Carpenito v Linksman
2018 NY Slip Op 34054(U)
July 12, 2018
Supreme Court, Orange County
Docket Number: EF000087-2018
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
--X
MICHAEL CARPENITO and ANTHONY CARPENITO,
Plaintiffs,

-against-

LAWRENCE I. LINKSMAN, CONKLIN SERVICES & CONSTRUCTION, INC., CONKLIN PROPERTIES, LLC d/b/a CONKLIN HOLDINGS, LLC, and FUNDEX PROPERTIES CORP.,
Defendants.
--X

DECISION AND ORDER
INDEX NO.: EF000087-2018
Motion Date: 5/7/18
Sequence Nos. 1 - 3

SCIORTINO, J.

The following papers numbered 1 to 34 were considered in connection with the application of defendants[1] seeking (Sequence #1) an order directing plaintiffs to provide a more definite statement and (Sequence #2) an order dismissing the complaint pursuant to Civil Practice Law & Rules §§3211; and the application of plaintiffs (Sequence #3) leave to interpose an Amended Complaint:

PAPERS	NUMBERED
Notice of Motion (Seq. #1)/Affirmation (Goldberg)/Exhibits A-D Defendants' Memorandum of Law	1 -7
Order to Show Cause (Seq. #2)/Affirmation (Benowich)/Exhibits 1-6	8 - 15
Stipulation and Affirmation regarding Sequence #2	16 - 17
Notice of Cross-Motion (Seq. #3)/Affirmation (Caruso)/Exhibits A-E Affidavit (Carpenito)/Exhibits A-D/Affidavit (Scandurra)/ Exhibits A-B	18 - 32
Plaintiff's Memorandum of Law	33
Defendant's Memorandum of Law in Reply and in Opposition to Cross-Motion	34

[1]The movants are defendants Linksman and Fundex. The Conklin defendants have not appeared and are apparently in default.

Filed in Orange County 07/12/2018 03:52:42 PM $0.00 Bk: 5128 Pg: 376 Index: # EF000087-2018 Clerk: EB

Background and Procedural History

This action stems from a loan in the sum of $500,000 made on or about October 31, 2006 by plaintiffs to defendant Conklin Services & Construction, Inc. (Conklin). The loan was evidenced by a Promissory Note (Exhibit A to Sequence #3), and bore a two year term with a due date of November 1, 2008, and an interest rate of 15% per annum[2]. There is no dispute that the loan was made, and there is no dispute that it was not repaid. The Note also references, *inter alia*, security in the form of a guaranty made by Hoboken Enterprises 2, LLC and Joseph Savino, as well as a security instrument (Mortgage) to be signed on the same date. Plaintiffs allege, and defendants do not deny, that the mortgage (apparently prepared in 2008) was never signed, and no evidence of a personal guaranty was provided.

On or about November 21, 2017, plaintiffs filed an action in the Supreme Court, Westchester County, under Index Number EF069369-2017, against Linksman, Bridge Funding and Optima Environmental Services, Inc., companies alleged to be controlled by Linksman. (Exhibit 3 to Sequence #2) That complaint sought recovery for breach of contract; fraud; successor liability, and corporate veil piercing.

In January 2018, plaintiffs filed this action by the filing of a Summons and Complaint. The Complaint sets forth allegations that, when plaintiffs made the loan to Conklin, Conklin owned certain real property located in the Town of Newburgh (the Premises). In 2015, with plaintiffs' loan still unpaid, Conklin transferred the Premises to defendant Fundex Properties, a secured creditor of Conklin. Plaintiffs allege the transfer was made without consideration. Fundex then initiated a foreclosure sale of Conklin's remaining assets pursuant to Article 9 of the Uniform Commercial

[2]The Note also included a default interest rate of 24%.

Code, and purportedly discharging Conklin's debt to plaintiffs. The assets were purchased by non-party Optima. It is alleged that defendant Linksman was the principal of multiple defendants, including Fundex and Optima, and that Optima and Fundex continue to operate Conklin's business. Plaintiffs claim that the transfer was entered into fraudulently to escape Conklin's liability to plaintiffs. Notwithstanding, in 2017, "defendants" acknowledged and promised to pay plaintiffs.

Plaintiffs assert causes of action for fraudulent transfer in 2015; successor liability by fraud; piercing the corporate veil; and unjust enrichment. Simultaneous with the filing of the Summons and Complaint, plaintiffs filed a Notice of Pendency against the Premises.

The Instant Motions

Sequence #1

By Notice of Motion electronically-filed on March 3, 2018, defendants Linksman and Fundex seek, pursuant to Civil Practice Law & Rules §3024(a), an order for a more definite statement. Linksman and Fundex asserted that the complaint was "so vague and ambiguous that [they] cannot be reasonably required to frame a response." Specifically, they assert that Fundex entails two separate and distinct entities, which are "lumped together" as one in the Complaint.

By reason of the filing of defendants' motion to dismiss (Sequence #2), no responses were filed to this motion.

Sequence #2

On April 5, 2018, defendants Linksman and Fundex (defendants) filed an Order to Show Cause seeking dismissal of the Complaint based on Civil Practice Law & Rules section 3211(a)(1), (4), (5) and (7). The application further seeks cancellation of the Notice of Pendency, with or without bonding.

Defendants assert that plaintiffs' underlying claim for repayment of their loan is barred by the statute of limitations. The claim for fraudulent transfer is barred by documentary evidence showing real and substantial consideration paid for the transfer of the Premises. Defendants alleged that the Orange County action was commenced in bad faith, and a *lis pendens* should not lie. They noted the existence of the Westchester County action, based on the same facts, and seeking essentially the same relief. Defendants argue that the prior action pending requires dismissal of the Orange County action as the claims are duplicative.

Moreover, defendants assert that the basis for all of the Orange County claims is the same, that is, the $500,000 debt purportedly owed to plaintiffs by the Conklin defendants. The defendants allege that the claim is time-barred and unenforceable and the complaint is nothing more than a "shell game" asserting claims and seeking remedies for which plaintiffs have established no right.[3] Each claim asserted in the Orange County complaint is based on the assumption that plaintiffs were a creditor of Conklin, which they were not because the debt is no longer enforceable.

Even if that were not the case, the defendants assert that the claim that the 2015 transfer was fraudulent for lack of consideration is meritless. Defendants append a copy of the Deed in Lieu of Foreclosure and Real Property Transfer Report (Exhibit 5 to Sequence #2) showing consideration of $5,082,248 as having been paid at the time. Such documentary evidence is fatal to plaintiffs' complaint, and does not afford them the right to have the allegations considered true on a motion to dismiss.

On or about April 25, 2018, the parties entered into a stipulation to cancel the Notice of

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[3]The 2006 Promissory Note was not appended to the original Complaint, and defendants in Sequence #2 argue that the loan was thus an oral, demand loan, the time to enforce which expired six years after the loan was made in 2006.

Pendency. A second stipulation, not electronically filed, consented, *inter alia*, to withdraw the Westchester action without prejudice and to consolidate the same with the Orange County action.

Sequence #3

By Notice of Cross-Motion electronically filed on April 30, 2018, plaintiffs seek leave to serve and file an Amended Verified Complaint, deeming the same served by service appended to the motion papers. In support of the application, and in opposition to the motion to dismiss, plaintiffs affirm, through counsel, that a payment demand was sent to defendant Linksman on December 5, 2016. (Exhibit A to Seq. #3) Subsequent emails from Linksman to his attorney (and copied to plaintiffs' attorney) dated December 12. 2016, referred to the loan plaintiffs made to Conklin, and stated that "[Linksman] told [plaintiff Tony Carpenito] along the way that [he] would try to work with him on an even footing as the $750,000." Thereafter, plaintiffs' attorney sent to defendants' attorney a draft Acknowledgment of Debt and Unconditional Promise to Pay (Exhibit C to Seq. #3); the acknowledgment was never signed.

Plaintiffs also submitted the affidavit of Anthony Carpenito, who averred that shortly after the 2006 Note was executed, defendant Linksman, through his then-attorney, began to communicate with him and other lenders to try to extend the term of the Note and to suspend interest payments. He also received a memorandum from Linksman in August 2007, and again in September 2007, requesting its lenders to forbear from demanding repayment. Carpenito believed that repayment then became due on March 8, 2009. In successive years, Linksman periodically advised him that his Note would be repaid. Plaintiff became concerned when, in 2015, he learned of the attempted foreclosure by Fundex against Conklin. However, he did not direct his attorney to demand payment until December 2016. In February 2017, Linksman again expressed a need for further extension and

forbearance, but said the Note would be repaid. Linksman told him that he would be repaid when Linksman or Fundex was repaid. Carpenito alleges that Linksman agreed at that time to acknowledge the debt in writing, but when presented with such an acknowledgment, he refused to sign it.

Plaintiffs suggest that the fraudulent conduct of Linksman equitably estops him from invoking the statute of limitations to dismiss the Complaint, and that his affirmative actions, both oral and written, acknowledging the validity of the debt, revived the statute.

Finally, plaintiffs submit the affidavit of John Scandurra, former COO of Conklin, who averred that, during the entirety of his employ with Conklin, from 2006 to 2015, Conklin's debt to plaintiffs was carried on their books. His predecessor, Joseph Savino, signed forbearance agreements securing the debt, including the debt to plaintiffs. Scandurra "suspected" that the forbearance agreements were either destroyed or concealed. Such fraudulent conduct, it is argued, entitles plaintiffs to pass-through liability against Linksman and the other defendants.

Defendants' Opposition to Cross-Motion

Defendants argue that the 2015 transfer of the Premises was made for good and valuable consideration; but, even if plaintiffs were able to demonstrate that it was not, plaintiffs have no standing to challenge it as, by the time of the transfer, they were no longer creditors of Conklin. Plaintiffs never sought to force the execution of the security instrument; never sought to collect or enforce the Note, and never memorialized any of the purported extensions to which they agreed. The proposed Amended Complaint only amplifies defendants' argument that plaintiffs themselves are responsible for their own inaction.

For the same reason, the unjust enrichment claim cannot survive. To the extent that the 2015

transfer did or may have injured plaintiffs, they were unsecured creditors, who were not entitled to successor liability after an Article 9 sale.

There can be no claim that Linksman or Fundex ever assumed liability for the Note. No written guaranty was ever provided, and there was no allegation that they acted as accommodation parties. Plaintiffs' argument that Linksman's statements acted as a reaffirmation is meritless, as such an acknowledgment can only take place by a writing signed by the party to be charged. No writing has been offered, other than an email sent by Linksman to his attorney at a time when the statute had already passed. Nor did the email sufficiently acknowledge an intention on the part of Linksman to repay the debt. No other statements have been alleged, and without such specificity, a cause of action for fraud cannot lie.

The Court has fully considered the submissions of the parties.

Discussion

The application of defendants (Sequence #2) for dismissal is granted.

An action on a note payable at a definite time is governed by a six-year statute of limitations. Uniform Commercial Code §3-318(a); Civ. Prac. Law & Rules §213(2) An action must be commenced within six years after the due date stated in the note. The Note which forms the basis for the claims at bar was executed in 2006, and carried a due date of November 1, 2008. Thus, the statute of limitations for enforcement of the Note expired on October 31, 2014, approximately three years before the commencement of the Westchester action. Unless the statute was tolled, waived or extended, or unless defendants are equitably estopped from asserting the defense of the statute of limitations, the action is time-barred.

Plaintiffs claim both that the alleged fraudulent actions and inactions of defendants should constitute a reaffirmation and acknowledgment of the debt; or alternatively, should estop them from asserting a statute of limitations defense. Neither argument can succeed.

Reaffirmation

The Complaint and proposed Amended Complaint assert that defendant Linksman, through statements and documents, purported to extend and/or reaffirm the Note. General Obligations Law §17-101 provides that a new or continuing obligation may only be evidenced by an acknowledgment or promise in writing, and that such a writing is the "only competent evidence... whereby to take an action out of the operation of the provisions of limitations of time for commencing actions...". (*Id.*)

A time-barred claim may be revived when the debtor signs a writing which validly acknowledges the debt. Gen. Obl. Law §17-101; (*Lynford v. Williams*, 34 AD3df 761 [2d Dept 2006]) However, such a writing must be by the debtor, and must both recognize the debt and contain nothing inconsistent with the intention on the part of the debtor to pay it. (*Hui v. East Broadway Mall, Inc.*, 4 NY 3d 790 [2005]) The requirement is met when, for example, a debtor or guarantor writes to a creditor after the statute of limitations has run, referencing the original loan, and confirming the balance due. (*See, e.g., Banco de Brasil, S.A. v. State of Antigua and Barbuda*, 268 AD2d 75 [1st Dept 2000]) Even without a specific promise to repay, if the debt is acknowledged in such a way as to imply an intention to repay, the statute may begin to run anew. (*Anonymous v. Anonymous*, 172 AD2d 285 [1st Dept 1991])

In the matter at bar, however, plaintiffs rely on verbal assurances by Linksman, which are ineffective to renew the statute, and to one email sent by Linksman to his attorney, which was copied to plaintiffs. Contrary to defendants' arguments, it is irrelevant that the email was written after the

statute had run, as the General Obligations Law provides that such a reaffirmation may occur before or after the running of the statute. However, what is relevant is that the email was neither signed by the debtor, which was, in 2016, Conklin, Linksman or any of "his" entities and was not sent directly to the plaintiffs, or intended to influence plaintiffs' conduct in any way. Read in full, the email refers to the fact that a loan had been made, but does not expressly recognize its continued existence, and does not contain even an implied, much less a clear, intent to repay by Linksman. Absent such communication to plaintiffs, the email does not suffice to take the action out of the operation of the statute, which, as defendants note, had expired years before. (*Lynford*, 34 AD3d at 763)

Plaintiffs, through the Scandurra affidavit, further rely on the fact that the debt was carried on the books of Conklin through Scandurra's tenure, ending in 2015. However, the Second Department has squarely rejected that argument, finding that "the mere fact that the debt was carried on defendant's books and tax returns would not, in and of itself, constituted the required acknowledgment. The critical determination is whether the acknowledgment imports an intention to pay." (*Estate of Vengroski by Vengroski v. Garden Inn*, 114 AD2d 927, 928 [2d Dept 1985])

Such intention being absent from the facts at bar, the argument for reaffirmation must fail.

Equitable Estoppel

The doctrine of equitable estoppel applies only when the actions of defendants lulled the plaintiffs into inaction to allow the statute of limitations to expire. (*Wiesel v. Rubenstein*, 12 Misc. 3d 1168(a) [Nassau Co. 2016], *citing Incorporated Village of Rockville Centre v. Town of Hempstead*, 276 AD2d 279 [2d Dept 2000]) It is an extraordinary remedy, which requires proof that the defendant made an actual misrepresentation, or concealed facts it was required to disclose. Due diligence on the part of plaintiff in commencing the action is an essential element of the doctrine.

(*Ross v. Louise Wise Services, Inc.*, 20 AD3d 272, 282 [1st Dept 2006], *aff'd as modified*, 8 NY 3d 478 [2007])

The protection of equitable estoppel is available only to a plaintiff who commences an action within a reasonable time after the facts giving rise to the estoppel have ceased to be operational. In no event will plaintiff be found to have exercised due diligence where an action is deferred, after discovery of relevant facts, beyond the length of the legislatively prescribed period of limitation. (*Campbell v. Chabot*, 189 AD2d 746 [2d Dept 1993]) Plaintiff's reliance upon defendant's deception, fraud or misrepresentation must be reasonable. (*North Coast Outfitters, Ltd. v. Darling*, 134 AD3d 998 [2d Dept 2015])

In the case at bar, plaintiffs were on notice, as early as 2006, that Conklin had not, and apparently would not, execute the security instrument meant to protect them. According to plaintiffs' own assertions, those instruments were not even prepared until 2008, and although plaintiffs assert they were never signed, they offer no information about what efforts they took to procure compliance at that point, or any explanation for why no action was taken. Plaintiffs simply say they were verbally asked to extend the loan, and that forbearance agreements were circulated, of which they appear to have no copies. No specific actions of deception or fraud are alleged by the complaint, or why plaintiffs' reliance upon them for years after the expiration of the statute was reasonable.

Even after plaintiff Anthony Carpenito acknowledges his suspicions that Linksman's alleged representations were false were raised in 2015, he waited more than another full year before commencing the Westchester action in 2017.

Even taking plaintiffs' allegations as true, as the Court is constrained to do on a motion to dismiss, there is no reasonable interpretation of the facts as presented by plaintiffs which would lead to a conclusion that their twelve-year delay can be viewed as reasonable or diligent, in the absence of partial payment, written promises or forbearance agreements, or specific fraud,.

On the basis of the foregoing, the application of defendants Linksman and Fundex for dismissal of the Complaint as against them is granted.

Defendants' motion for a more definite statement (Sequence #1) is denied as moot.

Plaintiffs' motion for leave to file and serve an Amended Complaint (Sequence #3) is granted without opposition, as against the Conklin defendants. Plaintiffs shall electronically file and shall effectuate service of an Amended Complaint upon the remaining defendants not later than August 17, 2018.

The remaining parties shall appear for preliminary conference on September 6, 2018 at 9:00 a.m. The Conklin defendants shall appear, as required, by counsel.

This decision shall constitute the order of the Court.

Dated: July 12, 2018
Goshen, New York

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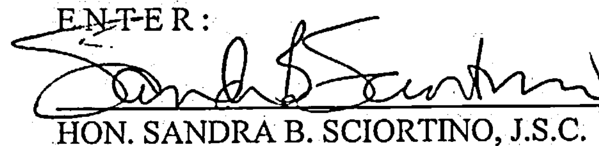

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*

Conklin Services & Construction, Inc.
Conklin Properties, LLC
Defendants *pro se*
94 Stewart Avenue
Newburgh, NY 12550