

Guertler v Pursino

2013 NY Slip Op 31507(U)

July 10, 2013

Sup Ct, Queens County

Docket Number: 2926/2013

Judge: Orin R. Kitzes

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

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EUGENE GUERTLER and DINA GUERTLER,

Plaintiffs, Motion Seq. No. 1

-against-

By: Orin R. Kitzes, J.S.C.

PHILIP PURSINO and PCN CONSULTING
GROUP LLC,

Dated: July 10, 2013

Defendants.

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Plaintiffs' motion for summary judgment pursuant to CPLR 3212 is granted in part in favor of Dina Guertler and against Philip Pursino only and denied in all other respects.

This is an action to recover from defendants on two promissory notes executed by Mr. Pursino. In the first promissory note (note 1), dated February 19, 2008, Mr. Pursino borrowed \$450,000 from plaintiff Eugene Guertler and agreed to make monthly payments in the amount of \$4,437 with interest at 7% per annum. In the event of default, note 1 expressly provided for payment of a late charge equal to 2% of any overdue payment of principal or interest made more than 15 days after its due and allowed the holder of the note to accelerate the debt. To accelerate the debt, the note holder must send a notice indicating that if the borrower does not pay the overdue amount by a certain date at least 30 days after the

date the notice is mailed or delivered, the note holder may require payment of the full amount of principal which has not been paid and interest immediately. Also, note 1 granted Mr. Guertler costs and expenses to enforce the note, including reasonable attorneys fees. Mr. Guertler acknowledges receipt of nine payments totaling \$39,933. On October 12, 2012, Mr. Guertler made a demand for payment of the total amount due on or before October 22, 2012, and such was not made. On November 3, 2012, Mr. Guertler sent a notice accelerating the debt and demanding payment of the entire balance due on the note by December 3, 2012. Mr. Pursino failed to make the payment.

In the second promissory note (note 2), dated March 1, 2010, Mr. Pursino borrowed \$300,000 from plaintiff Dina Guertler with monthly payments of \$2,827 at 6% interest per annum. In the event of default, a late charge is incurred equal to 2% of the overdue payment of principle and interest made more than 15 days after it's due as well as payment of legal expenses necessary to recoup any monies due. Ms. Guertler acknowledges receipt of \$65,021 toward the principle and interest. On October 12, 2013, a notice was sent to Mr. Pursino demanding full payment of the payments missed. Thereafter, a notice was sent to Mr. Pursino accelerating the debt and demanding payment on or before December 3, 2012. However, note 2 does not allow acceleration of the debt in the event of default.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and must accept as true facts that are alleged by the nonmoving party and all inferences which may be drawn from them (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574 [2d Dept 2004]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The burden then shifts to the motion's opponent to present facts in admissible form sufficient to raise a genuine, triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Lane v Feinberg*, 293 AD2d 654 [2002]).

A party establishes its prima facie entitlement to judgment on a promissory note as a matter of law by producing the promissory note executed by the defendant and by establishing the defendant's default thereon. After such a showing, it is incumbent upon the defendant to demonstrate, by admissible evidence, the existence of a triable factual issue (see *Allstate Fin. Corp. v Access Bag N Pack, Inc.*, 245 AD2d 325 [2d Dept 1997]; *Dvoskin v Prinz*, 205 AD2d 661, 661-662 [2d Dept 1994]).

Plaintiffs failed to meet their initial burden of establishing judgment as a matter of law in favor of Eugene Guertler and against

Mr. Pursino on note 1. Plaintiffs have not established that the debt was properly accelerated in accordance with the terms of the note. Since plaintiffs failed to meet their initial burden, it is not necessary to consider the sufficiency of the opposition papers (*Cugini v System Lbr. Co.*, 111 AD2d 114, 115 [1st Dept 1985], *appeal dismissed* 65 NY2d 1053 [1985]).

Accordingly, summary judgment is denied in favor of Eugene Guertler and against Philip Pursino.

With respect to note 2, the proof submitted is sufficient to establish plaintiffs initial burden of demonstrating entitlement to judgment as a matter of law in favor of Dina Guertler and against Mr. Pursino (*Sacco v Sutera*, 266 AD2d 446 [2d Dept 1999]). Therefore, the burden shifted to Mr. Pursino to demonstrate, by admissible evidence, the existence of a triable issue of fact on note 2 (*Id.*).

Mr. Pursino's grounds for opposing plaintiffs' motion are insufficient since they are merely bald assertions by his attorney without an affidavit of someone with personal knowledge of the facts (*see Marinelli v Shifrin*, 260 AD2d 227 [2d Dept 1999]). Nevertheless, the attorney affirmation failed to raise a triable issue of fact in opposition to the motion.

Accordingly, summary judgment is granted in favor of Dina Guertler against Philip Pursino for the principle balance of \$30,454.21 with interest thereon at 6% from September 15, 2011

together with statutory pre-judgment interest from April 15, 2013, plus the per diem rate to entry of the judgment.

With respect to summary judgment on note 1 and 2 against PCN Consulting Group LLC (PCN Consulting), plaintiffs have not established judgment as a matter of law. No proof has been submitted to show that PCN Consulting signed the promissory notes or that Mr. Pursino signed the promissory notes on behalf of PCN Consulting or that PCN Consulting is otherwise obligated to pay under the promissory notes. Therefore, the sufficiency of the opposition papers is not considered (*Cugini v System Lbr. Co.*, supra).

Accordingly, summary judgment is denied as against PCN Consulting on notes 1 and 2.

A hearing shall be conducted to determine the amount of reasonable attorney's fees in light of the grant of partial summary judgment in Dina Guertler's favor.

Settle judgment.

Dated:

J.S.C.