

Mancuso v GLC Partners, Inc.
2013 NY Slip Op 33294(U)
April 1, 2013
Supreme Court, New York County
Docket Number: 650331/2013
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROLE EDWIEAU
Justice

PART 35

MANCUSO, ROBERT F.

INDEX NO. 650331/13

-v-

MOTION DATE 3/15/13

GLC PARTNERS

MOTION SEQ. NO. 001

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 accordance with the accompanying Memorandum Decision, it is hereby ORDERED that plaintiff's motion pursuant to CPLR 3213 for summary judgment in lieu of complaint against defendant for \$200,000 plus interest from January 17, 2012, and attorneys' fees, costs, and disbursements is granted; and it is further

ORDERED that defendant's request for dismissal of this action is denied; and it is further

ORDERED that the issue of the amount of attorneys' fees, costs, and disbursements due plaintiff from defendant is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff Robert F. Mancuso, and against defendant GLC Partners, Inc., in the sum of \$200,000.00, plus 12% interest from January 17, 2012, plus costs and disbursements to be calculated by the Clerk upon an appropriate bill of costs; 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.

This constitutes the decision and order of the Court.

Dated: 4/1/13

[Signature] J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ROBERT F. MANCUSO,

Plaintiff,

-against-

GLC PARTNERS, INC.,

Defendant.
-----X

Index No.: 650331/2013
DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

Plaintiff, Robert F. Mancuso (“plaintiff”) moves pursuant to CPLR 3213 for summary judgment *in lieu* of complaint against defendant GLC Partners, Inc. (“defendant”) for \$200,000 plus interest from January 17, 2012, and attorneys’ fees, costs, and disbursements, based a note executed by defendant.

Factual Background

Plaintiff is the holder of a Series B Participating Convertible Note, dated January 17, 2012, issued by defendant, with a principal value of \$200,000 (the “Note”) in return for a \$200,000 loan. The Note is payable in full on April 1, 2017, with annual installments to be paid on or before October 1st of each year for so long as any principal balance is outstanding, plus any necessary adjustment based on audited financial statements to be paid no later than April 1st after the year in question.

The Note provides that in the event of a default, interest on the unpaid principal amount is to accrue at 12% per year from the date of default until the default is cured (§2(c)).

Plaintiff asserts that defendant failed to make its first interest payment due on October 1, 2012, and continues to be in default in accordance with paragraph 6(b). In subsequent emails to

plaintiff, defendant admitted its inability to pay its debts as they become due, constituting another event of default under paragraph 6(f).

Under the Note, paragraphs 7(a) and (c), upon a default, the Note shall mature and the entire unpaid principal amount plus all accrued and unpaid interest “shall automatically become immediately due and payable” “without presentment, demand, protest or further notice.”

Plaintiff contends that a demand for payment has been made and refused.

Therefore, plaintiff is entitled to the judgment sought in the complaint.

In opposition, defendant argues that relief under CPLR 3213 is unavailable where the instrument requires something in addition to defendant’s explicit promise to pay a sum of money. Here, plaintiff fails to acknowledge that the Note is expressly “junior to the Series A Notes” and that such a conditional obligation is not subject to a determination on a motion for summary judgment *in lieu* of complaint. Also, the Series A Notes which are senior to plaintiff’s Note, are not submitted with plaintiff’s motion. Further, the preamble to the Note indicates that it was issued as “part of a series of Notes pursuant to the provisions of one or more Note Purchase Agreements” and plaintiff also failed to submit the Note Purchase Agreement in its papers. An obligation which expressly references and incorporates a separate Pledge Agreement and Note Purchase Agreement, which are not included in the moving papers, is not an explicit promise to pay a sum of money. Thus, no judgment can properly be entered, and the action should be dismissed.

And, the emails indicate that Note was subordinate to the Series A Notes and that payment on the Note would negatively impact payments owed to the Series A Noteholders.

In reply, plaintiff points out that defendant admitted that it owed in excess of \$1.5 million

in past due “current” liabilities such as payroll and office rent, and further, that defendant had no near term prospects of paying such liabilities. The eventual collectability of a judgment is irrelevant to the character of the Note as an instrument for the payment of money only. The section of the Note cited to by defendant addresses the relative rights of defendant’s creditors in a potential liquidation scenario in the event defendant’s assets were insufficient to discharge its liabilities. This section does not address the rights of any creditor against the defendant or supersede the default and remedy provisions of the Note. Nor does the partially “junior” nature of the obligation in liquidation change the basic character of the Note as an instrument for the payment of money only. The Note contains an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time.

Further, plaintiff does not allege any breach of the Note Purchase Agreement or seek indemnity for third-party claims pursuant to its provisions. Plaintiff does not seek to enforce any security interest in the shares of defendant under the Pledge Agreement. The sole relief sought is a money judgment. The existence of other agreements does not change the nature of the Note.

Discussion

CPLR 3213 provides that “[w]hen 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.” CPLR 3213 is available “where a right to payment can be ascertained from the face of a document” (*Boland v Indah Kiat Fin. (IV) Mauritius*, 291 A.D.2d 342, 739 N.Y.S.2d 122 [1st Dept 2002] citing *Matas v Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328, 711 N.Y.S.2d 178 [1st Dept 2000]). 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 (see, 4 Weinstein-Korn- Miller, N.Y.Civ.Prac. ¶ 3213.04, at 253). In fact, the remedy has proved an effective one, particularly for financial institutions recovering on promissory notes and unconditional guaranties (see, Cozier, Summary Judgment § 25.4, at 830, in 2 Commercial Litigation in New York State Courts [Haig ed.]).

Plaintiff established a *prima facie* case of its entitlement to payment, as required, “by proof of the note and a failure to make the payments called for by its terms,” and defendants raised no issue of fact as to defenses to the Note (*Boland, supra* at 343 citing *Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137, affd 29 NY2d 617). The Note provides:

. . .the Company [defendant] hereby unconditionally promises to pay to the order of the Holder [plaintiff] . . . the principal sum of Two Hundred Thousand Dollars (\$200,000) (the “Principal Amount”). Interest shall accrue from the date hereof on the unpaid Principal Amount of this Note at a rate specified below.

* * * * *

2. Payments. The Company shall make the following payments under this Note:

(a) Beginning on the issuance date of this Note . . . the unpaid Principal Amount of this Note shall bear interest, in arrears, (i) at a base rate per annum equal to six percent (6%) (the “Base Rate”), payable in cash at the time and in the manner described below so long as any Principal Amount or any other cost or charge remains unpaid

The Base Rate shall be paid in cash on or before October 1st of each year for so long as there is principal outstanding.

Based on the plain language of the Note, plaintiff establishes as a matter of law defendant’s absolute, unconditional obligation to pay the sum of \$200,000. And, the submissions establish that defendant failed to make payments due under the Note.

That the Note indicates that it is issued “as part of series of Notes pursuant to the provisions of one or more Note Purchase Agreements” inconsequential for purposes of plaintiff’s

motion under CPLR 3213, as such reference does not impact the unconditional obligation of defendant to pay plaintiff (*Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 A.D.3d 380, 839 N.Y.S.2d 756 [1st Dept 2007]) (“the plain language of the promissory note at issue establishes as a matter of law defendant’s absolute, unconditional obligation to pay the sum of \$2.8 million . . . and incorporates by reference the terms and conditions of the companion sale agreement only to the extent necessary for the enforcement of the note. Consequently, the two agreements are not inextricably intertwined and CPLR 3213 is applicable”); *O&M Gourmet Foods v Marino’s 184 Foods*, 225 A.D.2d 340, 638 N.Y.S.2d 466 [1st Dept 1996] (although “the notes refer to the security agreement, this does not preclude CPLR 3213 treatment ” where the “notes were for sums of money only, and were executed by the Mayer parties, who defaulted in their obligations to pay thereunder “; “The promise to pay the notes was unconditional and absolute and the Mayer parties expressly waived “presentment for payment, demand, notice of dishonor, protest and notice of protest”)).

Further, the “junior” status of the Note referenced in Section 3(a) also has no bearing on defendant’s unconditional obligation to pay plaintiff. Section 3(a) describes the “Ranking” of the Note compared with the “Series A Notes” and indicates that the “Holder [plaintiff] will have a preference in the event of the Company’s liquidation based on the foregoing priorities.” As pointed out by plaintiff, this action does not involve a liquidation and therefore, Section 3(a) is irrelevant to this proceeding.

Therefore, as defendant failed to raise an issue of fact as to its liability to plaintiff under the Note, plaintiff is entitled to summary judgment, and defendant’s request for dismissal of this action is denied.

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 for \$200,000 plus interest from January 17, 2012, and attorneys' fees, costs, and disbursements is granted; and it is further

ORDERED that defendant's request for dismissal of this action is denied; and it is further

ORDERED that the issue of the amount of attorneys' fees, costs, and disbursements due plaintiff from defendant is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

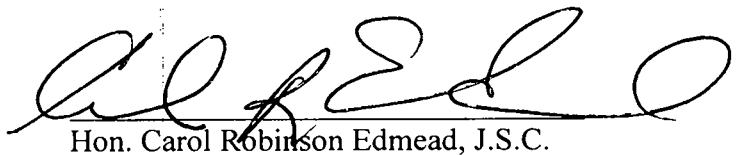
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk may enter judgment in favor of plaintiff Robert F. Mancuso, and against defendant GLC Partners, Inc., in the sum of \$200,000.00, plus 12% interest from January 17, 2012, plus costs and disbursements to be calculated by the Clerk upon an appropriate bill of costs; 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.

This constitutes the decision and order of the Court.

Dated: April 1, 2013


Hon. Carol Robinson Edmead, J.S.C.