

Sarfati v Palazzolo

2015 NY Slip Op 30129(U)

January 22, 2015

Supreme Court, New York County

Docket Number: 650183/2013

Judge: Saliann Scarpulla

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39**

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MARK SARFATI,

Plaintiff,

DECISION and ORDER

- against -

Index No. 650183/2013
Motion Seq. No. 001

FRANK PALAZZOLO,

Defendant.

-----X

For the Plaintiff:
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For the Defendant:
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HON. SALIANN SCARPULLA, J.:

In this action to recover the purported outstanding balance of loans pursuant to a Guaranty and Assignment, plaintiff Mark Sarfati (“Sarfati” or “plaintiff”) moves for an order granting summary judgment on his complaint in the amount of \$1.5 million, together with statutory interest from December 31, 2012, and dismissing defendant Frank Palazzolo’s (“Palazzolo” or “defendant”) counterclaim.

As alleged in the complaint, on or about June 1, 2008, Sarfati and non-party Mark Bassani (“Bassani”) entered into a stock purchase agreement, as sellers, with non-party NY Affordable Housing Bronx VIII Associates LLC (“NY Affordable”), as buyer. Pursuant to the stock purchase agreement, Sarfati sold to NY Associates his fifty percent

(50%) shareholder interest in eight (8) New York corporation, each of which owned a single building in the Bronx, NY. As part of the consideration for the sale of Sarfati's interest, NY Affordable agreed to enter into an agreement to repay loans to Sarfati and Bassani for \$2 million each, for a total of \$4 million. Pursuant to the terms of the stock purchase agreement, loan documentation was to be executed by NY Affordable to Sarfati and Bassani reflecting the loans.¹

On or around December 31, 2009, Sarfati, Bassani and Palazzolo entered into an agreement titled "Guaranty and Assignment of Loan Transactions Agreement" (the "Guaranty"). Sarfati alleges in the complaint that pursuant to the Guaranty, Sarfati assigned his interest in the loan due from NY Affordable to Palazzolo, Palazzolo agreed to repay the \$2 million principal amount owed to Sarfati by December 31, 2012 and that he would make his best effort to timely make monthly interest payments under the loan, and in exchange Sarfati agreed to pay Palazzolo two percent (2%) of the loan amount.² Sarfati states that Palazzolo made monthly interest payments on the \$2 million owed to Sarfati, and a partial payment of principal in the amount of \$500,000.00.

¹ The loan documents referred to were not submitted with this motion.

² While Sarfati states in his motion papers that he agreed to pay Palazzolo 2% of the loan amount, this term is not reflected in language of the Guaranty agreement. Similarly, the language of the Guaranty states that Sarfati and Bassani have "outstanding loans to NY Affordable," although the terms of the stock purchase agreement indicate that NY Affordable owes money under the loans to Sarfati and Bassani.

Sarfati alleges two causes of action in the complaint. First, Sarfati alleges that Palazzolo breached the terms of the Guaranty, and Sarfati seeks to recover the balance allegedly owed by Palazzolo, \$1.5 million, together with statutory interest from December 31, 2012. For a second cause of action, Sarfati alleges that Palazzolo received the assignment of Sarfati's claims against NY Affordable without payment of adequate consideration, and as a result Palazzolo was unjustly enriched.

Palazzolo denies all of the material allegations of the complaint, and asserts affirmative defenses for failure to state a cause of action, lack of consideration with respect to assumption of an obligation, Statute of Frauds, and failure of the plaintiff to prepare and/or execute an assignment of plaintiff's interests in the subject eight (8) corporations to defendant, thus voiding the alleged agreement. In addition, Palazzolo asserts one counterclaim, in which he alleges that in or around December 2009, an agreement was reached among Palazzolo, Sarfati and Bassani, pursuant to which Sarfati and Bassani agreed to assign to Palazzolo their right, title and interest in promissory notes and related loan obligations due and owing by no fewer than eight (8) corporations (the "corporations"), of which Sarfati and Bassani previously owned all of the issued and outstanding shares.³

³ This appears to refer to the assignment contained in the Guaranty, but Palazzolo does not submit any supporting documentation with his counterclaim.

Palazzolo claims that, starting in or around December 2009, and continuing in reliance on the assignment, Palazzolo made a series of loans to Sarfati totaling not less than \$793,500.00. Palazzolo claims that Sarfati failed to assign his right, title and interest in the loan obligations to Palazzolo, as contemplated by parties.

Palazzolo further alleges that on or around July 8, 2011, the corporations⁴ filed eight (8) separate voluntary petitions of relief pursuant to Chapter 11, Title 11, of the United States Bankruptcy Code in the U.S. Bankruptcy Court, Southern District of New York. In addition, Palazzolo alleges that Sarfati failed to assert any rights arising from the assigned loans during the administration of the Bankruptcy cases. Because Sarfati failed to assign the loans to Palazzolo, Palazzolo asserts, he lacked standing to assert rights arising under the assigned loans during the administration of the bankruptcy cases. Sarfati also failed to file claims with respect to the assigned loans, and the time for filing such claims has passed. As a result of the confirmation of the reorganization plans, Palazzolo argues, any rights arising from the loans were expunged, and he was unable to assert any claims with respect to the bankruptcy cases. Palazzolo therefore seeks to recover the value of the loans, \$793,500.00, together with interest from December 1, 2009.

⁴ Though not addressed by either party, these eight (8) corporations appear to be the same corporations sold to NY Affordable.

In support of his motion for summary judgment on his complaint, Sarfati argues that the terms of the Guaranty make it clear that an assignment occurred. Sarfati asserts that the assignment is enforceable, and that he has established a prima facie case of default on the guaranty by submitting proof of a valid guaranty, and of the defendant's failure to make a payment despite proper notice. Sarfati also argues that Palazzolo waived his right to assert the defense of invalidity of the assignment, because for three (3) years, Palazzolo "overtly treated" the Guaranty and Assignment as a valid contract by making partial payment of the principal and payment of the interest due for the underlying loans.

In opposition, Palazzolo argues that there are many questions of fact which prevent granting summary judgment in plaintiff's favor. First, Palazzolo avers that the assignment was never consummated, because Sarfati and Bassani never assigned any promissory note or any other indicia of indebtedness to Palazzolo. Palazzolo relies on the language of Par. 7 of the Guaranty which provides that

The parties agree to cooperate with one another after the execution hereof in order to effectuate the agreements between the parties contemplated hereby, whether by executing the documentation referred to herein and/or any additional documentation, or by taking any other action(s) reasonably required in order to effectuate the terms hereof.

Palazzolo emphasizes the phrase "whether by executing the documentation referred to herein and/or any additional documentation," and maintains that the documentation

contemplated by this provision was never provided by plaintiff, preventing the “consummation” of the assignment.

Palazzolo also challenges Sarfati’s assertion that Palazzolo performed under the assignment when he made payments to Sarfati totaling. Palazzolo notes that the payments Sarfati referred to in his moving papers were not made by Palazzolo personally, but by F&M Funding LLC (“F&M”), an entity owned by Palazzolo and his wife. Palazzolo claims that F&M made those payments as loans to Sarfati.

In reply, Sarfati submits the documentation from the bankruptcy proceedings in which F&M Funding LLC, Palazzolo’s company, was listed as a creditor of each corporation, in exact amounts corresponding to the loan amounts set forth for each corporation in the stock purchase agreement. Sarfati argues that he did not assert rights in the bankruptcy proceedings for debts which he has already assigned, and Palazzolo’s company did, in fact, assert its rights as a creditor in those bankruptcy proceedings.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty.” *4 USS LLC v DSW MS LLC*, 120 A.D.3d 1049, 1051 (1st Dep't 2014) (quoting *City of New York v Clarose Cinema Corp.*, 256 AD2d 69[1st Dept 1998]). See also *Poah One Acquisition Holdings Ltd. v Armenta*, 96 A.D.3d 560 (1st Dep't 2012); *Council Commerce Corp. v Paschalides*, 92 A.D.2d 579 (2d Dep't 1983). “Where a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement.” *Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 A.D.3d 444, 446-447 (1st Dep't 2012) (internal quotation omitted).

A “guaranty is a contract, and in interpreting it we look first to the words the parties used. A guaranty must be construed in the strictest manner, and a guarantor should be bound to the express terms of the written.” *Wider Consol., Inc. v Tony Melillo, LLC*, 107 A.D.3d 883, 884 (2d Dep't 2013) (internal citations and quotations omitted).

Here, the Guaranty provides in clear language that Palazzolo “agrees to guaranty payment of the Loan Transactions . . . [and] agrees to use his best efforts to make timely payments of the monthly interest payments due under the Loan Transactions.” It is well established that “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four

corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.” *Quest Equities Corp. v. Benson*, 193 A.D.2d 508, 510 (1st Dep't 1993) (quoting *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157 [1990]).

Palazzolo's reliance on the language in paragraph 7 is misplaced. His suggestion that additional documentation was required to effectuate the assignment and guaranty is not supported by the language of the agreement. First, paragraph 7 states that the parties must cooperate “whether by executing the documentation referred to here and/or any additional documentation” However, there is no additional documentation referred to either in paragraph 7 or anywhere else in the body of the agreement.

Moreover, paragraph 1 provides that Sarfati and Bassani “in consideration for [Palazzolo's] guaranty of payment of the Loan Transactions, hereby assign the Loan Transactions and all notes, collateral, and/or other evidence of same, together with all rights relating thereto to [Palazzolo].” This is a complete assignment of Sarfati's rights to Palazzolo, and does not require any additional documentation. *Leon v Martinez*, 84 NY2d 83, 88 (1994).

As there is no dispute that the parties executed the Guaranty, and that Palazzolo failed to make the payments as required by the Guaranty, I grant summary judgment to Sarfati on the complaint.⁵

In his counterclaim, Palazzolo alleges that the payments he made to Sarfati were loans. Given that the parties executed the Guaranty, that Palazzolo failed to complete payment under its terms, and that the payments from Palazzolo were in the exact amount owed to Sarfati under the terms of the Guaranty, Palazzolo fails to raise an issue of fact on his counterclaim. Other than his own unsupported and self-serving assertions, Palazzolo does not submit any admissible evidence to show that his payments to Sarfati were separate loans.⁶ Accordingly, I grant summary judgment dismissing Palazzolo's counterclaim.

In accordance with the foregoing it is hereby

⁵ Palazzolo alleges that he is not liable under the Guaranty because Sarfati failed to pay him 2% of the loan amount. As noted above, the Guaranty agreement makes no mention of an obligation by Sarfati to pay 2% to Palazzolo. As the terms of the Guaranty are clear, I will not consider extrinsic evidence of alleged modifications. *RM 14 FK Corp. v. Bank One Trust Co., N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007) ("The best evidence of what parties to a written agreement intend is what they say in their writing [T]here is no basis to interpret an agreement as impliedly stating something which the parties have neglected to specifically include") (internal citations and quotations omitted). However, Sarfati submit proof of payments to Palazzolo in the amount of \$32,250.00, which is approximately 2% of the outstanding \$1.5 million owed under the Guaranty.

⁶ Palazzolo's assertion that, even though Sarfati allegedly failed to make agreed upon payments to him or to execute the documents Palazzolo believed were necessary to complete the assignment, Palazzolo had his company loan even more money to Sarfati, completely lacks credibility.

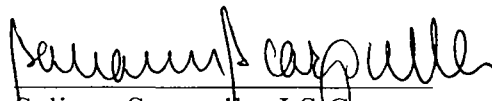
ORDERED that plaintiff Mark Sarfati's motion for summary judgment on his complaint and dismissing the counterclaim of defendant Frank Palazzolo is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Mark Sarfati and against defendant Frank Palazzolo in the amount of \$1,500,000, with interest at the statutory rate from December 31, 2012, until the date of satisfaction of the judgment.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 22, 2015

ENTER:


Saliann Scarpulla, J.S.C.