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| Puka Capital Funding, LLC v L & N Twins Place, LLC |
| 2013 NY Slip Op 33656(U) |
| April 3, 2013 |
| Supreme Court, Bronx County |
| Docket Number: 307611/2011 |
| Judge: Howard H. Sherman |
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF THE BRONX

Puka Capital Funding, LLC,

Plaintiff

Index No. 307611/2011

-against-
 L & N Twins Place, LLC

Decision and Order

Defendant

The following papers numbered 1- 13 read on motion by Maria Balaj for an order granting renewal of this court's prior decision and order and the motion of plaintiff for an order pursuant to CPLR 5228 appointing plaintiff as a receiver are hereby consolidated for purposes of disposition

| <u>PAPERS</u> | <u>NUMBERED</u> | |
|---|-----------------|--|
| Order to Show Cause - Affidavit /Maria Balaj Exhs. A-F Affidavit of Alexander J. Zadrina - Exhs. A,B /Affidavit of Eli Cohn, | 1,2,3,4 | |
| Memorandum of Law in Support of Motion | 5 | |
| Affidavit in Opposition to Motion - Exhs. A-D | 6 | |
| Memorandum of Law in Opposition to Motion | 7 | |
| Affidavit in Reply - M. Balaj - Exh. A | 8 | |
| Order to Show Cause - Affidavit /Zef Balaj - Exhs. | 9 | |
| Affidavits Of M. Balaj and E. Cohen in Opposition | 10,11 | |
| Memorandum of Law in Opposition | 12 | |
| Affirmation in Reply - Exhs. A-C | 13 | |

Upon the forgoing papers, the motion for renewal and the motion for a receiver are decided as set forth below.

Facts and Procedural Background

By decision and order of this court dated March 27, 2012, the motion of plaintiff Puka Capital Funding , LLC ("Puka Capital") for summary judgment in lieu of a complaint was granted. On April 10, 2012, judgment was entered in accordance with the decision and order in the amount of \$ 356, 987.17 with interest calculated at the rate

of 6 % per annum from 02/26/07.

The underlying claim was the default of defendant L & N Twins Place , LLC ("L&N ") in the payment of principal on a promissory note dated February 28, 2002 signed by David Balaj as a member of L & N . By its terms, all outstanding principal and accrued interest was due and payable as of February 28, 2007.

It is undisputed on this record, that in February 26, 2002, David Balaj and his wife Maria Balaj the only other member of L & N, purchased real property in Pleasantville, New York,¹ after having received \$861,000.00 from Puka Capital, a limited liability company whose managing director is Zef Balaj, ("Z. Balaj") , the father of David Balaj.

Also undisputed is the fact that that on April 30, 2002, L & N paid to Puka \$ 587,043.00 .

In 2009, David Balaj commenced divorce proceedings in Supreme Court, Westchester County.²

In August 2011, Puka Capital commenced this action seeking payment of the unpaid principal on the note.

Puka moved for summary judgment in lieu of a complaint, and in opposition, Maria Balaj maintained that the balance of the funds advanced by Puka Capital not

¹ The premises is described as a 7 unit residential building with six units being one-bedroom apartments , and one, a three-bedroom unit.

² Balaj v. Balaj , Index # . 23678/09, Supreme Court, Westchester County

repaid, was, in fact, intended to be a gift from her mother and father-in-law.

To date, David Balaj has not interposed an answer or appeared in this action.

Motion and Contentions of the Parties

1) **Maria Balaj** moves for leave to renew the prior motion on the basis of new documents not offered in opposition to the motion that would change the prior determination [CPLR 2221 (e)(2)].

Mrs. Balaj attests that the first time she saw the promissory note was when this action was commenced, and she maintains that the documents she has recently discovered establish that the note did not exist until prepared by her spouse in 2010, and that while those documents existed at the time of the motion, Mrs. Balaj did not then know of their existence, and only now could secure them.

The first of these documents³ consists of a meta-data history in connection with a Microsoft Word document file on her home computer retrieved with the assistance of her divorce attorney's para-legal, that "indicated that the Promissory Note was created on January 17, 2010." The designated author of the document is Alexander J. Zadrima, Maria's Balaj's brother, who is an attorney, and who, on occasion, represented Z. Balaj.

The second document is a typewritten letter addressed to Zef and Lina,⁴ from

³ Exhibit D

⁴ Mr. And Mrs. Zef Balaj

Maria and David dated May 3, 2002, thanking them for the "extremely generous monetary gift towards out new home ."

Alexander J. Zadrina, Esq., ("Zadrina") attests that he represented Zev Balaj in connection with commercial transactions and would send to his client" *pro-forma* commercial forms in Microsoft Word format for his use " including "a fill-in-the-blank Promissory Note form ." [Affidavit of Alexander J. Zadrina ¶ 3] Zadrina denies that he prepared the 2002 promissory note, which he states is confirmed by the fact that he did not, as would be his customary practice, witness or notarize the signatures.

In addition, he attests that the meta-data attached to the pro-forma note indicates that the document was saved by him, while the meta-data submitted in support of the motion indicates that the last modification was made and saved not by him , but by a computer identified as "Preferred Customer."

The motion is also supported by a three-page excerpt of the April 6, 2011 examination before trial testimony of David Balaj in the divorce proceeding. The subject note was offered as defendant's exhibit in the deposition, and David Balaj in identifying it, testified that his wife, while being aware of the loan , had no knowledge of the note , nor would she ever "acknowledge the fact why it was drafted." [DAVID BALAJ EBT: 374-375].⁵

⁵ Balaj v. Balaj, Index No. 23678/09 , Supreme Court, Westchester County

Puka Capital opposes the motion on the grounds that the documents and representations made by Balaj and Zadrima are wholly speculative, contrary to earlier representations, and refuted by documentary evidence, and there is no reasonable justification offered for the failure to tender either document in opposition to the original motion.

It is argued that the computer printout of the unsigned note could have been timely discovered and submitted with the exercise of diligence, and any explanation described by movant as a "stroke of luck" is not a reasonable explanation for a lack of such diligence.

It is maintained that the Zadrima affidavit lacks probative value as there is no showing that the two-page executed note had its origins in the four-page *pro forma* sample provided by Zadrima to Zef Balaj.

Zef Balaj attests that he never received the "thank you" letter in May 2002, or anytime thereafter, and as both his son and daughter-in-law lived in his house at the time awaiting the completion of the renovation of the Pleasantville property, it would be unlikely that such a note would have been sent to him and his wife at Puka Capital's business address. Moreover, there is no explanation other than the claim of a heightened sense of suspicion why the letter signed by the movant, was not retrieved and offered in opposition to the original motion.

In addition, it is maintained that the letter, signed only by L & N's principals , could not effect a discharge or modification of the note as against the non-signatory plaintiff, by its own terms,⁶ and the applicable provisions of the law [U.C.C. § 3-605].

In reply, Maria Balj attests that her proof of "fraud" is even more compelling as the computer that produced the note was not purchased by her spouse until 2006, as evidenced by a copy of the invoice annexed as an exhibit.

2) By order to show cause, Zef Balaj moves for an order appointing Puka Capital as the receiver of the Pleasantville real property pursuant to CPLR 5228(a) contending that there is a need to conserve the property and protect its position as a judgment creditor , "In that the Premises appears to be the only asset of L& N through which the Judgment may eventually be satisfied." [Affidavit of Zef Balaj ¶ 6].

It is alleged that as a result of L&N's failure to apply the rental income to real estate taxes, utilities and insurance , these expenses remain unpaid. Z. Balaj attests that since entry of the judgment, "Puka has been forced to pay some of expenses and undertaken some necessary repairs at the Premises because L& N either refuses or fails to meet its obligations vis-a-vis the Premises." [Id. ¶ 4].

Balaj further attests that he and his wife are the only members of both Puka Capital and ZLD Realty, LLC, a company engaged exclusively in the business of

⁶ Paragraph 7

managing commercial and residential real estate in this state and New Jersey , and his wife is approved by the Office of Court Administration to receive appointment as a receiver. Through their entities , Lina and Zef Balaj manage eight buildings in the Bronx and Westchester , and a commercial property in New Jersey, and are fully capable of acting as receiver for the subject premises.

As Puka only seeks authority to collect rents and to pay expenses and maintain lease agreements , it is argued that any required undertaking should be "nominal."

Maria Balaj opposes the motion attesting that since 2002, she has assisted in the management of the property where she and her children reside, and she continues to collect rents, make repairs and clean and sweep the hallways [Affidavit of Maria Balaj ¶ 16]. She denies the allegation of misuse of the rents she has collected, and further attests that pursuant to the terms of the divorce order, her spouse is required to pay expenses for the marital residence, thus accounting for the expenditures by Puka referenced in the moving papers.

Balaj argues that there is no demonstration here of special circumstances warranting the appointment of a receiver, and contends that if the court makes such a determination , under the circumstances here, the Receiver should be a neutral party , not her in-laws.

In reply, Puka argues that it is in the best position to serve as receiver here, and

contends that it has made the requisite showing under the statute , demonstrating the need to conserve the property and protect the interests of the judgment creditor, as the property is the only asset of the judgment debtor.

Discussion and Conclusion

Upon review of the papers herein , the court finds that the movant member of the defendant limited liability company, has demonstrated a sufficient basis for the renewal of the summary judgment motion .

To the extent it may be argued that the reason proffered for the failure to present the computer history and "thank you" note on the original motion are less than compelling, it is also to be observed that the court may exercise its discretion in the interests of justice.

It is settled that "[r]enewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (see CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (see e.g. *Spinac v Carlton Group, LTD.*, 99 AD3d 603, 952 N.Y.S.2d 870 [1st Dept. 2012]; *Mejia v Nanni*, 307 AD2d 870, 763 N.Y.S.2d 611 [1st Dept. 2003]; *Daniels v City of New York*, 291 AD2d 260, 737 N.Y.S.2d 598 [1st Dept. 2002]; *Strong v Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD2d 726, 659 N.Y.S.2d 104 [2nd Dept. 1997]). *Tuccillo v. Bovis Lend Lease, Inc.* 101 A.D.3d 625, 958 N.Y.S.2d 86 [1st Dept. 2012]

The record here supports such a finding, and upon renewal, it is the further finding of this court that the movant has raised material issues of fact concerning the execution of the note to preclude a finding of dispositive relief.

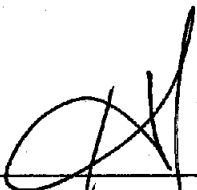
The computer data retrieved raises an at least arguable issue of fact that the execution of the note, acknowledged as an event completed without the movant's knowledge, was contemporaneous with the commencement of divorce proceedings between L & N's principals and was in furtherance of a fraudulent scheme to deprive her of recovering her share of the assets to which she would be entitled. While it is unresolved here as to the timing of its execution, it is clear that the note's enforcement, an event that would have been triggered by a default in 2007, came at a time at which the marriage of the principals was in the course of being dissolved.

For the reasons above stated the motion of the defendant for renewal is granted and that upon such renewal, the court vacates its prior order of March 27, 2012 granting the motion of the plaintiff for an award of summary judgment in lieu of a complaint as there are triable issues of fact.

The motion of plaintiff for an order pursuant to CPLR 5228(a) is denied as academic.

This constitutes the decision and order of this court.

Dated : April 3, 2013


Howard H. Sherman