Ross v Emefieh
2022 NY Slip Op 30591(U)
February 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 511723/2020
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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LENWOOD ROSS,

Plaintiff,

- against –

JOHN EMEFIEH and TYC REALTY, INC.,

Defendants.

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Index No.: 511723/2020
Motion Seq.: 01

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the plaintiff's motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 1, 11-24, 32-42 were read on this motion for summary judgment.

The plaintiff moves for the following relief: summary judgment; dismissal of the defendants' counterclaim; and dismissal of the defendants' affirmative defenses. In support of the motion the plaintiff submits a copy of a judgment entered on June 6, 2019 in Kings County in a related action, bearing index number 503823/2019; a copy of a Stipulation of Settlement dated July 30, 2019 executed by the parties in the related action; executed promissory notes dated July 21, 2019, February 3, 2020, and February 21, 2020; a copy of a check in the amount of $50,000 made payable to the plaintiff and a copy of a check in the amount of $10,000 made payable to Daniel Sully, the plaintiff's attorney; a letter of satisfaction executed by the parties dated February 21, 2020; a Satisfaction of Judgment dated February 25, 2020, and copies of two checks, both dated February 24, 2020, one made payable to the plaintiff in the amount of $145,000 and the other made payable to Daniel Sully in the amount of $55,000; a confirmation of a wire transfer to the plaintiff and David Sully in the amount of $90,000 from an escrow account allegedly authorized by Eastcor Land Services; the pleadings and defendants' discovery response to plaintiff's demand dated December 16, 2020 in this action.

The defendants' answer, dated August 6, 2020, includes a counterclaim alleging that the plaintiff was paid "over and above the accumulated interest the Plaintiff is claiming in the Complaint." The defendants assert affirmative defenses for lack of personal jurisdiction based on improper service (the first and second affirmative defenses, although it appears that the second was mislabeled as the third affirmative defense). The third affirmative defense is based on impossibility/frustration of purpose, and force majeure due to the Covid-19 pandemic. After oral argument, and upon careful consideration of the parties' submissions the plaintiff's motion is granted.

This action arises from the defendants' alleged default on an executed promissory note dated February 3, 2020, in the amount of $160,000 to be paid to the plaintiff. The indebtedness stems from a lawsuit brought by the plaintiff in an earlier action which alleged, inter alia, that the defendant, John Emefieh (Emefieh), by and through his entities, failed to release escrow funds

held by him in trust for the plaintiff. Defendant Emefieh is an attorney who represented the plaintiff in the sale of a property located in the County of Kings and City and State of New York in December of 2013. A judgment was entered against the three defendants in that action: the sum of $1,618,697.50 in favor of E.T. Realty LLC (E.T. Realty), which was wholly owned by the plaintiff, and $1,533,750 in favor of E.T. Realty against defendants, TYC Realty Inc., and 531 Classon Avenue LLC, entities allegedly owned by Emefieh.

Subsequent to entry of the judgment, two of the three entities, along with the plaintiff and E.T. Realty, agreed to settle the judgment for the sum of $800,000. On or about July 30, 2019, the parties entered into a Stipulation of Settlement for payment of $550,000 to be paid on or before September 9, 2019, and a separate promissory note for payment in the sum of $250,000. The defendants were unable to meet the September 9th deadline for payment, and the plaintiff agreed to accept $400,000 instead of $550,000 at the time of refinancing of a property, and the sum of $160,000, which was memorialized in a promissory note executed by the parties on February 3, 2020, which is the subject of the instant action. The promissory note states:

> For value received, John Emefieh and TYC Realty Inc. jointly and severally (obligors) agree to an indebtedness to Lenwood Ross in the principal amount of $160,000 00. Lenwood Ross agrees to accept the discounted amount of $150,000, provided the payment is timely received on or before July 15, 2021, time being of the essence. John Emefieh and TYC Realty Inc. jointly and severally agree to additionally pay to Lenwood Ross the of $500.00 per month as interest until such time as the principal is paid. Each payment shall be due on the 15th day of the month beginning in March 2020, and the obligors shall be given a 15 day grace period to cure any default in payment. In the event of any uncured default in any payment due hereunder, the principal shall be accelerated and due automatically and without further demand. This promise to pay may be prepaid at any time prior to the due date, in part or in whole, without penalty. The above stated amount due arises from Lenwood Ross accepting $400,000.00 instead of $550,000.00 as previously agreed to on or about July 21, 2019. Facsimile copies of this agreement may be used for all purposes.

The plaintiff alleges that the defendants, Emefieh and TYC Realty, failed to make any payments pursuant to the terms of the February 3, 2020 promissory note, and that the language is clear that in the event of the defendants' default the principal would automatically become due. The plaintiff has commenced related actions in Kings County Supreme Court related to the defendants' default on two other promissory notes executed by the parties relating to these transactions, which the plaintiff alleges are currently pending.

In opposition, the defendant argues, inter alia, that the Covid-19 pandemic rendered the defendants' performance according to the terms of the promissory note impossible, and that the doctrine of force majeure applies; that the plaintiff's claim has not ripened because the sum of $150,000 was not due until July 15, 2021; that the plaintiff is actually suing for a return of his capital contribution to a real estate investment partnership, rather than on a promissory note; that the plaintiff has not given the defendants credit for all monies repaid to the plaintiff; and that

discovery is required in order for the defendants to oppose the plaintiff's motion and to establish the merits of defendants' affirmative defenses and counterclaims.

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). The moving party bears the burden of showing its prima facie entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact. *See* CPLR § 3212(b); *Giuffrida v Citibank Corp*., 100 NY2d 72 (2003). When a prima facie showing has been made, the burden shifts to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues. *See Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 (1980).

A plaintiff establishes its prima facie entitlement to judgment as a matter of law with respect to a promissory note "if it show[s] the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms." *Torto Note Member, LLC v Babad*, 192 AD3d 843, 844 (2d Dept 2021), quoting *Lugli v Johnston*, 78 AD3d 1133 (2d Dept 2010) (internal quotation marks omitted); *see also Porat v Rybina*, 177 AD3d 632 (2d Dept 2019).

Here, the plaintiff has met his burden demonstrating his prima facie entitlement to summary judgment as a matter of law with respect to the promissory note of February 3, 2020. The note at issue was executed by the defendants, and its terms are unconditional and unequivocal, stating that the defendants were to pay the sum of $160,000, and that the sum would be reduced to $150,000 if the defendants paid in the entirety by July 15, 2021. The promissory note also required the defendants to pay additional sums in the amount of $500 per month commencing March15, 2020. In the event that the defendants defaulted in any payment required by the terms of the note the principal due was to be accelerated and due automatically. The unequivocal language also shows that the promissory note arose from the plaintiff's previous agreement with the defendants on or about July 21, 2019, to accept $400,000 instead of $550,000 in settlement of the judgment. The plaintiff's submissions also demonstrate that the payments made by the defendants to the plaintiff had nothing to do with the February 3rd promissory note, and that the defendants' default triggered acceleration of the payment of the principal due on the note.

In opposition, the defendants have failed to raise a triable issue of fact. The defendants' argument that their performance under the promissory note was impossible, and that the doctrine of force majeure applies is unavailing. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *See Kel Kim Corp. v Central Mkts*., 70 NY2d 900, 902; *see also Berman v TRG Waterfront Lender, LLC*, 181 AD3d 783 (2d Dept 2020). Further, in order for the doctrine of force majeure to be applicable, nonperformance under the terms of a contract or lease may be excused in circumstances where an event occurs that is "beyond the control of the parties." *See Beardslee v Inflection Energy, LLC*, 25 NY3d 150, 154 (2015); *Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900. In the instant action, there is no force majeure provision included in the promissory note. Moreover, the defendants failed to make the initial interest payment on March 15, 2020, prior to the Covid-19 shutdown, and as such the terms of

the note allowed for automatic acceleration of the principal amount without further demand by the plaintiff. The defendants have not demonstrated that they communicated their inability to perform under the terms of the note because of the pandemic, and have failed to submit evidence to substantiate their claim that the pandemic had a crippling effect on their income. In that respect, the affidavit of defendant, Emefieh, is general and conclusory.

The defendants' arguments that the plaintiff's claim is not based on the defendants' default on the promissory note but from an investment dispute, is without merit. The defendants fail to submit evidence substantiating this assertion, and the terms of the promissory note are clear and unambiguous. Likewise, the defendants' contention that the plaintiff has not credited the defendants for all monies paid must fail. No evidence is submitted to support this assertion, and the checks referred to by the defendants relate to payment on other promissory notes and agreements between the parties, not the promissory note at issue here. The plaintiff's submissions also established that the defendants' counterclaim should be dismissed, as there is no evidence that the defendants made payments to the plaintiff over and above the accumulated interest that the plaintiff claims to be due and owing by the defendants.

The defendants' assertion that the plaintiff commenced suit before his claim ripened is similarly unpersuasive. The unambiguous language contained in the promissory note refers solely to the plaintiff's representation that he would accept $150,000 in lieu of the full amount due of $160,000 if the defendants paid by July 15, 2021. That provision did not extinguish the defendants' obligation to pay $500 monthly, commencing March 15, 2020 as interest, until and unless the principal was paid in full. The evidence submitted by the plaintiff demonstrates that no payments were made on or before March 15, 2020, and the defendant has not tendered evidence of any payments made to the plaintiff prior to that date. The failure to make any payments on or before that date triggered the acceleration provision of the promissory note.

Lastly, the defendants have failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the plaintiff's control. *Zhou v 828 Hamilton, Inc.*, 173 AD3d 943 (2d Dept 2019).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiff's motion is granted in its entirety.

This constitutes the decision and order of the Court.

Dated: February 23, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.