

Maina v Rapid Funding NYC, LLC

2015 NY Slip Op 30244(U)

February 19, 2015

Supreme Court, New York County

Docket Number: 652525/2011

Judge: O. Peter Sherwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X
KIONGO W. MAINA,

Plaintiff,

DECISION AND ORDER

-against-

**Index No.: 652525/2011
Mot. Seq. No.: 008**

**RAPID FUNDING NYC, LLC, SIGNATURE BANK,
and N.Y.C. TAXI & LIMOUSINE COMMISSION,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

In motion sequence 008, defendants Rapid Funding NYC LLC (“Rapid Funding”) and Signature Bank (“Signature,” and together with Rapid Funding, the “Moving Defendants”) move for partial summary judgment as to their claim for an award of attorneys’ fees. Plaintiff opposes the motion and cross-moves to recover his own costs and attorneys fees incurred in defending this motion. For the following reasons, both the motion and the cross-motion are denied.

BACKGROUND

Plaintiff is a taxi driver. Until June, 2013, he owned a valuable New York City taxicab medallion which he was forced to sell primarily to pay off a loan made to him by Rapid Funding. Rapid Funding provides services to the taxi industry, including brokering taxi medallions and making loans. On January 31, 2008, Rapid Funding issued plaintiff a loan (the “Note”) in the amount of \$380,000, secured by plaintiff’s taxicab medallion, the taxicab, taxi-meter, and other assets. The parties refinanced the Note several times, ultimately creating a total encumbrance of \$540,000. Rapid Funding eventually sold an interest in the loan exceeding 90% to defendant Signature Bank. In connection with the initial loan, each refinancing, and the sale to Signature Bank, Rapid Funding retained portions of the loan proceeds for itself, claiming them as “origination fees” alleged to be standard in the taxicab financing industry. Further, most of the proceeds of each refinancing was used by Rapid Funding to payoff the prior loan it had made to Maina.

Plaintiff defaulted under the Note in several respects. The Note provided for payment of monthly installments of approximately \$3,500, due on the first day of each month, and a balloon payment due March 1, 2013, three years after the loan was made. The plaintiff failed to make the

April 1, 2010, payment, and failed to make any payments after June, 2011. Additionally, under the terms of the Note, plaintiff was required not to permit any subordinate encumbrances against the medallion without Rapid Funding's prior written consent. Nevertheless, plaintiff, permitted a subordinate lien to be filed against the medallion naming David Darzi as the secured party.

In an order dated January 20, 2012, the Court granted plaintiff's motion for a preliminary injunction, enjoining defendants from auctioning the taxi medallion. The order was conditioned on plaintiff making monthly installment payments of principal and interest in the amount of \$3,562.21, pursuant to the terms of the underlying Note. The order allowed Rapid Funding to seek relief from the preliminary injunction upon a default of plaintiff's payment obligations and failure to cure. Plaintiff failed to make the required payments as they came due. Further, under the terms of the Note, in the event that plaintiff did not make the March 1, 2013 balloon payment within ten days of the due date, plaintiff was to incur an additional 5% late charge on the amount of the balloon payment. Accordingly, by order dated May 29, 2013, the Court vacated the preliminary injunction prohibiting the sale of the medallion. Thereafter, the medallion was sold for \$1.05 million. The action then focused on allocation of the proceeds of the sale.

On February 21, 2013, the defendants moved for summary judgment on their first counterclaim for breach of contract based on the plaintiff's default under the Note. Defendants' summary judgment motion claimed that plaintiff's default triggered an acceleration clause which permitted Rapid Funding to sell the loan collateral to pay off the loan. Defendants also contended that pursuant to the Note, Rapid Funding could permissibly charge the plaintiff attorney fees of 20% of the principal and interest then due on the Note.

On April 11, 2014, the Court issued a Decision and Order granting the defendants' motion for summary judgment ("April 11 Order"). Judgment was entered against the plaintiff and in favor of the Moving Defendants in the amount of \$14,983.11 plus costs and disbursements. However, the Court denied the defendants' application for attorneys fees, finding that "[b]ecause Rapid Funding has offered no evidence to support the reasonableness of the attorneys' fees it seeks, this aspect of the motion must be denied" (Decision and Order dated April 11, 2014, p. 6). Indeed, the Court noted that the "[a]rbitrary imposition of a 20% attorney fee charge without any need to show that such fees are reasonable, is yet another penalty" (*id.*). As a result of the April 11 Order, the action was marked disposed.

Defendants now purport to bring a successive motion (styled as a motion for partial summary judgment) seeking to re-litigate the issue of attorneys' fees. Essentially, they contend that although the Court denied their application for attorneys fees in its April 11 Order on their prior summary judgment motion, they should be permitted to present evidence as to the reasonableness of its fees.

DISCUSSION

A. Defendants' Motion for Attorneys' Fees

Defendants motion suffers from a number of infirmities. First, the court disposed of the case on the prior summary judgment motion. Accordingly, at that point, the factual record in this case was closed. Defendants have not met their burden of establishing that the closed factual record should be reopened to permit them to file a second motion for summary judgment. Secondly, even if the closed record should be reopened, the Court has already determined that the contractual fee provision at issue was an unenforceable penalty.

1. Defendants Have Not Demonstrated that the Factual Record Should be Reopened

A trial court, in the exercise of discretion and for sufficient reasons, may allow a party to reopen the record and supply defects in evidence that have inadvertently occurred (*Kay Found v S & F Towing Serv. of Staten Island, Inc.*, 31 AD3d 499, 501 [2d Dept 2006]). However, the court's discretion to do so should be sparingly exercised (*King v Burkowski*, 155 AD2d 285, 285 [1st Dept 1989]). Motions to reopen the record will be denied where the motion is made after the court rules on the relevant issue and where the evidence sought to be introduced is not newly discovered (*Fischer v RWSP Realty, LLC*, 63 AD3d 878, 878 [2d Dept 2009]). Moreover, "successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" (*Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570, 570 [2d Dept 2014]).

The record in this case was closed following the Courts' grant of summary judgment. Defendants did not seek, pursuant to CPLR 2221, to renew or re-argue the motion. Instead, defendants have filed a second motion for summary judgment based on what they purport to be evidence of the reasonableness of their fees and make no effort to justify reopening the record. The evidence submitted in support of the fees application consists of counsel's fee invoices. There is no showing that this evidence is "newly discovered". Defendants had a full opportunity to submit

evidence of the reasonableness of the fees in conjunction with their prior summary judgment motion, which also sought an award of attorneys' fees. There has been no showing that defendants should be permitted to re-litigate the issue based on evidence that was readily available to them at the time of filing the prior motion (*see Fischer*, 63 AD3d at 878).

2. The Court Has Already Determined that the Fee Provision at Issue is an Unenforceable Penalty

Even if the Court were to re-open the case, the new motion for partial summary judgment must be denied. In deciding the prior summary judgment motion, the Court held that the provision at issue providing for the plaintiff's payment of defendants' attorneys' fees constituted an unenforceable penalty (*see* Decision and Order dated April 11, 2014, NYSCEF #69, p. 6). Indeed, "[a] provision for the payment of an arbitrary amount as an attorney's fee [is] in the nature of a penalty and therefore unenforceable" (*Fairfield Lease Corp. v Marsi Dress Corp.*, 303 NYS2d 179, 182 [Civ. Ct., NY County Special Term 1969] [*citing Franklin Nat'l. Bank v Wall St. Comm.*, 244 NYS2d 491; *aff'd* 21 AD2d 878 [2d Dept 1964]]; *Equitable Lumber Corp. v IPA Land Dev. Corp.*, 38 NY2d 516, 524 [1976]). The provision for payment of fees itself did not provide for recovery of reasonable attorneys fees; rather, the provision provided for payment of an arbitrary percentage of the amount of the loan then outstanding. Accordingly, the Court declined to enforce the provision and denied the summary judgment motion to the extent it sought attorneys' fees. The Court's order was not an invitation to the defendants to file a new summary judgment motion and to submit evidence of the reasonableness of their fees. Once the offending fee provision is struck as an unenforceable penalty, the instant application must fail.

In support of the argument that Rapid Funding's counsel is entitled to seek attorneys' fees from Maina despite the court's prior denial of their application, defendants rely nearly exclusively on *Korea First Bank v K.Y. Lee* (14 FSupp2d 530 [SD NY 1998]). In that case, the United States District Court for the Southern District of New York vacated an award of attorneys' fees on the grounds that the contractual provision providing for them in a fixed percentage was unenforceable as a matter of law (*id.* at 533). However, the court permitted the plaintiff attempt to establish the reasonable amount of their fees in a subsequent motion (*id.*). The case is distinguishable from the instant case in several ways.

First, the *Korea Bank* court determined that an award of attorneys' fees was proper insofar as the actual fee arrangement was disclosed and the fees were determined to be reasonable. In that case, it was not clear whether the contractual fee provision at issue "serve[d] as a penalty rather than a good faith attempt to pre-estimate damages or as to be unconscionable" (*id.* [citations omitted]). In the instant case, the court has already held that the contractual fee provision represents an unenforceable penalty. Accordingly, no purpose would be served by permitting successive summary judgment motions on this issue. Moreover, Korea Bank relied on *Equitable Lumber Corp. v IPA Land Dev. Corp.* (38 NY2d 516 [1976]). The fee provision in that case provided that "the seller would be entitled to reasonable attorneys' fees and that 30 percent would be a reasonable fee in the event it turned the matter over for collection" (*Korea First Bank*, 14 FSupp2d at 533; *Equitable Lumber Corp.*, 38 NY2d at 518). Accordingly, the *Equitable Lumber* " court remanded for a determination of factual issues as to whether the 30 percent figure operated as a penalty" (*see Korea First Bank*, 14 FSupp2d at 533 [summarizing *Equitable Lumber's* holding]), an issue already determined in this case. Additionally, the fee provision at issue here does not provide for reasonable fees as an alternative to the set percentage.

Second, the *Korea Bank* court reopened the factual record to permit the plaintiffs to submit specific evidence of the reasonableness of their fees (*id.*). The court there determined that the applicable standard for doing so had been satisfied, and accordingly vacated the fee award without prejudice for defendants to file a separate motion seeking fees (*id.*). Here, defendants have not satisfied the standard for reopening the record to receive evidence as to the reasonableness of the fees.

B. Plaintiff's Cross-Motion for Attorneys' Fees

The plaintiff has cross moved for their own attorneys' fees incurred in litigating this motion pursuant to 22 NYCRR 130-1.1. That provision provides that "[t]he court, in its discretion, may award to any party or attorney . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" (22 NYCRR 130-1.1[a]). "For these purposes, frivolous conduct can be defined in any of three manners: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false" (*Levy v*

Carol Mgmt. Corp., 260 AD2d 27, 34 [1st Dept 1999]; 22 NYCRR 130-1.1 [c]).

Plaintiff contends that the instant motion satisfies that definition. He contends that the instant motion is a “a *de novo* summary judgment application on a claim for which a judgment already exists, wasting both the Court’s and the Plaintiff’s time and money” (Russell Affirmation, ¶ 16). Defendants counter that the cross-motion is both procedurally and substantively improper. They contend that its procedurally improper in that it was not properly filed as a cross-motion, was not accompanied by the requisite filing fee, and was served on less than sufficient notice. They assert that it is substantively improper because their motion for attorneys’ fees motion is not frivolous.

Plaintiff’s arguments notwithstanding, the instant motion for summary judgment is not frivolous sufficient to rise to the level required under 22 NYCRR 130-1.1. Plaintiff does not contend that the instant motion was “undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or [to] assert material factual statements that are false” (*Levy*, 260 AD2d at 34; 22 NYCRR 130-1.1 [c]). Accordingly, plaintiff’s only contention is that the instant motion “is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” (22 NYCRR 130-1.1[c][1]). Although the defendants misinterpreted this court’s prior order, their motion was based on at least a plausible (although ultimately incorrect) reading of the relevant case law. Additionally, defendants’ argument stems from at least a plausible interpretation of this court’s order on the previous summary judgment motion. The Court previously determined that “Rapid Funding is entitled to recover attorney fees of 20% only if it demonstrates that the quality and quantity of the legal services rendered were such to warrant, on a *quantum meruit* basis, that full percentage” (Decision & Order dated April 11, 2014, p. 6). Defendants plausibly took this as an invitation to submit further documentation as to the reasonableness of its fees. However, as discussed above, the Court will not entertain successive motions for summary judgment (*see Tingling*, 120 AD3d at 570).

Simply because defendants’ arguments have failed, it does not follow that the motion is frivolous as that term is defined in 22 NYCRR 130-1.1. Plaintiff’s cross-motion for its attorneys’ fees incurred in connection with litigating this motion is denied.

Accordingly, it is hereby

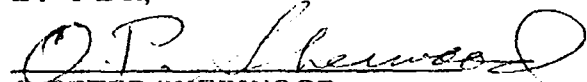
ORDERED that defendants' motion for summary judgment is DENIED; and it is further

ORDERED that plaintiff's cross-motion for costs and attorney fees is DENIED.

This constitutes the decision and order of the court.

DATED: February 19, 2015

ENTER,



O. PETER SHERWOOD

J.S.C.