Al Props. & Dev. (USA) Corp. v Marin
2012 NY Slip Op 33893(U)
May 17, 2012
Supreme Court, New York County
Docket Number: 651529/11
Judge: Bernard J. Fried

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

----------x

AI PROPERTIES AND DEVELOPMENT
(USA) CORP.,

Plaintiff,

- against-

Index No.: 651529/11

RICHARD A. MARIN,

Defendant.

----------x

APPEARANCES:

Attorneys for Plaintiff:

MORRISON COHEN LLP
909 Third Avenue
New York, NY 10022

By: Y. David Scharf, Esq.
Kristin T. Roy, Esq.
Evan Lupion, Esq.

Attorneys for Defendants:

ZUKERMAN GORE BRANDEIS
& CROSSMAN
875 Third Avenue
New York, NY 10022

By:John K. Crossman, Esq.
Frank C. Welzer, Esq.

FRIED, J.:

Plaintiff, AI Properties and Development (USA) Corp. (Properties), seeks an order, pursuant to CPLR 3213, granting it summary judgment in lieu of complaint on a promissory note for $500,000 (the Note) that it holds on a loan made to defendant, Richard A. Marin. Marin cross-moves for an order, transferring this action to my part, or, in the alternative, pursuant to CPLR 3211 (a) (4), dismissing the complaint, or converting this action to a

plenary lawsuit and consolidating it with another action before me,[1] in which Marin seeks employment compensation (the Marin Action).[2]

Accelerated relief is available, pursuant to CPLR 3213, when a plaintiff shows the existence of an instrument for the payment of money and the failure to pay, unless the defendant submits evidence sufficient to raise an issue as to a defense to the instrument (*Interman Indus. Prods. Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]; *Tongkook Am. v Bates*, 295 AD2d 202, 202 [1st Dept 2002]). To support their motion, plaintiff submits a copy of the Note, in which Marin promises to pay Properties $500,000, in full, on June 1, 2011. Defendant admits that the loan has not been paid back, and this is not a disputed fact. Therefore, plaintiff has met its burden on the motion.

In opposition to the motion, defendant asserts that he signed the promissory note expecting to pay off the loan from a then-future 2010 employment bonus of $1.25 million that he had been promised by plaintiff or its affiliate, and believed that he would be paid. Defendant makes averments about discussions he had with plaintiff in an attempt to demonstrate that the Note is not an integrated document and states that the parties intended that the loan amount be set off against plaintiff's 2010 bonus in order to assure that the bonus was paid timely. Defendant also states that the Note's maturity date reflects that the parties' thought that a one-year term would cover the period of time that it would take for 2010

---

[1] The motion to transfer the case was granted through an order that was separately filed. Therefore, defendant's cross- motion is deemed for dismissal of the complaint, or for conversion and consolidation.

[2] *Marin v AI Holding (USA) Corp.*, Index No. 651224/11.

employment bonuses to be paid out. Defendant argues that the Note does not contain a waiver of his rights to setoff, counterclaim or defenses, which he asserts is evidence that he reserved his right to have payments owed under the Note set off by the 2010 bonus monies owed to him.

A court may not consider parol evidence to vary the terms of an unambiguous and complete writing (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). "In the absence of a merger clause, as here, the court must determine whether or not there is an integration 'by reading the writing in the light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing'" (*Braten v Bankers Trust Co.*, 60 NY2d 155, 162 [1983], quoting *Ball v Grady*, 267 NY 470, 472 [1935]; *see e.g. TAJ Intl. Corp. v Bashian & Sons*, 251 AD2d 98, 100 [1st Dept 1998]).

Despite that it does not contain a waiver of setoff, counterclaim or defenses, a reading of the Note reveals that it is a fully integrated document, as the intentions of the parties may be easily gathered from it. Furthermore, had the parties agreed to permit the setting off of the amount owed under the Note by plaintiff's future 2010 bonus, as plaintiff maintains the parties discussed, this easily could have been incorporated into the document, and ordinarily would be expected to have been incorporated therein. Allowing setoff for an alleged separate and independent employment bonus contract, that, according to defendant, was formed well before the Note was executed, would vary the essence of the Note from what is essentially a simple loan document, in which the underlying consideration already has been fully

exchanged by plaintiff. In addition, the Note contains nothing that would lead the reader to believe that reference outside the document is required. The Note appears complete, there is no argument that its language suffers from ambiguity, and nothing in it, or the surrounding circumstances, gives rise to an inference that the parties did not *mutually* intend that it embody their complete agreement.[3]

As the writing is integrated, defendant improperly attempts to offer parol evidence to alter its terms (*see Alicanto, S.A. v Woolverton*, 142 AD2d 703, 704 [2d Dept 1988]; *Grasso v Shutts Agency*, 132 AD2d 768,769 [3d Dept 1987] [finding defendant's attempt to impose on a note a condition relating to plaintiff's performance under an employment contract unavailing and that the employment contract claim did not serve to bar recovery but was more properly the subject of a separate action, and that defendant could not offer parol evidence to alter note terms]).

That defendant may have had expectations concerning offsetting the Note does not bind plaintiff to those expectations. Defendant's contentions would serve to vary the Agreement considerably from what it is, a clear promise to pay a debt for a fixed amount of money on a fixed date.[4] *Tradition N. Am. v Sweeny* (133 AD2d 53, 54 [1st Dept 1987]),

---

[3] That the parties discussed various issues concerning the employer's payment of bonuses does not change the result. It would be quite unusual for parties not to have discussions concerning transaction before deciding what they actually desire to set down in a writing.

[4] Defendant points to his termination letter from plaintiff's affiliate, which states that Marin should have paid back the Note when he received his 2009 bonus. This does not raise a fact issue as to whether or not the parties agreed that defendant could set off what was owed under the Note against the 2010 bonus monies that defendant alleges he is owed, any more than a fact issue would have been raised had plaintiff submitted the letter to

upon which defendant relies, involves circumstances not present here, as each of the involved notes "by its terms holds open the possibility that defendant may repay the outstanding balance by earning bonuses" (*id.*, at 54).

Approximately a month before the filing of this action, the Marin Action was filed. As discussed above, in that action, Marin asserts claims for employment compensation. He also states that he intends to fully comply with his obligations under the Note, and to repay it by its due date, subject to offsets for bonus and other money owed to him. Defendant argues that, pursuant to CPLR (a) (4), plaintiff's motion for summary judgment in lieu of complaint should be denied, and this action dismissed or consolidated with the first-filed Marin Action.

Pursuant to CPLR 3211 (a) (4), a party may move to dismiss a claim where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." CPLR 3211 (a) (4) "vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]). Plaintiff's action for his bonus, however, is not "another action pending . . . for the same cause of action" because it is not the same cause of action. The Marin Action is for employment compensation and not for relief, declaratory or otherwise, concerning the Note.

Finally, Marin asserts that in the Marin Action, Properties or its affiliate, submitted,

---

demonstrate that the parties' intention was that the Note, with its June 2011 due date, be repaid in 2009.

as exhibits, copies of Marin's employment termination letter and a letter from Properties' counsel in which is written, respectively, that the Note was unauthorized and that Marin breached his fiduciary duty in instructing his subordinate to draft it. What Marin fails to provide is authority demonstrating that Marin, who is undoubtedly the borrower and the party charged with paying the Note, would be relieved of his obligation to pay back the money because of these submissions.

Defendant has failed to raise any genuine triable issues of fact as to any purported defenses available to him. Consequently, plaintiff is entitled to summary judgment in lieu of complaint on the Note, pursuant to CPLR 3213. In light of the foregoing, it is unnecessary to reach plaintiff's arguments, which include that documentary evidence demonstrates that defendant admitted that the bonus and loan were not linked, or that there is no identity of parties.

As there is no interest provision in the Note, no interest is due for its duration. As plaintiff does not otherwise address the interest issue, it has not met its burden on this motion as to interest, and this branch of the motion is denied .

The Note provides for attorneys' fees and the question of legal fees is referred to a Special Referee, to hear and determine the amount of legal fees that plaintiff is entitled to recover under the Note. If the parties so agree, the order to be settled shall provide that the referee shall hear and determine on consent; if there is no such consent, the order shall provide that the referee shall hear and report with recommendations.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment in lieu of complaint is

granted as to liability against the defendant; and it is further

ORDERED that the defendant's cross motion is denied; and it is further

ORDERED that the issue of attorneys' fees and costs is hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry, together with a completed Information Sheet,[5] shall be served on the Special Referee Clerk (Room 119) at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee.

DATED: 5/17/2012

ENTER:

J.S.C.

HON. BERNARD J. FRIED

[5]Copies are available in Room 119 at 60 Centre Street, and on the Court's website.