

VNB N.Y. Corp. v Pasta & Potatoes, Inc.

2012 NY Slip Op 30709(U)

March 21, 2012

Supreme Court, New York County

Docket Number: 105150/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

VNB NEW YORK CORP.,

INDEX No. 105150/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

PASTA & POTATOES, INC., 52 RESTAURANT
GROUP CORP., ED BRADY and NANCY BRADY,
Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+2

Answering Affidavits- Exhibits 3, 4, 5

Replying Affidavits 6

CROSS-MOTION: YES NO

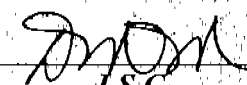
FILED

Upon the foregoing papers, it is ordered that this motion is:

MAR 23 2012

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION
NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/21/12



J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 58

FILED

MAR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
VNB NEW YORK CORP.,

Plaintiff

-against-

Index No. 105150/11

PASTA & POTATOES, INC., 52 RESTAURANT
GROUP CORP., ED BRADY and NANCY BRADY,

Defendants.

-----X

DONNA MILLS, J.:

The plaintiff VNB New York Corp. (VNB) moves, pursuant to CPLR 3213, for an order granting summary judgment in lieu of complaint against defendants, jointly and severally, in the sum of \$865,369.04, with interest thereon at the rate of 8.94% from April 1, 2010 through and including March 11, 2011, and at the rate of 24% (default rate) from March 11, 2011 to date, plus late charges in the amount of \$8,125.92, on the ground that there is an instrument for the payment of money between the parties, together with reasonable attorney's fees.

The defendants Pasta & Potatoes, Inc. and 52 Restaurant Group Corp. and non-party 199 Bowery Rest. Group LLC, borrowed the sum of \$844,009.27 from non-party Park Avenue Bank, giving in return a secured promissory note. The note and guarantee were executed as part of a global settlement entered into by the parties only after a prior motion for summary judgment in lieu of complaint was won by the lender. The note calls for monthly payments of \$7,387.11 and is due and payable in full on March 1, 2014. Park Avenue Bank is in receivership. The plaintiff VNB succeeded to Park Avenue Bank's assets. Non-party 199 Bowery Rest. Group LLC is in

bankruptcy. The defendants Ed Brady and Nancy Brady executed a personal guarantee of the note.

The plaintiff VNB alleges that the borrowers and the guarantors defaulted under the note by failing to pay the monthly installment due on May 1, 2009, and all subsequent installments. In support of its motion for summary judgment in lieu of complaint, the plaintiff VNB argues that the note is an instrument for the payment of money only.

In opposition to the motion, the defendants argue that the note and guarantee are tainted with fraud. The defendants allege that Charlie Antonucci, the president of the Park Avenue Bank, has gone to jail for fraud. It is alleged that Ed Brady and Nancy Brady would sign documents for Antonucci without understanding them. Nancy Brady also alleges that she was not authorized to sign the note on behalf of Pasta & Potatoes Inc.

CPLR 3213 permits the plaintiff VNB to commence an action "based upon an instrument for the payment of money only" by serving a summons, notice of motion for summary judgment, and supporting papers. A document comes within CPLR 3213 if a prima facie case for nonpayment of a debt can be made out by the terms of the instrument itself (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty (*Davimos v Halle*, 35 AD3d 270 [1st Dept 2006]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

Contrary to the defendants' contention, the plaintiff VNB is entitled to summary judgment to recover on the note and guarantee in question (*Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 NY3d 381 [2004]). The plaintiff VNB makes a prima facie showing by proving the existence of

the note and guarantee, and the defendants' default. In opposition, the defendants fail to establish, by admissible evidence, the existence of either a triable issue of fact, or a meritorious defense (*Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151 [1975]).

Absent fraud or mutual mistake, where the parties have reduced their agreement to a writing, the parol evidence rule excludes evidence of any prior or contemporaneous negotiations between them which is offered to modify or contradict the terms of the writing (*Marine Midland Bank-Southern v. Thurlow*, 53 NY2d 381 [1981]; *Neuberger Berman LLC v EMM Group, LLC*, 73 AD3d 542 [1st Dept 2010]). If proven at trial, lack of consideration is a perfectly viable defense (*Walcutt v Clevite Corp.*, 13 NY2d 48, 56 [1963]). However, to defeat a motion for summary judgment, whether brought under CPLR 3212 or in lieu of complaint under CPLR 3213, the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech. Inc.*, 62 NY2d 686 [1984]). There is no genuine issue regarding consideration for the note. The defendants hired the money. Moreover, the inadequate explanations given by the defendants indicating possible shady dealings on the part of their lender, appear unconnected to this note and guarantee. Reading the affirmation in opposition, one cannot even determine if the defendants are alleging that they were victims, and if so, of what?

The signer's duty to read and understand that which they sign is not diminished merely because they were provided with only a portion of that document. The defendants' decision not to inquire as to the terms and conditions is one by which they are bound (*Movado Group, Inc. v Mozaffarian*, 92 AD3d 431 [1st Dept 2012]); *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266, [1st Dept 2008], lv dismissed 12 NY3d 748 [2009]; *Hotel 71 Mezz Lender LLC v Falor*, 64

AD3d 430, 430 [1st Dept 2009]).

Finally, although Nancy Brady denies the authority to sign the note for Pasta & Potatoes Inc., she did have the authority to personally guarantee the Pasta & Potatoes, Inc. loan.

The note and guarantee demonstrate an unconditional obligation by defendants who may not now validly claim that the note was never to be paid (*Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1st Dept 1983], *aff'd* 62 NY2d 686 [1984]). Therefore, the motion for summary judgment in lieu of complaint must be granted.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants jointly and severally, in the sum of \$865,369.04, with interest thereon at the rate of 8.94% from April 1, 2010 through and including March 11, 2011, and at the rate of 24% (default rate) from March 11, 2011 to the date of this decision, and thereafter at the statutory rate, as calculated by the Clerk, plus late charges in the amount of \$8,125.92, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and it is further

ORDERED that the issue of reasonable attorneys' fees and costs expended in this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this branch of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or

receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: 3/21/12

FILED

ENTER:

MAR 23 2012



**NEW YORK
COUNTY CLERK'S OFFICE**

J.S.C.

DONNA M. MILLS, J.S.C.