

<b>Cross Riv. Bank v Haber</b>
2021 NY Slip Op 30583(U)
February 25, 2021
Supreme Court, Kings County
Docket Number: 519258/2020
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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CROSS RIVER BANK,

Plaintiff, Decision and order

- against -

Index No. 519258/2020

MAURICE HABER & ESTHER HABER,

Defendants, February 25, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3213 seeking summary judgement in lieu of a complaint. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On September 24, 2015 the plaintiff loaned two million dollars to an entity called Fragments Holding LLC. Thus, Fragments executed a promissory note which called for monthly payments. The note ws guaranteed by four people, Phillip Frankenberg, Claudia Frankenberg, Maurice Haber and Esther Haber. The guarantee stated that "if this Guaranty is signed by more than one person or entity, the obligations hereunder shall be joint and several with respect to all signatories to this Guaranty" (see, Guaranty, page 2). Fragments made payments through December 2018 and defaulted thereafter. Philip Frankenberg and Claudia Frankenberg filed for bankruptcy and this motion seeking recovery of the amount owed from the remaining guarantors has now been filed. Further, the plaintiff has moved

for summary judgement in lieu of a complaint asserting there are no factual issues that require resolution.

Conclusions of Law

It is well settled that in order to be entitled to judgement as a matter of law pursuant to CPLR §3213 the movant must demonstrate that the other party executed an instrument that contains an unequivocal and unconditional promise to repay the party upon demand or at a definite time and the party failed to pay according to the terms of the instrument (Mirham v. Awad, 131 AD3d 1211, 17 NYS3d 473 [2d Dept., 2015]). A promissory note is an instrument for the payment of money only and when sufficient evidence is presented concerning the circumstances upon which it was given then a §3213 motion is appropriate (Kim v. Il Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept., 2016]). Thus, the movant must establish the instrument is "facially incontestable" (J. Juhn Associates, Inc., v. 3625 Oxford Avenue Associates L.P., 8 Misc3d 1009(A), 801 NYS2d 778 [Supreme Court Nassau County 2005]). Therefore, where a defendant can raise questions of fact the notes were not instruments for the payment of money only then summary judgement must be denied (Farca v. Farca, 216 AD2d 520, 628 NYS2d 782 [2d Dept., 1995]).

In this case the defendants argue that Fragments did not borrow the full two million dollars available pursuant to the

loan. Thus, they are arguing the full amount was never loaned. However, in Federal Deposit Insurance Corp., v. Silvers, 177 AD2d 266, 576 NYS2d 10 [1<sup>st</sup> Dept., 1991] the court held a bald assertion the signatory of a promissory note did not receive all the funds was insufficient to raise any question of fact. Specifically, the court held that "said defendant merely asserts the note was unenforceable because he had never received any money or other kind of consideration for the note. This assertion, barren of any elaboration of the circumstances under which said defendant executed the \$100,000 promissory note, is a mere conclusion, insufficient to defeat plaintiff's summary judgment motion" (id). Thus, the conclusory assertions by the defendants that the entity did not receive any of the sums contained in the promissory note is insufficient to raise any question of fact. Further, the evidence sufficiently demonstrates all the funds available were borrowed.

Next, the defendants assert the promissory note was not an instrument for the payment of money only because it referenced other documents including "a contemporaneously executed Business Loan Agreement, Security Agreement, Mortgage, and Trademark Security Agreement, evidencing a complex business arrangement rife with material terms and conditions beyond a mere promise to pay money" (see, Memorandum of Law in Opposition, page 3). The case of Kim v. II Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept.,

2016] is instructive. In that case a party, the defendant there, executed a promissory note and failed to pay pursuant to its terms. The defendant argued it maintained a defense, namely the plaintiff's breach of a partnership agreement. The court rejected that argument finding that was an invalid defense. Specifically, the court noted the mere breach of a separate agreement without presenting any evidence challenging the validity of the agreement or without evidence of fraud was an insufficient basis to raise any questions of fact regarding the promissory note's unconditional obligation to pay. Again, in Mehta v. Mehta, 168 AD3d 716, 90 NYS3d 306 [2d Dept., 2019] the court held that "extrinsic matters predating the execution of the note were not relevant to the issue" of liability on the note. Further, in Margarella v. Ullian, 164 AD3d 898, 83 NYS3d 569 [2d Dept., 2018]) the court held that "the promissory note was not 'inextricably intertwined' with certain other allegedly related agreements the parties entered into, such that any breach of the allegedly related agreements by the plaintiffs may create a defense to payment on the promissory note" (id). The court explained this was true because the obligations under the note were "absolute and unconditional" therefore the promissory note was enforceable regardless of any other agreements that were entered into between the parties. Therefore, the existence of any other documents do not raise any questions of fact.

Thus, the defendants have failed to present any evidence challenging the underlying debt owed and therefore, the motion seeking summary judgement in lieu of a complaint is granted.

However, an inquest will be scheduled to determine the amount of interest, attorney's fees and other fees sought by the plaintiff. There can be no summary determination of those amounts.

So ordered.

ENTER:

DATED: February 25, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC