

Sternlicht v JMJ Films, Inc.

2016 NY Slip Op 30518(U)

March 7, 2016

Supreme Court, New York County

Docket Number: 156028/15

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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DAVID STERNLICHT,

Plaintiff,

-against-

Index No.

JMJ FILMS, INC., and JAMES MOSKOVITZ a/k/a
JIM MOSKOVITZ,

156028/15

Defendants.

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DONNA MILLS, J. :

Plaintiff David Sternlicht moves for summary judgment in lieu of complaint.

Plaintiff was a long-time computer consultant for defendants, who are engaged in the production and distribution of sports-related television programming. In early 2013, defendant James Moskovitz a/k/a Jim Moskovitz (Moskovitz), a principal of defendant MJM Films, Inc. (MJM), approached plaintiff, seeking interim financing pending a purported sale of his company. Plaintiff began making loans to defendants at that time with an initial advance of \$25,000. Plaintiff alleges that he continued to advance loans to defendants based on their assurances that a sale of the company was imminent. The parties executed four separate loan agreements, each with a separate confession of judgment. In March 2014, the parties executed a single confession of judgment (Confession) to reconcile all of the unpaid debts. The Confession covers direct advances of \$1,115,757.27, reimbursements of corporate expenses paid by plaintiff of \$259,482.22, accrued interest on the loans at a rate of 9% per annum, and other extension and forbearance fees. The parties agreed that a sum of \$1,700,000.00 was currently due to plaintiff, and agreed to an interest at a rate of 16% per annum.

Since the Confession was executed, defendants have made payments to plaintiff totaling

\$10,900. Plaintiff claims that defendants owe much more and has commenced this action to recover the balance of his loans, plus interest pursuant to the terms of the Confession.

Plaintiff moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint, using the Confession as an instrument for the payment of money only. Plaintiff contends that an affidavit of judgment by confession is a proper vehicle to enforce a debt, and the subject judgment demonstrates an unconditional obligation to pay. Plaintiff states that he is entitled to summary judgment because he claims that no proof outside of the Confession, other than lack of payment, is necessary to prove a prima facie case, as here. Moreover, plaintiff contends that defendants are precluded from asserting any defenses based on usury because in this jurisdiction, post-default interest is not subject to the usury defense. According to plaintiff, defendants are also estopped from asserting the defense of usury where they induced the inclusion of late fees, penalties and other incentives through their own conduct.

In opposing this motion, defendants raise a number of issues. First, they argue that plaintiff's affidavit contains several misstatements. They state that, contrary to plaintiff's affidavit, the loan agreements were not prepared by their counsel, but by plaintiff, who claimed to be a licensed attorney. Also, defendants dispute plaintiff's assertion that the parties agreed that the new debt balance totaled \$1,700,000, and that they agreed to the rate of interest for late fees.

Second, defendants claim that the Confession requires outside proof and does not qualify as a CPLR 3213 instrument for the payment of money only. The outside proof would allegedly include plaintiff's affidavit, and the four separate agreements with their own confessions. Defendants contend that the loan agreements upon which the Confession is based are invalid as

unconscionable and usurious.

Third, defendants aver that the Confession is contrary to documentary evidence, which indicates that plaintiff did not loan \$1,700,000 to them, but either \$1,364,257 or a lesser amount. In addition, defendants argue that the first loan agreement, dated July 3, 2013, was superseded by the second, dated August 21, 2013, and has no validity as an agreement. Defendants also argue that the remaining agreements are invalid on their faces and contain unenforceable penalties.

In reply, plaintiff argues that most of defendants' arguments are false and contradicted by the evidence. He holds that the Confession provides a sworn admission from Moskowitz that defendants owed him \$1,700,000. According to plaintiff, Moskowitz's subsequent testimony cannot be used to contradict prior sworn testimony in opposing a summary judgment motion.

Plaintiff contends that the Confession is enforceable on its face. Even though he referred to the agreements underlying the Confession in his affidavit, plaintiff insists that in no way did this undermine the validity of the Confession. Plaintiff argues that the defense of usury is without merit since defendants continued to make payment after the execution of the Confession, ratifying the terms of the instrument. In addition, plaintiff avers that the agreements are not usurious and that defendants proposed the operative terms of the agreements, regardless of whether they were represented by counsel. Plaintiff states that he is not attempting to enforce any penalty clauses in this action, so the alleged unenforceability issue is not relevant.

Under CPLR 3213, where the 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.’ 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 [internal citation omitted].”

Weissman v Sinorm Deli, 88 NY2d 437, 444 (1996).

The Confession is clearly an instrument for the payment of money only, the repayment of debts, which is not disputed by defendants. Defendants argue that it is the amount of the debt that is subject to dispute. Nevertheless, Moskowitz did execute this instrument on behalf of himself and JMJ, acknowledging that plaintiff was due \$1.7 million from defendants.

Defendants did not raise defenses of fraud or duress in order to invalidate the Confession.

The Confession is found to stand on its own without the need for outside proof. The reference to the details of the amount due, the itemization of the debt, including interest, is essentially evidence of the lack of payment.

The defense of usury raised by defendants is unavailing. With respect to JMJ, a corporation may not interpose usury as a defense, except for criminal usury. *See AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 (1st Dept 2009). With respect to both defendants, a loan is not usurious in requiring a high interest rate, after the original maturity date. *See Hicki v Choice Capital Corp.*, 264 AD2d 710, 711 (2d Dept 1999). The debts are overdue here, and the 16% per annum interest provided in the Confession is not usurious.

The court notes that defendants have paid \$10,900 towards the debt, reducing the amount due to \$1,689,100.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment in lieu of complaint is granted and the Clerk is directed to enter judgment in favor plaintiff in the sum of \$1,689,100.00, with

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interest on the sum calculated at the rate of 16% per annum from March 12, 2014, representing all payments received from defendants from March 12, 2014 to date, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: 3/7/16

ENTER:

Donna M. Mills

J.S.C.

DONNA M. MILLS