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SHORT FORM ORDER

Index No. 35082-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 07-16-2012
Submit Date: 07-24-2012
Motion No.: 001 MD

[ ] Final
[x] Non Final

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JEANETTE BOTTONE AND RICHARD DENIS,

Plaintiff,

- against -

LP PRINTING CORP AND LYNN PETERSON,

Defendants.
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Attorney for the Defendants
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ORDERED, In this action, inter alia, to recover on a promissory note and a personal guaranty, the plaintiffs move for summary judgment on the complaint and dismissing the defendants' counterclaim for fraud. The defendants oppose the motion.

Factual and Procedural Background

The relevant facts are essentially undisputed. On September 2, 2008, an Agreement of Sale was entered into between non-party JMJ Printing Corp. ("JMJ"), as Seller, and "a corporation to be formed by Lynn P. Peterson," as Purchaser, for the sale of the assets of JMJ, a printing business. The purchase price of $140,000 included a promissory note in the

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amount of $90,000. The closing of the sale occurred on October 1, 2008, at which time a Note in the amount of $90,000 was given by defendant LP Printing Corp. ("LP"), the corporation formed by defendant Lynn Peterson ("Peterson"), in favor of JMJ. The Note was personally guaranteed by Peterson. The Note required monthly payments for a period of five years.

Plaintiffs allege that the Note was assigned to them pursuant to an "Allonge to Note" which states:

> "This note, made the 1st day of October, 2008 by LP Printing Corp. to JMJ Printing Corp., is hereby assigned to Jeanette Bottone and Richard Denis, as of the 21st day of October 2008, by JMJ Printing Corp."

The Allonge to Note is signed by Plaintiffs Jeanette Bottone ("Bottone") and Richard Denis ("Denis"), but there is no indication that such signatures were made in their capacities as the owners of JMJ.

Plaintiffs commenced this action against LP and Peterson in 2011 alleging, among other things, that LP defaulted on the Note by failing to make the payment due June 1, 2011, and continuing thereafter. The first cause of action seeks to recover against LP for the balance due on the Note. The second cause of action seeks to recover the assets of LP pursuant to the terms of the Note. The third cause of action seeks to recover the balance due on the Note from Peterson as the guarantor. The fourth cause of action seeks an assignment of the lease for the premises at which LP operates, which lease had been assigned by JMJ to LP when the sale closed in 2008.

The Defendants served an answer to the complaint containing multiple affirmative defenses as well as a counterclaim for fraud alleging, among other things, that the Plaintiffs "intentionally inflated, manipulated or other wise distorted the size, value and quality of the accounts" of JMJ." Defendants further allege that Plaintiffs exerted undue and improper influence over Payomatic Corp., one of JMJ's customers, "to create a rouse that it was a valuable and regular customer" and that after the sale of JMJ to Defendants, Payomatic terminated its business relationship with Defendants.

The Plaintiffs now move for summary judgment "upon the cause of action set forth

in the Complaint." In support of their motion, the Plaintiffs submit their own affidavits, as well as an affidavit from Kevin Spelman, an officer of Payomatic Corp. In her affidavit, Bottone states, among other things, that she and Denis owned and operated JMJ and that in 2008 they decided to sell the business to Peterson for $140,000. She claims that the price was based upon JMJ's business "**without** 'Payomatic Corp.' invoices" and that the sale price would have double if it had included Payomatic invoices. Bottone further alleges that Peterson had counsel throughout the transaction, made a thorough investigation into the books and records of JMJ, was fully aware that Bottone's ex-husband is Spelman, an officer of Payomatic, and had a full understanding that there was no guarantee that JMJ's clients/customers would remain following the sale. Bottone contacted Peterson following Peterson's failure to make the Note payment due on June 1, 2011, at which time Peterson indicated that she was having trouble making payments as she had lost her largest client, Payomatic Corp. The affidavit from Denis essentially repeats the statements in Bottone's affidavit.

In his affidavit, Spelman states, among other things, that Payomatic had been a customer of JMJ and was a customer of LP for approximately six months following the sale of the business in 2008. During that time, the quality and timeliness of LP's work declined dramatically to the point where Payomatic decided to no longer use LP to produce its printed products. Spelman states that the decision to change printing vendors had nothing to do with his divorce from Bottone or his prior relationship with JMJ.

Based upon the foregoing, Plaintiffs argue that they are entitled to summary judgment as they have provided proof of the Note and nonpayment according to its terms. Plaintiffs contend that the Note was properly assigned to them by JMJ and, as such, they are the owners and holders of the Note. With regard to the counterclaim, Plaintiffs contend that the evidence establishes that Peterson conducted due diligence prior to entering into the Purchase Agreement and that Spelman's affidavit establishes that Payomatic stopped using LP because of the dramatic decline in the quality and timeliness of LP's work.

In opposition to Plaintiffs' motion, Peterson submits an affidavit in which she states that she "fully reiterate[s] the positions and statements of" her attorney made on her behalf as an individual and as President of LP. In an Affirmation in Opposition, Peterson's attorney

admits the existence of the Note between JMJ and LP. However, Defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law because the Allonge to Note, pursuant to which the Note was purportedly assigned from JMJ to Plaintiffs is defective. Specifically, Defendants contend, among other things, that the Allonge is not properly endorsed as it does not indicate that is only signed by Bottone and Denis as individuals, and not on behalf of JMJ, and that Plaintiffs have not demonstrated that the Allonge was attached to the Note.

In reply the Plaintiffs contend, through thier attorney's affirmation, that JMJ, by its officers Bottone and Denis, validly assigned the Note to Bottone and Denis, as individuals. Additionally, Plaintiffs contend that they have continuously had possession of the Note, initially in their capacities as officers of JMJ and then as individuals after JMJ assigned it to them. Finally, Plaintiffs claim that the Allonge is affixed to the Note by staples.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

As recently set forth by the Appellate Division, Second Department in *Griffon V, LLC v. 11 East 36th, LLC* (90 AD3d 705, 706-707 [2d Dept. 2011]):

> "To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a promissory note, a plaintiff must show the existence of a promissory note executed by the defendant and the failure of the defendant to pay in accordance with the note's terms. To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a guaranty, a plaintiff must submit proof of the underlying note, a guaranty, and the failure of the defendant to make payment in accordance with the terms of those instruments. Once the plaintiff submits evidence establishing its prima facie case, the burden then shifts to the defendants to submit evidence establishing the existence of a triable issue of fact with respect to a bona fide defense" (internal citations omitted).

The plaintiffs failed to establish a prima facie entitlement to judgment as a matter of law on the issue of liability. Because Defendants raised standing as an affirmative defense in their answer, it is Plaintiffs' burden to prove a valid assignment of the Note in order to demonstrate their standing as a holder. The Note is a negotiable instrument which requires indorsement on the instrument itself "or on a paper so firmly affixed thereto as to become a part thereof" (UCC 3-202[2]) in order to effectuate a valid assignment of the entire instrument (*see Slutsky v. Blooming Grove Inn, Inc.*, 147 AD2d 208, 212 [2d Dept. 1989]). The Note itself was not indorsed to Plaintiffs and the Plaintiffs evidentiary submissions were insufficient to establish that the Allonge was affixed to the Note. In their affidavits submitted in support of the motion neither plaintiff stated that the Allonge was affixed to the Note and the Allonge itself was annexed as a separate exhibit to the Plaintiffs' motion papers. Thus, the Plaintiffs failed to establish that the Note was validly assigned to them by JMJ and their motion for summary judgment is denied.

In any event, contrary to defendants' contention, the fact that the Allonge does not contain an express indication that Bottone and Denis signed the instrument on behalf of JMJ, rather than in their individual capacities, does not invalidate the purported assignment of the Note. The signatures on the Allonge must be read not in isolation, but in the context of the Note as a whole (*see 150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 AD3d 1 [1st Dept. 2004]). When read as a whole, it is clear that the Plaintiffs signed the Allonge in their corporate capacities as the corporation was the owner/holder of the Note and the only entity with the right to assign it. This conclusion is confirmed by the Plaintiffs affidavits and is not rebutted by an affidavit from the Defendants.

The Plaintiffs have also failed to make a prima facie showing of entitlement to summary judgment dismissing Defendants' counterclaim for fraud. The elements of a cause of action seeking to recover damages for fraud are "'a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury'" (*Centro*

Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 NY3d 269, 276 [2011] quoting *Global Mins. & Metals Corp. v. Holme*, 35 AD3d 93, 98 [1st Dept. 2006]).

Here, the Plaintiffs have not submitted evidence demonstrating as a matter of law that they did not intentionally inflate, manipulate or otherwise distort the size, value and quality of the accounts of JMJ, as alleged by Defendants. In fact, they did not submit any evidence regarding the representations made to Defendants prior to the sale regarding the size, value and quality of JMJ's accounts. Accordingly, that branch of Plaintiffs' motion seeking summary judgment dismissing Defendants' counterclaim is denied.

Counsel for the parties are hereby directed to appear before the Court for a preliminary conference on November 5, 2012, at 10 a.m.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: October 17, 2012
Riverhead, New York

Emily Pines
J. S. C.

[ ] Final
[x] Non Final