

Shakur v Fullerton

2023 NY Slip Op 32795(U)

August 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 522791/2020

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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SHABAKA SHAKUR,

Plaintiff,

Decision and order

- against -

Index No. 522791/2020

MARK FULLERTON, INVESTORS PROPERTIES AND
HOLDINGS LLC, AND SINSEMILLA LLC,

Defendants,

August 10, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #4

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 that he is entitled to judgement pursuant to a promissory note executed by the defendants. The defendants 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 May 28, 2019 the defendants executed a promissory note in the amount of \$200,000. The typewritten words of the note states the interest rate was zero, however, the numbers state the interest rate was 20%. In any event, pursuant to the terms of the note one payment was due in six months and the other payment due in twelve months. The plaintiff wired \$200,000 to the defendants and according to the complaint the defendants have only paid back ten thousand dollars. This lawsuit was commenced and the plaintiff has asserted causes of action for breach of contract and unjust enrichment. The plaintiff has now moved seeking summary judgement arguing there are no questions of fact

he is entitled to summary relief. The defendant opposes the motion arguing there is no evidence any funds were ever disbursed to the defendants thus no obligation to repay such funds ever commenced.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgment it is necessary for the movant to make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]).

Moreover, a movant cannot succeed upon a motion for summary judgement by pointing to gaps in the opponents case because the moving party must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

It is well settled that where a party introduces evidence of the existence of a loan and the defendant's failure to make payments according to the terms of the instruments then summary judgement is proper (see, JPMorgan Chase Bank N.A., v. Bauer, 92 AD3d 641, 938 NYS2d 190 [2d Dept., 2012]). 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 motion for summary judgement is appropriate (Kim v. Il Yeon Kwon, 144 AD3d 754, 41 NYS3d 68 [2d Dept., 2016]). While that case dealt with a summary judgement motion in lieu of a complaint the analysis is the same. 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]).

The defendant Mark Fullerton testified that he signed the

promissory note in his capacity as the president of the defendant corporations (see, Deposition of Mark Fullerton, pages 28, 29 (NYSCEF Doc. No. 60)). Further, Mr. Fullerton acknowledged that funds were borrowed although he could not recall if \$200,000 was the total sum (*id.*, at page 33). Moreover, Mr. Fullerton did agree that the companies received \$200,000 from the plaintiff (*id.*, at page 44) and admitted that the amount received was spent in furtherance of the company's goals and that there are no funds to repay the plaintiff (*id.*, at page 46). Thus, there are no questions of fact the plaintiff loaned the defendants \$200,000 pursuant to the promissory note and that all but \$10,000 has not been paid back.

First, there is no merit to the argument the motion should be denied so that the parties should be given the opportunity to conduct discovery and explore the possibility of any cure provision arguments. That is an improper basis upon which to oppose a motion for summary judgement. Indeed, the hope that future discovery might yield questions of fact is merely speculation insufficient to defeat a motion for summary judgement (Silverstein v. Westminster House Owners Inc., 50 AD3d 257, 855 NYS2d 64 [1st Dept., 2008]). Thus, arguments that discovery might raise question of fact is without merit (see, Lopez v. WS Distribution Inc., 34 AD3d 759, 826 NYS2d 516 [2d Dept., 2006]).

In addition, the actual wire transfer information does not

raise any question of fact the money was sent to the defendants. Although the information might demonstrate a negative balance with the banking institution that does not raise any question of fact the funds requested in the amount of \$200,000 were not disbursed. This is particularly true since the comments dated May 29, 2019 specifically state "the requested wire has completed" (see, Wire Transfer Detail Comments [NYSCEF Doc. No. 12]).

Uniform Commercial Code §3-118(c) states that regarding every instrument "words control figures except that if the words are ambiguous figures control" (id). In this case the words of the note concerning the interest rate differs from the numerical amount of the interest rate. The words state a zero percent interest rate while the numerical figures state a rate of 20%. There is no ambiguity in this regard, rather, there is a discrepancy. The plaintiff has failed to present sufficient evidence that the court should not decide the discrepancy pursuant to the Uniform Commercial Code or that the discrepancy can be attributed to a scrivener's error.

Therefore, based on the foregoing the motion seeking summary judgement is granted. The amount owed shall be the \$190,000.

Turning to the request to pierce the corporate veil, to succeed on such a request the plaintiff must demonstrate that "(1) the owners exercised complete dominion of the corporation in

respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Conason v. Megan Holding LLC, 25 NY3d 1, 6 NYS3d 206 [2015]). As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012]). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d

169 [2d Dept., 2008])).


While it is true the defendant did not comply with all corporate formalities there is no dispute the defendants "ran a real business, with employees, customers, and vendors, and the petitioner presented no evidence that the LLC was undercapitalized" or that Fullerton "commingled the assets of the LLC with his own or used corporate funds for personal use" (see, DePetris v. Traina, 211 AD3d 939, 181 NYS3d 298 [2d Dept., 2022])). "Moreover, while the petitioner demonstrated that Traina exercised complete domination and control over the LLC, he failed to show that Traina's actions, including abandoning certain fixtures and equipment to his landlord, were for the purpose of leaving the LLC judgment proof or to perpetrate a wrong against the petitioner" (id).

Likewise, in this case, there is no evidence Fullerton's actions were done with the express intent of committing any wrong against the plaintiff. Therefore, the motion seeking to pierce the corporate veil is denied.

So ordered.

ENTER:

DATED: August 10, 2023
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC