

Bershtein v Singh

2012 NY Slip Op 30571(U)

February 21, 2012

Sup Ct, Nassau County

Docket Number: 15410-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
ALEXANDRA BERSHTEIN,

**TRIAL/IAS PART: 16
NASSAU COUNTY**

Plaintiff,

**Index No: 15410-11
Motion Seq. No: 1
Submission Date: 12/22/11**

-against-

**IMINDER P. SINGH a/k/a VICTOR SINGH, INDU
SINGH and IN TOUCH CONCEPTS,**

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, Affidavit, Attorney's Affirmation and Exhibits.....x**
- Affidavits in Opposition, Affirmative Defenses and**
- Verified Counterclaims, and Exhibits.....x**
- Affirmation in Further Support, Affidavit in Further Support and Exhibits....x**

This matter is before the Court for decision on the motion filed by Plaintiff Alexandra Bershtein ("Bershtein" or "Plaintiff") on October 28, 2011 and submitted on December 22, 2011. For the reasons set forth below, the Court denies the motion, and deems the moving and answering papers the complaint and answer, respectively.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3213, granting Plaintiff Summary Judgment in Lieu of Complaint and directing the entry of judgment for the Plaintiff and against Defendants Iminder P. Singh a/k/a Victor Singh ("Victor"), Indu Singh ("Indu") and In Touch Concepts, Inc. ("ITC") (collectively "Defendants").

B. The Parties' History

In support of Plaintiff's motion, Bershtein affirms that on September 10, 2010, Victor made, executed and delivered to Plaintiff an Installment Note ("Note") in the original sum of One Million Six Hundred Thousand (\$1,600,000.00) Dollars. The Note was personally guaranteed by ITC, and by Indu, Victor's spouse ("Guarantees"). Bershtein provides copies of the Note and Guarantees (Ex. A to Bershtein Aff.). The Note contains an interest rate of two (2%) percent per annum.

Pursuant to the terms of the Note, Defendants were required to make monthly installments in the amount of One Hundred One Thousand Four Hundred Twenty Two Dollars (\$101,422.56) and 56/100 for a period of sixteen (16) months commencing on October 15, 2010. Bershtein affirms that Defendants made eleven (11) payments of principal and interest through August of 2011, but have failed to remit payments since that time. The unpaid principal balance on the Note, which is Five Hundred Four Thousand Five Hundred Eighty Seven Dollars (\$504,587.13) and 13/100, is now due in full.

The Note authorizes Plaintiff, upon any event of default, to declare the entire unpaid amount of principal or interest to be immediately due and payable. Plaintiff has demanded payment in full on the Note by serving a written notice to cure on Defendants via certified mail, return receipt requested, in accordance with the terms of the Note. Plaintiff provides a copy of the notice to cure (Ex. B to Bershtein Aff.). Pursuant to the Note, Plaintiff is also entitled to late fees at the rate of five (5%) percent with respect to any late payment, as well as reasonable attorney's fees and costs incurred in pursuing this action. Plaintiff submits that there is no defense to this action, and no triable issue of fact.

Plaintiff affirms that, in addition to their nonpayment, Defendants are also in default of the Note because Defendants transferred shares in ITC to Ravi Batra ("Batra") in violation of paragraph 6 of the Note which provides that the entire unpaid amount of principal and interest due shall immediately be declared due and payable upon transfer of any and all shares owned by Victor in ITC. In support, Plaintiff provides an article from The Indian Panorama Newspaper dated September 16, 2011 (Ex. C to Bershtein Aff.) which contains the caption "Ravi Batri is a stockholder for ITC, a Hicksville based 20 year old cellular company."

Plaintiff's counsel provides an affirmation regarding the services provided by him to Plaintiff and the fees charged for those services. Plaintiff's counsel affirms that attorney's fees in the sum of \$2,625.00 were incurred by Plaintiff in prosecuting this action.

In opposition, Victor affirms that until September 10, 2010, he and Plaintiff were shareholders in ITC, an entity that maintains an agency agreement with Verizon Wireless ("VZW") that permits ITC to sell VZW products and services. Victor and Plaintiff held all of the shares of ITC and each owned a 50% interest in ITC. On or about September 10, 2010, Plaintiff, Victor and ITC entered into an agreement ("Agreement") delineating the terms and conditions on which Victor would acquire Plaintiff's 50% interest in ITC and become a 100% owner of ITC.

Pursuant to the Agreement, 1) Defendants agreed to pay Alex the sum of \$2.6 million in exchange for all of her interest in ITC; 2) Defendants were required to pay, and did pay, Plaintiff \$1 million at closing via two bank checks (Ex. 2 to Batra Aff. in Opp.); 3) Defendants executed the Note in which they agreed to pay \$1.6 million to Plaintiff in monthly installments of \$101,422.56; 4) the Note was secured by a mortgage ("Mortgage") on the home of Victor and Indu; and 5) the Mortgage was to be held in escrow until a default.

On or about September 10, 2010, "[h]oping to obtain a better purchase price" (Victor Aff. in Opp. at ¶ 11), Victor paid Plaintiff an additional \$645,000. Victor affirms that this payment was used only as an advance payment towards his obligations on the Note, as the purchase price for Plaintiff's share of stock in ITC was not reduced. Victor alleges that he obtained these funds by taking loans from people he knew, and provides copies of the checks representing these alleged loans.

Victor affirms that, beginning in October of 2010, the Defendants made eleven (11) installment payments on the Note totaling \$1,115,648.16 and provides documentation corroborating those installment payments. Victor submits that he has overpaid his obligations to Plaintiff by not less than \$150,000. In support, he contends that 1) Defendants' total obligations to Plaintiff were \$2.6 million; 2) Defendants' total obligations to Plaintiff on the Note were \$1.6 million; 3) Defendants have paid Plaintiff a total of \$2,760,648.16 consisting of payments of \$1 million, \$645,000 and \$1,115,648.16. Thus, Victor contends, Defendants are not in default of their obligations and Plaintiff "apparently failed to credit ITC and myself with the \$645,000.00

in payments on the installment note that were made in advance of the first installment payment on the note being due” (Victor Aff. in Opp. at ¶ 22).

Victor avers that on or about September 20, 2011, during a luncheon meeting (“Meeting”), Plaintiff promised to refrain from claiming any default on any part of the Note and Agreement in exchange for consideration of \$40,000 that she claimed was otherwise due her, but which she could not prove. Victor alleges that he paid Plaintiff \$40,000 in exchange for her forbearing on claiming any default on the Note and Agreement and provides a copy of check dated September 20, 2011, payable to Plaintiff in the amount of \$40,000. Victor submits that the instant action lacks merit because Alex was paid in full. He contends that Defendants’ alleged overpayment to Plaintiff “was an error on my part which was induced, in large part, by the extreme stress of VZW’s July 26, 2011 threatened termination of ITC’s Master Agency Agreement” (Victor Aff. in Opp. at § 31).

Batra affirms that he is counsel for Defendants and, as of September 14, 2011, a non-voting minority shareholder, Chairman and General Counsel of ITC. Until September 10, 2010, Victor and Plaintiff were shareholders in ITC, an entity that maintains an agency agreement with Verizon Wireless (“VZW”) that permits ITC to sell VZW products and services. Victor and Plaintiff held all of the shares of ITC. On or about September 10, 2010, Plaintiff, Victor and ITC entered into the Agreement which delineated the terms and conditions on which Victor was acquiring Plaintiff’s 50% interest in ITC and becoming a 100% owner of ITC.

Batra affirms, *inter alia*, that 1) the Agreement was prompted by Plaintiff’s alleged diversion of ITC funds for her own use; 2) VZW, aided by certain of its subagents, was involved in fraudulent activity including the artificial inflation of the number of accounts by fraudulently activating prepaid cellular service in the names of phantom customers; 3) to cover up its own misconduct, VZW conducted a “sham” investigation (Batra Aff. in Opp. at ¶ 48) and concluded that ITC was involved in misconduct, resulting in the termination of ITC’s Master Agency agreement on or about July 26, 2011, to become effective January 31, 2012; and 4) subagents Reachout Wireless and American Candy, whom Defendants claim were also involved in fraudulent activity with VZW, filed a putative class action lawsuit against Defendants in New York County seeking to hold the Defendants liable for what Defendants contend was the plaintiffs’ own fraudulent activities (“Related Action”).

Batra affirms that he was present at the Meeting in September of 2011 which was also attended by Plaintiff, her son-in-law who is an attorney, and Victor. The participants discussed the July 2011 termination of the Master Agreement "at length" (Batra Aff. in Opp. at ¶ 50). Batra affirms that Plaintiff agreed to their suggestions that 1) Plaintiff forbear on collection of any remaining portions of the Note pending the resolution of ITC's disputes with VZW which might necessitate litigation; 2) ITC seek injunctive relief against VZW; and 3) Batra assume a minority non-voting ownership interest in ITC and assume the role of Chairman and General Counsel. The parties allegedly reached an agreement which involved Plaintiff's promise to refrain from claiming any default relating to the Agreement and, in exchange, Victor agreed to pay Plaintiff the sum of \$40,000 that she claimed was owed to her, although she could not substantiate that alleged debt. Victor paid the \$40,000 to Plaintiff but Plaintiff, in contravention of the parties' agreement, nonetheless issued default notices and sought acceleration of payment. Upon receiving Plaintiff's default notice, Batra sent a letter to Plaintiff's counsel in which he mentioned the Meeting, the promises allegedly made by Plaintiff at the Meeting and the \$40,000 paid by Victor to Plaintiff. Plaintiff's counsel did not respond to Batra's letter. Batra avers further that Victor recently reviewed the books and records of ITC. That review, which is still ongoing, revealed malfeasance by Plaintiff including her failure to verify billings received as accounts payable which resulted in improper credit card payments.

Batra affirms that Plaintiff cashed the \$645,000 in checks provided to her by Victor (Ex. 3 to Batra Aff. in Opp.). Defendants submit that Plaintiff has failed to credit those payments and, therefore, is seeking payments to which she is not entitled. Defendants contend that they have overpaid their obligations to Plaintiff, and are owed a refund.

In reply, Plaintiff denies Defendants' allegations regarding her diversion of funds but submits that those allegations are irrelevant to the instant motion. She describes as "ridiculous" (P's Reply Aff. at ¶ 9) Defendants' assertion that Victor pre-paid \$645,000 of the \$2.6 million before the closing. Plaintiff affirms that the checks provided relate to a separate transaction between Victor and Plaintiff involving the sale of shares and retail stock of thirteen (13) stores, including but not limited to Zcom of Woodbury, Inc. and Zcom of Carle Place, Inc. In support, she provides documentation (Ex. D to P's Reply Aff.), consisting of corporate resolutions and Plaintiff's resignation from those entities.

Plaintiff affirms that Victor's \$40,000 payment to her constituted his final payment on the sale of Zcom of NHP, Inc. and Zcom of Greenvale, Inc. They entered into a handwritten agreement dated March 26, 2011 (Ex. E to P's Reply Aff.) which provided that the final payment was due within six months, or October 1, 2011. Thus, the \$40,000 payment was never part of the sale of ITC. In addition, while Plaintiff admits attending the Meeting, she affirms that she never agreed to defer Victor's payment obligations under the Note, or to add Batra as a shareholder. Plaintiff also submits that the VWZ termination letter (id. at Ex. G) related solely to Victor's personal interactions with subagents, and improper payments by him, and did not involve Plaintiff.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by producing the Note and Guarantees, and demonstrating Defendants' failure to make required payments pursuant to those instruments. Plaintiff also contends that there is no defense to this action, and no triable issue of fact exists.

Defendants oppose Plaintiff's motion, submitting that 1) Plaintiff has failed to credit Defendants with the \$645,000 in payments, allegedly towards their obligations on the Note; 2) Plaintiff is estopped from pursuing this action in light of her alleged promise at the Meeting to forbear any default against the Defendants pending the resolution of their issues with VZW, and Defendants' payment of \$40,000 to Plaintiff; 3) there are issues of fact regarding whether Plaintiff fraudulent induced Defendants into entering the Agreement by withholding information from Victor regarding ITC's allegedly fraudulent conduct with VZW; and 4) in light of the issues raised by Defendants regarding their alleged overpayment to Plaintiff, the Court should exercise its discretion to dismiss this action.

In reply, Plaintiff submits that 1) Victor and Batra have accepted and acknowledged the debt owed by Defendants to Plaintiff based on Victor's default on the Note; 2) Victor had the opportunity, and obligation, to conduct due diligence prior to entering into the Agreement with Plaintiff; 3) many of Batra's statements are hearsay statements that the Court should disregard; 4) Batra's assertions regarding improper conduct by ITC subagents are irrelevant to the instant motion and do not create an issue of fact defeating Plaintiff's right to summary judgment; 5) with respect to the Meeting, Defendants have only established that Plaintiff agreed to ITC's

proposed litigation strategy and have not demonstrated Plaintiff's assent to deferring Defendants' default on the Note; 6) Defendants' assertion that the \$645,000 payment to Plaintiff, prior to execution of the Note, was a pre-payment on the Note is "an absurdity" (Cohn Reply Aff. at ¶ 14); rather, the \$645,000 was a payment for a separate transaction, specifically the sale of 13 stores; and 7) Defendants' estoppel arguments are an attempt "to create, out of whole cloth, a legal theory of estoppel since the Note itself required a writing which doe[s] not exist" (*id.* at ¶ 21).

RULING OF THE COURT

A. Summary Judgment in Lieu of Complaint

CPLR § 3213 provides as follows:

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. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise.

The purpose of CPLR § 3213 is to provide a speedy and effective means of securing a judgment on claims that are presumptively meritorious. *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434 (2d Dept. 2001).

A motion for summary judgment in lieu of a complaint in an action on a negotiable instrument will be granted only when it is clear that no triable issue or real question of fact is presented *First International Bank, Ltd. v. L. Blankstein & Son, Inc.*, 59 N.Y.2d 436 (1983), when the defense raised is unrelated to the plaintiff's cause of action *Parry v. Goodson*, 89 A.D.2d 543 (1st Dept. 1982), or when the defense is clearly without merit *Gateway State Bank v. Shangri-La Private Club for Women, Inc.*, 113 A.D.2d 791, 792 (2d Dept. 1985).

B. Promissory Note

To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms. *American Realty Corp. v. Sukhu*, 934 N.Y.S.2d 504, 505 (2d Dept. 2011), quoting *Lugli v. Johnston*, 78 A.D.3d 1133, 1135 (2d Dept. 2010). Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense. *Id.*, citing *Jin Sheng He v. Sing Huei Chang*, 83 A.D.3d 788, 789 (2d Dept. 2011).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's motion. Plaintiff has demonstrated her entitlement to judgment by showing 1) the existence of the Note, executed by the Defendants, which contains their obligation to repay, and 2) the Defendants' failure to pay in accordance with the Note's terms. Defendants, however, have submitted evidence in support of their defense which includes their contention that the payments of \$645,000 were intended to be credited towards their obligations on the Note. The Court is mindful that most of these payments preceded the execution of the Note, and has considered Plaintiff's argument regarding the implausibility of Defendants' contention that those payments were intended to be applied to the Note. Plaintiff contends that those payments were for separate transactions, specifically the sale of 13 stores, and has provided corporate resolutions and other documents in support of that assertion. Although most of the checks are cashier's checks which do not contain a memo line, the personal check from Satnam K. Oberoi to Plaintiff in the amount of \$50,000 contains no information in the memo portion regarding the purpose of that check. Under all the circumstances, and at this early stage of the litigation, the Court cannot reject Defendants' defense as a matter of law. The Court also concludes that summary judgment is inappropriate at this juncture in light of other issues raised including, but not limited to, 1) Plaintiff's alleged promise at the Meeting to defer Defendants' default on the Note, and 2) Plaintiff's alleged consent to Batra becoming a shareholder in ITC, notwithstanding the terms of the Note.

In light of the foregoing, the Court denies Plaintiff's motion and deems the moving and answering papers to be the complaint and answer, respectively.

All matters not decided herein are hereby denied.

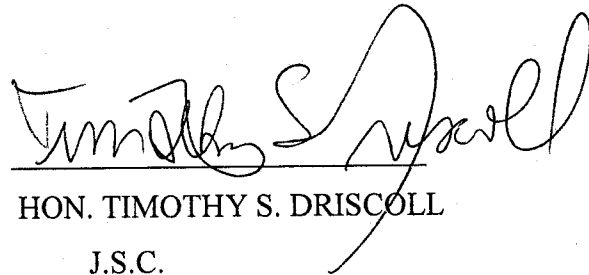
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on March 27, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

February 21, 2012



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

FEB 29 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**