

Gladstein v Keane

2017 NY Slip Op 30743(U)

April 18, 2017

Supreme Court, New York County

Docket Number: 152121/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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HARVEY GLADSTEIN,

Plaintiff,

Index No. 152121/15

-against-

DECISION/ORDER

THOMAS F. KEANE and SUSAN KEANE,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for:

Papers	Numbered
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced this action on March 3, 2015 by notice of motion for summary judgment in lieu of complaint. After the court denied the motion for summary judgment in lieu of complaint, discovery was held in the action. Defendants have now brought the present motion for summary judgment dismissing plaintiff's complaint on the ground that the note which forms the basis of this action was not in default at the time plaintiff attempted to accelerate the note. As will be explained more fully below, the motion is denied.

The relevant facts are as follows. Both plaintiff and defendant Thomas Keane were partners in the law firm Gladstein, Keane & Flomenhaft PLLC ("GKF"). In or around July 2012, defendants executed a promissory note in favor of plaintiff in the amount of \$180,000.00 pursuant to which

defendants were to make thirty monthly payments of \$6,000 “[c]ommencing on the first day of the month, after thirty (30) days of...(i) the retirement from the practice of law by the Payee (as evidenced in the sole discretion of the Payee, by written notice...)” (the “Note”). The Note further provides that the full amount will become due, upon the declaration and at the option of the plaintiff, if defendants fail to pay any installment within ten days after its due date. The Note provides that plaintiff “shall have the optional right to declare the amount of the total unpaid balance hereto to be due and forthwith payable in advance of the maturity date of any sum due or installment as fixed herein, upon the failure of the undersigned to pay, when due and after ten (10) days notice that same is due, any of the installments of interest and /or principal.”

Plaintiff alleges that he retired from GKF in September 2014 and that he advised Mr. Keane that he expected repayment of the loan to commence immediately. In November 2014, defendants made a single payment to plaintiff in the amount of \$6,000 and thereafter, notified plaintiff that they would not be making any further additional installment payments. On or about December 19, 2014, plaintiff sent Mr. Keane a written letter confirming that he retired from the firm effective September 19, 2014. Additionally, by letter dated February 3, 2015, plaintiff declared the Note accelerated and the full amount due on the Note.

Initially, the court finds that this motion for summary judgment was timely made. It is undisputed that the initial summary judgment motion was timely made but was denied without prejudice on the ground that defendants failed to submit working copies of their papers. Under these circumstances, the court will deem the second summary judgment motion to have been timely filed.

Defendants argue that they are entitled to summary judgment dismissing this action because the Note was not in default at the time that plaintiff attempted to trigger the acceleration clause under the

Note by letter dated February 3, 2015. This argument is based on defendants' position that the first payment under the Note did not become due until February 2, 2015 but defendants made their first payment under the note in November 2014, which was two months before any payment was due. According to defendants, plaintiff gave written notice of his retirement on December 19, 2014; thirty days after written notice was January 18, 2015; and the first payment of \$6,000 was due on the first day of the month after January 18, 2015, which was Sunday February 1, 2015. Defendants argue that they were not in default when plaintiff sent the ten-day notice dated February 3, 2015 attempting to accelerate and were not in default when plaintiff commenced the action in March 2015 because they had already made an initial payment under the Note in November 2014 before any payment was due.

The court finds that defendants are not entitled to summary judgment based on their argument that the Note was not in default when plaintiff accelerated the Note as there is a disputed issue of fact as to when the first payment became due under the Note and when there was a default under the Note. Defendants' entire argument is based on their contention that the first payment under the Note became due in February of 2015 based on the written letter sent by plaintiff in December 2014. However, plaintiff has consistently alleged in this action that he retired from the practice of law on September 19, 2014; that he advised defendants at that time that payment of the Note should commence; and that he confirmed that he had retired in September 2014 in a writing on December 19, 2014. This is consistent with defendants' actions in paying plaintiff the sum of \$6000 in November 2014 with a note in the memo section of the check stating "Loan Repay," which is when the first payment would be due under the Note if plaintiff had retired in September 2014. If plaintiff's version of the facts that he retired from the practice of law in September 2014 is accepted by the trier of fact, then defendants would have been in default when they failed to make the second payment due under the Note in December of 2014.

Moreover, if the second payment under the Note was due in December 2014 as plaintiff alleges, then plaintiff properly accelerated the Note when he sent the notice in February 3, 2015 that there was a default as defendants had not made any payments in December 2015 or January 2015 and plaintiff gave defendants notice that they had ten days to make the payment.

Even assuming, *arguendo*, that the first payment under the Note did not become due until February 2, 2015, there are still issues of fact as to whether defendants would be entitled to apply the payment they made in November 2014 to the first payment due in February 2015. Defendant Keane testified in his deposition that the payment he made in November was paid before it was due and was in effect a voluntary prepayment. It is unclear from reading the Note how a voluntary prepayment of \$6,000 would be applied. The Note states that it may be prepaid at any time and that if the “Note provides for installment payments of interest and principal, prepayment of principal payments shall be applied in the inverse order such installment payments are due, applying first to the last principal installment due hereunder.” The court cannot determine from reading this provision how the parties intended this provision to be applied as the parties were aware at the time they entered into the note how the Note was to be structured and the very next paragraph of the Note refers to a payment of principal and/or interest not being made within ten days of when it is due.

Moreover, even if plaintiff failed to properly accelerate the amounts due under the Note when he sent the ten day notice or when he commenced the action, his continued prosecution of this action to recover the amounts due under the Note evidences his current intention to accelerate the Note. *See City Streets Realty Corp. v. Jan Jay Construction Enterprises, Corp.*, 88 A.D.2d 558, 559 (1st Dept 1982) (“the mere filing of a summons and complaint with notice of pendency is sufficient indication of the intent to accelerate the mortgage”).

