-2009

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

INDEX
NO. 0206-2009

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 6-9-11
SUBMITTED: 8-4-11
MOTION NO.: 001-MG

WATSON PRODUCTIONS, LLC, x

Plaintiff,

GORDON & GORDON, PC
Attorneys for Plaintiff & Robert Watson
108-18 Queens Blvd. 6th Floor
Forest Hills, NY 11375

-against-

HOWARD DE CESARE AND SKYLINE DISPLAYS,
LLC,

Defendant.

LAW OFFICES OF RAYMOND A. GIUSTO
Attorneys for Defendants
715 South Country Rd
West Bay Shore, New York 11706

ROBERT WATSON
Additional Defendant
_____ x

Upon the following papers numbered 1 30 read on this motion to dismiss the Complaint and Summary Judgment; Notice of Motion and supporting papers 1-14; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15-27; Replying Affidavits and supporting papers 28-30; it is,

ORDERED that the motion by the defendants Howard de Cesare and Skyline Displays, LLC, for partial summary judgment dismissing the complaint and awarding them judgment in their favor on their first through fourth counterclaims is granted; and it is further

ORDERED the fifth counterclaim is severed; and it is further

ORDERED that the defendants Howard de Cesare and Skyline Displays, LLC, are awarded damages against the plaintiff in the amount of \$600,000, less any amounts recovered on the guarantee, with interest at the rate of 8% from December 1, 2006, until December 1, 2008, and at the statutory rate thereafter; and it is further

ORDERED that the defendants Howard de Cesare and Skyline Displays, LLC, are awarded damages against the additional defendant, Robert Watson, on the guarantee in the amount of \$180,000 with interest at the rate of 8% from December 1, 2006, until December 1, 2008, and at the statutory rate thereafter; and it is further

ORDERED that the defendants Howard de Cesare and Skyline Displays, LLC, are

✓
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Index No. 0206-09

page 3

Both the Promissory Note and Second Promissory Note were personally guaranteed by Robert Watson. However, as to the amount of the Second Promissory Note, his personal guarantee was limited to \$180,000.00. Pursuant to the terms of the Second Promissory Note, payments were to begin December 1, 2008. The Second Promissory Note provides that “the Holder of this Note may declare the entire unpaid amount of principal and interest under the Note to be immediately due and payable if Maker defaults”. The record reflects that no payment was made by December 1, 2008. On December 9, 2008, in accordance with the terms of the Second Promissory Note, Howard de Cesare¹, on behalf of Skyline LLC, sent a letter to Watson LLC, declaring a default and demanding full payment in the amount of \$600,000.00 plus interest at 8%. Thereafter, on or about December 17, 2008, Watson LLC attempted to remit a payment in the amount of \$1,117.93. However, this payment was rejected. Watson LLC then commenced this litigation.

The complaint alleges two causes of action. The first, against Mr. de Cesare individually, alleges that Watson LLC was fraudulently induced into entering the Sales Agreement and subsequent Notes because it relied on false representations made by de Cesare during negotiations. The second, seeks “rescission of the second promissory note due to lack of mutual intent”. The Court notes however, the movants’ argument that the second cause of action improperly seeks “rescission” instead of “reformation” as the language in the wherefore clause seems to suggest. The wherefore clause in the complaint, seeks from the Court “ a judgment amending the formula in the second promissory note to reflect the proper intent of the parties”.

The defendants Skyline LLC and de Cesare assert five counterclaims. Four of these counterclaims are against Watson LLC alleging a failure to pay the Second Promissory Note in accordance with its terms. Skyline LLC seeks judgment in the amount of \$600,000.00 which reflects an acceleration of the Note pursuant to its December 9, 2008 letter (the first counterclaim), a judgment granting a security interest in the assets of Watson LLC² (the third counterclaim) and attorney’s fees (the fourth counterclaim). The second counterclaim is asserted against Robert Watson individually to enforce the personal guaranty of \$180,000.00. The fifth counterclaim relates to the provision of the Agreement of Sale pertaining to the obligation of Watson LLC to remit one-half of all profits received from jobs listed on Exhibit E of the Agreement of Sale. Skyline contends that Watson LLC failed to tender any amount received and seeks damages in the amount of \$55,442.65.

Defendants de Cesare and Skyline LLC now move under §C.P.L.R. 3212(e)

¹Howard de Cesare is a member of Skyline LLC and also named as a defendant in his individual capacity.

² A security interest was created pursuant to the security agreement dated December 1, 2006, however, the court interprets this cause of action as one seeking to enforce the security interest.

Index No. 0206-09

page 4

requesting that the complaint be dismissed in its entirety for failure to state a cognizable legal theory, as well as failure to support a cause of action alleging fraudulent misrepresentation. In addition, de Cesare and Skyline LLC seek summary judgment on their first counterclaim against Watson LLC in the amount of \$600,000.00; on their second counterclaim against Robert Watson for \$180,000 pursuant to the personal guaranty; on their third counterclaim against Watson LLC to enforce the security interest in the assets of Watson LLC as provided for in the closing documents; and on its fourth counterclaim for attorney's fees.³

In opposition, Watson LLC claims that much of the equipment purchased from Skyline LLC was out of date and unusable. As a result, it was required to purchase from Skyline Corporate, additional showroom samples, mandatory training programs, literature and equipment. Watson LLC argues that the term "Wholesale Sales" as set forth in the Second Promissory Note, does not include those items it purchased from Skyline Corporate for non-profit generating assets such as these. Therefore, Watson LLC argues there was a mutual misunderstanding as to what items would or would not be included in the formula for calculating payments due. In addition, Watson LLC argues that Skyline LLC cannot recover under the Second Promissory Note as it is not a negotiable instrument. Watson LLC contends that the Second Promissory Note does not contain an unconditional promise to pay a sum certain, nor does the instrument on its face require the Note to be payable on demand. In the alternative, Watson LLC argues that summary judgment on the Second Promissory Note would be improper since the Note was intertwined with two other agreements, one of which Watson LLC claims was fraudulently induced by de Cesare.

As a note of clarification, Watson LLC in its opposition papers contends that while the second cause of action in its complaint seeks "rescission of the note", it is clear from the language that Watson's intention of this cause of action was seeking reformation of the note. Watson LLC requests leave to amend the complaint to clarify this cause of action if the Court deems it necessary.

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See, Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 629 N.Y.S.2d 813). To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a party must show the existence of an executed note, containing an unequivocal and unconditional obligation to repay, and the failure pay in accordance with the note's terms. (*See, Lugli v. Johnston*, 78 A.D.3d 1133, 1135, 912 N.Y.S.2d 108). If terms of a written contract are clear and unambiguous, intent of the parties must be found within the four corners of the contract (*See, Correnti v. Allstate Properties, LLC*, 38 A.D.3d 588, 832 N.Y.S.2d 594). Extrinsic evidence of the parties' intent may be considered only

³The defendants, de Cesare and Skyline Displays LLC also move to sever and continue the fifth counterclaim.

Index No. 0206-09

page 5

if the agreement is ambiguous, which is an issue of law for the courts to decide. (*See, Innophos, Inc. v. Rhodia, S.A.*, 10 N.Y.3d 25, 852 N.Y.S.2d 820 (2008)). A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself and there is no reasonable basis of difference of opinion (*See, Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 750 N.Y.S.2d 565). If a prima facie case is presented, the burden then shifts to the party opposing the motion to come forward with proof, in admissible form, demonstrating there are issues of material fact, which preclude the granting of summary judgment. (*See, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 A.D.2d 713, 641 N.Y.S.2d 701).

In support of this motion, defendants have attached copies of the Second Promissory Note dated December 1, 2006 . The Second Promissory Note, as well as the guaranty and security agreement are all executed by Robert Watson. The Second Promissory Note states that payments will begin December 1, 2008. The formula contained in Article 2(b) of the Agreement of Sale provides that the payments to be calculated using “the previous year’s wholesale sales between the Purchaser and SKYLINE, INC., (the Manufacturer)”. A fair reading of the language set forth in the Second Promissory Note reveals clear and unambiguous method for calculation of payments as well as a definitive date for the payments to start. In addition, it is undisputed that Watson LLC failed to make a payment by the December 1, 2008 due date. The language set forth in the Second Promissory Note gives the holder of the Note the right to declare the entire unpaid amount of principal and interest immediately due and payable if the maker defaults in the due and punctual payment of any installment. Skyline LLC notified Watson LLC of the default and notice of acceleration of the entire amount due. The Court finds that Skyline LLC and de Cesare establish their prima facie entitlement to judgment as a matter of law. The burden now shifts to Watson LLC to raise a material issue of fact.

First, Watson LLC has alleged that the Second Promissory Note was a part of a larger Sales Agreement which it was fraudulently induced into entering and is therefore unenforceable. However, Watson LLC fails to point to any specific misrepresentation made by Skyline LLC or by de Cesare which would lead to a fraudulent inducement. Additionally, the Sales Agreement contains specific merger clauses and “no representation” language to discourage these specific types of arguments. All of the agreements entered into by these parties were negotiated after months of due diligence, meetings with Skyline Corporate and drafted by their respective attorneys making Watson LLC’s argument of fraudulent inducement baseless and without merit. Therefore the first cause of action is dismissed.

Second, the Court turns to Watson LLC’s argument that there is a mutual mistake as to the parties intent of the Second Promissory Note and seeks reformation or rescission of the Second Promissory Note. It is well settled that rescission is proper only when the mistake is so material that it goes to the foundation of the agreement. Relief is only appropriate in exceptional situations where a mistake of both parties upsets the very basis for the contract in such a way as to have a material effect on the agreed exchange of performances, (*See, Da Silva v. Antonio*

Index No. 0206-09

page 6

Musso, 53 NY 2d 543). Moreover, proof of mutual mistake must be of the highest order and must show clearly and beyond doubt that there has been a mutual mistake. (*See, Asset Management & Capital Co., Inc. v. Nugent* 85 AD3d 947). As stated above, the formula for calculating payments under the Second Promissory Note relies on the amount of “wholesale Sales” between Skyline, Inc., the manufacturer, and Watson LLC. Skyline, Inc., as an independent entity, provides this information separate and apart from this pending litigation. The Second Promissory Note was executed after due diligence which included books and records, financials, profit reports and numerous other documents. The Court finds that Watson LLC has failed to sufficiently meet its burden in its allegation of “Mutual Mistake” and therefore warrants dismissal of Watson LLC’s second cause of action.

In view of the foregoing, the court also finds that de Cesare and Skyline are entitled to summary judgment on their first through fourth counterclaims. Accordingly, the motion is granted in its entirety.

The fifth counterclaim is severed and the parties are directed to continue discovery on this issue. The amount of attorneys fees to be awarded as set forth in the fourth counterclaim will be calculated at the trial or other disposition of the remaining issues before the Court.

HON. ELIZABETH HAZLITT EMERSON

Dated: October 17, 2011

J.S.C.