SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 650665/2013
NAGEL, IRA
vs
MONGELLI, JOSEPH
Sequence Number : 001
SUMMARY JUDGMENT/LIEU COMPLAINT

INDEX NO. _____
MOTION DATE 5.29.13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action to recover on two notes, plaintiff Ira Nagel ("plaintiff") moves pursuant to CPLR 3213 for summary judgment *in lieu* of complaint against defendant Joseph Mongelli ("defendant") in the amount of $684,000 plus interest at the default rate provided pursuant to contract, and for costs, disbursements and reasonable attorneys' fees.

This action arises out of a series of transactions related to a strip mall consisting of four commercial tenants located at 138 South Road, Enfield, Connecticut owned by 138 South Road LLC.

In support of his motion, plaintiff attests that defendant executed two promissory notes (Exhibits A and B) on April 1, 2010, payable on September 30, 2013, one of which was made payable to plaintiff for $300,000.00 ("plaintiff's note"), and one of which was executed by defendant for $300,000.00 and assigned to him by nonparty Barry Boyarsky ("Barry") ("Barry's note").[1] Under the notes, defendant agreed to pay interest only payments in monthly installments

[1] See Assignment of Limited Liability Company Interest in 138 South Road LLC from Boyarsky to Ira Nagel, dated August 24, 2012 (Exhibit C).

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

Dated: _____ _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

at the rate of 7% in the amount of $1,750.00 on November 1, 2011 and on the first day of each month thereafter until the remainder of the principal is paid in full (or in the event defendant could not refinance the existing first mortgage, the note shall be cancelled on September 30, 2013). The total interest due and owing on each note as of January 1, 2012 at the rate of 12% per annum and at the default rate of 12%, is $42,000.00 and payment of the Note has been duly demanded and refused. Therefore, plaintiff seeks $684,000.00.

According to plaintiff, both notes were given "in lieu of purchase of real property" (Affidavit, ¶6, Exhibit D, Management Agreement and Option to Purchase and Agreement of Sale (the "Option to Purchase Agreement"). The Option to Purchase Agreement is between 138 South Road LLC and defendant, and gives defendant the authority to manage the property as given to the managing member under the Operating Agreement, and expressly requires that "Joseph Mongelli, shall pay the interest on the two promissory notes. . . ." (¶5). And, "So long as Joseph Mongelli shall have fully performed all of the terms, conditions and provisions of this Agreement and make the payment required under the . . . promissory notes, he shall have an option to purchase the center under the following terms and conditions" (¶6). The Agreement further gave defendant "the exclusive option to purchase the Center" in consideration of the payment provided for in Article 7 of the Agreement (which required defendant to pay $100,000 upon execution of the Agreement). Defendant was also given "the option to purchase the Center for the sum of $700,000 above the mortgage balance as of April 1, 2010. . . ." (¶14).

In opposition, defendant argues that contrary to plaintiff "fraudulent[]" allegations, the two notes were not given in lieu of purchase of real property, but were "contingent components" of defendant's option to purchase the real property. Further, the assignment from Barry to plaintiff specifically refers to other documents and contingencies, which were not submitted by the plaintiff. Thus, plaintiff failed to prove that he is the legitimate holder of the note made to Barry. Furthermore, the notes state that payment on each by defendant shall be made on September 30, 2013 or in the event of default then on Demand, and as such, the principal balance under the notes are not yet due. Therefore, plaintiff's motion is premature. And, not only did plaintiff fail to provide any proof of a demand made upon defendant, there is no allegation (or proof) of any default by defendant that would trigger any demand and, both notes give defendant an opportunity to cancel the notes on September 30, 2013. Plaintiff also omitted the undated "Agreement Supplementing Promissory Note" executed by plaintiff and defendant, which affords defendant a credit in the amount of rent overdue by Skater City LLC (a commercial tenant of which plaintiff is the sole member) against the balance of plaintiff's note. Outstanding rent is due by Skater City LLC which would reduce any sum owed to plaintiff. Discovery is necessary on the above issues. And, the Court should grant defendant summary judgment dismissing plaintiff's action.

In reply, plaintiff argues that although a demand for payment was not required, a demand was made orally and in writing. The notes were not subject to any contingencies according to Article 3, sections 3-301 and 3-202 of the Uniform Commercial Code, and thus, the notes may be sold to any third party and are not contingent to any agreement. Defendant admits by his silence that he did not pay the notes, and that the notes are now due in full. The fraud defense is insufficiently pleaded. Further, defendant's opposition papers were untimely served on the night before the return date, and should be disregarded, notwithstanding that plaintiff was given time to

submit a reply.[2]

Discussion

CPLR 3213 provides: "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 prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money--an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 699 NE2d 242 [1996]; see, 4 Weinstein-Korn- Miller, N.Y.Civ.Prac. ¶ 3213.04, at 253). A document comes within CPLR 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms" (*Weissman supra, citing Interman Indus. Prods., v R.S.M. Electron Power*, 37 NY2d 151, 154–155, 371 NYS2d 675, 332 NE2d 859).

"To establish *prima facie* entitlement to summary judgment *in lieu* of complaint, 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 of the defendant to pay in accordance with the note's terms" (*Zyskind v FaceCake Marketing Technologies, Inc.*, --- NYS2d ----, 2012 WL 6619333 [1st Dept 2012]). "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 Pennsylvania Higher Educ. Assistance Agency v Musheyev*, 68 AD3d 736, 888 NYS2d 911 [2d Dept 2009]), and the defendant is obligated to set forth in his opposition papers any defenses he may have on the merits and to lay bare his evidentiary proof supporting any such defenses (*Alfred E. Mann Living Trust v ETIRC Aviation S.a.r.l.*, 78 AD3d 137, 910 NYS2d 418 [1st Dept 2010]). And, "It is settled that 'invocation of defenses based on facts extrinsic to an instrument for the payment of money only do not preclude CPLR 3213 consideration'" (*Alard, L.L.C. v Weiss*, 1 AD3d 131, 767 NYS2d 11 [1st Dept 2003] *citing Judarl LLC v Cycletech Inc.*, 246 AD2d 736, 737, 667 NYS2d 451 [1998]).

Here, plaintiff established, and it is uncontested, that defendant executed the two notes at issue. As to Barry's note, under the assignment, Barry transferred and assigned to plaintiff "all of his right, title and interest in the unpaid principal balance and any unpaid interest in the Promissory Note of Joseph Mongelli dated April 1, 2010 in the original amount of $300,000." (¶3). However, as pointed out by defendant, the first paragraph of the assignment states that

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[2] In light of plaintiff's submission of his reply papers, and the absence of any showing of prejudice, the Court considers defendant's opposition papers in their entirety (*Marte v City of New York*, 102 AD3d 557, 957 NYS2d 864 [1st Dept 2013] (holding that the motion court properly considered the opposition papers, "given that plaintiff has not shown prejudice by the late service, and had, in fact, submitted reply and supplemental reply affirmations") *citing, Prato v Arzt*, 79 AD3d 622, 912 NYS2d 881 [1st Dept 2010]). The caselaw cited by plaintiff holding to the contrary is either not controlling, or factually distinguishable as there is no mention of any reply papers submitted *(Risucci v Zeal Mgt. Corp.*, 258 AD2d 512, 685 NYS2d 280 [2d Dept 1999]; *Romeo v Ben-Soph Food Corp.*, 146 AD2d 688, 537 NYS2d 52 [2d Dept 1989]; *Foitl v G.A.F. Corp.*, 64 NY2d 911, 488 NYS2d 377 [1985] (holding that court abused its discretion in accepting the plaintiff's son's affidavit submitted with a surreply in opposition to defendant's summary judgment motion "several weeks after the return date of the motion") refusal to consider plaintiff's affidavit delivered to the Court "on the same day as, but several hours after, the motion was marked 'submitted' was not improper)).

Barry "as Assignor for good and valuable consideration . . . subject to the approval and execution of Release of Guaranty by American Eagle Federal Credit Union,. . . .and subject further to the execution of a Mutual General Release by and among Ira Nagel (plaintiff) and Sarah Rose, LLC, on the one hand, and Fern Boyarsky and Barry Boyarsky, on the other hand,. . . ." In reply, plaintiff failed to submit any documentation indicating that these conditions were satisfied. As such, plaintiff failed to establish, as a matter of law, that he is the assignee of Barry's note.

In any event, even assuming the assignment of Barry's note to plaintiff is effective, in light of all the submissions, plaintiff failed to establish defendant's default under either plaintiff's note or Barry's note. Under these notes, defendant agreed to pay plaintiff the principal sum on September 20, 2013 or in the event of a default "then on Demand." Defendant also agreed to pay monthly installments of interest only payments of $1,750.00 beginning on November 1, 2011 and on each month thereafter. However, plaintiff's affidavit submitted in support does not expressly allege that defendant defaulted on any payments on or after November 1, 2011. Instead, plaintiff states that interest at 12% per annum "is due and owing as of January 1, 2012 and interest shall accrue thereafter at the default rate of 12%."

Further, as to plaintiff's note, the Option to Purchase Agreement referenced a Contract of Sale attached thereto (¶6f), wherein the purchase price of the property was $700,000.00 over the balance of the mortgage, less the $100,000.00 down payment defendant made, plus "the balance of the amounts payable" by defendant "against the then outstanding balance of the Promissory Notes . . . after taking any credits . . . due to the Purchaser by reason of cumulative payments of monthly rent by Skater City LLC in an amount less than [$10,500] per month. . . ." (¶2.1). The April 2010 Skater City LLC lease was amended to advance the commencement of the monthly $10,500 rent two months sooner, from October 2011 to August 1, 2011. Under the Agreement Supplementing Promissory Note executed by plaintiff and defendant, defendant is granted a credit in the amount of rent overdue by Skater City LLC against the balance of plaintiff's note. And, plaintiff and defendant signed an "Agreement Supplementing Promissory Note," providing that any rent unpaid by Skater City LLC would offset the balance of the note, and, that moreover, defendant "shall not be . . . held in default under the terms of the note by reason of his *offsetting the unpaid rent against the current interest* and/or principal due under [plaintiff's] Note." (Emphasis added). In opposition, defendant submits a letter dated September 22, 2010 addressed to plaintiff in which he advises plaintiff that he "applied" the $1,750 interest only payment against September's $10,500 rent unpaid by plaintiff, thereby reducing the principal sum to $291,250. A similar letter was sent by defendant to plaintiff for the months of October 2010 through August 2011. Since the apparent offset taken by defendant did not constitute a default under the note pursuant to the Agreement Supplementing Promissory Note, it cannot be said that defendant defaulted under plaintiff's note.

As the movant, plaintiff bears the initial burden of establishing its cause of action and neither plaintiff's affidavit, nor his submissions, indicate that defendant failed to pay the interest only payments in accordance with the notes.

Further, plaintiff failed to establish that the notes constitute an instrument for the payment of money only and that no demand is necessary (*Bank of America, N.A. v Solow*, 59 AD3d 304, 874 NYS2d 48 [1st Dept 2009] (holding that no formal demand, beyond the motion in lieu of complaint, was necessary to state a cause of action on an absolute and unconditional guaranty,

which expressly waived demand or presentment and was expressly made a primary obligation of the defendant]). Here, the first paragraph of each note indicates that defendant agreed to pay the "Payee" (*i.e.*, plaintiff) $300,000 "on September 30, 2013 *or in the event of a default then on Demand.*" (Emphasis added). Although the notes contain a waiver of demand provision, such provision conflicts with the preamble in the notes. Therefore, contrary to plaintiff's contention, in order for plaintiff to recover the principal amount of each note at this juncture, plaintiff must establish defendant's default and that a demand was made, which plaintiff failed to establish as a matter of law with his moving papers. And, plaintiff's January 2013 demand letter noting defaults based on defendant's performance as manager of the property and from defendant's election of his option "not to close," improperly submitted in reply, is insufficient to overcome the above inadequacies in plaintiff's motion.

However, as defendant failed to establish his non-liability under the notes as a matter of law, summary judgment in his favor is likewise unwarranted at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3213 for summary judgment *in lieu* of complaint against defendant Joseph Mongelli is denied, and defendant's application for summary dismissal of the complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry; and it is further

ORDERED that plaintiff's motion papers shall be deemed the Complaint, and defendant shall serve its Answer to the Complaint within 30 days of service of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated 6·19·2013 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**