

Levy v BCC Group, Inc.
2014 NY Slip Op 31123(U)
April 18, 2014
Supreme Court, New York County
Docket Number: 653218/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----- X INDEX NO. 653218/12

JOEL F. LEVY

Plaintiff,

-- against --

THE BCC GROUP, INC., WENDY KATZMAN,
MICHAEL KATZMAN, AND JOSEPH GATTI,

Defendants.

----- X

JOAN A. MADDEN, J.:

In this action for breach of contract, plaintiff Joel F. Levy (“Levy”) moves for summary judgment on his breach of contract claims. Defendants BCC Group, Inc. (“BCC”), Wendy Katzman (“Katzman”), Michael Katzman (“MK”), and Joseph Gatti (“Gatti”) oppose the motion, which is denied for the reasons below.

Background

BCC is a property and casualty insurance brokerage business, incorporated under the State of Delaware and authorized to do business in the State of New York. Defendants Katzman and Gatti are owners of BCC. Katzman’s husband, MK, is the President of BCC. Levy is a former owner of BCC, and this action arises out of various agreements made in connection with his decision to retire and to sell his shares of BCC.

At the time of his retirement from BCC in 2006, Levy held 10 shares of common stock of BCC. Pursuant to the Stock Purchase, Consulting and Non-Competition Agreement (“BCC Stock Purchase Agreement”) dated January 1, 2006, Levy agreed to sell four shares of common stock to BCC. In consideration of this sale, BCC agreed to: (1) credit \$126,831.00 against a loan due to BCC from Levy; (2) pay Levy \$100,000.00, plus 7.75% interest, (3) pay Levy a consulting fee of \$100,000.00; (4) pay Levy a non- compete fee of \$100,000.00; and (5) assume liability for, and pay in full, a Bank of America loan, furniture lease and credit line (collectively

held in Levy's name, rather than BCC's name). The three payments of \$100,000.00 were to be paid in 96 equal monthly installments, commencing June 1, 2006, pursuant to a Promissory Note ("BCC Note").

Levy agreed to sell three shares of common stock of BCC to Katzman, and three shares of common stock of BCC to Gatti, pursuant to two separate Stock Purchase Agreements ("Individual Stock Purchase Agreements"). In consideration of this sale, Katzman and Gatti agreed to pay Levy \$103,642.50 each, in 96 equal monthly installments commencing June 1, 2006, pursuant to two separate Promissory Notes ("Individual Notes").

Pursuant to §1.11 of both the BCC Stock Purchase Agreement and the Individual Stock Purchase Agreements, a tolling provision stated that if BCC's net insurance revenue fell below \$887,132.00 for any calendar year commencing with 2007, then defendants have the right to toll their monthly payments to Levy for a 12 month period. To invoke the tolling provision, defendants were required to send Levy notice including: (1) a BCC annual insurance revenue statement, showing the reduced BCC net insurance revenue for such calendar year; and (2) a revised payment schedule for the remaining monthly payments. The tolling provision would commence on the first day of the month following such notice.

On December 19, 2006, Levy entered into a Supplemental Agreement ("Supplemental Agreement") with defendants, amending the BCC Stock Purchase Agreement, BCC Note, Individual Stock Purchase Agreements, and Individual Notes (collectively the "Operative Documents"). Pursuant to §2(B) of the Supplemental Agreement, the liability to pay and discharge the Bank of America credit line was amended as, "Katzman, MK and Gatti agree to cause the BOA Line of Credit to be fully paid and discharged on or before July 1, 2008."

Pursuant to §8 of the Supplemental Agreement, an Event of Default under the BCC Note and Individual Notes was defined as a material breach of the terms or agreements set fourth in the Supplemental Agreement, which breach is not cured within 30 days written notice. Similarly, §6(e) of the Supplemental Agreement defined an Acceleration Event as a material breach of the

covenants or restrictions in the Operative Documents or Supplemental Agreement, which breach was not cured within 30 days written notice. Pursuant to §5 of the Supplemental Agreement, a cross default provision was included stating that if an Event of Default or Acceleration Event occurred under any of the Operative Documents, Levy was entitled to acceleration of payments under all of the Operative Documents. Notably, the Supplemental Agreement did not amend the tolling provision of the BCC Stock Purchase Agreement and the Individual Stock Purchase Agreements.

Defendants made timely monthly payments to Levy pursuant to the Operative Documents and Supplemental Agreement. The Bank of America credit line was not paid and discharged by July 1, 2008. However, defendants made timely payments on the Bank of America credit line, and were never in default of such credit line.

On November 28, 2011, Levy served a Notice of Default to defendants for not remitting November 2011 monthly payments due to Levy under the BCC Notes and Individual Notes, and for breaching their obligation to pay in full and discharge the Bank of America credit line by July 1, 2008. As of November 18, 2011, \$30,223.20 was outstanding on the Bank of America credit line. Defendants thereafter, remitted their respective November 2011 payments to Levy.

On December 6, 2011, Levy served a Notice of Default to defendants for not remitting December 2011 monthly payment due to Levy under the BCC Notes and Individual Notes. This Notice also stated that defendants were in breach of their obligation to pay in full and discharge the Bank of America credit line, which arose more than three years earlier. Defendants thereafter remitted their respective December 2011 payments to Levy, and the only remaining breach concerned the failure to pay and discharge the Bank of America credit line.

On December 28, 2011, Levy served a Notice of Acceleration to defendants. The Notice of Acceleration stated that defendants breached their obligation to pay in full and discharge the Bank of America credit line and thus, Levy was exercising his right to accelerate all payments due under the Operative Documents.

On January 25, 2012, defendants served a Notice of Exercise of Tolling Rights to Levy. This Notice specified that BCC's accountants determined that BCC's annual net insurance revenue, for calendar year 2011, fell below the threshold of \$887,132.00, and as such defendants were invoking their right to toll payments to Levy for a 12 month period, commencing February 1, 2012. This Notice included: (1) a BCC annual insurance revenue statement for calendar year 2011, indicating a net revenue of \$468,853.66; and (2) an amortized payment schedule.

On September 13, 2012, Levy filed this action asserting causes of action for (1) specific performance by BCC to pay in full and discharge the Bank of America credit line; (2) damages of \$97,359.81 plus 12% interest for breach of the BCC Stock Purchase Agreement and BCC Note; (3) damages of \$38,287.86 plus 12% interest for breach of the Individual Stock Purchase Agreement and Individual Note by Katzman; (4) damages of \$38,287.86 plus 12% interest for breach of the Individual Stock Purchase Agreement and Individual Note by Gatti; (5) specific performance by Katzman, Gatti, and MK to pay in full and discharge the Bank of America credit line; and (6) attorney's fees. Levy withdraws his first and fifth causes of action for specific performance. Defendants filed their answer, denying Levy's claims in their entirety, and defendants seek dismissal of Levy's complaint and assert a counterclaim for attorney's fees.

On January 25, 2013, defendants served another Notice of Exercise of Tolling Rights to Levy, indicating that BCC's annual net revenue for calendar year 2012 again fell below the threshold of \$887,132.00, and as such defendants were invoking their right to toll payments for a 12 month period, commencing February 1, 2013.

Levy now moves for summary judgment. In support of his motion, Levy submits the above-mentioned support documents and his affidavit. Levy maintains that defendants breached §2(B) of the Supplemental Agreement by failing to pay in full and discharge the Bank of America credit line by July 1, 2008. Levy asserts that the Bank of America credit line, on which he remains personally liable, had a balance of \$30,223.10 as of November 18, 2011. Thus, Levy argues that both an Event of Default and Acceleration Event have occurred under §8 and §6(e) of

the Supplemental Agreement, respectively, because such breach is a breach of a material covenant of the Supplemental Agreement. Further, Levy argues that under §5 of the Supplemental Agreement, he is entitled to invoke his rights under cross- default provision because an Event of Default and Acceleration Event have taken place, thus entitling Levy to acceleration of payments by all defendants under the Operative Documents.

In opposition, defendants submit the affidavit of Gatti, who states that timely payments have been made on the Bank of America credit line, defendants continue to make payments, such credit line has never been in default and defendants have refinanced such credit line to assume all of its liability and remove Levy's liability. He also states that Levy's claims for breach of §2(B) of the Supplemental Agreement is Levy's attempt to circumvent defendant's rights under the tolling provision of §1.11 of the BCC Stock Purchase Agreement and the Individual Stock Purchase Agreements, and states that it was not until defendants sought to exercise their right under the tolling provision that Levy raised the issue of defendants failure to pay off the Bank of America credit line, four years earlier. Gatti also maintains that Levy has not suffered any damages as a result of defendants alleged failure to pay and discharge such credit line by July 1, 2008. Defendants thus argue that since Levy has not suffered any damages, no breach of the Supplemental Agreement has actually taken place.

Moreover, defendants argue that Levy waived his right to assert breach of contract as he did not raise the issue of the failure to discharge the credit line until December 2011, or approximately three and a half years after the alleged breach took place. Alternatively, defendants argue that Levy's claims brought four years after the alleged breach is barred by the doctrine of laches.

In reply, Levy argues that defendant's exercise of their tolling rights was untimely and insufficient as to the notice requirements in the Operative Documents. Further, Levy asserts that he did not waive his right to bring forth this claim because an express waiver provision in the

Operative Documents specifies that waiver of any provision or claim is only effective by writing, and there is no such writing here.

Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

To prevail on a cause for action for breach of contract the plaintiff must prove “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426 (1st Dept 2010); see also, Clearmont Property, LLC v. Eisner, 58 A.D.3d 1052, 1055 (3rd Dep’t 2009). When a party has failed to come forward with evidence sufficient to demonstrate damage flowing from the breach alleged, dismissal of the breach of contract claim is in order. ERE LLP v. Spanierman Gallery, LLC, 94 A.D.3d 492, 493- 494 (1st Dep’t 2012); Maschler v. Brenker, 85 A.D.3d 692, 693 (1st Dep’t 2011).

Here, Levy and defendants entered into several stock purchase agreements and promissory note agreements, memorializing Levy’s intention to retire from BCC and sell his shares in BCC back to the company, and remaining owners, Katzman and Gatti. Pursuant to the BCC Stock Purchase Agreement and in consideration of Levy’s sale of his shares, BCC agreed to fully pay and discharge the Bank of America credit line, held in Levy’s individual name at that time, by July 1, 2008. This Agreement was subsequently amended by the Supplement Agreement. Pursuant to §2(B) of the Supplement Agreement, the obligation to pay in full and discharge the Bank of America credit line was amended as defendants each assumed liability to pay off such credit line by July 1, 2008.

While it is undisputed that defendants did not pay off such credit line by July 1, 2008, defendants provide evidence in the form of Gatti's affidavit that they have made timely payments on such credit line, continue to make payments, and have never been in default of such credit line. Further, Gatti asserts that the credit line has been refinanced to transfer liability from Levy to BCC. Under these circumstances, it is, at best, unclear whether the failure to pay off the credit line resulted any damages to Levy.

Levy argues that he was damaged, as he was entitled to accelerate the payments due under the agreements, based on the defendant's failure to pay off the credit line by July 1, 2008. Notably, however, in order to accelerate the payments under the Supplemental Agreement, the breach must be "material." See Supplemental Agreement §6 (e), § 8. "[T]he question of materiality of breach is a mixed question of fact and law usually more of the former and less of the latter and thus is not properly disposed of by summary judgment." CMI II, LLC v. Interactive Brand Development, Inc., 13 Misc.3d 1214(A), *9 (Sup Ct NY Co. 2006); see also, Bank of New Zealand v. Peer Holdings, Inc., 1991 WL 221122, *3 (SD NY 1991). Here, it cannot be said as a matter of law that the failure of defendants to pay in full and discharge the Bank of America credit line by July 1, 2008, was a material breach permitting the acceleration of payment.

At the same time, however, based on the non-waiver provision in the Stock Purchase Agreements, it would appear that Levy did not waive his right to invoke this breach. With respect to whether laches precludes Levy's claims, the court notes that they were asserted within the six-year statute of limitations period for breach of contract, and that for defendants to succeed with respect to this defense, they must show that Levy's delay in bringing the claims "hampered [their] ability to defend against [it]." Knobel v. Shaw, 90 A.D.3d 493 (1st Dep't 2011).

As for whether defendants breached the agreement by not making payments after February 2012, it appears from the record that defendants have properly invoked their tolling

rights under §1.11 of the BCC Stock Purchase Agreement and the Individual Stock Purchase Agreements. Levy's argument that defendants improperly invoked this right, since the first notice of tolling was sent in January 2012, after Levy provided notices of default in November and December 2011, is unavailing. Defendants tolling rights do not relate to the November and December 2011 payments, which Levy acknowledges were made to him. Instead, the January 2012 notice relates to future payments to be made beginning on February 1, 2012, based on the BCC net insurance revenues for 2011. Further the attached revenue statement for 2011 indicates that the revenue amount fell below the \$887,132.00 threshold amount, as defined under the BCC and Individual Stock Purchase Agreements.

As for the timing of the notice, the tolling provision states only that the tolling shall occur beginning on the first of the month after Levy is provided with such notice including, the annual net revenue statement, and the revised payment schedule. Further, Levy's argument that defendant's notice of invoking their tolling rights was improper because defendants did not specify the identity of the accountants whom prepared BCC's net insurance revenue statement is without merit. The notice sent to Levy, with the appropriate net revenue statement attached, indicated that such revenue statement was prepared by BCC's accountants. Likewise, it appears that defendants properly invoked the tolling provision for the 12 month period, commencing February 1, 2013.

Accordingly, Levy's motion for summary judgment is denied.


Conclusion

In view of the above, it is

ORDERED that Levy's motion for summary judgment granting the complaint is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on May 8, 2014 at 9:30 a.m. in Part 11, room 351, 60 Centre Street, New York, New York.

Dated: April 18, 2014



J.S.C.
HON. JOAN A. MADDEN
J.S.C.