

Lupo v Anna's Lullaby Cafe LLC
2019 NY Slip Op 34141(U)
March 8, 2019
Supreme Court, Nassau County
Docket Number: 609239/16
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

FRAN LUPO AND LULLABY CAFÉ, INC.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 609239/16

Plaintiffs,

MOTION DATE: 3/6/19
Motion Sequence 006

-against-

ANNA'S LULLABY CAFÉ LLC,
DAVID SHEKHTER AND LIMOR SHEKHTER,

Defendants.

ANNA'S LULLABY CAFÉ, LLC,
DAVID SHEKHTER AND LIMOR SHEKHTER

Third-Party Plaintiffs,

-against-

KELLDAC LLC d/b/a TRANSWORLD BUSINESS
ADVISORS and DOUGLAS DaCOSTA, individually,

Third-Party Defendants.

The following papers read on this motion:

- Notice of Motion.....X
- Affirmation in Support.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

LUPO v ANNA'S LULLABY CAFÉ**Index No.: 609239/16**

Motion by plaintiffs Fran Lupo and Lullaby Café, Inc. for leave to reargue their motion for summary judgment is **granted**. Upon reargument, the court adheres to its decision granting summary judgment to defendants dismissing plaintiffs' complaint but also **grants** summary judgment to plaintiffs dismissing defendants' counterclaim for damages for breach of contract.

This is an action on a promissory note. Plaintiff Fran Lupo was the sole shareholder of plaintiff Lullaby Café Inc. Lullaby Café operated a café at 1000 South Oyster Bay Road in Hicksville. The café is leased from Sleepy's LLC, and Sleepy's Mattress employees are the café's primary customers.

In March 2016, Sleepy's approved the assignment of the lease to defendants. In that month, Lullaby Café entered into a contract to sell the café business to defendant Limor Shekhter, or an entity to be formed, defendant Anna's Lullaby Café LLC (Doc 27). The purchase price was \$280,000, payable \$50,000 cash and \$230,000 by promissory note. The contract contains a provision for liquidated damages in the amount of \$28,000, in the event of "willful, capricious, or other inexcusable default" on the part of either party.

On March 31, 2016, Lullaby Café, as tenant, assigned the lease to the premises to Anna's Lullaby. In the assignment, Anna's Lullaby assumed the lease.

On April 1, 2016, Anna's Lullaby Café issued a promissory note in the amount of \$230,000, payable to the order of Fran Lupo. The note carried interest at the rate of 6%, provided for monthly payments of interest and principal in the amount of \$5,079.17, commencing May 1, 2016, and was due April 1, 2020. The note has a provision for reasonable attorney fees incurred in collection. The note was guaranteed by Limor Shekhter and defendant David Shekhter.

On the same date, Anna's Lullaby signed a security agreement granting Lullaby Café a security interest in the equipment used at the café in order to secure the promissory note (Doc 28). The security agreement provides that upon default the secured party has various remedies, including the right to take possession of the collateral. Plaintiffs allege that Anna's Lullaby defaulted on the promissory note by failing to make the payments due on May, June, July, and August 1, 2016.

This action was commenced on November 30, 2016. In the first cause of action, plaintiffs sue on the promissory note and guarantees. Plaintiffs allege that the balance due on the note is \$217,181.45, plus interest from August 1, 2016. The second cause of action is for attorney's fees. In the third cause of action, plaintiff Lullaby Café seeks repossession

LUPO v ANNA'S LULLABY CAFÉ**Index No.: 609239/16**

of the collateral pursuant to the security agreement.

On December 5, 2016, the parties entered into a so-ordered stipulation which provided that plaintiff was granted possession of the premises at 5:00 p.m. on December 8, 2016 (Doc 14). The stipulation provides that defendants would pay plaintiff \$500, defendants would leave the dishes and pots, but defendants had the right to remove inventory and any equipment or fixtures they had "improved" at the premises.

In their answer filed on January 3, 2017, defendants raised various affirmative defenses, including estoppel and waiver (Doc 15). Additionally, defendants asserted a counterclaim seeking rescission of the contract to sell the café business on the ground of fraud in the inducement. Defendants alleged that plaintiffs misrepresented the revenue of the café. Defendants alleged that Sleepy's laid off employees in May and September 2016, which resulted in a loss of 30-50% of the cafe's customers. Defendants also asserted counterclaims for breach of the implied covenant of good faith and fair dealing, and breach of the agreement to sell the café business. Defendants sought liquidated damages of \$28,000 on their counterclaim for breach of contract.

By order dated October 19, 2018, the court upon renewal, denied plaintiffs' motion for summary judgment and, upon searching the record, granted defendants summary judgment dismissing the complaint. Defendants argued that plaintiffs' retaking possession of the premises constituted an election of remedies, which precluded plaintiff from proceeding on the promissory note and guarantees.

When a choice is made between "irreconcilable" claims, with full knowledge of the facts, the party making the election may not thereafter maintain an action on the inconsistent claim (**Peterson v Bane**, 194 AD2d 1001 [3d Dept. 1993]). Generally, one may not affirm and disaffirm a contract; a remedy which affirms and another remedy which disaffirms an agreement are inconsistent (**Metropolitan Life Ins v Childs Co.**, 230 NY 285, 291 [1921]).

Plaintiff clearly had full knowledge of the facts when it entered into the December 5, 2016 stipulation. Having elected to disaffirm the contract of sale and regain possession of the café, plaintiffs could not affirm the contract by suing on the note which constituted part of the purchase price.

By notice of motion dated December 12, 2018, plaintiffs move for leave to reargue their summary judgment motion. Plaintiffs argue that the doctrine of election of remedies

LUPO v ANNA'S LULLABY CAFÉ

Index No.: 609239/16

does not preclude the present action because their taking possession of the premises was not "irreconcilable" with their right to maintain an action on the promissory note.

The equitable doctrine of election of remedies is "centuries old" and "deeply rooted in a balance of fairness to both sides" (**Sandles v Magna Legal Services**, 90 NYS3d 843 [Civ. Ct. NY Co. 2018]). Under the doctrine of election of remedies, when a party materially breaches a contract, the non-breaching party must chose between two-options: it can elect to terminate the contract or to continue it (**Kamco v On the Right Track**, 149 AD3d 283, 282 [2d Dept. 2017]). In the ordinary case, an election of remedies is "merely a species of waiver" (Id at 283). At the "root" of the doctrine of election of remedies is the element of estoppel (**Schenck v State Line Telephone**, 238 NY 308, 312 [Cardozo, J. 1912]). The aspects of equity, waiver, and estoppel apply with equal, if not greater, force, when the election of remedies is made after an action has been commenced.

Plaintiffs argue that it was not inconsistent for them to seek to foreclose on the collateral and also to maintain an action on the note. However, the so-ordered stipulation awarded plaintiffs a remedy, possession of the café, not provided by the security agreement. Such a remedy was inconsistent with the agreement to sell the business and was tantamount to rescission of the agreement. However, having elected to rescind, plaintiffs may not sue on the note, a remedy predicated upon affirmance of the purchase contract. Similarly, defendants having elected to disaffirm the agreement, may not maintain a counterclaim for damages for breach of contract.

Accordingly, leave to reargue is **granted**. Upon reargument, the court adheres to its decision granting summary judgment to defendants dismissing plaintiffs' complaint but also grants summary judgment to plaintiffs dismissing defendants' counterclaim for damages for breach of contract.

Any argument not addressed herein is deemed to be without merit.

So ordered.

Date: MAR 08 2019


J.S.C.

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ENTERED

MAR 19 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE