Kraeutler v Kraeutler
2016 NY Slip Op 30886(U)
May 12, 2016
Supreme Court, New York County
Docket Number: 652768/2015
Judge: Shirley Werner Kornreich
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.SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JOHN A. KRAEUTLER,

Plaintiff,

-against-

HASTED KRAEUTLER, LLC, JOSEPH KRAEUTLER, and SARAH HASTED,

Defendants.

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Index No.: 652768/2015

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff John A. Kraeutler (John) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendants Hasted Kraeutler, LLC (the Gallery), Joseph Kraeutler (Joseph), and Sarah Hasted (Sarah). Seq. 001. John also moves by order to show cause, which has been partially mooted by subsequent events (e.g., the failure of the parties' mediation efforts), for clarification that this action should be decided on the merits now and independently of two other actions before this court concerning the Gallery. Seq. 002. All three defendants oppose the summary judgment motion, and Sarah opposes the order to show cause. Plaintiff's motions are granted in part and denied in part for the reasons that follow.

I. Background

John is Joseph's father. Joseph and Sarah are each 50% equity members in the Gallery, a New York LLC. Joseph and Sarah are currently embroiled in two derivative lawsuits before this court, styled *Hasted v Kraeutler*, Index No. 652797/2015 and *Kraeutler v Hasted*, Index No. 160769/2015 (collectively, the Related Actions), in which they accuse each other of myriad

[* 2]

improprieties. As discussed below, in October 2011, John loaned $400,000 to the Gallery, and the loan was, jointly and severally, personally guaranteed by Joseph and Sarah. Sarah claims that Joseph arranged the loan; he stated that he would be responsible for communicating with his father; and she was told by him that she was only guaranteeing half of the loan. Additionally, John has offered to reduce Sarah's liability to half of the loan if she forfeits her equity in the Gallery and resigns as an employee. That is the context of this action.

John's $400,000 loan to the Gallery is memorialized in a Promissory Note and Loan Agreement dated October 25, 2011. *See* Dkt. 4 (the Note) & Dkt. 5 (the Loan Agreement).[1] Joseph and Sarah executed the Note and the Loan Agreement on behalf of the Gallery. *See* Dkt. 4 at 6-7; Dkt. 5 at 10-11. The Note and the Loan Agreement are governed by Ohio law and contain *permissive* Ohio forum selection clauses. *See* Dkt. 4 at 5; Dkt. 5 at 9. It is undisputed that this court has personal jurisdiction over the parties in this action.

The Note carries an interest rate of 1.5%, payable monthly, and matures on October 25, 2016. *See id.* at 2-3. However, the Note provides that:

> At the option of the Lender [i.e., John], this Note shall become immediately due and payable without notice or demand upon the occurrence at any time of any of the following events of default (each, an "Event of Default"). (1) default of any liability, obligation or undertaking of the Borrower [i.e., the Gallery], any endorser or any guarantor hereof to the Lender, hereunder or otherwise, including, without limitation, **failure to pay in full and when due any installment of principal or interest** ... [other possible events of default omitted].

See id. at 3 (emphasis added).

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

The Note further provides:

> Upon the occurrence and during the continuance of an Event of Default, interest shall accrue at a rate per annum equal to the aggregate of 5.0% plus the rate provided for herein. If any payment due under this Note is unpaid for 10 days or more the Borrower shall pay, in addition to any other sums due under this Note (and without limiting the Lenders other remedies on account thereof), a late charge equal to 50% of such unpaid amount.
>
> This Note shall be binding upon the Borrower and each endorser and guarantor hereof [i.e., Joseph and Sarah] and upon their respective heirs, successors assigns and legal representatives and shall inure to the benefit of the Lender and its successors, endorsees and assigns.
>
> **The liabilities of the Borrower and any endorser or guarantor of this Note are joint and several** (except as may be expressly set forth in any guaranty of this Note); provided, however, the release by the Lender of the Borrower or any one or more endorsers or guarantors shall not release any other person obligated on account of this Note. ... Each reference in this Note to the Borrower, any endorser, and any guarantor, is to such person individually and also to all such persons jointly. No person obligated on account of this Note may seek contribution from any other person also obligated, unless and until all liabilities, obligations and indebtedness to the Lender of the person from whom contribution is sought have been satisfied in full. The release or compromise by the Lender of any collateral shall not release any person obligated on account of this Note.

See id. at 5 (emphasis added).

The Loan Agreement also provides that repayment of the loan to the Gallery is secured by the Galleries' assets and the personal guaranties executed by Joseph and Sarah. *See* Dkt. 5 at 2. It is unclear if any UCC statements were filed.

Section 10.2 of the Loan Agreement states:

> No delay or omission on the Lender's part to exercise any right or power arising hereunder will impair any such right or power or be considered a waiver of any such right or power, nor will the Lender's action or inaction impair any such right or power. ...

See id. at 8. Section 10.4 of the Loan Agreement then provides:

> No modification, amendment or waiver of, or consent to any departure by the Borrower from, any provision of this Agreement will be effective **unless made in a writing signed by the party to be charged**, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on the Borrower will entitle the Borrower to any other or further notice or demand in the same, similar or other circumstance.

See id. (emphasis added). Section 10.5 further provides:

> This Agreement (including the documents and instruments referred to herein) [e.g., the Note and the Guarantees] constitutes the entire agreement and supersedes all other prior agreements and understandings, both written and oral, between the parties with respect to the subject matter hereof.

See id.

Joseph and Sarah each executed virtually identical joint and several, personal guarantees of the loan. *See* Dkt. 6 (Sarah's Guaranty); Dkt. 7 (Joseph's Guaranty) (collectively, the Guarantees). The Guarantees are absolute and unconditional, and cover John's legal fees incurred in this action. *See* Dkt. 6 at 2 ("the liability of Guarantor hereunder is direct and unconditional and due immediately upon default of the Borrower without demand or notice and without requiring the Lender first to resort to any other right, remedy or security ... [and] the liability of the Guarantor shall be joint and several with the liabilities of any other guarantors"). Like the Loan Agreement, sections 15 and 16 of the Guarantees provide:

> [T]he Lender's delay or omission in exercising any of the Lender's rights and remedies shall not constitute a waiver of these rights and remedies, nor shall the Lender's waiver of any right or remedy operate as a waiver of any other right or remedy available to the Lender, The Lender's waiver of any right or remedy on any one occasion shall not be considered a waiver of same on any subsequent occasion, nor shall this be considered to be a continuing waiver;
>
> [T]his Guaranty incorporates all discussions and negotiations between the Lender and Guarantor concerning the guaranty and indemnification provided by the undersigned hereby, and that no such discussions or negotiations shall limit, modify, or otherwise affect the provisions hereof, there are no preconditions to the effectiveness of this Guaranty and that no provision hereof may be altered,

> amended, waived, canceled or modified, except by a written instrument executed and acknowledged by the Lender's duly authorized officer[.]

See id. at 3. Likewise, the Guarantees are governed by Ohio law and, as noted earlier, contain *permissive* Ohio forum selection clauses.[2]

The loan has been in default since November 2011 because no monthly interest payments have been made. Sarah, however, claims that John told Joseph that defendants were not required to make monthly interest payments and that Joseph, over Sarah's objections, refused to make interest payment with the Gallery's revenue. In her affidavit in opposition to John's summary judgment motion, Sarah provides her version of the story:

> In late September or early October of 2011, Joseph arranged a loan with his father, John, for [the Gallery]. **Joseph told me that he would be responsible for communicating with his father about the loan.** I had no problem with that since, **he was my partner and I trusted him completely**, as he knew. Joseph told me that his father would make a $400,000 loan to [the Gallery] and that the interest rate would be [1.5%] per year. **He told me that he and I had to sign a guarantee for half of the loan or $200,000**, if [the Gallery] could not repay the loan. Joseph said that he would have **his attorney** vet any loan documents prior to our signing them. I agreed. On or about October 19, 2011, Joseph told me that his attorney had reviewed the loan documents and they were "good." Joseph was, at that time, my partner, I trusted him completely and, as he knew, **I relied upon him in executing these documents**. I went with Joseph to a bank near [the Gallery] to [sic] a notary since, as he explained, our signatures had to be notarized. We both signed the documents. [The Gallery] received the $400,000 from John shortly thereafter. **Afterwards, Joseph reiterated that any communications concerning the Loan were to go through him to his father, and I was not to speak to his father about the Loan**. Indeed, I never spoke to John about any matter relating to the Loan or its repayment. Joseph was responsible for dealing with the Loan for his father. In late 2011 or early 2012, I saw that no interest payments had been made on the Loan and asked Joseph when interest was to be paid. **He said that he had spoken to his father and that while**

[2] Joseph's contention that this action must be brought in Ohio is frivolous for the reasons set forth in John's brief, namely that both Ohio and New York courts have expressly rejected the arguments proffered by Joseph. *See* Dkt. 21 at 8-12 (explaining that, even if John could have sought an Ohio cognovit judgment, he is alternatively permitted to file an action under CPLR 3213 in this court).

> **the note called for monthly interest payments, that his father was not requiring any interest to be paid on the Loan**. From then through 2015 — or almost four years — [the Gallery] never made interest payments on the Loan, and I never heard any claim from Joseph or his father that any interest was due or that the Loan was in default. In February 2012, [the Gallery] had a successful gallery showing and I suggested that since [the Gallery] had some extra funds that we use $50,000 to pay down the principal of the Loan. Joseph refused and said that he did not wish to do so since the Loan was not due and there was no reason to make a pre-payment of the principal. In October or November of 2014, after another successful show by [the Gallery] at the gallery, I again asked Joseph to approve a payment of $50,000 to John from [the Gallery's] accounts to pay down the principal of the note. Joseph again told me that he did not wish to do so since the Loan was not due and there was no reason to make a pre-payment of the principal. He also said that his father did not expect or need a pre-payment. Between February 2012 and June 2015, in reliance on Joseph's statements on behalf of John, [the Gallery] did not make any payments on the Loan. During this entire period of time, John never asked for interest or other payments and never took any actions to enforce the terms of the Loan.

See Dkt. 18 at 2-4 (headings, paragraph breaks and numbering omitted; bold added).

In a letter dated May 4, 2015, John demanded payment on the loan and made Sarah the offer, mentioned earlier, of halving her liability on her Guaranty if she forfeited her equity in the Gallery and resigned as an employee. *See* Dkt. 23. Sarah did not agree to do so. By letters dated July 24, 2015, John demanded repayment of the Loan from Sarah, Joseph, and the Gallery. *See* Dkt. 8-10. On August 11, 2015, John commenced this action by filing a summons and the instant motion for summary judgment in lieu of complaint. The court adjourned the original oral argument date and ordered the parties to mediation in this action and the Related Actions. The parties did not settle.

On February 11, 2016, John moved by order to show cause, as relevant here, for clarification that this action is not consolidated with the related actions. The court reserved on the instant motions after oral argument. *See* Dkt. 50 (4/12/16 Tr.). A preliminary conference was held in the Related Actions, and discovery is proceeding.

II. Discussion

"Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is 'based upon an instrument for the payment of money only.'" *Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). It is well settled that a motion under CPLR 3213 is an appropriate means to collect on a note [*Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560 (1st Dept 2012), citing *Bank of Am., N.A. v Solow*, 59 AD3d 304 (1st Dept 2009)] and an unconditional guarantee. *See Acadia Woods Partners, LLC v Signal Lake Fund LP*, 102 AD3d 522, 523 (1st Dept 2013), citing *European Am. Bank v Lofrese*, 182 AD2d 67, 71 (2d Dept 1992). "To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms." *Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 (1st Dept 2012). Moreover, to meet its prima facie burden on a claim to enforce a personal guaranty, a plaintiff "must prove 'the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty.'" *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 492 (2015), quoting *Davimos v Halle*, 35 AD3d 270, 272 (1st Dept 2006). "Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense." *Zyskind*, 101 AD3d at 551.

John has met his *prima facie* burden by demonstrating that the Note is in default because of the Gallery's failure to make monthly interest payments and that Sarah and Joseph have joint and several liability under their respective Guarantees. Defendants have not rebutted this *prima*

facie showing. Sarah's contention that John orally waived his right to collect interest is unavailing. The loan documents expressly preclude oral modifications and their anti-waiver provisions make clear that John's decision not to call the loan for more than three years after default cannot preclude him from doing so now. Under Ohio law,[3] which governs the loan documents, this precludes Sarah's claims of waiver. *See Kelley v Ferraro*, 936 NE2d 986, 994 (Ohio Ct App 2010) ("Ohio law is very clear that a contract that expressly provides that it may not be amended, modified, or waived except in writing executed by the parties is not subject to oral modification"); *see also* Dkt. 21 at 16 n.7 (collecting cases). While Sarah correctly contends that Ohio law, like New York law, provides for exceptions to this rule, Ohio law does not give effect to an alleged oral wavier unless it is "clear and unequivocal." *See Home S. & L. of Youngstown v Snowville Subdivision*, 2012 WL 4755355, at *5-6 (Ohio Ct App 2012); *cf. Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 425 (2013), citing *Rose v Spa Realty Assocs.*, 42 NY2d 338 (1977) (setting forth New York's similar "unequivocally referable" requirement").

Sarah has not made any such allegation. In fact, Sarah has not alleged that John ever waived the payment of interest. Rather, she claims that Joseph did so on behalf of John by acting as his agent. Sarah, however, fails to validly plead agency because she does not allege any act taken by John to expressly or impliedly make it appear to Sarah that Joseph was acting as John's agent. Under Ohio law:

[3] It should be noted that, as John correctly contends, Ohio contract law has many pertinent similarities to New York law, such as the fact that Sarah's failure to review the loan documents before signing them cannot absolve her of liability against John. *See* Dkt. 21 at 12-13 n.4 (collecting Ohio and New York cases).

> [I]n order for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) [t]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. **The apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent**; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority.

Brown v Extendicare, Inc., 39 NE3d 896, 910-11 (Ohio Ct App 2015) (emphasis added; citations and quotation marks omitted); *see Hallock v State*, 64 NY2d 224, 231 (1984) ("Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. **The agent cannot by his own acts imbue himself with apparent authority**.") (emphasis added). In any event, even if agency was pleaded, the alleged statements regarding John's waiver can be fairly interpreted as forbearing on the requirement to make monthly interest payments, as opposed to an outright wavier of the obligation to do so or the right to later hold defendants in default and call the loan. Hence, John's alleged wavier is not clear and unequivocal. Sarah's claims of waiver and oral modification, therefore, are not viable.

That said, Sarah's allegations are extremely troubling. She has pleaded facts suggesting that Joseph breached his fiduciary duty to her, his partner in a two-person LLC, by lying about the terms of the loan documents, which Joseph had his attorney review. Moreover, either Joseph is lying about his father's statements about the need to pay interest or John is being less than candid about his conversations with his son. These facts might well give rise to a claim against

Joseph for fraudulently inducing Sarah to execute her Guaranty and/or for negligent misrepresentation. They may also suggest aiding and abetting claims against John.

Nevertheless, in this summary judgment action in lieu of complaint brought by John involving an unconditional guarantee, Sarah has not pleaded any facts which establish a defense. At best, Sarah's allegations raise issues which should be probed in the Related Actions. While John is entitled to summary judgment on liability against Sarah, Joseph and the Gallery, the court, as a matter of equity, will stay enforcement of the judgment at this juncture. Sarah should be permitted to pursue her claims against Joseph since, if she prevails, she might be able to set off much of her liability under the Guaranty. Also, her allegations against John may well give rise, in the Related Actions, to liability on the part of John. Accordingly, it is

ORDERED that the motions by plaintiff John A. Kraeutler are granted to the following extent: (1) summary judgment on liability on the loan, the amount guaranteed and reasonable attorneys' fees is granted to plaintiff against defendants Hasted Kraeutler, LLC, Jospeh Kraeutler, and Sarah Hasted; (2) an inquest on damages shall be conducted after the adjudication of the actions styled *Hasted v Kraeutler*, Index No. 652797/2015 and *Kraeutler v Hasted*, Index No. 160769/2015; (3) this action is stayed in the interim; and (4) the motions are otherwise denied.

Dated: May 12, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C