

Big Big Big LLC v For Sale LLC
2013 NY Slip Op 30795(U)
April 15, 2013
Supreme Court, New York County
Docket Number: 108510/11
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

4/1/13
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PRESENT: MANUEL J. MENDEZ
Justice

PART 13

BIG BIG BIG LLC

Plaintiff

INDEX NO. 108510/11

MOTION DATE 03-06-2013

- v -

FOR SALE LLC and MICHAEL GITTER,

Defendant.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

FILED

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

PAPERS NUMBERED

1-2, 3

Answering Affidavits — Exhibits _____

4-5, 6

APR 19 2013

Replying Affidavits _____

7

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Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that Plaintiff's motion for summary is granted.

Plaintiff is the holder of an unsecured promissory note in the amount of \$100,000 Dollars, signed by defendant For Sale LLC (hereinafter "For Sale") and guaranteed by defendant Michael Gitter (hereinafter "Gitter"). The note is dated January 24, 2007 and has a maturity date of March 31, 2007.

Section 3 of the note EVENTS OF DEFAULT, lists the events of default. One of the events of default is "(a) failure by the company to make payment of the principal and unpaid accrued interest of this Note when due and payable. Another event of default is (f) failure by the company to comply in all respects with sections 5 and 8 hereof, and , with respect to Section 8 only, the continuation of such failure for a period of five days."

Section 7 of the note COMPANY REPRESENTATIONS, part (f) states: " the Company currently owns or has the exclusive right to use(except for the Zipper IP, which is non exclusive), on a royalty-free basis, all applications and registrations for patents, copyrights, trademarks, trade names, service marks, brand names and internet domain names and all other material intellectual property rights ("intellectual property") used in or necessary to the conduct of the Company's business as currently or contemplated to be conducted. All such Intellectual Property is either owned in full by the Company or Michael Gitter, except for the Zipper Technology used on the Company's Zipper shoes (the "Zipper IP")...."

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

Section 8 PROTECTIVE PROVISIONS (A) details actions which the company cannot take until the note is paid in full, one of them being (k) “Take any action that could result in any of the Company’s representations and warranties under this Note becoming untrue, or fail to promptly notify the Holder of the occurrence or non-occurrence of any event which could result in any of such representations and warranties becoming untrue.”

Section 8C states : “within 30 calendar days of the date of this Note, the Company and Michael Gitter shall cause all of Michael Gitter’s right and interest in and to any Intellectual property used or contemplated to be used in the conduct of the Company’s business (e.g. ‘Snaps’ name and logo, patents for shoe design and snaps technology, website domain names and URL’s) to be transferred, in form and substance acceptable to the Holder, to the Company at no cost and without any further ownership interest or right to payment (e.g. royalty payments) or use accruing to Michael Gitter or any other person (except with respect to the Zipper IP, the use of which is permitted by Michael Gitter’s co-applicant, subject to an oral agreement with such co-applicant that it shall use the Zipper IP only in geographic regions outside the United States).

Section 10 GUARANTEE OF THE COMPANY’S OBLIGATION IN CERTAIN EVENTS OF DEFAULT states: “in consideration of the loan made by Holder to the Company pursuant to this Note, Michael Gitter (“Gurantor”) irrevocably and unconditionally undertakes that if, following the occurrence of an Event of Default resulting by a breach by the Company of the provisions of Sections 8 or 5 of this Note, the Company fails to pay in full and on time any amount due under or in connection with this Note, Gurantor (I) will promptly on demand pay that amount as if it were the principal obligor and (ii) agrees to indemnify Holder on demand against each loss, liability and cost which Holder incurs as a result of the Company’s failure to perform in full and on time its obligations under or arising out of this Note.....this guarantee shall continue and remain in full force and effect until all the obligations of the Company and its liabilities arising under this Note shall have been duly performed, paid and discharged....Notwithstanding anything herein to the contrary, Michael Gitter’s personal liability under this Section 10 shall not in any event exceed \$150,000 in the aggregate.”

Section 13 MISCELLANEOUS states: (d) Expenses of Collection- if this Note is referred to an attorney for collection, whether or not suit has been filed or any other action instituted or taken to enforce or collect under this Note, the Company shall pay all of the Holder’s costs, fees (including reasonable attorney’s fees and paralegal’s fees) and expenses in connection with such referral.”

“(f) Debtor- Creditor Relationship- the Holder shall in no event be construed for any purpose to be a partner, joint-venturer or associate of the Company, it being the sole intention of the parties to establish a relationship of debtor and creditor.”

For Sale defaulted on the note by failing to pay at the maturity date and the Plaintiff brought suit against it and Gitter as “Guarantor”. Plaintiff claims that it is entitled to Summary Judgment against For Sale due to its non-payment of the note and that it is entitled to Summary Judgment against Gitter as Guarantor because For Sale and Gitter breached the provisions of Sections 8 and 5 of the note thereby triggering the guarantee. More specifically, Plaintiff alleges that For Sale breached sections 3 (a)

and (f), 7(f), 8 A (k) when it misrepresented that it owns or has the exclusive right to use on a royalty-free basis, all applications and registrations for patents, copyrights, trademarks, Trade names, Service marks, brand names and internet domain names and all other material intellectual property rights ("intellectual property") used in or necessary to the conduct of the Company's business as currently or contemplated to be conducted and that all such Intellectual Property is either owned in full by the Company or Michael Gitter.

For Sale and Gitter also violated Section 8C when Gitter failed to transfer to For Sale his rights and interest in any intellectual property used or contemplated to be used in the conduct of the Company's business.

Defendants oppose the motion and argue that the guarantee has not been triggered and that the note was not for a loan but for financing of a joint-venture.

"The contractual language fixes the boundary of the legal obligation of the guarantor" (Phoenix Acquisition Corp., v. Campcore, Inc., 81 N.Y. 2d 138, 612 N.E. 2d 1219, 596 N.Y.S. 2d 752 [1993]). "When the terms of a contract are clear and unambiguous the intent of the parties must be found within the four corners of the contract giving practical interpretation to the language employed and the parties' reasonable expectation, thus a written agreement that is complete, clear and unambiguous on its face must be enforced according to its terms" (Westchester County Corrections Officers Benevolent Association v. County of Westchester, 99 A.D. 3d 998, 953 N.Y.S. 2d 623 [2nd. Dept. 2012]; United Management Administration & Marketing Services, Inc., v. Interstate National Dealer Services, 102 A.D. 3d 766, 958 N.Y.S. 2d 192 [2nd. Dpt. 2013]).

"When interpreting an unambiguous contract term, evidence outside the four corners of the document is generally inadmissible to add to or vary the writing "(R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29, 771 N.E. 2d 240, 744 N.Y.S. 2d 358 [2002]).

A reading of the Note clearly shows what constitutes an event of default. It can also be clearly ascertained what conduct on the part of For Sale and Gitter triggers the guarantee. For Sale did not pay on the note, For Sale made representations that it owned or has the exclusive rights to certain Patents, Licenses, Trademarks, Trade names, Service Marks, Brand names and URL's, when it actually didn't. Gitter and For Sale represented that within 30 days of the signing of the note all of Gitters rights and interesting to any intellectual property used or contemplated to be used in [For Sale's] business would be transferred to [For Sale]. That did not occur.

A reading of the Note clearly shows that the parties were not entering into a joint-venture but their relationship was that of a Debtor-Creditor.

For Sale defaulted in the payment on the note and in the representations made to Plaintiff triggering the guarantee (see North Fork Bank & Trust Company v. Thomason Industries Corporation, 194 A.D. 2d 772, 599 N.Y.S. 2d 835 [2nd. Dept. 1993]). The guarantee Gitter executed and gave to plaintiff was Clear, Complete and unambiguous on its face and was also unconditional. Gitter irrevocably and unconditionally undertook that following an event of default he will "(I) promptly on demand pay that amount as if [he] was the principal obligor." This language in the

guarantee makes Gitter liable for the entire amount (Wurlitzer Company v. Playtime Distributors, Inc., 58 A.D. 2d 684, 395 N.Y.S. 2d 267 [3rd. Dept. 1977]; Raven Elevator Corp., v. Finkelstein, 223 A.D. 2d 378, 636 N.Y.S. 2d 292 [1st. Dept. 1996]).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law against For Sale for defaulting on the Note and against Gitter on the Guarantee by submitting the Promissory Note and Michael Gitter's deposition Transcript (see H & H Custom Homes, Inc., v. H. Kossof, 96 A.D. 3d 445, 946 N.Y.S. 2d 131 [1st. Dept. 2012]; First American Bank of New York, v. Builders Funding Corporation, 200 A.D. 2d 946, 607 N.Y.S. 2d 460 [3d. Dept. 1994]). Defendants have failed to raise a triable issue of fact.

Defendant asserts affirmative defenses that are boilerplate, conclusory, devoid of merit and should be dismissed (Brown v. State Farm Insurance Company, 237 A.D. 2d 476, 655 N.Y.S. 2d 104 [2nd. Dept. 1997]; Affalato v. Standard Fire Insurance Co., 277 A.D. 2d 264, 715 N.Y.S. 2d 657 [2nd. Dept. 2000]).

Accordingly , it is ORDERED that Plaintiff's motion for partial Summary Judgment is granted, and it is further

ORDERED, that plaintiff is granted judgment against defendant For Sale LLC in the amount of \$100,000.00 plus statutory interest from March 31, 2007, and it is further

ORDERED, that plaintiff is granted judgment against defendant Michael Gitter in the amount of \$100,00.00 plus statutory interest from March 31, 2007, and it is further

ORDERED, that plaintiff is granted judgment dismissing all of defendants affirmative defenses, and it is further

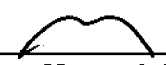
ORDERED, that the portion of the plaintiff's action that seeks recovery of attorney's fees is severed and the issue of the amount of reasonable attorneys fees plaintiff may recover against the defendants For Sale LLC and Michael Gitter is referred to a Special Referee to hear and report, and it is further

ORDERED, that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry upon counsel for the defendants, upon the Clerk of the Trial Support office (Room 158), and together with a completed information sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: April 15, 2013


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FILED

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