SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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JUAN ROSARIO,

Plaintiff,

DECISION/ORDER
Index No. 651400/2015

-against-

JUANITOS GROCERY CORP. a/k/a JUANITO'S GROCERY CORP. and TEMISTOCLES VARGAS,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Juan Rosario commenced the instant action pursuant to Civil Practice Law and Rules ("CPLR") § 3213 with a summons and notice of motion for summary judgment in lieu of complaint against defendants. Although plaintiff's motion for summary judgment in lieu of complaint was granted by this court on default on May 15, 2015, the parties stipulated to vacate the court's Order on or about October 28, 2015. Plaintiff now moves for an Order pursuant to CPLR § 3212 for summary judgment or pursuant to CPLR § 3213 for summary judgment in lieu of complaint against defendants. For the reasons set forth below, plaintiff's motion is granted as to liability only.

The relevant facts are as follows. On or about May 30, 2014, plaintiff and defendant Juanitos Grocery Corp. a/k/a Juanito's Grocery Corp. ("Juanitos") executed a Contract of Sale of Business (the "Contract") whereby plaintiff agreed to sell Juanitos his grocery store located at 144 Sherman Avenue, New York, New York (the "store"), including the stock in trade, fixtures, equipment and the like, for $217,000.00. Plaintiff agreed to sell the store "free and clear of any debts, mortgages, security interests or other liens or encumbrances except as herein stated." On the same date, plaintiff and Juanitos executed a Rider to Contract of Sale – Estoppel (the "Rider") whereby plaintiff agreed that it would be responsible for all liabilities and debts, including taxes, through October 16, 2013 and Juanitos agreed that it would be

responsible for all liabilities and debts, including taxes, from October 17, 2013. Plaintiff and Juanitos also executed an Installment Promissory Note (the "Promissory Note") whereby Juanitos agreed to pay plaintiff the principal sum of $217,000.00 with interest thereon at the rate of 24% per annum compounded weekly, which was to be paid in 156 weekly installments of $1,950.00 for a total of $304,137.23. In the Promissory Note, defendant Temistocles Vargas ("Vargas") agreed to guarantee Juanitos' obligation under the Promissory Note (the "Guaranty"). Although Juanitos made thirty installment payments pursuant to the Promissory Note, in December 2013 Juanitos stopped making payments. Plaintiff asserts that, as of the present date, the total amount due and owing on the Promissory Note is $245,700.00, including both principal and interest.

Pursuant to CPLR § 3213, "[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." "In order to qualify for CPLR § 3213 treatment, plaintiff must be able to establish a prima facie case by proof of the agreement and a failure to make the payments called for thereunder." *SCP (Bermuda) Inc. v. Bermudatel Ltd.*, 224 A.D.2d 214, 216 (1st Dept 1996). "A defendant can defeat a CPLR § 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact." *See Banco Popular N. Am. v. Victory Taxi Mgt.*, 1 N.Y.3d 381, 383 (2004).

In the present case, plaintiff has established his *prima facie* entitlement to summary judgment against defendant as he has demonstrated the existence of the Promissory Note between plaintiff and Juanitos and the Guaranty between plaintiff and Vargas, which are for the payment of money only, and that defendants have failed to make certain payments called for under the Promissory Note and Guaranty.

In opposition, defendants have failed to raise a triable issue of fact as to their liability for breach of the Promissory Note and Guaranty but have raised a triable issue of fact as to the amount of damages plaintiff may recover. Defendants' argument that the Promissory Note and Guaranty must be deemed void on the ground that the interest rate therein, which they assert exceeds 25% per annum when compounded weekly as provided in the Promissory Note, is usurious is without merit. Neither a corporation nor an individual guarantor of a corporate debt may assert a defense of civil usury, which applies where the interest

rate on a loan or forbearance of money or other property to an individual exceeds 16% per annum. *See* GOL § 5–521(1); General Obligations Law ("GOL") § 5–501; Banking Law § 14–a(1). However, a corporation and an individual guarantor may assert a defense of criminal usury where interest "on the loan or forbearance of any money or other property" in excess of 25% per annum is knowingly charged. *See* GOL § 5-521(3); Penal Law § 190.40; *Tower Funding, Ltd. v. David Berry Realty, Inc.*, 302 A.D.2d 513, 514 (2d Dept 2003). Where a seller charges interest in excess of 25% per annum on a promissory note executed as part of the sale of a business, this interest rate is not usurious as the transaction does not involve a loan or forbearance of money or other property. *Stitz v. Stevens*, 70 A.D.2d 588, 588 (2d Dept 1979) (holding that promissory notes executed in connection with the sale of a business were not usurious and therefore void as "[n]othing akin to borrowing or lending of money [was] involved").

In the present case, even assuming *arguendo* that the interest rate in the Promissory Note and Guaranty exceeds 25% per annum, the Promissory Note and Guaranty are not void on the ground that the interest rate is usurious as these agreements are not for the "loan or forbearance of any money or other property" but rather were executed as part of the sale of the store.

Defendants' argument that they did not breach the Promissory Note and Guaranty by failing to make required payments because plaintiff first breached its agreement in the Promissory Note to sell the store "free and clear of any debts, mortgages, security interests or other liens or encumbrances except as herein stated" is also without merit. Specifically, defendants have provided evidence that after purchasing the store on May 30, 2014, Juanitos received a notice from the New York State Tax Department of outstanding sales tax obligations of $17,253.65 for the tax period ending on May 31, 2014 and a notice from the New York State Gaming Commission of outstanding obligations of $23,520.08 on May 13, 2015. However, pursuant to the Rider, Juanitos expressly agreed that it would be responsible for all liabilities and debts, including taxes, from October 17, 2013, which clearly includes the aforementioned notices of the store's debts dated May 31, 2014 and May 13, 2015. Thus, as the aforementioned notices fall within the scope of the Rider, defendants have failed to make a *prima facie* showing that plaintiff breached its agreement in the Promissory Note to sell the store free and clear of any debts except as therein stated.

However, defendants have raised an issue of fact as to the amount of damages plaintiff may recover based on their argument that plaintiff has failed to properly credit Juanitos' 30 payments on the Promissory Note. This issue of fact must be determined at trial.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in lieu of complaint against defendants is granted with regard to liability only; and it is further

ORDERED that an immediate trial of the aforesaid issues of fact as to the amount of damages to which plaintiff is entitled shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the decision and order of the court.

DATE : 3/22/17

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.