

Kremer v Sinopia, LLC
2011 NY Slip Op 33679(U)
October 13, 2011
Supreme Court, New York County
Docket Number: 603724/09
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS Justice

PART 53

KREMER

INDEX NO. 603724/09

- v -

SINOPIA

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

is decided in accordance with accompanying memorandum decision and order.

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



Dated: 10/13/11

CHARLES E. RAMOS

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
DR. GEORG KREMER, KREMER PIGMENTS, INC.,
and KREMER PIGMENTE GMBH & CO.KG,

Plaintiffs,

Index No.: 603724/09

-against-

SINOPIA, LLC, and ALEX WARREN,

Defendants.

-----X
Hon. Charles Edward Ramos, J.S.C.:

In motion sequence 002, defendant Alex Warren ("Warren") moves, pursuant to CPLR 3211 (a)(1), to dismiss certain claims asserted against him individually in the amended verified complaint. Plaintiffs Dr. Georg Kremer ("Kremer"), Kremer Pigments, Inc. ("Kremer Pigments"), and Kremer Pigmente GMBH & Co. KG ("Kremer Pigmente"), (collectively, "Plaintiffs"), cross-move for a default judgment against defendant Sinopia, L.L.C. ("Sinopia") pursuant to CPLR 3215, and for summary judgment, pursuant to CPLR 3212, against defendants Warren and Sinopia (collectively, "Defendants").

Background

Kremer, a citizen and resident of Germany, entered into negotiations to sell 200 shares (100%) of stock in Kremer Pigments, a New York corporation, to Sinopia, a California limited liability company. Warren is the sole owner and managing member of Sinopia.

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On December 13, 2006, Kremer and Sinopia entered into a Stock Purchase Agreement (the "SPA"). The SPA provides that Sinopia pay three sums in consideration for the shares:

- (1) \$100,000 (the "Purchase Price");
- (2) \$24,000 (the "Security Deposit"); and,
- (3) the cash value of the Company's inventory ("Inventory Value") (SPA, Section 1.5; 2.3).

The SPA outlined the obligations of Buyer (Sinopia) and Seller (Kremer and Kremer Pigmente) at the closing. The Buyer's obligations included delivery of a promissory note encompassing the Purchase Price, the Security Deposit, and the Inventory Value, signed by both Sinopia and Warren as co-obligors, on a joint and several basis (SPA, Section 2.3).

At the closing, Kremer delivered the shares of Kremer Pigments to Sinopia in return for a promissory note to Kremer for \$124,000 representing the Purchase Price and the Security Deposit. Although Sinopia took possession of the inventory, no note was ever issued for the Inventory Value.

Warren was president of Kremer Pigments from December 13, 2006 through July 31, 2008 (the "Tenure Period"). During this time, Sinopia and Kremer Pigments ordered and received additional goods from Kremer Pigmente without remitting payment. On July 31, 2008, the outstanding shares of Kremer Pigments were returned to Kremer pursuant to the "Minutes of the Board of Directors" for Kremer Pigments (Elan Affidavit, Exhibit C) (hereinafter, the

"Minutes Agreement"). Pursuant to the Minutes Agreement, Warren assumed personal liability for "all claims, loans and liens" incurred by Kremer Pigments during the Tenure Period. He further agreed to furnish to Georg Kremer "all financial statements, tax returns, and proof of existing and/or non-existing liabilities, both financial and legal."

Warren's motion seeks to dismiss claims made against him personally for the Inventory Value and the unpaid invoices issued from Kremer Pigmente to Sinopia.

Plaintiffs' cross-motion seeks a default judgment against Sinopia for failing to answer the Second Amended Verified Complaint, and for summary judgment against Defendants to recover the Inventory Value and all monies due under the various invoices issued by Kremer Pigmente to Sinopia and Kremer Pigments between December 13, 2006 and July 31, 2008.

Discussion¹

A. Standards

I. Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(1), the

¹ It should be noted that failure to submit separate memos of law (not incorporated into affidavits or attorney affirmations) is a violation of Part 53's Practice Rule #7 which clearly states: "Memos of Law ARE REQUIRED on ALL motions. Failure to submit separate memos of law (not incorporated into attorney affirmations) may result in the denial of the motion" (emphasis in original).

complaint must be dismissed where the claims asserted are directly refuted by documentary evidence. Dismissal is warranted only where the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83 [1994]).²

II. Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1886]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Amatulli v Delhi*

² A document may be used as evidence in a motion pursuant to CPLR 3211 (a)(1) where the documentary evidence is "unambiguous and undeniable, such as ...a contract" (*Leon v Martinez*, 84 NY2d 83, 88, [1994]). The SPA and the Minutes Agreement qualify as documentary evidence. In order for a cause of action to be dismissed based upon documentary evidence, that evidence must resolve all factual issues and clearly refute a plaintiff's cause of action (see *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, [1998]).

construction Corporation, 77 NY2d 525, 533 [1991]).

B. Threshold Issue

Plaintiffs' cross-motion seeks, in part, entry of a default judgment against Sinopia for failing to answer the Second Amended Verified Complaint (CPLR 3215[a]) (or the "Complaint"). The Complaint was appropriately served by mail and e-filed on February 24, 2011 (see CPLR 3215[4][iii]. CPLR 3025(d) provides that an answer is due 20 days after proper service of an amended pleading. The Plaintiffs' submission of affidavits of service and a letter notifying Sinopia of its failure to answer establishes a prima facie entitlement to a default judgment against Sinopia. Warren fails to adequately raise a material issue of fact to defeat summary judgment and require a trial. Therefore, Plaintiffs' motion for a default judgment against Sinopia is granted. Consequently, the remainder of this decision will only address Plaintiffs' claims against Warren in his individual capacity.

C. Warren's Motion to Dismiss

Warren's motion to dismiss was filed prior to Plaintiffs' Second Amended Verified Complaint. However, as impliedly consented to by the parties, the Court will address Warren's motion to dismiss as if directed to the Second Amended Verified Complaint.

The first cause of action is for breach of the SPA, the

Minutes Agreement, and for goods received without remitting payment. The Plaintiffs allege that Defendants breached the SPA by not delivering a promissory note representing the Inventory Value as required therein (see SPA, Schedule 1.5). Further, Plaintiffs allege that Warren has defaulted on liabilities that were assumed in the Minutes Agreement.

I. Breach of the SPA

Warren is not in breach of the SPA because Warren is not a party to the SPA. The SPA clearly states that it was entered into "by and between DR. GEORG KREMER an individual ("Seller") and SINOPIA, LLC, fully owned and represented by Alex Warren, a California limited liability company, ("Buyer")" (SPA at Pg. 1). Pursuant to New York Limited Liability Company Law ("LLC Law") 609(a),³ Warren cannot be held personally liable for the obligations and/or liabilities of Sinopia, solely for acting in his capacity as managing member while conducting the business of

³ LLC Law § 609(a) states:

"Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company (including a parts on having more than one such capacity) is liable for any debts, obligations, or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company."

that entity (see *Collins v E-Magine, LLC.*, 291 AD2d 350, [1st Dept 2002], appeal denied, 98 NY2d 605 [2002] ["members and managers...of a limited liability company...are expressly exempt from personal responsibility for [its] obligations"). Therefore, Warren is not personally liable for Sinopia's obligations under the SPA and claims arising from breach of the SPA.

Relying on language that appears in Section 2.3, Plaintiffs contend that the SPA confers liability upon both Sinopia and Warren. Section 2.3 states that "At the Closing and unless otherwise waived in writing by Seller, Buyer shall deliver to seller the following: (a) "A promissory note payable to Seller in the principal amount of \$124,000...; and the inventory value calculation and repayment plan...for which both, SINOPIA LLC and Alex Warren personally are co-obligors on the notes, on joint and several basis."

However, this provision merely requires that at closing, Sinopia is obligated to deliver promissory notes, to which Sinopia and Warren are co-obligors. Beyond the terms set forth in the note that was provided at the closing, Plaintiffs fail to adequately provide a basis upon which this clause exposes Warren to liability under the SPA. Therefore, Warren cannot be liable under the SPA for the Inventory Value because Sinopia failed to issue a promissory note holding him joint and severally liable. Likewise, Warren is not liable under the SPA for invoices issued

by Kremer Pigmente to Sinopia for goods ordered. Therefore, to the extent that any cause of action seeks to hold Warren personally liable for the Inventory Value and invoices issued by Kremer Pigmente to Sinopia, it is dismissed.

II. Breach of the Minutes Agreement

Warren concedes that he is liable for "all claims, loans and liens which were aquired [sic] and/or incurred" by Kremer Pigments during the Tenure Period (see Minutes Agreement).

However, Plaintiffs appear to allege in the Complaint that pursuant to the Minutes Agreement, Warren is also liable for debts incurred by Sinopia during the Tenure Period. This allegation is belied by a plain reading of the Minutes Agreement, that clearly does not encompass debts accrued by Sinopia. In fact, the scope of the liability that Warren assumed in the Minutes Agreement is reasonably specific and will be enforced in accordance with its terms (see *805 Third Ave v M.W. Realty Associates*, 58 NY2d 447, 453 [1983] [provisions of a contract delineating the rights of the parties prevail over the allegations in the complaint]). Consequently, to the extent that any cause of action seeks to hold Warren personally liable for the debts accrued by Sinopia in relation to the Minutes Agreement, it is dismissed.

D. Plaintiffs' Cross-Motion for Summary Judgment

I. Breach of Contract Claims (First, Third, and Fourth Causes of Action)⁴

Warren is in breach of the entire Minutes Agreement. This includes his failure to remit payment on "all claims, loans and liens which were aquired [sic] and/or incurred" by Kremer Pigments during the Tenure Period, and his failure to furnish to Georg Kremer "all financial statements, tax returns, and proof of existing and/or non-existing liabilities, both financial and legal." Therefore, summary judgment (as to liability) is appropriate (*NFL Enterprises LLC v Comcast Cable Communications, LLC*, 51 AD3d 52 [1st Dept 2008])[a complete written agreement that is unambiguous on its face must be enforced according to the plain meaning of its terms).

II. Unjust Enrichment (Second Cause of Action)

Plaintiffs allege that Warren was unjustly enriched by his ownership of the stock, lease, and inventory of Kremer Pigments (Elan Affidavit in Support of Cross-Motion, ¶ 5). However, as previously discussed, Warren is not personally liable for the obligations and/or liabilities of Sinopia. Moreover, the SPA governs this precise subject matter, precluding recovery in

⁴ Plaintiffs' first, third and fourth causes of action allege, *inter alia*, breaches and seek remedies relating to the SPA. As discussed above, Warren is not accountable under the SPA because he is not a party to the SPA. Therefore, summary judgment is not warranted as to those claims.

quasi-contract. Therefore, Plaintiffs fail to make a prima facie showing of entitlement to judgment as a matter of law.

III. Fraudulent Inducement Claim (Fifth Cause of Action)

Fraudulent inducement is "the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when he made, and that there was justifiable reliance and resulting injury" (*Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009], appeal withdrawn, 12 NY3d 780 [2009]). Georg Kremer alleges that statements made by Warren fraudulently induced him to enter into an agreement to sell Kremer Pigments to Sinopia through the SPA. Specifically, Warren is alleged to have orally represented to Georg Kremer that if shares and inventory of Kremer Pigments were transferred to Sinopia, Warren would personally guarantee payment (see Second Amended Verified Complaint ¶¶ 41-47).

However, a claim for fraudulent inducement of a contract must fail if the acts alleged to constitute fraud "do not arise from circumstances extraneous to, and not constituting elements of, the contract, and therefore do not represent the breach of a legal duty independent of the contract" (*Baker v Norman*, 226 AD2d 301, 304 [1st Dept 1996], appeal dismissed, 88 NY2d 1040 [1996]). Here, by Plaintiffs' own admission, Warren's alleged oral representations were memorialized in Sections 1.5, 2.3 and 4.3 of

the SPA (see Elan Affidavit in Support of Cross-Motion, ¶¶ 26, 54). Therefore, summary judgment must be denied.

All other arguments raised in the parties' papers were considered and deemed without merit.

Accordingly, it is

ORDERED that Alex Warren's motion to dismiss is granted, in part, and denied, in part, as set forth above; and it is further

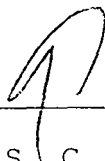
ORDERED that Plaintiffs' cross-motion for summary judgment against Alex Warren is granted, in part, and denied, in part, as set forth above, and the Clerk is directed to enter judgment as to liability against Alex Warren as to the Minutes Agreement; assessment as to damages shall await the resolution of the remaining claims/counterclaims; and it is further

ORDERED that Plaintiffs' cross-motion for default judgment against Sinopia LLC is granted.

Settle order on notice.

Dated: October 13, 2011

ENTER:



J. S. C.

CHARLES E. RAMOS