

Thadani v Liteaid, Inc.
2015 NY Slip Op 31351(U)
July 24, 2015
Supreme Court, New York County
Docket Number: 152042/2015
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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ARVIND THADANI,

Plaintiff,

Index No.
152042/2015

**DECISION AND
ORDER**

- against -

Mot. Seq. #001

LITEAID, INC. and PREM RAMCHANDANI,

Defendants.

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

Plaintiff, Arvind Thadani (“Plaintiff” or “Thadani”), moves, pursuant to CPLR § 3213, for summary judgment in lieu of complaint against defendants, Liteaid, Inc. (“Liteaid”) and Prem Ramchandani (“Ramchandani”) (collectively, “Defendants”), jointly and severally, in the amount of \$125,000.00. Plaintiff claims to have loaned Liteaid the sum of \$50,000.00 (the “First Loan”), pursuant to a promissory note dated June 20, 2013 between Plaintiff and Liteaid, with Ramchandani as guarantor. Plaintiff claims to have loaned Liteaid an additional sum of \$75,000.00 (the “Second Loan”), pursuant to a promissory note dated July 1, 2013 between Plaintiff and Liteaid, with Ramchandani as guarantor (and together with the promissory note reflecting the First Loan, collectively, the “Promissory Notes”). Plaintiff claims that Defendants are in default of their respective obligations under the Promissory Notes.

In support, Plaintiff submits: the affidavit of Thadani, dated February 9, 2015; the attorney affirmation of Sandeep Chatrath, dated February 25, 2015; a copy of a cancelled check payable to Liteaid in the amount of \$50,000.00; a copy of a cancelled check payable to Liteaid in the amount of \$75,000.00; copies of the Promissory Notes; and, copies of six payments made under the Promissory Notes.

Defendants oppose. In opposition, Defendants submit: the attorney affirmation of Paul Greenfield, dated April 14, 2015; the affidavit of Ramchandani,

dated April 8, 2015; and, a copy of a promissory note, dated May 15, 2012, whereby Plaintiff loaned Liteaid \$25,000.00, with an interest rate of 24% per annum.

CPLR § 3213 provides that, “[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 read in the first instance.” (*Weissman*, 88 N.Y.2d at 445). To prevail on a motion for summary judgment in lieu of complaint under CPLR § 3213, the plaintiff must present proof of the “instrument for the payment of money only” and evidence of the defendant’s failure to make the payment called for by the instrument’s terms. (*Matas v. Alpargatas S.A.I.C.*, 274 A.D.2d 327, 328 [1st Dep’t 2000]).

Here, Plaintiff submits copies of the Promissory Notes. In the affidavit of Plaintiff, Plaintiff avers that, “[u]nder the terms of the Promissory Note relative to the First Loan, defendant Liteaid agreed to pay me the sum of \$50,000.00, together with interest at a rate of 12.00% per annum.” (Thadani Aff. ¶ 10). Plaintiff further avers that, “[p]ayments on the Promissory Note relative to the First Loan were to have been made monthly for interest only in the sum of \$500.00, per month commencing on July 20, 2013” and that, “[u]nless the Promissory Note was prepaid, the final payment thereunder was to have been made on December 20, 2013, in the sum of \$50,000.00.” (*Id.* ¶ 11). Plaintiff avers, “[u]nder the terms of the Promissory Note relative to the Second Loan, defendant Liteaid agreed to pay me the sum of \$75,000.00, together with interest at a rate of 12.00% per annum.” (*Id.* ¶ 12). Plaintiff avers that “[p]ayments on the Promissory Note relative to the Second Loan were to have been made monthly for interest only in the sum of \$750.00, per month commencing on August 1, 2013” and that, “[u]nless the Promissory Note was prepaid, the final payment thereunder was to have been made on December 31, 2013, in the sum of \$75,000.00.” (*Id.* ¶ 13).

Plaintiff avers that “Defendants have made only six payments of \$1,250.00 each on the two Promissory Notes (\$500 each relative to the First Loan and \$750 each relative to the Second Loan) . . . for July 2013, August 2013, September 2013,

October 2013, November 2013, and December 2013.” (*Id.* ¶ 16). Plaintiff avers that “Defendants have failed to make the payments to pay off the two Promissory Notes.” (*Id.* ¶ 17). Plaintiff avers:

I am therefore owed the sum of \$125,000.00 with respect to the two Promissory Notes together with interest at 12% per annum from December 31, 2013. This sum as of January 31, 2015, is \$125,000.00 (the principal due) plus thirteen months (\$1,250.00 per month) interest in the sum of \$16,250.00 for a total of \$141,250.00, plus attorneys' fees as permitted under the two Promissory Notes.

(*Id.* ¶ 18).

Accordingly, with respect to Liteaid, Plaintiff establishes a prima facie case of Plaintiff's right to payment under Promissory Notes, 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, Defendants fail to raise any triable issue of fact with respect to Liteaid's default under the Promissory Notes.

As far as individual defendant Ramchandani is concerned, an unconditional guaranty may constitute an instrument for the payment of money only, for purposes of an accelerated judgment under CPLR § 3213. (*Acadia Woods Partners, LLC v. Signal Lake Fund LP*, 102 A.D.3d 522, 522-23 [1st Dep't 2013]). To demonstrate entitlement to recover on a personal guaranty, a plaintiff must present evidence of the guaranty, the amount of the debt guaranteed, and defendants' default. (*Carrera Casting Corp. v. Cord*, 106 A.D.3d 422 [1st Dep't 2013]).

Here, Defendants do not dispute that Ramchandani signed each of the Promissory Notes, in his individual capacity, on a signature line marked “Guarantor”. However, Defendants argue that the guaranty is a conditional guaranty of collection, and not an absolute guaranty of payment. In the affidavit of Ramchandani, Ramchandani avers:

I also signed my name to the notes above the word “Guarantor”. The notes contain no other words related to the guaranty; simply a line for a signature with the word “Guarantor” written underneath it. The notes do not say

that my guaranty was “absolute” or “unconditional”, nor do they state that I am a guarantor of payment. Indeed, at the time the loans were made it was the clear understanding between the plaintiff and me that I would guaranty only that if Liteaid defaulted in payment and the plaintiff was unable to collect the amount owed via legal proceedings, I would be responsible for the repayment of the loans.

(Ramchandani Aff. ¶ 3).

Here, Defendants adequately raise a triable question of fact as to the nature of Ramchandani’s guaranty, which is not evident from the face of the Promissory Notes. The Promissory Notes, which contain a signature line marked “Guarantor”, do not contain any express language as to the nature or extent of such guaranty. Furthermore, Plaintiff argues, in reply, that the parties exchanged emails discussing the Promissory Notes, and that such emails demonstrate Ramchandani’s intent to unconditionally guaranty Liteaid’s obligations under the Promissory Notes. (Thadani Reply Aff. ¶¶ 14-17). To the extent that outside proof extrinsic to the Promissory Notes is necessary to determine Ramchandani’s obligations under Promissory Notes and guaranty, Plaintiff fails to meet its burden of establishing that an accelerated judgment under CPLR § 3213 is warranted as against Ramchandani.

Accordingly, Plaintiff’s motion for summary judgment in lieu of complaint is denied with respect to individual defendant Ramchandani and the parties are directed to proceed with litigation as set forth below.

Wherefore, it is hereby

ORDERED that Plaintiff’s motion for summary judgment in lieu of complaint granted only as against entity defendant Liteaid, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the plaintiff, Arvind Thadani, and against entity defendant Liteaid, Inc., in the amount of \$125,000.00 plus interest at the rate of 12% per annum (from 3/2/2015), as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED the Plaintiff’s moving papers, consisting of a notice of motion, the affidavit of Plaintiff in support of Plaintiff’s motion, and the reply affidavit of

Plaintiff in further support of Plaintiff's motion for summary judgment in lieu of complaint, are hereby deemed the complaint in this action and the Defendants' answering papers, consisting of the affidavit of Ramchandani, are hereby deemed the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 205, 71 Thomas Street, on October 20, 2015, at 9:30 AM.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 24, 2015



Eileen A. Rakower, J.S.C.