WOC Debt LLC v Drillman
2024 NY Slip Op 34602(U)
December 30, 2024
Supreme Court, Kings County
Docket Number: Index No. 524379/2024
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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WOC DEBT LLC,

Plaintiff, Decision and order

- against - Index No. 524379/2024

BORUCH DRILLMAN a/k/a BARRY DRILLMAN;
MOSHE SILBER a/k/a MARK SILBER and
BORUCH GOTTESMAN a/k/a BARRY
GOTTESMAN,

Defendants, December 30, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The plaintiff has moved pursuant to CPLR §3213 seeking summary judgement in lieu of a complaint. The defendants have 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 November 30, 2022, the plaintiff loaned $1,375,000 to an entity called BRC Williamsburg Holdings LLC. The note memorializing the loan was executed by defendant Boruch Drillman as an authorized signatory. Further, the defendants Boruch Drilllman, Moshe Silber and Boruch Gottesman guaranteed the debt. The plaintiff's assert that while interest payments in the amount of $200,000 were made, and some further interest payments as well, by the time of the maturity date of February 8, 2023, the principal had not been paid at all. The plaintiff now moves seeking summary judgement concerning the note in the amount of $1,375,000 plus interest at a rate of 21.820% per annum from November 30, 2022 through February 28, 2023 and from February 28,

2023 through the date of Judgment, interest at the rate of 24% per annum, less $200,000 concerning payments made. As noted, the motion is opposed.

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]).

Therefore, where a party introduces evidence of the

existence of a loan, personal guarantees 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]). In this case, there is no dispute the principal has not been repaid. Rather, defendant Gottesman asserts the parties entered into a Heter Iska, a religious document utilized to circumvent the Jewish prohibition against interest by treating all loans as partnerships or business ventures (see, In re Venture Mortgage Fund L.P., 245 BR 460 [S.D.N.Y. 2000]). Thus, he asserts that in fact no loan took place. However, the note clearly evidence a loan and obligations pursuant to the note are not affected by a Heter Iska (8430985 Canada Inc., v. United Realty Advisors LP, 148 AD3d 428, 48 NYS3d 402 [1st Dept., 2017]). Thus, a Heter Iska is "merely a compliance in form with Hebraic law" and does not actually create any partnership, joint venture, or some other profit sharing agreement (see, Kirzner v. Plasticware LLC, 47 Misc3d 1209(A), 16 NYS3d 792 [Supreme Court Kings County 2015]).

Furthermore, the note itself states that the "Borrower agrees that the terms of this Note shall be governed by the laws of the State of Ohio. Mortgagor irrevocably consents to the jurisdiction of the courts of the State of Michigan for all matters relating to this Note and/or the Mortgage" (see, Note,

page 3 [NYSCEF Doc. No. 5]). Thus, the note itself "disavows any such intent to substitute the relevant laws with that of the Jewish Law" (see, VNB New York Corp., v. Lynbrook LLC, 2012 WL 359289 [Supreme Court Nassau County 2012]). Therefore, regardless of what the Heter Iska states, there is no basis to assert the note is not really a loan.

Therefore, the motion seeking summary judgement concerning defendant Gottesman is granted.

Turning to defendant Drillman, the defendant argues that service pursuant to CPLR §308(4) was defective since some of the times for attempted service was improper. It is well settled that pursuant to CPLR §308(4) the plaintiff must exercise due diligence to demonstrate that personal service or service upon someone of suitable age and discretion could not be made. Thus, one attempt at personal service is insufficient (see, Markoff v. South Nassau Community Hospital, 91 AD2d 1064, 458 NYS2d 672 [2d Dept., 1983]). Likewise, service at the same times of the day, especially when at those times it is reasonable for someone to be either at work or in transit from work, then such service is insufficient (Coley v. Gonzalez, 170 AD3d 1107, 94 NYS3d 873 [2d Dept., 2019]). Moreover, in Serrano v. Staropoli, 94 AD3d 1083, 943 NYS2d 201 [2d Dept., 2012], the court held that due diligence included trying to ascertain the business address of the party to effectuate service there. Therefore, where the affidavit from

the process server fails to indicate efforts to locate defendant's business address for personal service there then service is improper (see, also, County of Nassau v. Letosky, 34 AD3d 414, 824 NYS2d 153 [2d Dept., 2006], Earle v. Valente, 302 AD2d 353, 754 NYS2d 364 [2d Dept., 2003], Annis v. Long, 298 Ad2d 340, 751 NYS2d 370 [2d Dept., 2002]). These requirements are not merely technical rules but emerges from an understanding that the purpose of serving process is to try and ensure that process is received.

In this case, the affidavit of service lists numerous times when personal service upon the defendant Drillman was attempted. One of the attempts was on a Saturday. There is insufficient evidence such service violated General Business Law §13 since that statute requires malice which has been defined as knowledge the defendant observes and recognizes the Sabbath (see, Hirsch v. Zvi, 184 Misc2d 946, 712 NYS2d 238 [Civil Court of the City of New York, 2000]). In any event, such service was surely improper and cannot constitute a valid attempt to support the requisite attempts necessary to resort to service pursuant to CPLR §308(4). Thus, according to the affidavit of the process server there were two additional attempts at service, Thursday September 19, 2024 at 6:52 PM and Tuesday September 24, 2024 at 1:08 PM (see, Affidavit of Process Server [NYSCEF Doc. No. 28]). However, those attempts were both during working or commuting hours and

insufficiently attempted to serve process when the defendant was home. Moreover, there is no indication at all that service was attempted at the defendant's place of business. This is significant since the note lists the business address of the entity as 90 Broad Street in New York County (see, NYSCEF Doc. Nos. 5). Thus, the plaintiff was familiar with the business address of the defendant and was required to attempt service at that location before resorting to alternative service.

Therefore, concerning the defendant Boruch Drillman, the plaintiff failed to engage in due diligence. Consequently, there was no service upon the defendant, therefore, there was never jurisdiction conferred upon him and consequently the motion seeking summary judgement is denied. Further, the court has no jurisdiction over this defendant and the case cannot proceed against him.

However, the plaintiff shall be afforded 120 days from receipt of this order to effectuate and file proper service and proof of service (Murphy v. Hoppenstein, 279 AD2d 410, 720 NYS2d 62 [1st Dept., 2001]).

So ordered.

ENTER:

DATED: December 30, 2024
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC