

Berkowitz v Weisman
2018 NY Slip Op 32733(U)
September 10, 2018
Supreme Court, Kings County
Docket Number: 501214/2012
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of September 2018.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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**LEOPOLD BERKOWITZ, individually and derivatively
on Behalf of 48-52 Franklin LLC,**

DECISION AND ORDER

Plaintiff(s),
- against -

Index # 501214/2012

**MARSHALL WEISMAN, a/k/a ELLIOT MARSHAL
WEISMAN, 48-52 FRANKLIN LLC, WILLIAFRANK,
LLC, 48 FRANKLIN LAKE, LLC, JSC TRIBECA, LLC,
52-48 FF ESTATES, LLC, MAXIM CREDIT CORP, and
TITAN CAPITAL,**

Defendant(s).

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APPEARANCES

**ASHER FENSTERHEIM, PLLC
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HON. SYLVIA G. ASH, J.S.C.

In this commercial action, Leopold Berkowitz (hereinafter "Plaintiff") seeks a money judgment against Marshall Weisman (hereinafter "Defendant") in the amount of \$1,360,860.11, plus interest. Defendant seeks to dismiss Plaintiff's claims in its entirety.

Procedural History

Plaintiff commenced the above-captioned action by filing a summons and complaint on May 21, 2012. Defendant then filed his answer on June 29, 2012. On October 17, 2012, the parties filed a stipulation of discontinuance as to all claims against Maxim Credit Corp. On October 19, 2012, the parties filed a discontinuance as to all claims against 48 Franklin Lake LLC, Titan Capital ID LLC, and 52-48 Franklin LLC. On March 30, 2016, Plaintiff filed an order to show cause (Mot. Seq. #1) seeking summary judgment and a money judgment against Defendant. On May 18, 2016, Defendant filed a notice of cross motion (Mot. Seq. #2) seeking to dismiss Plaintiff's twenty-second and twenty-third causes of action for failure to state a cause of action. On July 27, 2016, Mot Seq. #1 & 2 were denied.

Statement of Facts

On May 18, 2007, Plaintiff and Defendant signed two operating agreements (hereinafter "the Agreements") for 48-52 Franklin LLC, an organization that holds title to and facilitates the development of commercial and residential buildings. The Agreements state, in relevant part, that Plaintiff shall make an initial capital contribution of \$500,000 in his individual capacity and another \$500,000 contribution as a member of T.B.F. Charitable Trust. The Agreements further state that proceeds from the closing or refinancing of each completed unit shall be applied to the payment of all recorded liens, re-payment of capital contributions, payment of all expenses relating to the project, and profits in accordance with the agreement. Specifically, section VII (b) of the Agreements state that re-payment of capital contributions should be paid "at each closing pro-rata, the total of capital contributions divided by the final approved number of units to be built. No profits shall be distributed to its members prior to the repayments of capital contributions."

On or about June 22, 2009, Plaintiff made an additional capital contribution of \$1,000,000 to 48-52 Franklin, LLC. On January 6, 2010, Defendant wrote a letter stating that Plaintiff invested \$650,000 to 48-52 Franklin, LLC for an additional 3% profits and that the entire \$650,000 is personally guaranteed by Defendant. Specifically, the letter states that Defendant will personally guarantee the funds will be returned within 6 months, and if not, there will be an additional charge of 7% per annum and an additional 14% charge if the funds are not returned within 12 months of the dated letter. Furthermore, the letter states that “[t]he monies shall be deemed due and owing within 24 months of said investment and signing of this agreement, at which time Mr. Leopold Berkowitz may fully exercise his rights under the personal guarantee of Mr. Marshall Weisman to secure the return of his investment.” On January 20, 2010, both parties signed another operating agreement memorializing Plaintiff’s \$650,000 contribution in addition to the \$2 million already contributed.

By letter signed and dated August 25, 2010, the parties signed an agreement that modified and extended the prior agreements regarding the repayment date with all other terms of the deal remaining the same. Specifically, the August 25, 2010 letter states:

This shall confirm, that to date Leopold Berkowitz has invested \$2,650,000 to 48-52 Franklin LLC. In previous agreements, the parties agreed that if said funds were not repaid by June 22, 2011 (the “Repayment Date”) then Mr. Berkowitz will assume Mr. Weisman’s shareholder position outright, and at that time Mr. Leopold Berkowitz may fully exercise his rights under the personal guarantee of Mr. Marshall Weisman. Both parties have agreed that in consideration of 48-52 Franklin LLC hereby giving to Leopold Berkowitz an additional 1% share, for a total of a 10% share of profits in 48-52 Franklin LLC., Mr. Leopold Berkowitz agrees to extend the Repayment Date to June 22, 2012 (the “New Repayment Date”), with all other terms of the deal remaining the same. Any reference in the prior agreements regarding the Repayment Date, shall be considered modified and extended by this agreement to the New Repayment Date. The parties agree to execute such additional documentation as requested by Leopold Berkowitz to effectuate the foregoing agreement.

As of June 22, 2012, however, Defendant had not yet fully repaid Plaintiff. On or about July 11, 2012, Defendant made a payment of \$364,910.38. On or about August 31, 2012, Defendant made a payment of \$659,002.47. On or about September 4, 2012, Defendant made a payment of \$164,749.53. On or about March 28, 2014, Defendant made a final payment of \$879,092.79, totaling \$2,067,755.17 in payments to Plaintiff. Plaintiff now seeks an unpaid principal of \$582,244.83 plus applicable interest. Defendant, however, contends that these payments should be first applied to the personally guaranteed portion of Plaintiff's contribution. Defendant also contends that Plaintiff failed to satisfy the required condition precedent before seeking enforcement against him.

Evidence

The trial of this action was held on March 14, 2018 and March 20, 2018. Plaintiff introduced the following exhibits:

Exhibit Description

- 1 Operating Agreement dated May 18, 2007
- 3 Letter dated January 6, 2010
- 4 Operating Agreement dated January 20, 2010
- 5 Letter dated August 25, 2010
- 7 Examination Before Trial dated November 11, 2014

Thereafter, the matter was submitted for decision.

Discussion

The terms of a contract are clear and unambiguous when the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion; conversely, contract language is ambiguous when it is reasonably susceptible of more than one interpretation, and

extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language. *Re/Max of New York, Inc. v. Energized Realty Grp., LLC*, 135 A.D.3d 924, 24 N.Y.S.3d 176 (N.Y. App. Div. 2016)

A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises. *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 (1995). [I]t must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent. *Kass v Kass*, 235 AD2d 150, 159 (1997). If the language is in any way ambiguous, the law does not favor a construction which creates a condition precedent. *Id.* A contractual duty will not be construed as a condition precedent absent clear language showing that the parties intended to make it a condition. *Ashkenazi v Kent S. Assoc., LLC*, 51 AD3d 611, 611–12 (2008).

With regards to the alleged condition precedent in the August 25, 2010 letter, the court finds the ambiguous language insufficient to establish a condition precedent because it is reasonably susceptible to more than one interpretation. The court realizes ambiguity regarding a term of the August 25, 2010 letter that states that “Mr. Berkowitz will assume Mr. Weisman’s shareholder position outright, and at that time Mr. Leopold Berkowitz may fully exercise his rights under the personal guarantee of Mr. Marshall Weisman.” The word “will” in this statement gives the reader an impression that the assumption of Mr. Weisman’s shareholder position is a natural or automatic occurrence that is inevitable, opposed to a condition precedent that Plaintiff must deliberately do before he has the ability to exercise his rights under the personal guarantee. Therefore, the uncertainty of whether Plaintiff is expected to deliberately take action to assume Defendant’s shares or whether the assumption of the shares is automatic creates ambiguity within

this term. Thus, this court holds parallel to the court in *Kass* to find that the law does not favor a construction which creates a condition precedent when ambiguous language exists.

“[P]arties should be free to chart their own contractual course” unless public policy is offended”. *Vil. Taxi Corp. v Beltre*, 91 AD3d 92, 99 [2d Dept 2011]. It is a well-established principle that written agreements are construed in accordance with the parties intent and [t]he best evidence of what parties to a written agreement intend is what they say in their writing. *Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013].

Stability of contract obligations must not be undermined by judicial sympathy. The courts may not rewrite the contract that the parties freely entered into upon a finding that one of those parties failed to satisfy its obligation to negotiate in good faith pursuant to CPLR 3408. The court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert. *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 22 [2d Dept 2013].

In the present case, Defendant argues that Plaintiff's initial \$2 Million capital contribution was not a debt obligation for which an enforceable remedy for payment existed. The court, however, disagrees. Section VII (b) of the Agreements state that re-payment of capital contributions should be paid “at each closing pro-rata, the total of capital contributions divided by the final approved number of units to be built. No profits shall be distributed to its members prior to the repayments of capital contributions.” The court recognizes section VII (b) of the Agreements as a debt obligation with an enforceable remedy for payment, however, liability for the \$2 Million portion of this debt is not enforceable against Defendant in his personal capacity, as he has not personally guaranteed the initial contributions. Therefore, the court finds that 48-52 Franklin LLC is obligated to repay Plaintiff a total of \$2,650,000 for capital contributions, \$650,000 of which is personally guaranteed by Defendant.

As a general rule, the debtor has the right to specify to which debt he wishes a payment to be applied. *Beyer Bros. of Long Is. Corp. v Kowalevich*, 89 AD2d 1005, 1005-06 [2d Dept 1982]. In the absence of such a designation, the creditor may make it. *Id.* When neither the debtor nor the creditor makes such an application, the court will make it as equity and justice require and, usually, the funds will be applied to the debts in the order of time in which they stand in the account. *Id.*

With regards to the repayment of the capital contribution, it is undisputed that 48-52 Franklin LLC made payments to Plaintiff totaling \$2,067,755.17. Defendant, however, contends that these payments should first be applied to the \$650,000.00 capital contribution that was personally guaranteed instead of the initial \$2 Million capital contribution. The court disagrees.

The court holds parallel to the rationale in *Beyer Bros. of Long Is. Corp.* in determining that the payments made on behalf of 48-52 Franklin LLC should be applied to the debts in the order of time in which they stand in the account. Here, there are no facts to indicate that Defendant designated payment or intended to pay off the personal guaranteed portion of the capital contribution first, instead, the record suggests that 48-52 Franklin LLC made four payments to Plaintiff in satisfaction of an overall debt. Therefore, this court finds that 48-52 Franklin LLC's payments should be applied to the debt in the manner in which they were obtained. Thus, Plaintiff is entitled to a judgment holding Defendant individually liable for the entire outstanding balance of Plaintiff's capital contribution, as that was the last debt obtained and the only debt remaining.

Conclusion

Plaintiff is entitled to a judgment against Defendant in his individual capacity for \$582,244.83 plus interest at the contract rate of 14% per annum. Accordingly, Plaintiff is directed to submit a proposed judgment on notice within 45 days.

This constitutes the decision and order of the court.

E N T E R,



SYLVIA G. ASH, J.S.C.