

Francisco v Nimmo

2020 NY Slip Op 32842(U)

July 29, 2020

Supreme Court, Queens County

Docket Number: 709118/2018

Judge: Cheree A. Buggs

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FILED

Short Form Order

7/29/2020

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NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IAS PART 30 **COUNTY CLERK**
QUEENS COUNTY

LESLIE FRANCISCO, FRANCISCO FUNERAL
HOME, INC., and PARK HILL FUNERAL
HOME INC.,

Index No.: 709118/2018

Motion Date: July 22, 2020

Motion Calendar: 21 and 22

Plaintiff,

Motion Sequence No.: 2 and 3

-against-

SCOTT NIMMO and BERGEN FUNERAL
HOME SERVICE, INC.,

Defendants.

The efiled papers numbered 53-60 submitted and considered on this **motion sequence number 2** by defendants SCOTT NIMMO and BERGEN FUNERAL HOME (collectively referred to as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3126 dismissing the plaintiffs LESLIE FRANCISCO, FRANCISCO FUNERAL HOME, INC. and PARK HILL FUNERAL HOME INC. (collectively referred to as "Plaintiffs") Complaint for failing to provide responses to Defendants initial discovery demands or pursuant to CPLR 3124 compelling the Plaintiffs to provide responses or be precluded from offering evidence at trial, vacatur of the Note of Issue. The efiled papers numbered 62-81 submitted and considered on this **motion sequence number 3** by Defendants seeking an Order pursuant to CPLR 3212 dismissing the claims made against them and for such other and further relief as this Court deems just and proper.

Papers
Numbered

Motion Sequence Number 2

Notice of Motion -Affidavits-Exhibits..... EF 53-60

Motion Sequence Number 3

Notice of Motion-Affidavits-Exhibits..... EF 62-81

Plaintiffs commenced this breach of contract action by filing the Summons and Complaint on or about June 13, 2018. The Defendants moved pre-answer pursuant to CPLR 3211 to dismiss the Complaint. The Court denied the motion by Short Form Order dated December 13, 2018 and directed Defendants to file an answer. The Defendants filed a Verified Answer on January 11, 2019. A Preliminary Conference was held and both parties attended. A Preliminary Conference Order was signed on August 20, 2019. The Note of Issue was filed on October 8, 2019.

Plaintiffs first cause of action seeks to hold Defendants responsible for a breach of a Security Contract. Plaintiffs alleged that the Defendants violated the Security Agreement by taking possession of certain caskets which were located at the premises and were on consignment from non-party Matthews International, which commenced collection proceedings against the Plaintiffs. Plaintiffs seek a judgment in the amount of \$25,000.00 with interest, costs, attorneys’ fees and disbursements. Plaintiff Leslie Francisco’s second cause of action seeks indemnification pursuant to the Security Agreement, and seeks a judgment in the amount of all counsel fees paid by plaintiff as a result of this action, with interest, costs and disbursements. The third cause of action is a demand that certain subject caskets be returned to Matthews International which Defendants have allegedly wrongfully retained. Plaintiffs seek a judgment granting the return of the caskets to Plaintiffs. Plaintiffs fourth cause of action alleges that at the closing, Defendants were not being sold the names of Francisco Funeral or Park Hill Funeral Home, nor the client list or certain telephone numbers, however, Defendants have taken possession and control over the subject phone numbers. Plaintiffs seek a judgment granting the return of the telephone numbers. Plaintiffs fifth cause of action alleged that Defendants breached the terms of the Promissory Note and seek damages in the amount of \$122,661.01 as of June 1, 2018, plus interest, late charges, attorneys’ fees and costs.

Discussion

The Court’s function on a motion for summary judgment is “to determine whether material factual issues exist, not to resolve such issues” (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, “it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence

of such issues ... or where the issue is ‘arguable’” [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

Where there are no material and triable issues of fact, the motion for summary judgment should be granted....[t]he party making the motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issue of fact and the party must do so by tender of evidentiary proof in admissible form.” (*See Dougherty v Kinard*, 215 AD2d 521 [2d Dept 1995]; *see also Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].) “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party.” (*See Adams v Bruno*, 124 AD3d 566 [2d Dept 2015].)

First Cause of Action

Plaintiffs allege Defendants have defaulted under the terms of the Security Agreement by taking possession of caskets that were on consignment from Matthews International and refusing to cooperate with Matthews International regarding the caskets. As such Plaintiffs seek a judgment in the sum of \$25,000.

Defendants point to the Promissory Note, Security Agreement and canceled checks to support their claim that a default has not occurred. Paragraph 5 labeled “Default” states “If we fail to make any payments required by this Note within 30 days after its due date, r [sic] we fail to keep any other promise we make in this Note, the Lender may declare that we are in default. Upon default, we must immediately pay the full amount of all unpaid principle, interest, other amounts due in this Note and the Lender’s costs of collection and reasonable attorney’s fees.” The Promissory Note specifies monthly payments were in the amount of \$2,500 and were to commence November 20, 2017, all other payments were due on the first day of each month ending on October 20, 2022.

Paragraph 11 of the Security Agreement states a default occurs upon: failure to make a payment, failure to perform or observe a covenant or agreement within the Security Agreement, a breach by a guarantor, incorrect representation or warranty, failure to furnish financial information, to permit inspection of books and records, or to furnish collateral satisfactory to plaintiff Leslie Francisco, failure to pay indebtedness which would have the affect of acceleration of the loan, revocation, expiration of any governmental registration required in connection with the agreement in a manner unacceptable to plaintiff Leslie Francisco, etc.

Defendants allege Plaintiffs have not plead that any of the events of default contained in either of the instruments have occurred. Furthermore, Defendants have provided canceled checks to prove that they have complied with the Promissory Note and made the required payments.

Second Cause of Action

Plaintiff Leslie Francisco seeks indemnification from the Defendants, pursuant to the Security Agreement. As such Plaintiffs are seeking judgment in the sum of all counsel fees paid arising out of this action.

The Security Agreement provides that Defendants will indemnify Leslie Francisco from and against any and all claims, etc. arising out of the Security Agreement or any other security held by Leslie Francisco. Defendants assert the caskets which are at issue in the Complaint are not security for the loan because they were on consignment from Matthews International. Defendants assert neither party owned the caskets, they were owned by a non-party third party. Therefore, according to Defendants they are only liable for debts which arose post-closing and as established by the email from Dan Henry, Manager of Financial Planning and Analysis at Matthews International, there is currently no outstanding balance.

Third Cause of Action

Plaintiffs assert that Defendants have refused to return the caskets that belong to Matthews International and are seeking a judgment granting return of the same.

Defendants assert that Matthews International is owed nothing pursuant to correspondence between Counsel for Defendants and Matthews International. Defendants attach an email allegedly from the Manager of Financial Planning and Analysis at Matthews International, Dan Henry. In the email Dan Henry states "Please see attached for a consignment report we just ran, there are no open invoices and no balance on Francisco's account. All consignment items were returned".

Fourth Cause of Action

Plaintiffs assert that at the closing Defendants were not being sold the names FRANCISCO FUNERAL or PARK HILL FUNERAL HOME, client lists or the phone numbers: 718-846-0549, 718-847-4244, 718-847-4500 and 718-847-4245. Plaintiffs allege the phone numbers were not listed on the Schedule of the Contract of Sale or the Bill of Sale. Plaintiffs seek a judgment for the return of the phone numbers.

Defendants allege they were sold the phone numbers in question at Closing. Defendants assert plaintiff Leslie Francisco's son Richard owned the account with Time Warner Cable. That Defendants obtained the proper forms to transfer the accounts at the closing, the same were signed at the closing by Richard on October 20, 2017. However, after the closing Defendants learned that the phone services were cancelled due to outstanding charges on the account, Defendants paid the

outstanding balance and reinstated the numbers. Currently, Defendants assert they do not use the numbers. As to usage of the name Park Hill Funeral Home, the Contract of Sale provides Defendants with the right to use the name. Currently, Defendants use the name Bergen Funeral Home.

Fifth Cause of Action

Plaintiffs assert Defendants have breached the Promissory note and seek acceleration of the loan and a judgment against Defendants for \$122,661 plus interest, late charges, attorney fees and costs.

See Defendants arguments as asserted under the first and third causes of action.

The documentary evidence submitted by defendants herein failed to utterly refute the factual allegations contained in the complaint to establish a defense as a matter of law. The affidavits of defendant Scott Nimmo, Jean Etheridge, Andrew G. Pontone were all notarized out of state and were not accompanied by a Certificate of Conformity (*see* CPLR 2309[c]). The attestation on Nimmo's affidavit states County of Kings, however it was notarized in New Jersey. The General Security Agreement is undated, and is not properly notarized under Executive Law 137, as the notary failed to state when the document was witnessed. The Promissory Note is not dated. The Lender, Leslie Francisco's signature does not appear on the General Security Agreement or the Promissory Note. Even if the Court accepted these documents, in opposition, plaintiff stated that the Bill of Sale is not attached to these papers, and Schedule A does not contain the relevant names of the funeral home or numbers. The plaintiffs funeral home contained 11 caskets which were on consignment from Matthews International the evening prior to the closing, as well as affidavits from Rich Francisco, Anthony G. Pettinato, Joseph Adragna Jr., Viannakis Dianellou and Vernon Chotilal, wherein all affiants attested, among other things, that the evening prior to the closing, they all saw eleven caskets in the showroom. Defendants have failed to make a sufficient showing requiring dismissal of the plaintiff's complaint under CPLR 3211 (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Anderson v Armentano*, 139 AD3d 769 [2d Dept 2016]). (*Francisco v Nimmo et al.*, Sup Ct, Queens County, December 13, 2018, Buggs, C. index No.709118/2018)


In response to the above cited concerns of this Court, Counsel for the Defendants asserts she was in attendance at the closing and thus has personal knowledge. She asserts there was no bill of sale. Furthermore, she explains that the Promissory Note and the Security Agreement were not signed by Plaintiff because it is not customary to do so. Finally, Counsel asserts the only copies in Defendants' possession are copies from the closing. All original documents are in the possession of the Plaintiffs and despite the discovery demands referenced in motion sequence number two Defendants have yet to receive a response from Plaintiffs. According to Defendants the documents in Plaintiffs possession are likely to be dated properly. Therefore it is,

ORDERED, that Defendants **Motion Sequence Number 3** is granted without opposition, the action is dismissed, and it is further;

ORDERED, that **Motion Sequence Number 2** is denied as moot.

This constitutes the decision and Order of the Court.

Dated: July 29, 2020



Hon. Chereé A. Buggs, J.S.C.

FILED

7/29/2020

3:05 PM

**COUNTY CLERK
QUEENS COUNTY**