

**Levy v The BCC Group, Inc.**

2016 NY Slip Op 30163(U)

January 26, 2016

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  
JOEL F. LEVY,

INDEX NO. 653218/12

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, moves for an order pursuant to CPLR 3212 granting summary judgment awarding him money judgments against defendants BCC Group, Inc. ("BCC"), Wendy Katzman and Joseph Gatti (collectively "defendants"), and reasonable attorney's fees. Defendants oppose the motion and cross-move for summary judgment.

The following facts are not disputed unless otherwise noted. Plaintiff Joel F. Levy is the former owner of defendant BCC, an insurance agency. Defendants Wendy Katzman, Michael Katzman and Joseph Gatti were formerly employed by Levy. In 2006, Levy sold BCC to defendants pursuant to several stock purchase agreements and promissory notes. Defendants paid Levy nothing outright for the business, but instead agreed to pay him a total of \$634,116.00 over a period of eight years or 96 months commencing on July 1, 2006, with the full amount due on May 1, 2014.

The parties executed several stock purchase agreements and promissory notes. Specifically, under a Stock Purchase, Consulting and No-Competition Agreement ("BCC stock purchase agreement") dated January 1, 2006, Levy agreed to sell four shares of common stock (or 40% of his interest) to defendant BCC for \$226,831.00, which included a credit of \$126,831.00 against a loan

due to BCC from Levy and a payment of \$100,000 plus 7.75% interest. BCC also agreed to pay Levy a \$100,000 consulting fee and a \$100,000 non-compete fee, together with 7.75% interest on each amount. Pursuant the BCC stock purchase agreement and a separate promissory note, BCC agreed to make the payments in 96 equal installments commencing June 1, 2006 and ending May 1, 2014.

Levy sold the remaining 60% of his interest in BCC to defendants Wendy Katzman and Joseph Gatti pursuant to two separate individual stock purchase agreements. Katzman and Gatti each received three shares of BCC common stock. Pursuant to the individual stock purchase agreements and two separate promissory notes, Katzman and Gatti each agreed to pay Levy \$103,642.50 plus 7.75% interest, in 96 equal monthly installments commencing June 1, 2006 and ending May 1, 2014.

Under section 1.11 of the parties' stock purchase agreements and section 2 of their promissory notes, defendants had the right to toll their monthly payment obligations for a one-year period if BCC's revenue fell below the threshold amount of \$887,132 in the prior year. To invoke this tolling provision, defendants were required to send Levy a notice that included a statement from their accountant as to BCC's reduced revenue, and a revised payment schedule for the remaining monthly payments. Section 1.11 of the stock purchase agreements is entitled "Tolling of Payments by Buyer [or The BCC Group]" and section 2 of the promissory notes is entitled "Temporary Tolling of Payment Obligations." The provisions are substantively identical.<sup>1</sup> Section 1.11 of the Katzman and Gatti stock purchase agreements provides in relevant part as follows:

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<sup>1</sup>The main distinction is based on BCC's additional obligation to pay plaintiff the \$100,000 consulting fee and the \$100,000 non-compete fee.

(a) If the BCC Net Insurance Revenues (as defined in Section 7.1) for any calendar year commencing with calendar year 2007 are less than EIGHT HUNDRED EIGHTY-SEVEN THOUSAND ONE HUNDRED THIRTY-TWO and 00/11 (\$887,132.00) . . . then notwithstanding anything contained in this Agreement or the Share Purchase Note [the Promissory Note] to the contrary, Buyer's obligation to make monthly payments under the Share Purchase Note shall be tolled for a twelve-month period . . .

(b) If Buyer's payment obligations are tolled as contemplated under subsection (a) above, then upon the lapse of any such tolling, the unpaid amounts of the monthly installments of the principal and interest under the Share Purchase Note by reason of such tolling (such amounts collectively the "Tolled Payments") shall be amortized and paid to Levy in equal monthly amounts over the Balance of the Payment Period (as defined in Section 7.1).

(c) In the event the Buyer shall seek the tolling of its payment obligations as provided for in subsection (a) above, then with respect to the applicable Reduce Revenue Calendar Year, Buyer shall cause The BCC Group to delivery to Levy Notice of such tolling together with (I) an annual financial statement of The BCC Group . . . and (II) a revised Note Payment Schedule prepared by the BCC Accountants to reflect the revised payment schedule contemplated by subsection (a) of this Section 11.1 (such revised schedule, the "Revised Note Payment Schedule").

For six years, defendants made all required payments. By letter dated January 25, 2012, they advised plaintiff that they were exercising their right to toll their monthly payments for one year beginning February 1, 2012. In accordance with requirements of the stock purchase agreements and the promissory notes, defendants submitted a revenue statement for 2011 prepared by their accountant, and a revised monthly payment schedule which amortized the 12 tolled payments for 2012 over the balance of the payment period resuming on January 1, 2013 and concluding with the final payment on May 1, 2014. The following year, defendants again exercised their right to toll their monthly payments, advising plaintiff by letter dated January 25, 2013, and submitting a 2012 revenue statement prepared by their accountant and a revised payment schedule amortizing the tolled payments over the balance of the payment period resuming on January 1, 2014 and ending with the final payment on May 1, 2014. In both

January 2014 and January 2015, defendants again advised plaintiff by letter that they were tolling the monthly payments, but submitted only a revenue statement without a revised payment schedule.

Plaintiff asserts he has not received any payments from defendants since December 2011, and that their promissory notes "fully matured" on May 1, 2014 and were not paid. Defendants assert that in 2014 and 2015, they properly exercised their right to toll payment, and as a result they currently owe nothing to plaintiff.

At issue here is the effect of the toll on the payments that are still due and owing, specifically whether the toll on the payments also tolled and extended the date of the final payment and the maturity date of the promissory notes. Plaintiff asserts that the toll temporarily suspended defendants' obligation to pay plaintiff, but did not serve to extend the final payment date of May 1, 2014, when the promissory notes matured and the full amount was due. Rather at the end of the toll period, the monthly payments were recalculated by amortizing the tolled payments over the remainder of the 96-month payment period, with all amounts to be fully paid by the original May 1, 2014 final payment date. Defendants, on the other hand, argue that the toll of the payments served to toll and extend the final payment and maturity date, so each time a one-year toll for payment is invoked, the final payment or maturity date is likewise tolled for an additional year.

The parties' disagreement involves an issue as to the interpretation of tolling provisions in the stock purchase agreements and promissory notes. Where, as here, the terms of the agreements are straightforward, clear and unambiguous, their interpretation presents a question of law for the court, and the parties' intent must be found within the four corners of the

agreements, giving a practical interpretation to the language employed and reading the agreements as a whole. See Ellington v. EMI Music, Inc., 24 NY3d 239 (2014); White v. Continental Casualty Co., 9 NY3d 264, 267 (2007). “The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning.” Brooke Group v. JCH Syndicate 488, 87 NY2d 530, 534 (1996). Moreover, clear contractual language does not become ambiguous merely because the parties argue different interpretations. See Riverside South Planning Corp v. CRP/Extell Riverside, LP, 60 AD3d 61, 67 (1<sup>st</sup> Dept 2008), aff’d 13 NY3d 398 (2009). The court is obligated to interpret the contracts so as to give meaning to all terms, so a contract should not be interpreted in a way that would leave any of its provisions without force or effect. See Excel Graphics Technologies, Inc v. CFG/AGSCB 75 Ninth Avenue, LLC, 1 AD3d 65 (1<sup>st</sup> Dept 2003), lv app disp 2 NY3d 794 (2004); 350 East 30<sup>th</sup> Parking, Ltd v. Board of Managers of 350 Condominium, 280 AD2d 284 (1<sup>st</sup> Dept 2001). A court may not, in the guise of interpreting a contract, add or excise terms, or distort the meaning of those used to make a new contract for the parties. See Riverside South Planning Corp v. CRP/Extell Riverside, LP, 13 NY3d 398 (2009). Moreover, “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.” Riverside South Planning Corp v. CRP/Extell Riverside, LP, 60 AD3d at 68 (quoting WWW Assocs, Inc v. Giancontieri, 77 NY2d 157 [1990]).

Applying these principles, the court concludes that the clear and express terms of the stock purchase agreements and promissory notes support the interpretation advanced by plaintiff. As quoted above, those agreements provide that if the “payment obligations are tolled as

contemplated under subsection (a) above, then upon the lapse of any such tolling, the unpaid amounts of the monthly installments of principal and interest . . . by reason of such tolling . . . shall be amortized and paid to Levy [or “the Holder”] in equal monthly amounts over the Balance of the Payment Period.” Section 7.1 of the stock purchase agreements defines “Balance of the Payment Period” as “mean[ing] a period of consecutive months equal to ninety-six (96) less the number of months for which payments have been made under the Share Purchase Note [Promissory Note],” and for BCC, Section 7.1 includes payments made “on account of the Consulting Fee and the Non-Compete Fee.”<sup>2</sup>

The plain meaning of the language employed establishes that once defendants invoke their right to toll their payment obligations for one year, at the end of the toll period, the tolled payments are “amortized . . . in equal monthly amounts over the Balance of the Payment Period,” which is the original period of 96 consecutive months ending with the final payment on May 1, 2014. While defendants argue that the one-year toll of the monthly payments resulted in extending the May 1, 2014 final payment date by the same number of months during which payments were tolled, i.e. one year, the record shows that in 2012 and 2013 defendants fully understood that the May 1, 2014 maturity date remained unchanged by the payment toll. When defendants advised plaintiff in January 2012 and January 2013, that they were invoking their right to toll payment for the 12-month periods beginning February 1, 2012 and February 1, 2013, respectively, they annexed revised payment schedules entitled “Remaining Amortization Schedule,” which calculated the amount of each defendants’ new monthly payment, and listed

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<sup>2</sup> Under section 1.2 of the stock purchase agreements, the “Share Purchase Note” is the “promissory note as executed and delivered.”

the number of months remaining of the original 96 month payment period, with May 1, 2014 as the date of the final payment. By defendants' own calculations, the amount of their monthly payments increased so that each defendant's debt was fully and finally satisfied by the original May 1, 2014 final payment and maturity date. Given defendants' use of the May 1, 2014 date, it is clear they did not intend the tolling of their payment obligations to likewise toll and extend the date for final payment and maturity.

Defendants' reliance on unrelated provisions in the CPLR and the General Obligations Law pertaining to the tolling of the statute of limitations, is misplaced as those statutes have no bearing on the issue of the parties' intent as gleaned from the four corners of their agreements. See Ellington v. EMI Music, Inc, supra; White v. Continental Casualty Co, supra. Defendants improperly seek to add words to the agreements that conflict with the most natural and sensible reading. See Kolbe v. Tibbetts, 22 NY3d 344 (2013). Notably, under defendants' proposed interpretation, the maturity date of the debt could be continuously extended indefinitely as long as BCC revenues fall short of the threshold amount, and plaintiff would never be paid the full amount agreed to for the sale of his business.

Based on the foregoing, plaintiff's motion for summary judgment is granted and defendants' cross-motion for summary judgment is denied. Plaintiff submits an affidavit as to the amounts owed by defendants BCC (\$110,831.85), Wendy Katzman (\$38,287.86) and Joseph Gatti (\$38,287.86).<sup>3</sup> Defendants do not dispute those amounts, nor the 12% default rate of interest in the promissory notes. Moreover, pursuant to section 4 of the promissory notes,

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<sup>3</sup>Although plaintiff's notice of motion seeks a judgment against BCC in a different amount (\$97,359.81), the court relies on the sworn statements in plaintiff's affidavit as to the amount due and owing, which defendants have not controverted.

plaintiff is entitled to an award of reasonable attorney's fees, and a hearing shall be held to determine the reasonable amount of such fees. Finally, since plaintiff's motion does not seek any relief as against defendant Michael Katzman, who was not a signatory to any stock purchase agreement or promissory note, the complaint is dismissed as against him.

Accordingly, it is

ORDERED that plaintiff's motion for summary is granted and defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Joel F. Levy and against defendant BCC Group, Inc. in the amount of \$110,831.85 together with interest as computed by the Clerk at the rate of 12% from May 4, 2014; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Joel F. Levy and against defendant Wendy Katzman in the amount of \$38,287.86 together with interest as computed by the Clerk at the rate of 12% from May 4, 2014; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Joel F. Levy and against defendant Joseph Gatti in the amount of \$38,287.86, together with interest as computed by the Clerk at the rate of 12% from May 4, 2014; and it is further

ORDERED that the complaint is dismissed as against defendant Michael Katzman and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff is entitled to an award of reasonable attorney's fee and said claim is severed and an assessment is directed to determine the reasonable amount of such fees; and it is further

ORDERED that on or before February 26, 2016, plaintiff shall file a copy of this decision and order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall thereupon place this action on the appropriate calendar for the assessment directed herein; and it is further

ORDERED that if plaintiff fails to comply with the immediately preceding paragraph, the claim for attorney's fees will be dismissed.

DATED: January 26 2016

ENTER:

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