[* 1]

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

PRESENT: JEFFREY K. OING JUDGE, SUPREME COURT — PART 48

Justice

Index Number : 105570/2008
CADLEROCK
vs
RENNER, JAN Z.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

"This motion is decided in accordance with the annexed decision and order of the Court."

"This motion is decided in accordance with the ann...

"This motion is decided in accordance with the ...

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/13/12

JEFFREY K. OING
JUDGE, SUPREME COURT J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
----------x

CADLEROCK, LLC,

Plaintiff,

-against-

JAN Z. RENNER,

Defendant.

Index No.: 105570/08

Mtn Seq. No. 003

DECISION AND ORDER

----------x

JEFFREY K. OING, J.:

In this action to collect on a promissory note, defendant, Jan Z. Renner, moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff, Cadlerock, LLC ("Cadlerock") cross-moves to strike defendant's affirmative defense and for summary judgment in its favor.

Background

Defendant executed a promissory note dated November 22, 1988 (the "Note") in the principal amount of $64,600 with Cadlerock's predecessor-in-interest, Aaron Ziegelman, in order to finance his purchase of a cooperative apartment located in a residential building in Sunnyside, Queens (Schwarsin Aff., Ex. A). The Note provided that defendant would pay interest only of 6% per annum on the amount owed, commencing January 1, 1989 and continuing monthly until November 22, 1993 (Id.). He timely made the requisite interest payments of approximately $323 each month, but did not pay off his principal on or before November 22, 1993. Pursuant to the terms of the Note, in the event defendant continued to owe the amount thereunder as of November 22, 1993,

the interest rate would increase to the highest rate lawfully permitted to be charged (Id.). Pursuant to that provision, Cadlerock's predecessor-in-interest advised defendant by letter dated September 23, 1993 (the "extension letter"), that as of December 1, 1993, the Note would be extended for an additional twenty year term at an interest rate of 14% per annum (Schwarsin Aff., Ex. B). The extension letter advised that the first monthly payment of $803.31 would be due on December 1, 1993 and that such payments would be applied to payment of the 14% interest charge, with any balance going to the reduction of principal. The extension letter also advised defendant that he may "want to search for a more favorable amortized, self-liquidating loan while interest rates are low" (Id.). Defendant apparently ignored the extension letter and continued to make monthly installment payments in the same amount he had been paying since the loan's inception.

In or about May 1994, Cadlerock purchased the Note. Neither Cadlerock's predecessor-in-interest nor Cadlerock appears to have ever advised defendant that he was in arrears, demanded that he pay any such arrears, or provided him with any account statement or 1099 tax statements. Defendant was also never declared in default, and the debt on the Note was never accelerated. Nevertheless, Cadlerock now contends that it had been assessing defendant the 14% per annum interest charge on the amount in arrears all along.

Defendant, meanwhile, continued to make the same monthly payment of $323 for nine years until January 2003 when he entered into a contract to sell the Sunnyside apartment. Because Cadlerock held a security interest in the apartment based on the Note, the parties entered into a stipulation, dated January 22, 2003 (the "stipulation"), whereby Cadlerock released its security interest in exchange for payment of $62,000, the purchase price of the apartment (Schwarsin Aff., Ex. L). The stipulation expressly provided that by accepting this sum, Cadlerock "does not release" defendant "from the Promissory Note" and "reserves all rights to seek to collect any sums it contends are due under the Promissory Note," and defendant, in turn, "specifically reserves the right to assert any and all defenses that he may have if and when CADLEROCK, L.L.C. should seek to collect any sums due on the Promissory Note less the $62,000.00 from the proceeds of the sale and payments made on the Promissory Note" (Id., ¶ 3). Following execution of the stipulation, defendant paid Cadlerock the $62,000 from the apartment sale proceeds.

Defendant claims that at the time he executed the stipulation he was not advised of the amount of arrears due and owing as a result of his failure to pay the full amount of installment payments since 1993, and that, in fact, he was never told that there were any arrears (Renner Aff., ¶¶ 9-10). To the extent that he acknowledges being aware of any arrears due and owing, he claims he thought he owed approximately $2,600. After the stipulation was executed, defendant was never given any

future payment coupons or told that any future payment was even required.

Procedural History

Cadlerock commenced the instant action more than five years after defendant sold his apartment. The complaint alleges a single cause of action for payment due under the Note. Cadlerock seeks $50,334.42, the amount allegedly owed by defendant as of January 23, 2003, plus interest at the rate of 14% per annum from that date and attorneys' fees (Complaint, ¶16). By its current estimate, Cadlerock claims that defendant owes it $87,632.86, plus interest from the date of the Complaint (Id.).

Cadlerock previously moved for summary judgment on its claim in mtn seq. no. 001. In opposition, defendant argued that the action was barred by the applicable six-year statute of limitations (CPLR 213 [2]). The Court (Justice Marylin G. Diamond) agreed, holding that:

> since this action was not commenced until on or about April 18, 2008, the plaintiff is therefore time barred from seeking to recover the amount of any installment, including any interest which may have accrued thereon, which the defendant defaulted on paying prior to April 18, 2002. Thus, the plaintiff may only recover the difference between the monthly installments which the defendant paid after April 18, 2002 and the monthly amount, presumably $803.31, which he was required to pay on the 20-year loan extension, plus the 14% interest which has accrued on these arrears, together with the remaining balance on the principal.

(9/3/2009 Decision, p. 2)

In the same decision, Justice Diamond also found that a triable issue of fact existed as to whether Cadlerock's claims were barred by the doctrine of laches.

On appeal, the First Department unanimously affirmed the decision, but found that "the defense of laches is unavailable in this action at law commenced within the period of limitations" (Cadlerock, LLC v Renner, 72 AD3d 454 [1st Dept 2010]). The First Department went on to state that "a triable issue of fact exists whether plaintiff's claims are barred by the doctrine of equitable estoppel, i.e., whether defendant justifiably relied on the nine years of inaction by plaintiff and its predecessors-in-interests to reasonably conclude that his monthly payments were sufficient to satisfy his payment obligations under the note, and therefore was misled into paying a reduced amount for years without realizing that interest was accruing at 14% interest rate" (Id.).

Discussion

Defendant now argues that summary judgment dismissing the claim against him is appropriate because Cadlerock is equitably estopped from collecting any monies owed because he had no reason to believe that he would be responsible for the amount outstanding given the lengthy delay in enforcement; that he relied on Cadlerock not seeking any additional interest for 13 years; and that he reasonably concluded that the matter was settled when the parties executed the stipulation and he paid Cadlerock $62,000.

Cadlerock, in turn, argues that the Court should strike defendant's equitable estoppel defense and grant summary judgment in its favor because he fails to demonstrate that he was misled by Cadlerock to believe enforcement would not be sought and because he fails to demonstrate that he justifiably relied on Cadlerock's conduct to his disadvantage.

"Estoppel is imposed by law in the interest of fairness to prevent the enforcement of rights which would work a fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought" (Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 106 [2006] [quotation and citation omitted]). The essential elements of equitable estoppel consist of conduct, reasonable reliance, and harm. Typically, equitable estoppel is a question of fact for trial and cannot be resolved on a summary judgment motion (Id.).

Here, defendant seeks to avoid trial by arguing that Cadlerock's conduct in this case, i.e., waiting so many years to seek additional payment, is sufficient to establish the requisite estoppel elements. But, as the First Department plainly stated in its decision on this case, "whether plaintiff's claims are barred by the doctrine of equitable estoppel, i.e., whether defendant justifiably relied on the nine years of inaction by plaintiff and its predecessors-in-interests to reasonably conclude that his monthly payments were sufficient to satisfy his

payment obligations under the note, and therefore was misled into paying a reduced amount for years without realizing that interest was accruing at 14% interest rate" is a "triable issue of fact" to be resolved by a jury (Cadlerock, LLC, supra, 72 AD3d at 454). Nothing subsequently produced by either party in discovery alters this conclusion. Moreover, as noted above, whether equitable estoppel applies is generally a question of fact that cannot be resolved on a summary judgment motion (e.g., Vigliotti v North Shore University Hosp., 24 AD3d 752 [2d Dept 2005]).

Cadlerock's cross motion to strike equitable estoppel as an affirmative defense and for summary judgment in its favor must also be denied for these same reasons. Cadlerock's remaining argument that defendant's equitable estoppel defense must be stricken based on Renner's admission that he was aware of the terms of the Note and the 1993 fee increase is unavailing. Here, defendant's knowledge is immaterial as he is not claiming that the obligation did not exist. Instead, he is seeking to estop Cadlerock from enforcing that obligation based on its failure to act over the course of so many years, including the five years after the apartment was sold and after defendant tendered to Cadlerock all proceeds from that sale.

To the extent that Cadlerock relies on defendant's deposition testimony, wherein he states that the harm he suffered as a result of the delay is "a lingering stressful thing" and "nothing else" (Renner EBT, 6/14/2011, Giordano Aff., Ex. K, at 42), to demonstrate that he has not suffered harm, a full reading

of the deposition transcript suggests that defendant may not have fully understood the question he was being asked. In any event, elsewhere in the transcript, defendant clearly states that he was "negatively impacted by waiting five or six years from the sale of the apartment to them launching a lawsuit ... in a lot of ways ... I clearly assumed that we were done, a couple of thousand dollars had been settled and we moved on with our lives" (Id., at 41). Thus, at a minimum, his testimony is sufficient to create an issue of fact for the jury as to whether he suffered harm as a result Cadlerock's protracted and unexplained delay in bringing the instant action.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment and to strike defendant's affirmative defense of equitable estoppel is denied; and it is further

ORDERED that the parties are directed to telephone Part 48 at 646-386-3265 to schedule a pre-trial conference within 30 days after entry of this decision.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/13/12

HON. JEFFREY K. OING, J.S.C.