

Alcobi v Bagbag

2017 NY Slip Op 30326(U)

February 21, 2017

Supreme Court, New York County

Docket Number: 654572/2016

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
ASHER ALCOBI,

Plaintiff,

DECISION AND
ORDER

-against-

Index No.
654572/2016

BOAZ BAGBAG,

Defendant.
-----X

HON. ANIL C. SINGH, J.:

Plaintiff Asher Alcobi moves pursuant to CPLR 3213 for summary judgment in lieu of complaint to recover \$190,000 under an agreement dated September 9, 2009. Defendant Boaz Bagbag opposes the motion.

The agreement provides in relevant part as follows:

1. Issues have arisen between Bagbag and Alcobi and such parties wish to settle such issues;
2. Boaz Bag Bag [sic.] individually, has agreed to pay Alcobi, the sum of \$190,000 owed to him by Bag Bag as follows:
 - a. September 10, 2009 – \$95,000
 - b. September 10, 2010 – \$95,000. Interest shall be imputed upon both such payments.

3. Bag Bag has acknowledged that he shall use his best efforts to cause one or more real estate brokerage transactions to be referred to Peter Ash Realty, Inc., a New York Real Estate Broker of which Asher Alcobi is the licensed

sales person. Provided that such transaction are not know [sic.] to Peter Ashe or never worked on by Peter Ashe. Further, Peter Ashe is not obligated to work on such transaction, i.e. to find a buyer, seller, tenant etc. to such Transaction [sic.].

5. In the event Bag Bag will fail to pay the first payment, or violate any part of this agreement, Bag Bag agrees to pay all expenses, included but not limited to attorney fees, taken by Alcobi to enforce, defend, claim, any part of this agreement [sic.], plus interest of 15% from the date of this agreement on principal and expenses.

6. Bagbag represent[s] that although he is filed for bankruptcy, he is allowed to sign this agreement and it is not in conflict with his status.

Alcobi states that Bagbag has failed to make the payments under the agreement and still remains in default.

Discussion

“When an action is based on an instrument for the payment of money only ... the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of the complaint” (CPLR 3213). This provision allows the enforcement of “some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness (other citations omitted).” (Interman Indus. Prods. v. R.S.M. Electron Power, 37 NY2d 151, 154 [1975]). Plaintiff must “establish a prima facie case via proof of the note and a failure to make the payments called for by its terms” (Bonds Fin.,

Inc. v. Kestrel Tech., LLC, 48 A.D.3d 230, 231 [1st Dept., 2008] (internal citation and quotation marks omitted)). “It does not qualify if outside proof is needed, other than simple proof of nonpayment or a similarly de minimis deviation from the face of the document” (id.).

Once plaintiff has set forth a prima facie case, the burden shifts to the defendants to come forward with proof of evidentiary facts by affidavit or otherwise rebutting these facts and demonstrating the existence of a genuine and substantial triable issue of fact (Zyskind v. FaceCake Mktg.Tech., Inc., 101 A.D.3d 550 [1st Dept., 2012]).

Here, Bagbag has explicitly and unconditionally acknowledged an indebtedness of \$190,000 to be paid in two installments. Extrinsic evidence outside the four corners of this agreement is not necessary to establish the debt. Bagbag’s obligations in paragraph three of the agreement to use his best efforts to make referrals to Peter Ash Realty, Inc., is a separate covenant unrelated to the obligation to make payment (Premium Assignment Corp. v. Utopia Home Care, Inc., 58 AD3d 709 [2nd Dept. 2009] (“the instrument at issue did not require any additional performance on the part of the plaintiff as a condition precedent to repayment”).

The Court finds that undisputed facts presented by Alcobí establish a prima

facie case for summary judgment in lieu of complaint.

Bagbag does not dispute that he failed to make the payments. Rather, his attorney argues that summary judgment in lieu of complaint should be denied because the agreement fails to recite consideration for the promise and is, therefore, unenforceable.

This argument is refuted by the agreement, which expressly states that Bagbag is paying Alcobi \$190,000 which is "owed to him by Bagbag." A discharge of a pre-existing debt is valid consideration (Barclays Bank v. Skulsky Trust, 287 AD2d 365 [1st Dept. 2001]). Accordingly, Bagbag's promise to pay is enforceable.

Finally, Bagbag contends that the debt was discharged by a Chapter 7 bankruptcy filing in which Alcobi appeared and participated as an unsecured creditor. The parties entered into the agreement on February 9, 2009. The Bankruptcy Court issued a final decree discharging Bagbag's debts on February 1, 2013.

In the September 9th agreement, Bagbag expressly stated that despite the prior bankruptcy filing, he was agreeing to pay the sum of \$190,000. An explicit written assurance to make payment of a debt after a petition for bankruptcy is filed is not discharged (Stern v. Starr, 156 Misc. 746 [Cty. Ct. NY Co. 1935]).

Bagbag's reliance upon Lake Parkway Associates v. Noble, 3 Misc.3d 915 [City Ct. Rochester 2004], is misplaced. In Lake Parkway, the court held "only debts that arose prior to the date of a bankruptcy court's 'order for relief' are discharged in a bankruptcy action" (id., at 918) (emphasis in original). The bankruptcy petition is considered to be the "order for relief" (11 USC Section 301). Accordingly, under the Bankruptcy Code, the debtor is discharged from all debts that arose prior to the filing of the petition. Since Bagbag entered the September 9, 2009 agreement after the petition was filed, the debt was not discharged upon issuance of the final decree on February 1, 2013.

Accordingly, it is

ORDERED that plaintiff Asher Alcobi's motion for summary judgment in lieu of complaint is granted against defendant Boaz Bagbag, and it is further


ORDERED that the Clerk of the Court is directed enter judgment in favor of plaintiff Asher Alcobi and against defendant Boaz Bagbag in the amount of \$190,000, together with interest at the contract rate of 15% from September 10, 2009, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the claim for expenses and attorneys' fees is severed and

referred to a Special Referee of the Supreme Court who shall hear and report on the sums necessarily incurred by Alcobí for expenses and reasonable attorneys' fees in this action; 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 upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Date: February 21, 2017
New York, New York



Anil C. Singh
ANIL C. SINGH