SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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TARA OF TRIBECA LLC,

Plaintiff,

- v -

JOHN MORAN and 20 KILARNEY TAVERN CORP.,

Defendants.

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Index No. 652184/2016

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Tara of Tribeca LLC ("Tara" or "plaintiff") moves for an order, pursuant to CPLR 3213, directing the entry of summary judgment in lieu of a complaint in favor of plaintiff and against defendants John Moran ("Moran") and 20 Kilarney Tavern Corp. ("Kilarney") (collectively, "defendants") in the amount of $182,467.20 with interest at the statutory rate from March 1, 2016, on the basis of a promissory note and personal guaranty executed in conjunction with an asset purchase agreement for a restaurant called Tara of Tribeca. Plaintiff also seeks a declaratory judgment "regarding breach of the contract and additional terms for the future that result from such breach" and attorney's fees.

In support of its motion, plaintiff submits the affidavit of Joseph Crotty, managing member of Tara, sworn to on April 22, 2016, and the affirmation of Kevin Sean O'Donoghue, Esq., annexing copies of the: (a) Asset Purchase Agreement; (b) Promissory Note; (c) Personal Guaranty; and (d) notice of default letter, dated March 24, 2016.

Crotty avers that plaintiff and defendant Kilarney signed an Asset Purchase Agreement (the "Agreement") in September 2015 for a restaurant called Tara of Tribeca, located at 20 Warren Street, New York, NY 10007 (the "Restaurant"). Pursuant to the Agreement, Moran signed a Promissory Note (the "Note") dated September 10, 2015 in the amount of $152,056 in principal and $30,411.20 in interest to accrue through March 1, 2020. Moran also signed a Personal Guaranty

(the "Guaranty"), dated September 10, 2015, in which Moran personally guaranteed to pay the amount of money indebted to plaintiff in the Note. Crotty alleges that plaintiff has fully performed pursuant to the Agreement and that defendants have not yet paid plaintiff the full amount due, despite the fact that all three documents were duly executed. Crotty attests that payments were due to commence on March 1, 2016 and that a notice of default was mailed via certified mail, return receipt requested, on March 24, 2016. The March 24 letter stated:

> Pursuant to Section 3 of the Promissory Note that you executed on September 10, 2015, this letter serves as Notice that no payments have yet been made on the Promissory Note. If you do not make current the Annual Payment Obligation (as defined in the Promissory Note) within ten (10) days of the date affixed above, the Note shall be considered to be in default and all sums contained therein shall become immediately due.

Defendants oppose plaintiff's motion and cross move for consolidation of the instant action for trial with an action pending under Index Number 651096/2016 filed on March 3, 2016 in Supreme Court, New York County (the "Related Action"). In the Related Action, Moran and Kilarney seek declaratory relief regarding the enforceability of the Note and Guaranty as well as rescission of the Note and Guaranty.

Defendants submit the affidavit of Moran, principal of defendant Kilarney, and the attorney affirmation of Brian M. Rudner, Esq., annexing copies of the (a) Summons and Verified Complaint in the Related Action; (b) Asset Purchase Agreement; (c) Note and Guaranty; (d) affidavits of service; (e) answer and counterclaims in the Related Action; and (f) reply to counterclaims.

Moran avers that between March and July 2015, he and Crotty had numerous discussions regarding the sale and purchase of the Restaurant. When Moran inquired as to the existence of a public assembly permit for the Restaurant, Crotty replied that his lawyer had told him that a public assembly permit was not needed. In July 2015, Crotty and Moran reached an agreement whereby Moran would manage the Restaurant until such time as a written agreement between Kilarney and Tara could be formalized. Moran further avers that, when he undertook operation of the Restaurant in late July 2015, it was in "total disarray" and he repaired certain defects at his sole cost and expense. On September 10, 2015, Kilarney and Tara executed the Agreement, whereby Kilarney would purchase and Tara would sell certain assets of the Restaurant. As set forth in the Agreement, the purchase price was $207,056.00, payable as follows: (a) $55,000 on account by

check subject to collection, allocated as lease security; and (b) $152,056, subject to adjustments as provided in the Agreement, to be delivered to Seller at Closing in the form of a promissory note with a commencement date of March 2016, payable over 48 months with 5% interest annually. Moran states that, contemporaneous with the execution of the Agreement, Kilarney made a payment of $55,000 to Crotty and Moran signed the Note and Guaranty and delivered the same to counsel for plaintiff and Crotty on September 10, 2015.

Moran further attests that subsequent to the execution of the Agreement but prior to the scheduling of a closing, he realized that several material representations made by plaintiff and Crotty in the Agreement were false. First, Moran cites paragraph 5.1(i) of the Agreement, which states that "[A]ll certificates of occupancy, permits (*including a public assembly permit*) . . . have been issued and are in full force and effect." Moran states that he notified plaintiff's counsel of the lack of a public assembly permit for the Restaurant by email dated November 16, 2015 and that plaintiff failed to cure the default within ten days of being notified.

Second, Moran cites paragraph 5.1(d) of the Agreement:

> Seller has received no notice of and, to Seller's knowledge, there are no violations threatened or pending against Seller as of the date hereof in any city, state, federal or other governmental agency affecting the Restaurant, assets or the Premises nor have any complaints been filed with the Community Board or any governmental entity.

Moran states that subsequent to execution of the Agreement but prior to scheduling a closing, Moran learned that the New York City Fire Department had issued a Notice of Violation for the Restaurant on November 25, 2014. Moran notified plaintiff's counsel of the violation by email dated November 16, 2015 and plaintiff failed to cure the default within ten days of being notified.

Finally, Moran cites paragraph 5.1(b) of the Agreement:

> Seller has received no notice of and, to Seller's knowledge, there exist no actions, proceedings or investigations pending or threatened against Seller, its owners or its Assets that would affect this transaction . . .

Moran attests that a plumber named Sean Avalon advised Moran in October 2015 that plaintiff and Crotty owed Avalon $6,000 for plumbing services rendered and that Avalon would file a mechanics' lien if the debt was not promptly paid.

Defendants allege that the above representations were false when made and served as material inducements for defendants to enter into the Agreement. Defendants further allege that plaintiff did not fully perform under the Agreement, and that Kilarney exercised its right of termination under the Agreement on December 21, 2015. Defendants state that they never received the assets of the Restaurant because the Agreement was terminated prior to closing.

In reply, plaintiff argues that the only issue in this matter is the promissory note and the personal guaranty. Plaintiff contends that "[t]he parties agreed to have a purchase agreement and also separately executed the Promissory Note and the Guaranty because the payment was separate from the contract."

CPLR 3213 provides that, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. CPLR § 3213. A document qualifies as an "instrument for the payment of money only" for purposes of CPLR 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms." *Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 (1996) (internal citations omitted). By contrast, a document "does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." *Id.*

To prevail on a motion for summary judgment in lieu of complaint arising out of a promissory note, "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 Mktg. Tech., Inc.*, 101 A.D.3d 550, 551 (1st Dept. 2012); *Matas v. Alpargatas S.A.I.C*, 274 A.D.2d 327, 328 (1st Dept. 2000). "A defendant can defeat a § 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact." *Banco Popular N. Am. v. Victory Tax Mgmt.*, 1 N.Y.3d 381, 384 (2004).

Here, the Note is referenced throughout the Agreement and subject to adjustments as provided in the Agreement. *See Hirsch v. Rifkin*, 166 A.D.2d 293, 294 (1st Dept. 1990) ("Where an instrument sued upon is subject to terms and conditions in a separate document, the accelerated procedure for judgment under CPLR 3213, based upon an instrument for the payment of money only, may not be employed."); *Technical Tape v. Spray Tuck*, 131 A.D.2d 404 (1st Dept. 1987) (where promissory note sued upon was subject to the terms and conditions of the agreement of sale and the agreement outlined a complicated formula for the

finalization of the price, the note was not an instrument for the payment of money only and could not serve as a predicate for a CPLR 3213 motion). In his affidavit, Crotty acknowledges the interconnectedness of the Agreement and the Note in his assertions that "Plaintiff has fully performed pursuant to the APA [Asset Purchase Agreement]" and "[t]he amount of $182,467.20 is a sum certain that Defendants owe Plaintiff pursuant to the dictates of the APA [Asset Purchase Agreement], the Promissory Note, and the Guaranty." Section 2.2 of the Agreement outlines the adjustments to be made to the Purchase Price at Closing. Section 2.1(b) of the Agreement provides that the outstanding Purchase Price "subject to adjustments as provided herein" is "to be delivered to Seller at Closing in the form of a promissory note with a commencement date of March 2016, payable over 48 months with 5% interest annually." Because the Agreement contains no definite statement of the amount due since the amount is subject to adjustments, the Note, which is based on the Agreement's terms and conditions, does more than merely require the payment of money only. Accordingly, plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213 is denied.

Turning to defendants' cross motion for consolidation, CPLR 602(a) provides:

> When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

"Consolidation is generally favored in the interest of judicial economy and ease of decision making where cases present common questions of law and facts." *Raybov v. McCrory Corp.*, 210 A.D.2d 145 (1st Dept. 1994). "When consolidation is proposed, the burden today is on the resisting party to show that it would prejudice him." Siegel, N.Y. Prac. § 128, at 228 (5th ed. 2011).

Here, the two actions involve the same parties, arise out of the same transaction, involve the same documentary evidence, and plaintiff has not shown that it would suffer any prejudice as a result of consolidation. *See Rae v. Hotel Governor Clinton, Inc.*, 23 A.D.2d 564, 565 (2d Dept. 1965) (holding that consolidation was properly granted where the two actions embraced "the same set of promissory notes").

Wherefore, it is hereby,

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff's moving papers are hereby deemed the complaint in this action and the defendants' answering papers are hereby deemed the answer; and it is further

ORDERED that defendants' cross motion to consolidate the instant action (Index No. 652184/2016) with the action pending under Index Number 651096/2016 in Supreme Court, New York County, is granted; and it is further

ORDERED that the above-captioned action (bearing Index No. 652184/2016) shall be consolidated with *20 Kilarney Tavern Corp., and John Moran, Plaintiffs v. Joseph Crotty, Defendants* (pending in the Supreme Court, New York County, under 651096/2016) under Index No. 651096/2016; and it is further

ORDERED that that plaintiff and defendants are directed to submit a proposed order to the Court with an amended caption based upon the consolidation of the two actions.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: NOVEMBER 18, 2016

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EILEEN A. RAKOWER, J.S.C.