Globe Wholesale Tobacco Distribs. Inc. v Hsu
2020 NY Slip Op 33209(U)
September 30, 2020
Supreme Court, Kings County
Docket Number: 514583/17
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
----------X
GLOBE WHOLESALE TOBACCO DISTRIBUTERS INC.,

Plaintiff, Decision and order
Index No. 514583/17

- against -

JULIANA LEE HSU,

Defendant, September 30, 2020
----------X
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3212 seeking summary judgement. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On November 8, 1999 the defendant executed a personal guaranty agreeing to pay all money owed to plaintiff by Ranko International Trading Corp., an entity owned by the defendant. The complaint alleges the defendant failed to pay the amount owed following a demand made on July 6, 2017. The plaintiff has now moved seeking summary judgement arguing there are no questions of fact the money is owed. The defendant opposes the motion arguing a co-signatory of the guaranty should be responsible for at least of the debt. Further, defendant argues the guaranty expressly prohibits increasing the debt greater than certain sums without the express approval of the plaintiff and the sums sought exceed

that amount. Further, the defendant argues the guaranty was unconscionable because the defendant is not fluent in English and agreed to terms adverse to her interests.

Conclusions of Law

Summary Judgment may be granted where the movant establishes sufficient evidence which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary Judgment would thus be appropriate where no right of action exists foreclosing the continuation of the lawsuit.

It is well settled that a motion for summary judgment should not generally be granted before any discovery has taken place (Fazio v. Brandywine Realty Trust, 29 AD3d 939, 815 NYS2d 470, [2d Dept., 2006]). This is especially true where discovery is necessary to ascertain whether the plaintiff can establish the contentions found in the complaint and whether the defendant can establish any valid defenses (See, generally, Manufacturer's and Trader's Trust Company v. Norfolk Bank, 16 Ad3d 467, 791 NYS2d 599 [2d Dept., 2005]). Thus a summary judgment motion filed prior to any discovery should generally be denied as premature (Amico v. Meliville Volunteer Fire Company Inc., 39 AD3d 784, 832 NYS2d 813 [2d Dept., 2007]) with leave to renew following the

completion of all discovery (Zafarani v. Salton/Maxim Housewares, Inc., 18 AD3d 651, 795 NYS2d 633 [2d Dept., 2005]).

The defendant does not dispute the fact money owed has not been paid back. Thus, it is well settled that a prima facie showing sufficient for summary judgment is made by submitting proof of an underlying agreement, the personal guaranty of the obligations under that agreement, and the failure to make payment in accordance with the terms of the agreement (HSBC Bank USA, N.A. v. Laniado, 72 AD3d 645, 897 NYS2d 514 [2d Dept 2010]). The defendant asserts that her partner in the business was also a guarantor and should be responsible for some of the debt owed. While that may be true, that is not a basis upon which to deny summary judgement since the defendant in this case is liable as a guarantor for the full amount of the debt owed. To the extent the defendant has any claims against Chang Kim the president of Renko, the defendant in this case may initiate a contribution action against Kim (Leo v. Levi, 304 AD2d 621, 759 NYS2d 94 [2d Dept., 2003]). The failure to join Kim as a party in this lawsuit does not raise any question of fact and would not prevent summary judgement.

Next, the defendant argues the guaranty agreement cannot be enforced because one of the provisions was violated. Indeed, Section 3 of the agreement states that both Hsu and Kim will not

incur any debt greater than Five Hundred Thousand Dollars ($500,000) "without the express permission in writing by GLOBE to do so" (id). Globe argues that while there was no express agreement permitting the debt to exceed that amount the continued relationship between Globe and Ranko and the continued sales of goods from Globe to Ranko surely satisfies the provisions of the agreement. This provision clearly was intended to limit Globe's exposure to increased debt while at the same time limiting Ranko's actual debt. Thus, the continued purchase and sale of goods from Globe to Ranko, freely entered into between the parties, was an explicit acknowledgment that the debt ceiling contained in the agreement was waived by Globe. To the extent the defendant argues that her co-guarantor Kim engaged in purchases that increased the debt of the corporation in an unhealthy way, such claims can be pursued against Kim. However, they are not relevant to the plaintiff's claims against defendant. Consequently, that it not a basis upon which to oppose the request for summary judgement.

The defendant next argues the agreement was unconscionable. In King v. Fox, 7 NY3d 181, 818 NYS2d 833 [2006] the court quoting Black's Law Dictionary stated that "at common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair

promisee would accept on the other" (id). Thus, an unconscionable contract is one that is "so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (Simar Holding Corp., v. GSC, 87 AD3d 688, 928 NYS2d 592 [2d Dept., 2011]). To demonstrate a contract is unconscionable, it must be shown the contract was both procedurally and substantively unconscionable when made (Gillman v. Chase Manhattan Bank, N.A., 73 NYS2d 1, 537 NYS2d 787 [1988]). Further, where the facts underlying the claims of an unconscionable contract are essentially undisputed the court may decide the matter as a question of law (David v. #?1 Marketing Services Inc., 113 AD3d 810, 979 NYS2d 375 [2d Dept., 2014]).

The basis for the argument the agreement was unconscionable is the fact English is not the first language of the defendant and thus she was induced into signing a "one-sided" agreement (see, Memorandum in Opposition, ¶4). However, an ordinary guaranty without any indicia of any unconscionable conduct depriving the party of any meaningful choice cannot defeat a motion for summary judgement (North Fork Bank & Trust Co., v. Thomason Industries Corp., 194 AD2d 772, 599 NYS2d 835 [2d Dept., 1993]). Similarly, there mere fact the defendant's native

language is not English does not automatically mean the contract was procedurally unconscionable. The defendant has not presented any evidence the contract formation was the result of high pressure tactics, there was a failure to disclose certain terms of the agreement, there was a refusal to bargain on certain terms, there was misrepresentation or fraud or unequal bargaining power (see, Nu Dimensions Figure Salons v. Becerra, 73 Misc3d 140, 340 NYS2d 268 [New York City Civil Court 1973]). Thus, merely alleging unconscionability, without providing any evidence to support the existence of such unconscionability is an insufficient manner in which to oppose a motion for summary judgement. Therefore, in this case, there really is no dispute the defendant owes the money demanded. The defendant's reasons for not paying are chiefly complaints she has against her former partner Kim. Those claims do not raise any questions of fact regarding the plaintiff. Thus, the plaintiff's motion seeking summary judgement is granted.

So ordered.

ENTER:

DATED: September 30, 2020
Brooklyn, NY

Hon. Leon Ruchelsman
JSC