SMG Auto. Holdings LLC v Kings Auto. Holdings, LLC
2022 NY Slip Op 30389(U)
January 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 502949/2021
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

SMG AUTOMOTIVE HOLDINGS LLC,

Plaintiffs, Decision and order

- against - Index No. 502949/2021

KINGS AUTOMOTIVE HOLDINGS, LLC, D/B/A KINGS COUNTY CHRYSLER, DODGE, JEEP & RAM, JPMORGAN CHASE BANK, N.A., SVITLANA FLOM, GARY FLOM, VENIAMIN NILVA, AND 2316 FLATBUSH AVE LLC, January 31, 2022

Defendants,

KINGS AUTOMOTIVE HOLDINGS, LLC, D/B/A KINGS COUNTY CHRYSLER, DODGE, JEEP & RAM,

Third-Party Plaintiff,

- against -

ZACHARY SCHWEBEL and ALEXANDER LANDA,

Third-Party Defendants

PRESENT: HON. LEON RUCHELSMAN

The third party defendant Zachary Schwebel has moved pursuant to CPLR §3211 seeking to dismiss the third party complaint. The third party plaintiff 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 February 7, 2017 Zachary Schwebel executed a guaranty concerning a promissory note. The third party complaint seeks to collect sums pursuant to the note. The guaranty was executed in favor of an entity called SMG Auto Enterprises, LLC. However, the entity that entered the note is titled SMG Automotive Holdings, LLC. The third party defendant seeks dismissal of the

action on the grounds the entity seeking to collect under the note is not the same entity to which the guaranty was executed. The third party plaintiff opposes the motion arguing that a misnomer contained in the guaranty cannot be grounds for dismissal of the third party action.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Maslansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

In J.N.K. Machine Corp., v. TBW Ltd., 155 AD3d 1611, 65 NYS3d 382 [4th Dept., 2017] a corporate agent signed a contract on behalf of TBW Inc., instead of TBW Ltd. The other party sought to hold the director individually liable. The court noted that

generally a corporate office signs a contract on behalf of the corporation, however, if the corporation does not exist the agent can be personally liable on the contract. The court explained that rule was designed to protect parties who enter into contracts with individuals misrepresenting corporate entities. However, "as long as the identity of the corporation can be reasonably established from the evidence...an error in the use of the corporate name will not be permitted to frustrate the intent which the name was meant to convey" (id). While that case concerned the imposition of personal or corporate liability, the logic of that holding controls the guaranty in this case as well.

The third party defendant argues that pursuant to Duffy Co., v. Todebush, 157 AD 688, 142 NYS 790 [1st Dept., 1913] surrounding circumstances nor parole evidence may be examined to determine the correct party to a guaranty where there are allegations the wrong party was inadvertently included. In that case a guaranty mistakenly stated it was guaranteeing payment for A.W. Todebush & Company instead of A.W. Todebush Company. The court held that "the guaranty is perfectly clear and plain as it stands. It undertakes to guarantee A. W. Todebush & Co. To so read it as to turn it into a guaranty of A. W. Todebush Company would be, not to construe it, but to change its tenor. This cannot be done" (id). The third party defendant argues that based upon that authority there can be no question of fact the

guaranty in this case cannot provide any guaranty for the note in question. The Court of Appeals affirmed the conclusion reached in Duffy Co., (supra) but observed that the plaintiff did not prevail "not upon the proper application of the rule against changing the plain terms of written guaranties by extrinsic evidence of intention or surrounding circumstances, but upon a total failure of proof, competent or incompetent, from which it could be inferred that defendant knew that plaintiff's contract was with A.W. Todebush Company and not with A.W. Todebush & Co., or that he intended to guarantee a debt of the corporation and not of the partnership" (J.P. Duffy Co., v. Todebush, 216 NY 297, 110 NE 625 [1915]). Therefore, when proof that a mere mistake occurred the harshness of the rule enunciated in Duffy Co., (supra) is relaxed thereby. Indeed, in Spanierman Gallery, PSP v. Love, 320 F.Supp2d 108 [S.D.N.Y. 2004] the court held that a contract will be enforced where a misnomer occurs since "the misnomer is held unimportant" (id). In that case an officer signed on behalf of R.H. Love Galleries instead of R.H. Love Galleries Inc. The court explained that "plaintiffs have not alleged that, at the time of the contract, they were under any actual misapprehension that there was some other, unincorporated group with virtually the same name as R.H. Love Galleries, Inc. Absent such an allegation, the Court will not permit the Plaintiffs to capitalize on that technical naming error in

contravention of the parties' evident intentions" (id). Further, Fletcher Cyclopedia of the Law of Corporations, §3014: *Effect of Misnomer or Assumed Name* states that "a mistake in setting out the name of a corporation in an instrument is not fatal where the identity of the corporation is apparent. It is well-settled that if the identity of the corporation otherwise appears, the failure to properly designate its proper residence, or the naming of one that is wrong, does not in any way affect the validity or authenticity of the instrument" (id). Thus, notwithstanding Duffy Co., v. Todebush, 157 AD 688, 142 NYS 790 [1st Dept., 1913] which has not been cited by a New York case in over one hundred years,[1] there is sufficient evidence the parties were clearly aware the guaranty referred to the correct entity despite the misnomer.

Therefore, there is no basis upon which to dismiss the guaranty at this stage of the litigation. Consequently, the motion seeking to dismiss the third party complaint is denied.

So ordered.

ENTER:

DATED: January 31, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

[1] Hughes v. Brant, 1993 WL 535162 [S.D.N.Y. 2004] did cite to Duffy Co., v. Todebush, 157 AD 688, 142 NYS 790 [1st Dept., 1913] however it did not endorse the holding at all.