

Gallar v Dapaah

2016 NY Slip Op 32312(U)

November 22, 2016

Supreme Court, New York County

Docket Number: 150926/2015

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MARIA NOELIA IBANEZ GALLAR,

Plaintiff,

Index No.
150926/2015

**DECISION and
ORDER**

- against -

Mot. Seq. 004

RICHARD ALFRED DAPAAH,

Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Maria Noelia Ibanez Gallar (“Plaintiff” or “Ms. Gallar”), brings this action to recover on a Promissory Installment Note (“Note”) dated January 15, 2008, pursuant to which Defendant, Richard Alfred Dapaah (“Defendant” or “Mr. Dapaah”) allegedly agreed to pay Plaintiff \$80,000 in five annual installments of \$16,000, at an annual interest rate of 5.25%.

Plaintiff previously moved for an Order (Mot. Seq. #1), pursuant to CPLR §3213, for summary judgment in lieu of complaint, for the unpaid principal in the sum of \$80,000, together with the contractual interest, plus costs, expenses, and attorneys’ fees incurred in connection with enforcing the Note. Plaintiff submits a supporting affidavit, which annexes a copy of the Note and Default Notice. Defendant opposed and raises issues concerning service. By Decision and Order dated July 8, 2015, the Court referred the matter to a Special referee to hold a traverse hearing and to hear and report with recommendations concerning whether service was properly effected on Defendant. A traverse hearing was held on October 15, 2015 before Special Referee Jeremy R. Feinberg (“Special Referee Feinberg”). Special Referee Feinberg issued a Report and Recommendation dated January 22, 2016 in which he reported and recommended that “Plaintiff has met her burden, and thus, this honorable court should conclude that Plaintiff properly served Defendant

pursuant to CPLR 308(2) at the Disputed Address.” By Decision and Order dated March 23, 2016, the Court confirmed the Report and Recommendation. (Mot. Seq. 3).

By Notice of Motion filed on June 28, 2016, Plaintiff moves again for Notice of Motion for Summary Judgment in Lieu of a Complaint seeking to recover on a Note dated January 15, 2008, pursuant to which Defendant allegedly agreed to pay Plaintiff \$80,000 in five annual installments of \$16,000, at an annual interest rate of 5.25%. Plaintiff submits, inter alia, the attorney affirmation of Carlos M. Calderon; an affidavit from Plaintiff, Ms. Gallar; and a copy of the Note.

Defendant opposes. Defendant submits, inter alia, the attorney affirmation of Stephen Basedow, Esq.; the affidavit of defendant, Mr. Dapaah, the parties’ marriage certificate, the parties’ judgment of divorce; and an email dated December 4, 2007 from Mr. Dapaah to an individual named Betty Huang, cc: Neil Richardson Delta and Noella Ibanez.

The Note, dated January 15, 2009, provides that Mr. Dappah, as “borrower,” is to repay the principal amount of \$80,000.00 to Ms. Gallar, as “payee,” in yearly payments in the amount of \$16,000.00 over a five-year term. Mr. Dappah signed the Note. The first payment was due on January 31, 2009 and the final scheduled payment was due on January 31, 2013. The Note provides, “Annual interest rate on matured, unpaid amounts shall be at an annual rate of 5.250%.” The Note also provides that Defendant must pay all costs related to collecting or enforcing the Note, including reasonable attorney’s fees and court costs. Payments were to be made directly to Ms. Gallar. Ms. Gallar states in her affidavit that despite due demand, Defendant failed to make any of the required payments and is in default of his payment obligations under the Note.

As to the validity of the Note, Mr. Dapaah avers that he was married to Plaintiff in New York on August 30, 1996, that the parties were separated in 2006, and the divorce was finalized on April 9, 2008. Mr. Dapaah avers, “Plaintiff demanded that I sign the within ‘Note’ in exchange for changing the grounds of divorce to ‘abandonment’ from ‘cruel and inhuman treatment,’” and that “[a]ny interest that I had in attaching my name to the Note was induced by Plaintiff because I did not want the grounds of my divorce to be listed, although unwarranted, as cruel and inhuman treatment.” Attached to Mr. Dapaah’s affidavit is an email dated December 4, 2007 from Mr. Dapaah with the subject “Promissory Note and Divorce

Action Matters [Final].” The email is directed to an individual named Betty Delta, and cc’d to Neil Richardson Delta and Noella Ibanez. Mr. Dapaah writes:

Regarding the promissory note:

I will pay \$80,000 to Noella in equal payments denominated in U.S. dollars over five years. I will forward the first payment on 31-Jan-2009. If Noelia does not receive the first payment by 15-Feb-2009, then one year of simple interest on the outstanding amount of \$80,000 at an annual rate of 5.250% (or \$4,200) will be added to the amount owed to her, resulting in a total of \$84,000. In each subsequent year, if Noella does not receive payment by 15-Feb, then one year of simple interest at an annual rate of 5.250% on the outstanding amount due to her at that time will be added to that outstanding amount.

Regarding the divorce action:

Refile the summons to dissolve the marriage on grounds of abandonment.

In his affidavit, Mr. Dapaah further avers:

Furthermore, any funds that are the subject of this motion and underlying Note were given to both Plaintiff and myself from Plaintiff’s father. In fact, monies distributed by Plaintiff’s father that are believed to be the concern of the subject matter of this Note were distributed not only to both of us, but also for the purpose of funding Plaintiff’s and my business together. Additionally, upon information and belief, at the time said monies were distributed, there was never any indication that said monies distributed to us would need to be reimbursed to Plaintiff’s father, let alone to Plaintiff herself as she now aims to prove. Therefore, in equity, I do not believe Plaintiff is entitled to the total amount of monies demand [sic] in the within motion.

CPLR § 3213 provides, “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in

lieu of a complaint.” A document comes within CPLR § 3213 “if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms.” (*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 444 [1996] [internal citations omitted]). By contrast, the instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document. (*Id.*). The test “is not what the instrument may be reduced to by part performance or by elision of a portion of it ... but rather how the instrument is read in the first instance.” (*Weissman*, 88 N.Y.2d at 445).

In an action to recover on a promissory note, the plaintiff establishes a prima facie case by submitting proof of the note and of the defendant’s default. (*Bank of NY v. Sterlington Common Assocs.*, 235 AD2d 448). It is then incumbent on the defendant to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense. (*Colonial Commercial Corp. v. Breskel Assocs.*, 238 AD2d 539 [2nd Dept. 1997]).

Here, Plaintiff establishes a prima facie case of Plaintiff’s right to payment under the Note, as required, “by proof of the note and a failure to make the payments called for by its terms”. (*Boland v. Indah Kiat Fin. (IV) Mauritius Ltd.*, 291 A.D.2d 342, 343 [1st Dep’t 2002] quoting *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136, 137 [1st Dep’t 1968], *affd* 29 N.Y.2d 617 [1971]). In opposition, Defendant does not deny making the Note. He does not demonstrate economic duress. Indeed, the four corners of the Note demonstrate a clear and unequivocal promise to pay a sum certain. Defendant fails to substantiate his claim that he was somehow coerced or fraudulently induced by Plaintiff to sign the Note in exchange for an agreement for changing the grounds of divorce. The Note does not reference the divorce proceedings. Defendant’s December 4, 2007 email, which he writes to three recipients including Plaintiff, is insufficient to establish his claim. In addition, Defendant further fails to provide evidence to substantiate any of his remaining claims. Thus, in opposition, Defendant fails to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense.

Wherefore, it is hereby

ORDERED that plaintiff’s motion for summary judgment in lieu of Complaint is granted; and it is further

ORDERED that the Clerk enter judgment in favor of plaintiff, Maria Noelia Ibanez Gallar, and against defendant, Richard Alfred Dapaah, in the amount of \$80,000.00, together with interest from January 30, 2015 until the date of entry of judgment (at the contractual interest rate of 5.25% per annum, as calculated by the Clerk, and thereafter at the statutory rate, 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 amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties, including defendant, of the date of the hearing.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

Dated: November 22, 2016



NOV 22 2016

J.S.C.
HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST X REFERENCE