

Scharf v Idaho Farmers Mkt. Inc.

2013 NY Slip Op 31043(U)

March 28, 2013

Sup Ct, New York County

Docket Number: 650644/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

JARED SCHARF,

Plaintiff,

INDEX NO. 650644/2012
MOTION DATE Nov.21,2012
MOTION SEQ. NOS. 1, 2
E-FILED

-against-

IDAHO FARMERS MARKET INC.,

Defendant.

The following papers, numbered 1, were read on this motion to dismiss

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	
Reply Affidavits	
Cross-Motion	X No

Plaintiff moves pursuant to CPLR 3213 for summary judgment in lieu of complaint (seq. 001). By Order to Show Cause Andrew Poma moves for leave to intervene in this action and to oppose plaintiff's motion (seq. 002).

Plaintiff Scharf sues upon a promissory note (the "Note") issued by defendant Idaho Farmers Market Inc. ("Idaho") on February 18, 2011, in the principal amount of \$1,292,000.00 in favor of Adem Arici. Plaintiff alleges that in exchange for his legal services to Arici, he obtained the Note by Omnibus Assignment from Arici "made as of May 10, 2011" but not signed before a notary public until December 30, 2011 (Exh. 2 to Scharf Aff).

Plaintiff alleges that prior to the assignment, the Note had been modified by a Credit to Loan Agreement dated March 1, 2011, that provided credits to Idaho on its Note obligations against four specified scheduled payment installments totaling \$85,117.66, of which the principal constituted \$71,988.06 (Exh. 4 to Scharf Aff.). In addition, plaintiff alleges that prior to July 1, 2011, Idaho made installment payments totaling \$256,500, leaving a principal balance due and owing under the Note of \$963,511.94. Further, plaintiff alleges that prior to the assignment, Arici's lawyer served a notice of default and acceleration (Letter of Marc E. Verzani, Esq., dated July 15,

2011; Exh. 5 to Scharf Aff.). Thereafter, plaintiff alleges, a further payment of \$85,500 was made on Idaho's behalf under the Note, reducing the principal balance to \$878,011.94.

Defendant Idaho, in opposition, alleges that plaintiff is not a holder in due course and therefore took the Note subject to the defenses available to a party in an action for breach of contract. Further, it alleges that Arici fraudulently induced the execution of the Note.

Proposed intervenor Andrew Poma alleges that Idaho issued the Note upon and in exchange for Arici's sale to Poma of his one-third interest in the stock of Idaho pursuant to a Stock Purchase Agreement dated February 18, 2011 (the same date as that of the Note). Poma claims that all payments made pursuant to the Note were from his own funds, since he was the purchaser of Arici's stock. Prior to the transaction with Arici, Poma held a one-third interest in Idaho; after the sale Poma became Idaho's majority shareholder.

Poma alleges that Arici made false statements to induce him to sign the Stock Purchase Agreement, including that he was not aware of any litigation against Idaho, when in fact there were three lawsuits against Idaho at the time he entered into the Stock Purchase Agreement.

Poma and Arici, among others¹, have been indicted in the United States District Court for the Southern District of New York on crimes relating to skimming cash and failure to pay payroll taxes at six fine food markets, including Idaho. Alternatively to the claim of fraudulent inducement, Poma alleges that there should be a set-off against any monies due under the Note for Arici's pro-rata share of tax liabilities pursuant to the provisions of the Stock Purchase Agreement.

DISCUSSION

Poma's motion to intervene pursuant to CPLR 1013 is granted. Consideration of such a motion begins with the question of whether the motion is timely. In examining the timeliness of the motion, "courts do not engage in mere mechanical measurements of

¹Mark Verzani, Arici's attorney in the sale to Poma, was also named in the indictment with Arici on separate charges of conspiring to violate the Cuban trade embargo and was individually charged with obstructing justice and witness tampering.

time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." (*Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010][citations omitted]).

Poma's motion was made during the pendency, and prior to argument, of plaintiff's 3213 summary judgment motion. Since it was made during the initial stage of this litigation, it is not untimely. (*American Home Mortg. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 621 [2d Dept 2012]; *Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676 [2d Dept 2010]; *In re Trustco Bank*, 33 Misc3d 745, 755 [Sur Ct, Schenectady County 2011]; *cf. JP MORGAN Chase Bank, N.A. v Edelson*, 90 AD3d 996, 996-997 [2d Dept 2011]). Further, the intervention, since it is premised on essentially the same facts as are alleged by defendant Idaho, will not unduly delay the determination of the action or prejudice the substantial rights of plaintiff. (CPLR 1013). Finally, since both sides concede that Idaho issued the Note to secure Poma's payment obligation under the Stock Purchase Agreement, Poma has demonstrated a real and substantial interest in the outcome of the proceedings. (*Mauro v Atlas Park, LLC*, 99 AD3d 872 [2d Dept 2012]).

In support of his motion for summary judgment in lieu of complaint, plaintiff established a prima facie entitlement to judgment by producing the promissory note executed by Idaho and Arici's assignment and by demonstrating that Idaho defaulted in payment of the Note. (*Silber v Muschel*, 190 AD2d 727 [2d Dept 1993]). Accordingly, to preclude plaintiff from enforcing the terms of the Note, it is incumbent upon Idaho to establish, by admissible evidence, that a triable issue of fact exists. (*Id.*, 190 AD2d at 728).

Idaho has alleged that plaintiff is not a holder in due course of the Note. Further, proposed intervenor Poma alleges that he was fraudulently induced to enter into the Stock Purchase Agreement and to cause Idaho to issue the Note. He also alleges that he, and not Idaho, made all of the payments that were made on the Note.

Plaintiff's motion for summary judgment in lieu of complaint is denied. Since the plaintiff does not contend that he held the Note in due course, the defense of fraudulent inducement may be asserted against him. (*Silber v Muschel*, 190 AD2d 727, 728; *Pan Atl. Group v Isacsen*, 114 AD2d 1022, 1023 [2d Dept 1985]; *cf. Connecticut Nat. Bank v Giroux*, 188 AD2d 413 [1st Dept 1992]). Thus, there is a triable issue of fact precluding summary

judgment. (*Kehoe v Abate*, 62 AD3d 1178, 1180-81 [3d Dept 2009]; cf. *Banco Popular North America v Victory Taxi Mgt, Inc.*, 1 NY3d 381 [2004]; *Korea First Bank of N.Y. v Noah Enterprises, Ltd.*, 12 AD3d 321, 322 [1st Dept 2004]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant's attorney within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service thereof; and it is further

ORDERED that the motion of Andrew Poma to intervene is granted, and that Andrew Poma be permitted to intervene in the above-entitled action as a party defendant; and it is further

ORDERED that plaintiff shall add Andrew Poma as a party defendant in the complaint to be served herein and listing Andrew Poma as the last defendant in the caption; and it is further


ORDERED that Andrew Poma serve his answer upon the attorneys for the plaintiff and the defendant, or move with respect to the complaint in the above-entitled action, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the County Clerk and upon the Clerk of the Trial Support Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on June 5, 2013 at 2:00 PM.

This constitutes the decision and order of the Court.

Dated: March 28, 2013



Ellen M. Coin, A.J.S.C.

NON-FINAL DISPOSITION