[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

----------X

IPFS CORPORATION,

Plaintiff,

-against-

K & A TRUCKING, INC.,

Defendant.

----------X

Index No. 150723/14
Motion Date:10/15/14
Mot. Seq.: 001

DECISION AND ORDER

Ellen M. Coin, J.:

In this action involving a premium finance loan, plaintiff IPFS Corporation moves, pursuant to CPLR 3212 for summary judgment on its first and second causes of action, for breach of contract and for contractual attorney's fees, respectively. Plaintiff also moves to strike defendant K & A Trucking, Inc.'s affirmative defenses.

Factual Background

Plaintiff is in the business of financing insurance premium payments on policies in which its customers are the insureds. On December 27, 2012, plaintiff and defendant executed an insurance premium financing agreement (Financing Agreement). Plaintiff financed the sum of $44,413.55 on defendant's insurance policies with Ullico Casualty Co. (Ullico), with a finance charge of $1,512.89, for a total of $45,926.44. Defendant promised to repay the balance of the loan in seven monthly payments of

$6,560.92.

Defendant made the first payment, as due, on December 28, 2012. Defendant did not make the second payment, due on January 25, 2013, compelling plaintiff to send a Notice of Intent to Cancel the policies on January 30, 2013, giving defendant until February 17, 2013 to pay before cancellation of the policies. The Notice of Intent imposed a $328.05 late payment fee. Defendant made the second payment on February 18, 2013, including payment of the late fee.

Defendant failed to make the third installment payment on February 25, 2013. On March 4, 2013, plaintiff sent another Notice of Intent to Cancel the policy, giving defendant until March 22, 2013 to pay the February installment, plus the late fee.

Defendant failed to answer the March 2013 Notice of Intent to Cancel, and plaintiff sent defendant a Notice of Cancellation of the policies on April 4, 2013, with an effective cancellation date of April 7, 2013. The policies were cancelled thereafter.

Ullico was placed in rehabilitation on March 11, 2013, and in liquidation on May 30, 2013. Apparently, because of Ullico's rehabilitation, plaintiff could not obtain a return of the unearned premiums from Ullico, although plaintiff claims to have served a notice of claim against Ullico in liquidation. This action is brought to recover the amount of those unearned

premiums from defendant, as payment of the balance of the loan.

Defendant contends that it has no obligation to repay the loan, despite its default, based, in part, on Insurance Law § 3428 (d). Insurance Law 3428 (d) states, in pertinent part,

> "[w]henever an insurance contract the premiums for which are advanced under a premium finance agreement . . . is cancelled, the insurer or insurers within a reasonable time not to exceed sixty days after the effective date of the cancellation shall return whatever gross unearned premiums are due under the insurance contract or contracts to the . . . premium finance agency . . . for the benefit of the insured."

Defendant argues in its affirmative defenses that under Insurance Law § 3428, plaintiff is constrained to look to the insurer for repayment, rather than to defendant insured; that plaintiff waived its right to obtain the balance of the loan; that plaintiff failed to mitigate its damages; that the agreement lacks consideration; that plaintiff is barred by the doctrine of equitable estoppel; and that plaintiff has failed to name a necessary party, Ullico.

Much of defendant's defense to the action and motion is based on an incident which allegedly occurred between the parties, as follows. Defendant claims that it received a Rehabilitation and Injunction Order (Order) against Ullico, dated March 11, 2013, filed with the Delaware Chancery Court. The Order enjoined the institution of any action against Ullico.

According to Kathy Felicello (Felicello), defendant's president, defendant "took necessary steps to protect itself"

upon receipt of the Order." Felicello aff, ¶ 8. Felicello claims to have cancelled the "March 2013" payment to plaintiff. *Id.*, ¶ 7. She claims that in a conversation with an unidentified "agent" of plaintiff, Felicello was told that plaintiff would refund the payment to plaintiff if the stop payment order with defendant's bank was ineffective. *Id.*, ¶ 9. Felicello does not say whether the check was stopped or returned to defendant by plaintiff. Defendant received notification of the cancellation of the Ullico policy on April 4, 2013. Defendant then financed a new policy with a new insurer through plaintiff.

Plaintiff's litigation recovery manager Melissa Staples (Staples) denies that any check was received from defendant after February 18, 2013, and states that there is no evidence that any payment was ever stopped. She states, "I can say unequivocally that there is no evidence in plaintiff's records that there was any communication between [defendant] and [plaintiff] regarding a stop payment request." Staples aff, at 8. Further, Staples notes that any payment in "March 2013" would actually have been payment of the February installment, not the March installment, and that defendant was already in default when Ullico was placed in rehabilitation.

Analysis

Summary judgment is a "drastic remedy." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "[T]he 'proponent of a

summary judgment motion 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.'" *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

Plaintiff's Prima Facie Case

Initially, the court notes that Insurance Law § 3428, by its terms, does not limit a premium finance company's recovery of the balance of its loan solely to the unearned premiums in the hand of the insurer. It is a direction to the insurer to pay the premium finance company any unearned premiums upon the cancellation of the policy, not a direction to the premium finance company to obtain the unearned premiums from the insurer in satisfaction of the insured's financed debt. Further, the

Finance Agreement itself provides that plaintiff "at its option may enforce payment of this debt without recourse to the security given to the Lender," i.e., the unearned premiums. Finance Agreement, ¶ 6. Nor does the pending liquidation of Ullico estop plaintiff from seeking recovery from defendant. *US Premium Fin. v Sage Equip. Leasing Corp.*, 122 AD3d 919, 920 (2nd Dept 2014). Plaintiff may pursue both routes, collection on a note against defendant and a claim for return of unearned premiums in Ulico's liquidation, without detriment to either. (*Id.*). Thus, plaintiff may proceed to collect on its loan here.

Courts have held that a premium finance agreement is an "instrument for payment of money only," for purposes of a CPLR 3213 motion for summary judgment in lieu of complaint, indicating that the premium finance company can look to its borrower for the repayment of the loan. *See AFCO Credit Corp. v Eshaghian*, 217 AD2d 676, 677 (2d Dept 1995); *AFCO Credit Corp. v Boropark Twelfth Ave. Realty Corp.*, 187 AD2d 634 (2d Dept 1992). All that is necessary is proof of "the instrument and a failure to make the payments called for by its terms . . . ." *AFCO Credit Corp. v Boropark Twelfth Ave. Realty Corp.*, 187 AD2d at 634. Plaintiff has made this showing, and defendant has not denied nonpayment. Therefore, plaintiff is entitled to judgment, unless defendant has a valid affirmative defense.

Affirmative Defenses

As defendant does not seek to defend all of its affirmative defenses, only those at issue will be addressed.

a. Frustration of Purpose

Defendant first argues that its performance under the Finance Agreement should be excused because "the purpose of the agreement was frustrated." Defendant's memorandum of law, at 5. Defendant maintains that the sole purpose of the Finance Agreement was "for K&A to have insurance coverage," which it lost when Ullico went into receivership. *Id.* at 6.

"[T]o invoke frustration of purpose as a basis for nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense." *PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 508 (1st Dept 2011)(interior quotation marks and citations omitted). "The doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." *Id.* (interior quotation marks and citation omitted).

This court finds that a loan is not frustrated because the borrower does not get what it paid for. The agreement between the parties did not contemplate guarantee of the insurer's performance. Plaintiff's purpose, to lend money at a return, was

not frustrated when Ullico went into receivership. Plaintiff should not lose the value of its loan because an insurance company chosen by defendant failed to provide the coverage promised. Thus, frustration of purpose defense does not apply here.

b. Waiver

Defendant next argues that there is an issue of fact as to whether plaintiff waived its right to collect the balance of the premiums. According to defendant, as a result of the alleged communications with plaintiff's "agent," plaintiff "acquiesced in [defendant's] non-payment, indicating both [plaintiff's] awareness of a potential breach and simultaneous waiver of that breach." Defendant's memorandum of law, at 8. Defendant also argues that the fact that the parties entered into a new premium finance contract with a new insurer indicates a waiver of the right to collect on the previous loan.

> "Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage. However, waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection [internal quotation marks and citations omitted]."

Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 104 (2006). Intent to waive a right is generally a question of fact. *Id.*

Defendant has failed to raise an issue of fact on its affirmative defense of waiver. First, the court notes that any conversations between defendant's agent and an unnamed agent of plaintiff would be hearsay, and it is well settled that "'[a] party opposing summary judgment may proffer hearsay evidence, but such proof may not be the sole factual basis for denying summary judgment [citation omitted].'" *Andron v Libby*, 120 AD3d 1056, 1057 (1st Dept 2014).

Even if it could be shown that plaintiff's agent had a conversation with defendant's agent about stopping a check on the last payment defendant purports to have made, there is utterly no indication that plaintiff intended to relinquish its right to recover the loan balance. It might indicate that plaintiff expected to recover its premiums from Ullico, but that is not a knowing abandonment of the loan balance.

Further, to the extent that defendant is arguing that plaintiff's agent was offering an oral modification of the Finance Agreement, such a modification would be inadequate to alter the agreement. The Finance Agreement states that "[t]his document is the entire Agreement between [plaintiff] and [defendant] and can only be changed in writing signed by both parties . . . ." Finance Agreement, ¶ 18. It is well settled that "[p]arties to a written agreement who include a proscription against oral modification are protected by subdivision 1 of

section 15-301 of the General Obligations Law." *Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 (1977); *see also Ralco, Inc. v Citibank, N.A.*, 32 AD3d 301 (1st Dept 2006). Therefore, any conversation with plaintiff's agent would not create a modification of the Finance Agreement.

c. Equitable Estoppel

Nor is plaintiff equitably estopped from seeking to recover on its loan. Equitable estoppel

> "'is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.'"

Fundamental Portfolio Advisors, Inc., 7 NY3d at 106, quoting *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 (1982). The evidence must show that the defendant "*significantly and justifiably* relied on [plaintiff's] conduct to [defendant's] disadvantage . . . [emphasis added]." *Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 106.

Even if it were to be shown that plaintiff's agent sought to help defendant to stop the March check, this would not create a circumstance where defendant could reasonably believe that its debt to plaintiff of over $30,000 was forgiven. Defendant did not change its position in any way, much less in a significant and justifiable way, based on the alleged conversation with

plaintiff's agent, merely because it may have come to the happy belief that it would never have to pay the debt.

Nor does the fact that the parties entered into a new financing agreement for a new insurance policy establish reasonable reliance on defendant's part that it would never have to pay off the earlier debt. The two contracts are independent of each other, as it was not plaintiff's fault that defendant's insurer went out of business. The fact that plaintiff decided to retain defendant as a customer after defendant failed to pay the first debt also does not create justifiable reliance on defendant's part, or show any change in defendant's position to its disadvantage.

d. Mitigation of Damages

There is no failure on plaintiff's part to mitigate damages. Since, by agreement, plaintiff was not barred from seeking repayment of its loan without recourse to the collateral, in the form of the unearned premiums, it was not required, as defendant claims, to "take reasonable steps to recover the unearned premiums" (Defendant's memorandum of law, at 10) before going after defendant. *US Premium Fin.*, 122 AD3d at 920. Further, filing a notice of claim in Ullico's liquidation was a reasonable step toward a return of the unearned premiums, which proved fruitless.

e. Failure to Join a Necessary Party

Finally, this court holds that Ullico is not a necessary party to this action to recover on a loan. Insurance Law § 3428 does not, in any way, forgive the insured's debt in the event that the insurer fails to repay the unearned premiums to the premium finance company.

Conclusion

In sum, defendant's affirmative defenses fail to overcome plaintiff's showing, or to create a question of fact on this motion for summary judgment, that defendant is liable for the remainder of the loan. The affirmative defenses are hereby stricken. The remainder of defendant's arguments are without merit.

Plaintiff, by agreement, is entitled to recover "attorney's fees and other collection costs" in this action. Finance Agreement, ¶ 13. These fees and costs will be addressed at a reference.

In accordance with the foregoing, it is

ORDERED that the motion for summary judgment brought by plaintiff IPFS Corporation is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant K & A Trucking, Inc. in the amount of $33,132.65, together with interest at the rate of ____% per annum from the date of June 25, 2013, until the date of the decision on this

motion, and thereafter at the statutory rate of 9%, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon presentation of an appropriate bill of costs; and it is further

ORDERED that the matter of attorney's fees and other collection costs incurred by plaintiff in attempting to collect on defendant's debt is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference, or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[1] upon the Special Referee Clerk in the Motion Support Office, Rm. 119 at 60 Centre Street, who is directed to place the matter on

[1]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: 1/16/15

ENTER:

Ellen M. Coin, A.J.S.C.