Stephens v Abrahami
2016 NY Slip Op 30723(U)
February 29, 2016
Supreme Court, New York County
Docket Number: 158918/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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ALICE STEPHENS,

Plaintiff, Index No. 158918/12

-against-

KENNETH ABRAHAMI,

Defendant.

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JOAN A. MADDEN, J.:

Plaintiff Alice Stephens ("Stephens") moves for partial summary judgment on her claim against defendant Kenneth Abrahami ("Abrahami"), in the amount due and owing under five promissory notes, and for reasonable attorneys' fees. Abrahami opposes the motion.

Background

This action arises out of four separate loans made by Stephens to Abrahami in 2005, totaling $319,000. The money was used by Abrahami to finance his investment in a real estate construction company called Keneli LLC ("Keneli"). At the time of the loan, Stephens and Abrahami were involved in a romantic relationship, that began in 2000, and ended in 2011.

The loans are memorialized by five promissory notes ("the Notes"), which were prepared by Abrahami. The first loan, made on October 12, 2004, is in the amount of $45,000, as evidenced by two notes for the same loan both which specify an annual interest rate of 15%. One of the two notes, which is signed by Abrahami as the debtor and guarantor, does not specify a payment date. The other note is signed by Abrahami as a representative of

"Kenelie (sic) Properties" and as a guarantor of Keneli's obligations, and provides that the principal amount is payable in full on October 12, 2005, and includes a 6% late charge in the event any of the loan is not paid in full by that date.

The second loan, for $175,000, was made on January 6, 2005, and specified an interest rate of 9%, and is payable on demand.[1] The third loan is in the amount of $25,000 and was made on June 12, 2005, and is memorialized in a note with an interest rate of 9%, and has no payment date. The note identified "Keneli Prop," as "Borrower," but there was no signature on the note by any representative of that company. Abrahami signed the note as a guarantor. The last loan was made on February 2, 2006, in the amount of $74,000, and is evidenced by a note which specified interest at 12.5%, and has no payment date; Abrahami signed his name on the note as borrower.

With the exception of one of the notes memorializing the first loan, which provides for a 6% late charge, the Notes each provide that in the event the note is in default and placed in collection, that the borrower will pay reasonable attorneys' fees and the costs of collection.

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[1]The note includes an "Attachment" which provides that it was payable upon demand, acknowledges that Abrahami had borrowed the moneys that were being loaned, and sets forth Abrahami's agreement that the interest rate could "float" to make sure that it would always be at least 3% above whatever rate Stephens was paying on money she had borrowed.

Abrahami paid interest in accordance with the terms of the Notes until July 2009. By letter dated July 20, 2009, (hereinafter "the July 2009 letter"), Abrahami wrote to Stephens requesting that the interest rates under the Notes "be computed on a semi-annual basis [and which would]... always [come] to approx. twice the 5 year U.S. Treasury Securities," and stating that he would issue new promissory notes to Stephens. Attached to the July 2009 letter is an "amortization schedule," indicating a debt of $319,000 and providing for the full payment of the debt by 60 monthly payments of interest and principal in the amount of $6,019.92, during a five year period.

Abrahami did not issue new promissory notes. In addition, the record contains two written responses from Stephens stating, *inter alia*, that any agreement would require that the interest be two points above prime, and requesting that be included in the agreement. There is no evidence that Abrahami responded to Stephens' request.

However, from July 2009 until April 2012, Stephens accepted monthly payments from Abrahami, in approximate amount indicated on the amortization schedule attached to the letter. Specifically, in July and August 2009, Stephens accepted payments of $6,053.53, and beginning in September 2009, Stephens accepted a monthly payment of $6,113.06 until April 2012, after which Abrahami stopped paying Stephens.

Following Abrahami's default, Stephens demanded payment including in an email to Abrahami dated July 8, 2012. After Abrahami failed to comply with her payment demands, Stephens commenced this action on December 17, 2012, which alleges Abrahami's default under the Notes, and seeks to recover a total of $205,976.13, in principal and interest as of December 31, 2012, as well as a penalty, reasonable attorneys' fees and accounting fees. Attached as exhibit B to the complaint is an amortization schedule prepared by Gilman & Ciocia ("G&C"), a tax and financial planning firm retained by Stephens in connection with this action, which shows that the total principal and interest due and owing under the notes as of December 31, 2012 is $204,178.35, a 6% penalty on the unpaid balance of the $45,000 loan in the amount of $1,797.78, for a total of $205,976.13, with monthly interest on the four loans totaling $1,729.14. Abrahami does not challenge these calculations based on the terms of the Notes.

Abrahami interposed an answer asserting defenses of (1) modification, (2) cancellation and renunciation, (3) promissory estoppel, (4) statute of limitations, (5) usury, and (6) offset. He also asserted counterclaims (1) seeking the return of conditional gifts allegedly made in contemplation of marriage, including an engagement ring purchased for Stephens by Abrahami in 2001, and contributions of moneys for improvements and

furnishings to Stephens' homes in the Berkshires and New York City; (2) for unjust enrichment based on Stephens' retention of the engagement ring and moneys used for improvements for Stephens' two homes; (3) for breach of contract in connection with Stephens' withholding the engagement ring after the parties did not marry; and (4) for breach of implied trust based on Stephens' failure to return the engagement ring after the parties' relationship ended. Stephens filed a reply to the counterclaims.

After the majority of the discovery in this action was complete, Stephens made this motion for summary judgment on her complaint in the amount of $256,121.19, which consists of $190,345.23 in principal allegedly due and owing in May 2012, when Abrahami ceased making payments, interest allegedly due and owing from May 2012 to May 2015, and a 6% penalty under the second of two notes memorializing the $45,000 loan. Plaintiff also seeks an award of reasonable attorneys' fees.

In support of her motion, Stephens submits her own affidavit, copies of the Notes, an excerpt from Abrahami's deposition in which he testifies that he obtained the money from Stephens as evidenced in the Notes, a July 8, 2012 email demanding payment, and an amortization schedule prepared by G&C as to the amounts due and owing under the loans.

In her affidavit, Stephens states that she made the four

loans to Abrahami as evidenced by the Notes; that Abrahami made the payments of interest due under the Notes until July 2009; that while she accepted payments made after July 2009, she did not agree to the terms of the July 2009 letter and attached amortization schedule; and that after April 2012, Abrahami stopped paying her and did not respond to her demands for payment. With respect to the July 2009 letter, a copy of which is attached to her affidavit, Stephens states that while she expressed a willingness to consider adjustments to the terms of the loans, that since she was paying interest on the moneys she had loaned him at a floating rate in excess of prime, that she could not consider any changes that did not assure her of receiving more interest than she was paying. As evidence of this position, Stephens submits her handwritten letter dated July 29, 2009, in which she rejected any proposal that did not include an interested that "floated" above prime. Stephens also submits a print out of an email purportedly from her to Abrahami dated July 31, 2009,[2] which Abrahami produced in discovery that states, *inter alia*, that she would like the interest rate tied to prime.

In opposition, Abrahami submits his affidavit in which

[2]Stephens states that she does not recall writing the email and that the language does not appear to her to be the type of language she would use. However, she asserts that "[the email] is consistent with many of the things I said to Mr. Abrahami after I received his proposal to change the terms of the Notes" (Stephens Aff. ¶ 27).

he does not deny that he borrowed $319,000 from Stephens; however, he argues that as Stephens did not report the interest payments as income on her tax returns, and that since he made payments to her of $337,041, she has been fully paid.[3]

Abrahami also argues that based on the doctrine of promissory estoppel, Stephens cannot recover under the Notes since she agreed to change their terms of the Notes and he relied to his detriment on this promise. In support of this argument, Abrahami relies on the amortization schedule attached to the July 2009 letter and his own statement that the Notes were "novated, modified, renounced and cancelled [on] June 23, 2009, and replaced with an agreement for payment of the $319,000 including both principal and interest" (Abrahami, Aff. ¶ 33). Abrahami further argues that he relied on Stephens' promise to his detriment as he waived the statute of limitations by making payments on stale notes and on a note with a 15% interest rate, which he argues is void under the usury laws. In view of such reliance, Abrahami argues that Stephens is estopped from denying her promise and relying on the Notes to recover from him.

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[3]Abrahami also argues that there are facially defects to certain of the Notes, including that the Note evidence the loan for $175,000, states that it is for "one hundreth (sic) of seventy-five dollars." This argument is without merit as Abrahami prepared the Notes and this typographical error is insufficient to raise an issue of fact particularly as the figures are unambiguous and are controlling. See NY UCC §3-118.

Alternatively, Abrahami argues that the statute of limitations on the three demand notes dated January 6, 2005, June 12, 2005 and February 6, 2006, expired six years after the date of the notes (i.e. on January 6, 2011, June 12, 2011, and February 6, 2012), and therefore this action, which was commenced on December 17, 2012, or more than 10 months after the statute of limitations expired on the last demand note is untimely as to these notes.

Abrahami also argues that the 15% interest rate in the October 12, 2004 note which is due and owing on October 12, 2005, and includes a 6% late charge is usurious and violates General Obligations Law §§ 5-501 and 5-511.

Abrahami next argues that his defense of offset precludes a grant of summary judgment. In his affidavit, Abrahami states that Stephens owes him at least $80,000 for ring he gave to her which, he asserts, Stephens acknowledged on numerous occasions to be an engagement ring. In addition, according to Abrahami, in response to Stephens' demands and requests, and because they planned to marry, he paid for items of jewelry (other than the ring), invested in, and made repairs to, Stephens' two homes, and purchased furnishing for these homes. In support of his statements, Abrahami submits an appraisal for the ring dated February 11, 2002, which values the ring at $91,000 and receipts for various other items purchased. Abrahami states that the

amounts he spent on the ring and other items, and money he paid for Stephens' daughter's law school tuition, total approximately $140,000.

In reply, Stephens notes that Abrahami does not deny that the loans were made for his business ventures, and therefore argues that the loans, as memorialized by the Notes, are separate and distinct transactions that cannot be offset by the amounts sought in the counterclaims arising out of the parties' personal relationship. Stephens also argues that the her claim is timely since Abrahami's payments on the Notes started the statute of limitations running anew, and his written acknowledgment of his debt in the July 2009 letter revived any time barred claim in accordance with General Obligations Law ("GOL") § 17-101.

As for Abrahami's argument that the doctrine of promissory estoppel precludes Stephens from seeking recovery under the Notes, she argues that doctrine does not apply as she never agreed to the new proposed new terms of payment, nor did Abrahami detrimentally rely on any promise by her with respect to the statute of limitations as he acknowledged the debt in the July 2009 letter. With respect to the usury defense, Stephens notes that 15% is a legal interest rate, and that the note does not indicate that interest accrues on the late charge.

Discussion

On a motion for summary judgment, the proponent "must make a

prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of prof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

In this case, Stephens has made a prima facie showing entitling her to summary judgment based on proof of Abrahami's obligations to repay the four loans under the terms of the Notes, and his default on these obligations. See Fleet Bank v. M& Z Headwear, Inc., 308 AD2d 507 (2d Dept 2003)(plaintiff established a prima facie entitlement to judgment as a matter of law by demonstrating that the defendant corporation defaulted on the loan agreement and the individual defendants failed to meet their obligations as guarantors of the loan); Mariani v. Dyer, 193 AD2d 456 (1st Dept 1993), lv. denied 82 NY2d 658 (1993)(citations omitted)(holding that "[a]n affidavit showing due execution and default in payment on a promissory note... establishes a prima facie case, and a plaintiff is entitled to summary judgment unless the defendant submits evidentiary proof sufficient to raise a triable issue of fact with respect to asserted defenses"); E.D.S. Security Systems, Inc. v. Allyn, 262 AD2d 351

(2nd Dept 1999)("plaintiffs sustained their initial burden of demonstrating their entitlement to judgment as a matter of law by submitting proof of the existence of an underlying note, a guarantee, and the failure to make payment in accordance with their terms").

Moreover, Abrahami has failed to meet his burden of offering evidence to rebut plaintiff's prima facie showing of entitlement to summary judgment, and his defenses are without merit. First, Abrahami's argument that he has paid back the loans in full as the amount he has paid exceeds the principal amount of the loan ignores that the Notes require interest payments. In fact, Abrahami's payments before July 2009 were equal to the interest due and owing under the Notes, which he acknowledged in the amortization table annexed tho the July 2009 letter. Moreover, contrary to Abrahami's position, Stephens' apparent failure to report the interest payments on her tax returns does not alter his obligations under the terms of the Notes.

Next, Stephens' claim is not barred by the six-year statute of limitations provided under CPLR 213(2) for commencement of an action on a note. With the exception of one of the two notes for the $45,000 loan, the Notes are demand notes[4] and are thus

[4]Where Notes do not specify a payment date, they are payable upon demand. See NY UCC § 3-108(providing that [i]nstruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated"); see also, Farhadi, Inc. v. Anavian, 58

payable immediately upon the date of their execution and delivery, and no demand is necessary to start the running of the statute of limitations. Lynford v. Williams, 34 AD3d 761, 762 (2d Dept 2006); NYUCC § 3-122(3). That being said, however, when a defendant makes partial payments on a demand note, each repayment "start[s] the statute of limitations running anew" Grant v. Marshall, 307 AD2d 274, 274 (2d Dept 2003). Here, as Abrahami made payments in accordance with the terms of the Notes at least until July 2009, the action is timely. Moreover, as argued by Stephens, Abrahami's July 2009 letter, which unambiguously acknowledges the $319,000 debt and his obligation to pay it, revived the limitations period. See Banco do Brasil S.A. v. State of Antiuga and Barbuda, 268 AD2d 75, 77 (1st Dept 2000); GOL § 17-101.[5]

As for Abrahami's argument that promissory estoppel applies to prevent Stephens from enforcing the repayment terms of the Notes, such argument is unavailing. To demonstrate a claim or defense based on the doctrine of promissory estoppel it must be shown that there is a "clear and unambiguous promise that

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AD2d 546, 546 (1st Dept 1977).

[5]GOL § 17-101 provides that "[a]n acknowledgment or promise contained in writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the [CPLR]."

..give[s] rise to detrimental reliance" Emigrant Bank v. UBS Real Estate Securities, Inc., 49 AD3d 382, 384 (1st Dept 2008). Here, Abrahami does not point to any evidence of a promise by Stephens to alter the terms of the Notes, and her acceptance of moneys paid in the approximate amount proposed by Abrahami does not constitute a clear and unambiguous promise of the kind that would induce detrimental reliance Thome v. Alexader & Louisa Calder Foundation, 70 AD3d 88, 104 (1st Dept 2009), lv denied, 15 NY3d 703 (2010).[6]

The court also finds that the defense of offset, which is based on allegations in the counterclaims as to Abrahami's purchase of the engagement ring and his various payments and purchases at the alleged request of Stephens during their relationship, does not warrant a denial of summary judgment in Stephens' favor. In this connection, it has been when a counterclaim arises "apart from [a] defendant's loan obligation and are not inextricably intertwined with, or inseparable from

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[6]The two cases cited by Abrahami in support of his argument that promissory estoppel applies here are not to the contrary. Notably, both cases recite the standard for promissory estoppel, including the requirements of a clear and unambiguous promise and detrimental reliance. In Matlin Patterson ATA Holdings LLC v. Federal Express Corp., 87 AD3d 836 (1st Dept 2011), lv denied 21 NY3d 853 (2013) the doctrine was held to be inapplicable for reasons not relevant here, whereas in Clifford R. Gray, Inc. v LeChase Construction Services, LLC, 31 AD3d 983 (3d Dept 2006), issues of fact were found as to the promissory estoppel claim based on evidence of a clear promise and detrimental reliance.

it," it is proper to sever it and allow judgment to be entered on amounts due on the loan. See Banco do Estado de Sao Paulo S.A. v. Mendes Junior International Company, 249 AD2d 137, 138 (1st Dept 1998). Here, as Abrahami's obligations under the Notes are independent from those at issue in the counterclaims which relate to the parties' personal relationship, his assertions of offset do not provide a basis for denying Stephens' motion or staying the execution of judgment pending the resolution of the counterclaims. Id.

Next, the defense of usury is without merit as the note at issue has a legal interest rate of 15%, which is one percentage point below the 16% rate allowable by law. See GOL § 5-501; Banking Law § 14-a; Borowski v. Falleder, 296 AD2d 301, 301 (1st Dept 2002). Moreover, with respect to Abrahami's apparent argument that the late charge makes the loan usurious, it has been held that usury does apply based on default obligations. See Kraus v. Mendelsohn, 97 AD3d 641, 641 (2d Dept 2012)(holding that defense of usury did not apply where promissory note at issue imposed a rate of interest in excess of the statutory maximum only after note's default).

Accordingly, Stephens is entitled to summary judgment on the in the amount of $269,885.67, which consists of principal due and owing under the Notes ($190,345.23) and interest due and owing under the Notes from the May 2012 default until the date of this

decision ($79,540,44).[7] However, although Stephens is entitled to attorneys' fees under the terms of the Notes, a hearing is required to determine the reasonable amount of such fees.[8] First National Bank of Islip v. Brower, 42 NY2d 471 (1977).

Conclusion

Accordingly, it is

ORDERED that Stephens is entitled to summary judgment on the complaint against Abrahami in the amount of $269,885.67, and the Clerk shall enter judgment accordingly, and the complaint is severed; and it is further

ORDERED that portion of Stephens' action seeking recover of attorneys' fees due and owing in connection with collection under the Notes and the issue of the amount of reasonable attorneys fees is referred to the Special Referee Clerk in the General Clerk's Office (Room 119M, 646-386-3028 or spref@court.state.ny.us) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the

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[7]The interest is based on a calculation of $1,729.14 interest per note per month for 38 months (May 2012 to February 2016), and as specified in the calculations provided by Stephens' accountants G&A, which calculations have not been challenged by Abrahami.

[8]The court declines to assess a 6% penalty based on one of the notes for the $45,000 loan, since the other note for the same loan does not allow for such a penalty but permits reasonable attorneys' fees, for which Abrahami is being held liable.

References link under Courthouse procedures), who shall assign this matter to a Special Referee to hear and report as specified above; and it is further;

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that when the parties appear at the hearing before the Special Referee, Stephens shall provide copies of her specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services, and counsel shall arrange for the requisition of the Court files so that they are available at the hearing for the Referee's inspection and evaluation of written work performed; and it is further

ORDERED that the Referee's report and recommendations shall include specific findings identifying counsel's hourly rate and a breakdown of the nature and category of the legal services performed, and the hours attributed to each category; and it is further

ORDERED that counsel for Stephens shall, within 15 days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise

counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the action shall continue as to the counterclaims.

DATED: February 29, 2016

HON. JOAN A. MADDEN
J.S.C.