

Hempel v Wise

2023 NY Slip Op 30469(U)

February 9, 2023

Supreme Court, New York County

Docket Number: Index No. 656844/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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SHERYL HEMPEL, BYRON BLOUNT, and ALEXANDER
UNGER,

Plaintiffs,

INDEX NO. 656844/2021

MOTION DATE 04/28/2022

MOTION SEQ. NO. 001

- v -

DANIEL WISE, JTD BUILDERS, LLC, 193 HENRY STREET,
LLC, and 201 EAST BROADWAY EQUITIES, LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 42 were read on this motion for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, the motion for partial summary judgment is granted per the following memorandum, and for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 15-17, 37-38), and as further explicated on the record of August 4, 2022 (tr of proceedings, NYSCEF Doc. No 39), in which the court concurs. As more specifically set forth therein, plaintiffs established entitlement to summary judgment on their first three causes of action for breaches of promissory notes by submitting the notes and proof of defendant Daniel Wise’s failure to pay the notes when they became due on October 1, 2019 (*Alard, L.L.C. v Weiss*, 1 AD3d 131, 131 [1st Dept 2003] [“Having established defendant's execution of the note and default in payment, plaintiff made out a prima facie case”]). Further, plaintiffs have also established entitlement to summary judgment on the fifth through seventh causes of action on the guarantees executed by defendants JTD Builders, LLC (“JTD”), 193 Henry Street, LLC (“193 Henry”), and 201 East Broadway Equities, LLC (“201 East”), by submission of the executed guarantees and proof of defendants’ failure to pay sums owed thereunder (*Gard Entertainment*,

Inc. v Country in New York, LLC, 96 AD3d 683, 683 [1st Dept 2012] [“Here, plaintiff established its entitlement to summary judgment as against Block by demonstrating proof of the guarantee he made in connection with a note executed by Country and his failure to make payments called for by its terms”). Defendants admit that they executed the notes and guarantees and that they have not made any payments to plaintiffs (Def.’s statement of material facts, NYSCEF Doc. No. 36, ¶¶ 2, 15, 26, 35, 40, 42, 47, 49, 54).

In opposition, defendants claim that the notes and guarantees were amended and/or superseded by a Sharing Agreement between plaintiff Sheryl Hempel and defendant Wise regarding a construction project located at 330 Grand Street, New York, New York (Amendment to Sharing Agreement, NYSCEF Doc. No. 1, Exhibit 7). In particular, defendants rely on paragraph 2(d), which acknowledges the promissory notes and then provides that “at any time a payment of shared compensation is to be made hereunder and any amount is then outstanding under any of such Notes . . . then [Wise’s] share of shared compensation otherwise payable to [Wise] . . . shall . . . instead be paid and applied in prepayment and/or satisfaction of such obligations” (*id.*, ¶ 2[d]). Defendants interpret this provision to modify the payment terms and maturity dates of the promissory notes and guarantees such that plaintiffs would only be entitled to recover thereunder if and when there is shared compensation under the Sharing Agreement.

It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). The agreement should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). Instead,

“[t]he court construe[s] the plain and ordinary meaning of the unambiguous terms and conditions of the agreement” (*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327, 327 [1st Dept 2007]).

Here, the unambiguous terms of the Sharing Agreement are not susceptible of defendants’ construction. Beyond referencing the existence of the promissory notes, the cited language does not purport to alter their text nor that of the guarantees. Instead, the plain language of the Sharing Agreement as amended simply provides that, if Wise is owed any compensation under the Sharing Agreement at a time when he also owed money under the notes, then such compensation under the Sharing Agreement would go to plaintiffs instead. Rather than the wholesale re-writing of the parties’ agreement that defendants envision, it is more akin to a wage garnishment applied to a debtor’s salary until the underlying debt has been satisfied. Nowhere in the Sharing Agreement is there any indication that plaintiffs intended to give up the right to recover under the notes and guarantees except in the event that the 330 Grand Street project turned a profit (*Osprey Partners, LLC v Bank of New York Mellon Corp.*, 115 AD3d 561, 562 [1st Dept 2014] [“the best evidence of the parties’ intent is what they say in their writing”]).

Defendants’ argument that the motion should be denied because discovery has not taken place is unavailing. Defendants do not suggest that facts relevant to the parties’ various agreements “essential to justify opposition may exist but cannot [now] be stated” (CPLR 3212[f]; *Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016] [The “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion”]).

So much of plaintiffs’ motion to dismiss defendants’ counterclaims is also granted. As an initial matter, the court excepts the reasonable excuse for late filing of the amended answer and counterclaims proffered by defendants, and in light of the de minimis one-day delay in

amending the answer as of right pursuant to CPLR 3025(a) and compels acceptance of the amended answer and counterclaims pursuant to CPLR 3012(d) (*Gazes v Bennett*, 70 AD3d 579 [1st Dept 2010]).

Defendants assert counterclaims for breach of contract and breach of fiduciary duty against Hempel arising out of the Sharing Agreement. The breach of contract counterclaim is insufficient due to defendants' failure to specifically allege, in nonconclusory fashion, which provisions of the Sharing Agreement Hempel violated, as defendants' allegations do not link to any language in the Sharing Agreement (*Matter of Sud v Sud*, 211 AD2d 423 [1st Dept 1995]). The breach of fiduciary duty counterclaim also fails because defendants cannot allege the existence of a fiduciary duty running from Hempel to Wise (*Roni LLC v Arfa*, 74 AD3d 442, 444 [1st Dept 2010], *affd* 18 NY3d 846 [2011]). The Sharing Agreement explicitly states that “[t]he relationship of the parties under this agreement is that of independent contractors, and this Agreement does not establish any partnership among the parties or between any of them” (Sharing Agreement, NYSCEF Doc. No. 1, Exhibit 6, ¶ 5). While defendants nonetheless argue that the court should construe a partnership or joint venture between Hempel and Wise based on the sharing of compensation and obligations, defendants' own allegation that Hempel maintained “exclusive decision-making authority for” and “control over” the 330 Grand Street project (Amended Answer, NYSCEF Doc. No. 13, ¶¶ 95-96) is fatal to its claims (*Hammond v Smith*, 151 AD3d 1896, 1899 [4th Dept 2017] [Finding no partnership where “the evidence overwhelmingly demonstrate[d] that defendant had sole control and management of the business”]).

Accordingly, it is hereby

ORDERED that the plaintiffs' motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiffs and against defendants on the first through third and fifth through seventh causes of action as follows; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Sheryl Hempel and against defendants, jointly and severally, on promissory notes 1 and 3, in the principal amount of \$1,451,631.79, together with interest at the rate of 10% per annum on the amount of \$300,000 and 25% per annum on the amount of \$400,000, representing the unpaid principal originally advanced, from the date of April 28, 2022, until the date of entry of judgment, and thereafter at the statutory rate until satisfaction of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs and against defendants, jointly and severally, on promissory note 2, in the amount of \$985,887.94, together with interest at the rate of 25% per annum on the amount of \$400,000, representing the unpaid principal originally advanced, from the date of April 28, 2022, until the date of entry of judgment, and thereafter at the statutory rate until satisfaction of judgment, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the fourth cause of action is severed, and the balance of the claims are continued; and it is further

ORDERED that defendants' counterclaims are severed and dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, on March 1, 2023, at 2:00 PM.

This constitutes the decision and order of the court.



<u>2/9/2023</u>				<u>LOUIS L. NOCK, J.S.C.</u>
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE