Arici v Poma
2019 NY Slip Op 31586(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 654665/2017
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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ADEM ARICI

Plaintiff,

- v -

ANDREW POMA,

Defendant.

INDEX NO. 654665/2017

MOTION DATE 05/30/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131
were read on this motion to/for JUDGMENT - SUMMARY.

HON. BARRY R. OSTRAGER:

This action arises out of Plaintiff Adem Arici's sale of his one-third interest in non-party Idaho Farmer's Market Inc. (the "Market") to Defendant Andrew Poma. Plaintiff alleges that he sold the shares to Defendant for a purchase price of $1,542,000.00 pursuant to a Stock Purchase Agreement ("SPA"). Plaintiff alleges that Defendant failed to make certain monthly installment payments as required by the SPA. Defendant's counterclaims allege that Plaintiff is obligated to indemnify Defendant in connection with certain tax liabilities Defendant incurred in connection with the SPA. Presently pending before the Court is Plaintiff's motion for summary judgment on his affirmative claims pursuant to CPLR § 3212, and to dismiss Defendant's counterclaims pursuant to CPLR § 3211(a)(1) and (a)(7). For the reasons stated below, Plaintiff's motion is granted in part and denied in part.

Background

On February 18, 2011, Plaintiff and Defendant entered into the SPA in which Plaintiff agreed to sell to Defendant shares of the Market in exchange for $1,542,000.00. The SPA required the Defendant to make a payment to Plaintiff in the amount of $250,000.00 upon execution of the SPA and further required that the Defendant make monthly installment payments through July 1, 2015. *See* SPA § 1.3 [NYSCEF Doc. No. 69].

It is undisputed that Plaintiff tendered the shares to Defendant and that Defendant paid $250,000.00 upon execution of the SPA. Additionally, it is undisputed that Plaintiff received several monthly installment payments subsequent to the execution of the SPA. Plaintiff alleges that Defendant ceased making monthly installment payments under the SPA and is in breach of contract.

Plaintiff also alleges that on February 28, 2011, the Market, a non-party herein, executed a promissory note (the "Note") in favor of Plaintiff for $1,292,000.00.[1] Plaintiff alleges that the Note was intended to be a guarantee of Defendant's underlying debt to Plaintiff.

On December 30, 2011, Plaintiff purportedly executed an assignment of the Note to non-party Jared Scharf ("Scharf"). Plaintiff alleges that because of mutual mistake, or clerical error, the SPA was erroneously listed as one of the documents assigned to Scharf. Plaintiff and Scharf agree that the SPA was never intended to be assigned as part of the assignment of the Note. The SPA itself allegedly contains a non-assignability clause. Thus, Plaintiff alleges that he, and not Scharf, is the proper holder of the SPA.

[1] The Court notes that that sum is equal to the SPA purchase price of $1,542,000.00, less the $250,000.00 payment Defendant made to Plaintiff upon execution of the SPA.

On February 29, 2012, Scharf commenced an action to recover on the Note against the Market. Scharf eventually released his claims against the Market under the Note in exchange for a settlement payment of $275,000.00.

Plaintiff argues that he is entitled to amounts still due under the SPA, less the amount Scharf received in settling his separate claim under the Note, which is purportedly a guarantee of the SPA. Thus, Plaintiff commenced this action for breach of the SPA seeking to recover amounts still due and owing.

Plaintiff's Claims

On a motion for summary judgment, the movant bears the initial burden to "make a 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." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "Once this showing has been made, however, 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." *Id.*

Plaintiff seeks summary judgment in his favor on his claim for breach of the SPA. Plaintiff argues that Defendant executed the SPA and failed to make monthly installment payments pursuant to the terms of the SPA. Plaintiff further asserts that the Note that was executed by the Market was intended as a guarantee of the SPA and was not intended to replace Defendant's payment obligations under the SPA. Thus, Plaintiff necessarily argues that if Defendant failed to make payments under the SPA, Plaintiff would, as recourse, be able to hold the Market liable under the Note. *See* Arici Affidavit ¶ 4 [NYSCEF Doc. No. 68]. Once the Market, as guarantor, settled claims with respect to the Note, Plaintiff asserts he had the right to

hold Defendant liable with respect to the outstanding balance under the SPA. Thus, Plaintiff seeks to hold Defendant liable for the unpaid portion of the SPA, less the amount the Market paid to settle its claims, as guarantor, under the Note.

Defendant takes a diametrically opposite position with respect to the purpose of the Note vis-à-vis the SPA. Defendant argues that the Market's tender of the Note to Plaintiff was intended to *satisfy* Defendant's payment obligations to Plaintiff under the SPA. Defendant asserts that the execution of the Note essentially extinguished Defendant's payment obligations to Plaintiff under the SPA. *See* Poma Affidavit ¶ 6 [NYSCEF Doc. No. 88]. Thus, Defendant argues that upon the Market's tender of the Note to Plaintiff, Defendant ceased to have any payment obligations under the SPA and cannot be in breach thereof.

The Court finds, however, that a plain reading of the SPA and the Note does not clearly support the position of either party in this lawsuit. The SPA makes no reference to the Note and certainly does not provide that tender of the Note satisfies Defendant's payment obligations under the SPA.

Likewise, the Note does not explicitly reference the SPA and does not provide that it is being tendered in satisfaction of Defendant's payment obligations under the SPA. The Note does, however, contain the same monthly payment schedule as the SPA, the only difference being that the Market is required to make payment under the Note whereas Defendant is required to make payment under the SPA. Although the SPA and the Note make no reference to each other, do not indicate that one is a guaranty for the other, and do not indicate that one is in satisfaction of the payment obligations of the other, it would be premature to conclude, as a matter of law, that these two contracts are wholly unrelated given their identical, parallel

payment schedules. Indeed, neither party argues that the two contracts give rise to two wholly separate payment obligations totaling over $3 million.[2]

Thus, the Court declines to find as a matter of law, and without the benefit of deposition testimony, that the Note is a guaranty of Defendant's debt under the SPA, that the Note itself fully satisfied Defendant's payment obligations under the SPA, or that the Note and the SPA give rise to entirely independent payment obligations. While a plain reading of the SPA and the Note suggests the existence of two separate payment obligations, both parties argue that the two contracts are interrelated—though in different respects—and the identical payment schedules would seem to indicate that the two documents are interrelated in some respect. Thus, the motion for summary judgement must be denied because there exists a triable issue of fact as to the intent of the parties in executing the Note in relation to the SPA.

Defendant's Counterclaims

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[2] In 2014, the First Department stated: "Nothing on the face of either the note or the stock purchase agreement creates an issue of fact about whether the parties intended to treat these documents as mutually dependent contracts.... Plaintiff's right to payment can be ascertained from the face of the note itself, without resorting to extrinsic documents." *Scharf v. Idaho Farmers Mkt. Inc.*, 115 A.D.3d 500, 501 (1st Dep't 2014).

In connection with an appeal of the motion to dismiss in this action, the First Department stated: "Contrary to the motion court's concern that [Arici] is seeking double recovery, we find, accepting the allegations in the complaint as true, that [Arici] is only seeking to be 'made whole' by receiving the balance of the purchase price set in the stock purchase agreement, after deducting amounts already paid by defendant and [the Market], including those received in connection with the *Scharf* litigation. There is nothing in the stock purchase agreement or the note that would prevent plaintiff from suing defendant to recover the remainder of the purchase price due under the stock purchase." *Arici v. Poma*, 168 A.D.3d 411, 412 (1st Dep't 2019).

Thus, it appears the First Department implicitly held in 2019 that the Note and the SPA, based on a plain reading of both documents, are two independent contracts giving rise to two independent payment obligations. The only way to reconcile the First Department's 2019 opinion with its 2014 opinion is to conclude that the First Department has not definitively held, as a matter of law, that the two contracts are wholly independent such that Poma's payment obligations under the SPA are entirely separate and distinct from the Market's payment obligations under the Note.

Additionally, neither party argues, in connection with the instant motion, that the SPA and the Note give rise to wholly independent payment obligations, nor do the parties argue that the First Department has held such as a matter of law. Thus, this Court declines to parse the dicta of the two First Department decisions, and the Court further declines to make a finding that neither party advances or seemingly believes to be reflective of the true state of facts.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction .... Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

Defendant interposes two counterclaims. The first counterclaim seeks specific performance of Section 4.5 of the SPA which purportedly obligates Plaintiff to indemnify Defendant against damages flowing from any tax liability against the Market up to Plaintiff's pro rata share of such liability.

Plaintiff seeks to dismiss Defendant's first counterclaim pursuant to CPLR § 3211(a)(1) and (a)(7) because, Plaintiff asserts, Defendant cannot seek indemnification for tax liability that stems from Defendant's criminal conviction for tax-related crimes.

It is not disputed that in November 2014 the Defendant pleaded guilty to various tax-related offenses in the Southern District of New York. *See* Judgment in a Criminal Case [NYCSEF Doc. No. 78].

Defendant argues that the SPA obligates Plaintiff to indemnify Defendant for damages associated with that tax crime in the amount of $710,186.29—Plaintiff's pro rata share of the liability.

In general, "public policy considerations preclude either indemnification or contribution for the consequences of [] illegal acts." *Elican Holdings, Inc. v. Hudson Oil Refining Corp.*, 96 A.D.2d 792, 793 (1st Dep't 1983). Thus, it is the longstanding rule in New York "that one may not contract for indemnification for the consequences of a criminal or illegal act to occur in the future." *Feuer v. Menkes Feuer, Inc.*, 8 A.D.2d 294, 297 (1st Dep't 1959). However, there is an exception to this rule regarding an agreement to indemnify for criminal conduct that *preceded*

the agreement. "[O]ne may make an agreement to be indemnified or to indemnify with respect to a crime or illegal act which occurred prior to the making of the agreement. This has been the law for many years throughout the United States and in this State." *Id.* at 297-98.

Here, Defendant seeks contractual indemnity for criminal conduct that occurred prior to execution of the SPA, and thus the public policy concerns Plaintiff raises are not applicable. Therefore, Plaintiff's motion to dismiss Defendant's first counterclaim is denied.

Defendant's second counterclaim seeks a declaration from this Court regarding the enforceability of the payment obligations in Section 1.3 of the SPA. The parties' obligations under the SPA will be adjudicated in connection with Plaintiff's breach of contract claim and thus Defendant's counterclaim is entirely unnecessary and therefore dismissed.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's motion to dismiss Defendant's counterclaims is granted in part and denied in part. The Clerk is directed to sever and dismiss the second counterclaim from the action; and it is further

ORDERED that the parties appear for a compliance conference on September 17, 2019 at 9:30 a.m.

BARRY R. OSTRAGER
JSC

6/3/2019
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
APPLICATION:		GRANTED		DENIED	X	GRANTED IN PART	OTHER
CHECK IF APPROPRIATE:		SETTLE ORDER				SUBMIT ORDER	
		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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