

Castaldo v Castaldo
2018 NY Slip Op 30573(U)
March 29, 2018
Supreme Court, Suffolk County
Docket Number: 031049-11
Judge: Elizabeth H. Emerson
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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

JERRY CASTALDO,

Plaintiff,

-against-

PHILIP CASTALDO,

Defendant.

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DECISION AFTER TRIAL

In this action, plaintiff seeks the payment of \$300,000 based upon an alleged guarantee of a note dated December 21, 2001. The complaint alleges two causes of action: breach of the guarantee dated December 21, 2009,¹ in the amount of \$300,000 and reasonable attorney fees in the amount of \$5,000 with interest from December 21, 2009.

This matter has been on the court's calendar since 2011 due to protracted discovery, 13 adjournments, a medical emergency, the replacement of plaintiff's attorney after disbarment, and finally the dismissal and restoration of the action to the court's trial calendar.² By order dated October 23, 2017 (Emerson, J.), this court granted plaintiff's motion to restore and directed the parties to appear for trial on December 8, December 11, and December 12, 2017. The trial was conducted in one day on December 8, 2017, during which time both parties testified. At the

¹ Plaintiff testified that the allegation in the complaint that the guarantee was dated December 21, 2009 was in error, but that the actual date that is reflected on the guarantee is December 21, 2001.

² The matter had been scheduled for trial on three separate occasions before finally proceeding to trial in December 2017. At each of these scheduled dates, the plaintiff was unable to proceed for a variety of reasons. On each occasion the defendant appeared and was ready to proceed. On the third occasion the court dismissed the matter, but afforded the plaintiff the opportunity to move to restore the matter to the trial calendar, which he did.

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conclusion of the trial, counsel were given the opportunity to submit post-trial briefs. Defendant submitted its post trial brief on February 22, 2018. No post-trial submissions were received from plaintiff. Only the plaintiff and defendant testified as witnesses at the trial.

Plaintiff Jerry Castaldo testified as follows: In 2001 that he learned about an investment opportunity from his brother, defendant Philip Castaldo. This opportunity consisted of lending money to a third party in return for interest of 12% per annum. Plaintiff told defendant that he was interested in investing and that he would split the accrued interest on such investment by retaining ten percent and giving defendant two percent as long as defendant guaranteed the return of the principal. As a result of that conversation, plaintiff invested three hundred thousand dollars (\$300,000) with non-party Joe Forgione. Defendant executed the following guarantee:

“For valuable consideration, the undersigned does hereby absolutely and unconditionally guarantee to you and your assigns the prompt payment of any note(s) and other evidences of debt **described below and any renewals, extensions or changes in form thereof (any or all of which are hereinafter referred to as items)**, together with interest and the reasonable cost of collection, including attorney’s fees. The undersigned waives protest of any such terms, notice of the acceptance hereof, notice of default of the party(ies) to such items and any other notice or demand to which the undersigned might be entitled, and agrees that renewals or extensions or changes in form of said indebtedness or any part thereof may be made by you from time to time without notice to the undersigned and without impairing or releasing the liability of the undersigned. Neither the taking or the release of security, nor the addition of or the release of parties on said items, nor the changing of the terms or form thereof, nor the illegality thereof, nor the release of liability of any party thereof, nor the lack of diligence on your part in exercising any remedies against the parties to said items shall release the undersigned from the absolute and unconditional liability of the undersigned hereunder.”

“If there is more than one party signatory hereto, the liability of the undersigned shall be joint and several.

Note(s) or other Evidence(s) of Debt

<u>Name of Payer</u>	<u>Dated</u>	<u>Date Due</u>	<u>Amount</u>
Philip Castaldo	12/21/01	12/21/02	\$300,000.00

Philip Castaldo”

From 2001 through late 2006, plaintiff received interest payments from Forgione in the

amount of roughly \$30,000 per year. Such interest was paid quarterly. In keeping with their agreement, the plaintiff received ten percent and defendant received two percent of the interest accrued on the total investment. At the end of the first year, plaintiff did not demand payment from Forgione on the principal, but chose to reinvest his money. Plaintiff testified that he did not read the guarantee and did not keep records regarding payments.

Plaintiff testified that, at some point, he learned from defendant that the interest rate on his investment would be reduced. However, plaintiff continued to receive interest payments from Forgione, although he could not recall if the amount was different. Sometime in 2007, defendant approached him with regard to the guarantee. Plaintiff testified that defendant said he wouldn't hold up his end of the agreement and that he wanted it to stop. During cross examination, plaintiff testified that he was unaware that the interest rate had changed around the time that defendant stated that he wanted to discontinue the guarantee. Plaintiff continued to receive interest payments from Forgione. When asked if he received a new promissory note,³ plaintiff testified that he had no recollection of it. However, earlier deposition testimony reveals that plaintiff was aware of a new promissory note inasmuch as such note was used by him to make a claim in Bankruptcy Court. During his testimony, plaintiff read a portion of a 2007 note into the record, as follows: "As of January 15, 2007 all previous Promissory Notes between the Parties are null and void." Plaintiff testified that on May 14, 2010, Forgione filed for bankruptcy and Forgione stopped making the interest payments to plaintiff. Plaintiff filed a claim in Bankruptcy Court against Forgione on September 8, 2010, for \$300,000 as a creditor on the ground that Forgione owed him \$300,000 pursuant to a promissory note. Plaintiff received a partial reimbursement of the principal from the Bankruptcy Creditor's Committee in the amount of \$30,000. Upon the conclusion of the Bankruptcy Court claim, plaintiff sought payment of the remaining principal from defendant based on the guarantee, which defendant refused. This action was commenced on October 21, 2011.

Defendant, who was called to the stand by plaintiff as an adverse witness, testified as follows: He had invested twice with Forgione and had shared his experience with plaintiff. Plaintiff expressed an interest in the deal and suggested that, if he invested, plaintiff would take ten percent of the interest and defendant could have two percent as long as defendant guaranteed the principal amount. Defendant executed a guarantee and understood that the guarantee would be effective for one year. Over the next six years, they received interest payments from Forgione. An investor could add money to his account and take money out, and each time Forgione would write a new promissory note for a term of one year. Defendant advised plaintiff in late 2006 that the interest rate on the investment would be reduced to nine percent. Defendant told plaintiff

³ The 2007 promissory note was admitted into the record for identification only. Defendant in its memorandum of law now seeks its admission into evidence by judicial notice. The Court declines defendant's application on the ground that the note is not universally regarded as established by common knowledge, such as the laws of the State, historical events, the course of nature, or main geographical features (*Ptasznik v Schultz*, 247 AD2d 197). Therefore, judicial notice is inapplicable and defendant's request is denied.

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that, if he took the full nine percent interest, then defendant would not guarantee the investment. Since plaintiff was agreeable to this change, defendant stopped the guarantee because he was no longer receiving two percent interest.

The burden of proof rests with plaintiff, who must establish the truth and validity of each claim by a fair preponderance of the credible evidence (*see, Liberty Doorworks, Inc. v Baranello*, 35 Misc 3d 1222 [A] at *5). Stated otherwise, in order for plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the factfinder as more nearly representing what took place than the evidence opposed to it (**Id.**). If it does not, or if the evidence weighs so evenly that the factfinder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the Defendant (**Id.**). Only when the evidence favoring the Plaintiff's claim outweighs the evidence opposed to it may the Plaintiff prevail. (**Id.**).

A guarantee to answer for the debt of another is required to be in writing and subscribed by the person to be charged (**New York Produce Trade Assoc., Inc. v Mazzilli**, 49 AD2d 729). NY General Obligations Law § 5-701 provides, in part:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;
2. Is a special promise to answer for the debt, default or miscarriage of another person.

An oral guarantee to pay the loans made to a third party is barred by the statute of frauds (**General Obligations Law** § 5-701 [a]][2]; **Karl Ehmer Forest Hills Corp. v Gonzalez**, 159 AD2d 613). A guarantee is an agreement to pay a debt owed by another which creates a secondary liability and, thus, is collateral to the contractual obligation (**Brewster Transit Mix Corp. v McLean**, 169 1036, quoting **Shire Realty Corp. v Schorr**, 55 AD2d 356).

The court, having considered the evidence it finds reliable and having accepted so much of the testimony that it finds credible, finds that plaintiff has failed to meet its burden on either cause of action. The Court finds that the only guarantee in existence was the 2001 guarantee. That guarantee, by its terms, was a guarantee of the obligations evidenced by the Note dated December 21, 2001, that matured on December 21, 2002. Although the language of the guarantee includes extension of the original indebtedness, the court finds that there is sufficient credible evidence in the record to establish that the 2001 Note was replaced by a later Note whose terms were different from the original 2001 note. Accordingly, plaintiff is unable to meet his burden with respect to enforcement of the written guarantee. Moreover, any alleged oral

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agreement to continue the guarantee after it expired in 2002 is barred by the Statute of Frauds and is unenforceable (**Karl Ehmer Forest Hills Corp. v Gonzalez**, 159 AD2d 613).⁴

Plaintiff, having failed to establish that defendant breached the guarantee by a preponderance of the evidence, has also failed to establish its entitlement to attorney fees. Accordingly, the complaint is dismissed.

Dated: March 29, 2018


J.S.C.

⁴ The Court further notes that recovery on the promissory note dated December 21, 2001 is barred by the Statute of Limitations.