

Gluckstern v Arklow-FBF LLC
2019 NY Slip Op 33735(U)
December 16, 2019
Supreme Court, New York County
Docket Number: 652499/2019
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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INDEX NO. 652499/2019

STEVEN GLUCKSTERN

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

ARKLOW-FBF LLC,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for STRIKE & SUMMARY JUDGMENT

OSTRAGER, BARRY R. J.S.C.

Before the Court is Plaintiff's motion 001 to strike Defendant Arklow-FBF LLC's affirmative defenses and counterclaims, and for summary judgment on his first cause of action, and entry of judgment plus interest accruing at the contractual rate, plus attorneys' fees and costs to collect the debt. The Court heard oral arguments on this motion on November 26, 2019. Based on the foregoing documents and the representations made before the Court at oral argument, Plaintiff's motion for summary judgment on his first cause of action is granted.

This is a simple action to recover on a loan agreement. Defendant Arklow-FBF LLC ("Arklow") entered into a loan agreement (the "Loan Agreement") with non-party Great-West Life & Annuity Insurance Company ("Great West") (NYSCEF Doc. No. 3). The most recent amendment to the Loan Agreement became effective as of December 17, 2010 (the "Third Amendment") (NYSCEF Doc. No. 4). Together with the Third Amendment to the Loan

Agreement, Arklow delivered a secured promissory note dated December 17, 2010, in the Original Principal Amount of \$1,542,490.35, plus interest (the "Note") to Great-West (NYSCEF Doc. No 5). Plaintiff, Mr. Gluckstern served as a personal guarantor on the Note.

Defendant Arklow ultimately defaulted on the Note on August 11, 2017 (NYSCEF Doc. No. 6). Defendant failed to cure its default and pay the amount due to Great-West. Great-West then sued Plaintiff as the guarantor to recover on the Note. To resolve that litigation, Plaintiff purchased the Note from Great-West. As a result, Plaintiff became and continues to be the holder of the Note, with all the same rights and remedies available to the previous lender, Great-West.

Plaintiff brought this action in April 2019 for (1) breach of the Note and Loan Agreement and (2) in the alternative, for replevin of the collateral pledged under the Loan Agreement (NYSCEF Doc. No. 2). Plaintiff admits that if summary judgment is granted on his first cause of action, his second cause of action is rendered moot (NYSCEF Doc. No. 34).

Defendant raises several unsupported affirmative defenses. Defendant failed to provide a factual basis for his first, second, third, fourth, fifth, seventh and eleventh affirmative defenses. Defendant's eight, ninth and twelfth affirmative defenses relate to Plaintiff's second cause of action. As such, only Defendant's sixth affirmative defense is the subject of discussion here. Defendant's sixth affirmative defenses alleges that Plaintiff does not have standing to maintain this action because he is not the holder of the Note under U.C.C. Article 3.

In an action for non-payment of loan obligations created under loan documents, a *prima facie* case is established through proof of the note at issue and the failure of the obligee to make payment in accordance with its terms. *See Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136 (1st Dept 1968, *affd* 29 NY2d 617 (1971)); *see also Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 155 (1975).

The Court finds that Plaintiff has made a sufficient showing that: (1) Defendant entered into the Note and the Loan Agreement with Great-West; (2) Plaintiff bought the loan from Great-West; (3) the assignment from Great-West to Plaintiff was valid under both the Note and the Loan Agreement's terms; (4) Defendant defaulted and remains in default on the Note; and (5) no payment has been made by Defendant. Thus, Plaintiff has met his burden of establishing his *prima facie* case.

Defendant argues that Plaintiff did not establish a *prima facie* case because Plaintiff has not proven that he is the holder of the Note pursuant to UCC § 3-202(b). Specifically, Defendant argues that Plaintiff has not afforded Defendant the opportunity to inspect the original Note and the Allonge, and Defendant disputes that the Allonge is firmly affixed to the Note.

The Court is unpersuaded by Defendant's argument. Plaintiff filed an affidavit stating that he purchased the Note from Great-West (NYSCEF Doc. No. 16 ¶4). Plaintiff e-filed the Note (NYSCEF Doc. No. 21) and the Allonge to the promissory note signed by Great-West (NYSCEF Doc. No. 24).

Plaintiff's counsel represented in two affirmations made on personal knowledge the original Note and Allonge were sent to Plaintiff in care of his attorneys directly from counsel for Great-West and was received by counsel as a single document, with the allonge "firmly affixed" to the Note at the back by a staple and that the staple was removed by counsel so the document could be necessarily scanned and included as an exhibit in this e-filed case (NYSCEF Doc. Nos. 41 and 42).

In compliance with the Court's instructions, Plaintiff's counsel brought the original Note and Allonge to Court on November 26, 2019 for inspection. Plaintiff's counsel represented on the record to the Court that the Allonge arrived firmly affixed to the Note and the staple was only

removed for the purpose of e-filing it (NYSCEF Doc. No. 47). Defendant apparently did not avail itself of the opportunity to inspect the Note and Allonge at the oral argument.

The Court is satisfied with the representations made by Plaintiff and Plaintiff's counsel in their affirmations and by counsel at oral argument. As such, the Court finds that Defendant's argument put forth in its sixth affirmative defense that Plaintiff is not holder of the Note because Plaintiff failed to show the Allonge was firmly affixed to the Note is without merit. Accordingly, Plaintiff's motion for summary judgment on his first cause of action is granted. Plaintiff's second cause of action is dismissed as moot without prejudice to be raised in enforcement of this judgment.

Plaintiff is entitled to \$1,633,889.79, the total amount that Defendant owed to Great-West on the date of the original notice of default August 9, 2018 (NYSCEF Doc. No. 6), plus contractual interest at the default rate (NYSCEF Doc. No. 3). The Loan Agreement defines the "default rate" as the lesser of either the maximum legal rate or 5% above the defined "interest rate" (6.84%) per annum. As such, Plaintiff is entitled to \$1,633,889.79, plus interest at a rate of 11.84% per annum accruing from the original notice of default on August 9, 2018 until the date of the decision and order on this motion.

Plaintiff also requests attorney's fees as provided in Section 4.1.14 of the Loan Agreement (NYSCEF Doc. No. 3). If Plaintiff intends to pursue his claim for attorney's fees, he should file a motion on notice, attaching all relevant bills or invoices as exhibits by January 22, 2020.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to strike Defendant's affirmative defenses and counterclaims is granted; and it is further

ORDERED that the Plaintiff's motion for summary judgment on his first cause of action in the Complaint herein is granted, and the Clerk of the Court is directed to enter judgment in favor of Plaintiff Steven Gluckstern and against defendant Arlow-FBF LLC in the amount of \$1,633,889.79, together with interest at the contractual rate of 11.84% per annum until the date of the decision and order on this motion, and thereafter at the statutory rate of 9% per annum, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon e-filing of a propose judgment and an appropriate bill of costs; and it is further

ORDERED that Plaintiff's second cause of action in his Complaint is dismissed without prejudice as moot.

12/16/2019
DATE

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: