

Long Beach Lot 3 Inc. v Brady
2018 NY Slip Op 30551(U)
March 30, 2018
Supreme Court, New York County
Docket Number: 150834/2012
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES**PART 28***Justice*

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LONG BEACH LOT 3 INC.,

INDEX NO. 150834/2012

Plaintiff,

MOTION DATE 03/20/17

- v -

NANCY BRADY, ED BRADY

MOTION SEQ. NO. 005

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 171, 172

were read on this application to/for

JUDGMENT - SUMMARYORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for summary judgment is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Nancy Brady and Ed Brady in the amount of \$859,496.22, plus interest at a rate of 10% per annum from the date of _____ until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Court upon submission of an appropriate bill of costs.

DECISION

In this an action, plaintiff Long Beach Lot 3 Inc. seeks to recover on a written Pledge and Security Agreement and Guarantee.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the Complaint.

BACKGROUND

Plaintiff commenced this action against defendants, siblings Nancy Brady and Ed Brady, seeking to recover \$32,296.00 on a Pledge and Security Agreement executed by Nancy Brady, and \$859,496.22 on a Guarantee executed by Ed Brady.

The following facts are gleaned from the submissions of the parties.

In April 2007, plaintiff loaned \$1,000,000.00 to three companies, Pasta & Potatoes, Inc., 52 Restaurant Group Corp., and 199 Bowery Rest. Group, LLC., which were owned by Nancy Brady. In exchange for the loan, the three companies gave plaintiff a Convertible Promissory Note in the principal amount of \$1,000,000.00, with a maturity date of April 4, 2008 (Convertible Promissory Note. Nancy Brady executed the Convertible Promissory Note as principal of the three companies.

After making several payments, the three companies defaulted on Convertible Promissory Note. Plaintiff commenced an action, Long Beach Lot 3 Inc. v Pasta & Potatoes, Inc., Sup

Ct, NY County, Stallman, J., Index No. 106225/08 ("Pasta & Potatoes action"), by filing a motion for summary judgment in lieu of complaint to recover the outstanding balance on the Convertible Promissory Note.

By order entered October 7, 2008, the Court (Stallman, J.), granted plaintiff's motion for summary judgment in lieu of complaint, in the amount of \$889,219.08, plus interest, costs, and disbursements. The Court concluded that plaintiff had established a prima facie case for summary judgment by submitting a copy of a Convertible Promissory Note and proof of default on the note based upon the affidavit of plaintiff's president. In so doing, the Court rejected defendants' argument, among others, that the loan was not fully funded.

Judgment entered November 14, 2008, awarded plaintiff the principal sum of \$889,219.08, plus interest, costs, and disbursements. By order, entered January 30, 2009, the Court (Stallman, J.), denied the defendants' motion to reargue.

On January 30, 2009, attempting to settle the November 14, 2008 judgment, the three companies issued to plaintiff a Secured Promissory Note in the principal amount of \$941,825.14. The Secured Promissory Note required the three companies to make monthly payments of \$25,000.00, from February 1, 2009 to February 1, 2011. Nancy Brady signed the Secured Promissory Note once again as principal of the three companies.

To secure the settlement of the judgment, defendants executed documents guaranteeing punctual payment of the three companies' obligations under the Secured Promissory Note. Nancy Brady executed a Pledge and Security Agreement, dated January 30, 2009, in favor of plaintiff, in the principal amount of \$941,825.14.

Under the Pledge and Security Agreement, Nancy Brady granted plaintiff a first priority security interest in (1) her right, title, and interest to the three companies; (2) all securities, moneys or property representing dividends or interest on any of the three companies; (3) her right, title, and interest under any insurance policy payable by reason of loss or damage to the three companies; (4) her right, title, and interest in connection with any property in any accounts, cash proceeds, chattel paper, collateral, commercial tort claims, deposit accounts, documents, electronic chattel paper, equipment, fixtures, general intangibles, goods, instruments, inventory, investment property, letter-of-credit rights, noncash proceeds, payment intangibles, proceeds, software, supporting obligations, and tangible chattel paper of the three companies; and (5) her proceeds from any of the foregoing property, including proceeds of insurance. Her interests amount to 20% of the companies.

The Pledge and Security Agreement further states:

"If an Event of Default shall exist and not be cured, Lender shall have the right to receive any and all income, cash and dividends, distributions, proceeds or other property received or paid in respect of the Pledged Company Interests and make application thereof to the Debt, in such order as the Lender, in its sole discretion, may elect, in accordance with Loan Documents".

Ed Brady executed a Guarantee, also dated January 30, 2009, in favor of plaintiff, in the principal amount of \$941,825.14, guaranteeing the full and punctual payment and performance of the three companies' obligations of the Secured Promissory Note when due.

Attached to plaintiff's moving papers is the three companies' repayment history for the Secured Promissory Note. The document reveals that the three companies made an escrow payment of \$30,000 in December 2008; the required monthly payments in February, March, and April 2009; and sporadic payments of varying amounts in December 2009, January, February, and December 2010, and January 2011. The total payments made were \$156,000.00, and the unpaid balance was \$859,496.22.

The exhibits in the moving papers also establish that plaintiff sent defendants notices of default of the Secured Promissory Note, seeking to enforce the Pledge and Security Agreement and the Guarantee.

Lawsuit

Plaintiff commenced this action when defendants failed to fulfill their obligations under the Pledge and Security Agreement and the Guarantee.

The Complaint alleges causes of action against Nancy Brady to enforce various provisions of the Pledge and Security Agreement (first, second, and third causes of action), and against Ed Brady to enforce the Guarantee (fourth causes of action). Plaintiff claims that Ed Brady is responsible for the principal balance of \$869,496.22, plus interest, and that Nancy Brady is responsible for \$32,296.00, the amount shown as earnings from the three companies on her federal income tax returns for the years 2011, 2012, and 2013.

Defendants' answer includes general denials of the allegations in the Complaint and numerous affirmative defenses.

Plaintiff now seeks summary judgment to recover the balance due under the Secured Promissory Note.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980])). Once this showing has

been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, supra). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiff seeks to recover under the Pledge and Security Agreement and the Guarantee, based on the default under the Secured Promissory Note by the three companies. On review of the submissions, the Court concludes that plaintiff has established a *prima facie* showing of entitlement to judgment as a matter of law, tendering proof of the Promissory Note, Pledge and Security Agreement, and Guarantee; proof of default by the three companies in the form of payment history for the Secured Promissory Note attached to an affidavit of nonpayment from plaintiff's president; and defendants' failure to comply with the terms of the Pledge and Security Agreement and the Guarantee to cure the default (see European American Bank & Trust Co. v Schirripa, 108 AD2d 684 [1st Dept 1985]).

Defendants' assertion that the Secured Promissory Note was not fully funded was rejected by the Court in the Pasta & Potatoes action. Such Court's determination is binding and

conclusive in this action (see Koch v Consolidated Edison Co. of NY, 62 NY2d 548, 552-553 [1984]).

The assertion that plaintiff's recovery would be inequitable and should be estopped based on the criminal record of plaintiff's founding principal, nonparty Charles J. Antonucci, Sr. ("Antonucci"), is simply insufficient to raise any triable issues of fact and defeat summary judgment.

Estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt, LP., 7 NY3d 96, 106 [2006]).

Here, defendants offer no evidence to justify the imposition of estoppel in this action. As stated, the Secured Promissory Note, Pledge and Security Agreement, and Guarantee were all executed in plaintiff's favor in January 2009, more than one year before Antonucci pleaded guilty to federal charges for his role as president of nonparty Park Avenue Bank (see Information in United States v Antonucci). Furthermore, the stipulations in the federal action contemplated satisfaction of the settlement reached by the parties to the Secured Promissory

Note. Specifically, by Stipulation and Order, dated December 9, 2011, the parties in the federal action against Antonucci agreed:

"that the note receivable described as the 'Note receivable from 199 Bowery-Long Beach Lot 3 LLC ...,' and referenced in the Plea Agreement, is in fact a note due from 199 Bowery Restaurant Group, LLC, Pasta & Potatoes, Inc., and 52 Restaurant Group Corp. To Long Beach Lot 3 Inc. (The 'Note'); and that the United States seeks to forfeit only that interest in the Note previously held by [Antonucci)]."

In a subsequent stipulation of 2014, the United States agreed that:

"the percentage of interest it seeks to forfeit from [Antonucci] in said Note ... shall be no more than 7.5% which is the percentage value [Antonucci] previously held in Long Beach Lot 3 Inc. ...

Long Beach Lot 3, Inc. ... agrees that it shall forfeit, turnover and remit to the United States, and the United States agrees to accept, an amount equal to 7.5% of any recovery against the makers of the Note, 199 Bowery Restaurant Group LLC, pasta & Potatoes Inc. and 52 Restaurant Group Corp. or the guarantor of the Note, Ed Brady, or the pledger of collateral to secure the Note, Nancy Brady".

The assertion that plaintiff cannot establish prima facie entitlement to relief since it did not provide Nancy Brady with a notice of default under the Pledge and Security Agreement is similarly unavailing. A review of the submissions reveals no language requiring that notice of default be served on Nancy Brady, in her personal capacity. Courts cannot undermine the stability of contract obligations by interfering between parties whose contract terms for notice of default are clear and

unambiguous (see First Natl. Stores, Inc. v Yellowstone Shopping Ctr., Inc., 21 NY2d 630, 638 [1968])).

Paragraph 1 of the Pledge and Security Agreement states that an "'Event of Default' has the meaning ascribed to such term in the Note of the Loan Document as defined in the Note". The notice requirements for "Events of Default" under the Secured Promissory Note, as set for in paragraph 4.1, require service of notice to counsel for the three Companies.

It is undisputed that notices of the default of the Secured Promissory Note were properly served on counsel for the three companies on August 16, 2010 and November 1, 2011, with copies served on Nancy Brady as officer of the defaulting Companies. The November 1, 2011 notice states, in part:

"I have been retained by Long Beach Lot 3 ('LBL') to commence proceedings to enforce its rights under a Secured Promissory Note ('Note') dated January 30, 2009, in the principal amount of \$941,825.14, along with the accompanying Pledge and Security Agreement ('PSA') and other supporting documents, all signed by Nancy Brady as an officer of the defendant corporations"

Copies of the Note and Pledge and Security Agreement were included with the notices of default. Thus, Nancy Brady received the requisite notice of the default.

Contrary to defendants' assertion, the financial loss suffered by Brady in her investments in the three companies did not relieve her of her obligations under the Pledge and Security

Agreement. Paragraph 7 of the Pledge and Security Agreement expressly states:

"If an Event of Default shall exist and not be cured, Lender shall have the right to receive any and all income, cash dividends, distributions, proceeds or other property received or paid in respect of the Pledged Company Interests and make application thereof to the Debt, in such order as Lender, in its sole discretion, may elect, in accordance with the Loan Documents".

In summary, plaintiff has met its burden of establishing, by competent evidence, entitlement to summary judgment on the Complaint to recover on the Pledge and Security Agreement and the Guarantee executed by defendants. Defendants have failed to establish the existence of material issues of fact that require a trial of the action.

<u>3/30/2018</u> DATE		<u> DEBRA A. JAMES, J.S.C.</u>		
CHECK ONE:	☒ CASE DISPOSED	☐ DENIED	☐ NON-FINAL DISPOSITION	
	☒ GRANTED		☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ DO NOT POST		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE