Inta-Boro Acres, Inc. v Duzel
2017 NY Slip Op 31247(U)
June 1, 2017
Supreme Court, Suffolk County
Docket Number: 19927/2014
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Inta-Boro Acres, Inc.,

Plaintiff,

-against-

Mustafa Haluk Duzel a/k/a M. Haluk Duzel a/k/a Mustafa H. Duzel a/k/a Haluk Duzel,

Defendant.

Motion Sequence No.: 001; MD
Motion Date: 9/30/16
Submitted: 10/26/16

Index No.: 19927/2014

Attorney for Plaintiff:

John M. Stravato, Esq.
P.O. Box 298
Bethpage, NY 11714

Attorney for Defendant:

Tayfun C. Yalcin, Esq.
1807 73rd Street
Brooklyn, NY 11204

Clerk of the Court

Upon the following papers numbered 1 to 24 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 11; Answering Affidavits and supporting papers, 12 - 18; Replying Affidavits and supporting papers, 19 - 24; it is

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor is denied.

In this action for breach of contract and unjust enrichment, the plaintiff seeks damages allegedly recoverable when the plaintiff was obligated to pay two debts owed by the defendant to nonparty Bay Ridge Federal Credit Union (Bay Ridge). The plaintiff commenced this action by the filing of a summons with notice on October 9, 2014. After service of the complaint, the defendant joined issue by the service of an answer dated December 27, 2014 containing five affirmative defenses. The plaintiff filed a note of issue and certificate of readiness on June 14, 2016, despite its acknowledgment that the parties did not serve any discovery demands or depose one another.

It appears that the plaintiff is a "car service cooperative company" which provides dispatch services to its shareholders via "radio calls."[1] The plaintiff's shareholders operate taxis and derive their income from the business generate by the dispatch of calls to them. It is undisputed that the defendant obtained a loan in the amount of $25,500 from Bay Ridge in May 2010 secured by his shares of stock in "Intra-Boro radio number 105." On May 26, 2010, the defendant executed a voucher deduction agreement (VDA) with the plaintiff authorizing the plaintiff to deduct funds from the payments due to him under the dispatch system to make payments to Bay Ridge. The defendant obtained a loan in the amount of $25,000 from Bay Ridge in April 2013 secured by his share of stock in "Intra-Boro radio number 140." On April 26, 2013, the defendant executed a voucher deduction agreement (VDA) with the plaintiff to the same effect as the prior agreement. Both VDA's are supported by respectively dated letters of understanding (LOU) from the plaintiff to Bay Ridge setting forth, among other things, the plaintiff's obligations regarding the defendant's loan agreement, and the rights of the plaintiff and Bay Ridge regarding the shares of stock pledged as security for the respective loan. It appears that the defendant defaulted on the loans he obtained from Bay Ridge.

In its complaint, the plaintiff sets forth two causes of action. In its first cause of action, the plaintiff alleges, among other things, that it agreed in the VDA's "to make such payments to [Bay Ridge] even if sufficient vouchers had not been submitted," and that it has been damaged in the amount of $50,500. In its second cause of action, the plaintiff alleges that it "made it possible for the defendant to borrow the necessary funds from [Bay Ridge] to purchase the 'radios' ... from which the defendant derived the benefits of ownership," and that "[a]s a direct result, ... the defendant was enriched through ownership of the radios and use of the proprietary system ... [and] derived a regular stream of income from the radios."

The plaintiff now moves for summary judgment in its favor. In support of its motion, the plaintiff submits the pleadings, the affidavit of its president, the affirmation of its attorney, and the subject VDA's with their accompanying LOU. In his affidavit, Aamir Haq (Haq) swears that he is the plaintiff's president, that the defendant agreed to have weekly deductions withheld "from moneys owed to him by Intra-boro in order for Intra-boro to make the required payments to [Bay Ridge]," and that the defendant defaulted on the subject loans. He states that the defendant was "no longer submitting sufficient vouchers to cover the payments to [Bay Ridge], that "Intra-boro ceased to make payments to [Bay Ridge]," and that Bay Ridge "sought the remaining payments from Intra-boro." He indicates that the plaintiff paid $16,863.20 to satisfy the defendant's obligation on the May 2010 loan, and $21,636.94 to satisfy the defendant's obligation on the April 2013 loan, and he requests judgment in the amount of $38,500.14.

In his affirmation, counsel for the plaintiff contends that the plaintiff's submission meets its burden of establishing entitlement to summary judgment, that the defendant has failed to deny any of the allegations in the complaint in his answer, and that none of the defendant's affirmative

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[1] In the absence of discovery, the parties have not always been successful in conveying the details of their interactions, business activities, and business operations, or the customs and practices of their industry.

defenses have merit. Counsel's contention that the defendant has admitted the allegations in the complaint because the answer indicates that the defendant denies having knowledge and information sufficient to form a belief as to certain allegations is without merit. More importantly, the affirmation of counsel for the plaintiff does not address the merits of the majority of the defendant's affirmative defenses, merely stating that the defendant "has offered no proof" regarding said defenses. CPLR 3212 (b) provides in pertinent part: "A motion for summary judgment shall be supported by affidavit ... and by other available proof ... and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." The plaintiff has failed to demonstrate the absence of triable issues of fact on every issue raised by the pleadings (*see* ***Stone v Continental Ins. Co.***, 234 AD2d 282, 650 NYS2d 772 [2d Dept 1996]; ***Aimatop Restaurant, Inc. v Liberty Mut. Fire Ins. Co.***, 74 AD2d 516, 425 NYS2d 8 [1st Dept 1980]).

In addition, the plaintiff has failed to established its prima facie entitlement to summary judgment in its favor on the causes of action in its complaint. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

The common law elements of a cause of action for breach of contract are (1) the existence of a contract between the plaintiff and the defendant, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damage (***Second Source Funding, LLC v Yellowstone Capital, LLC***, 144 AD3d 445, 40 NYS3d 410 [1st Dept 2016]; ***Hampshire Props. v BTA Building. & Developing, Inc.***, 122 AD3d 573, 996 NYS2d 129 [2d Dept 2014]). The subject VDA's contain identical language, and provide in pertinent part that:

> Whereas [Bay Ridge] has indicated its willingness to grant the loan and/or accept the collateral upon certain conditions (which include but are not limited to) that the borrower shall authorize [the plaintiff] and [the plaintiff] shall agree to a) deduct from accounts due [the defendant] and remit to [Bay Ridge] for payments on the loan amounts sufficient to maintain the loan in good standing and b) withhold work assignments and payments to [the defendant] upon Bay Ridge's] request in the event the Loan becomes in default.

The subject VDA's further provide, among other things, that the defendant authorizes the plaintiff to deduct monies "next due" to the defendant if his weekly vouchers are insufficient to pay an installment due to Bay Ridge, and to remit the authorized deductions to Bay Ridge "on a timely

basis, until it receives written notice from [Bay Ridge] that the Loan has been paid in full." In paragraph 2, entitled "Agency," the VDA's provide in pertinent part:

> "[The defendant] acknowledges the [the plaintiff] is not hereby assuming any payment obligations of [the defendant] to [Bay Ridge]; and that [the plaintiff] shall not be obligated to take any action on behalf of [the defendant] with respect to [the defendant's] payment obligations to [Bay Ridge] other than as specified in [the section authorizing deductions and the remitting of the subject payments to Bay Ridge]."

The subject LOU's provide, among other things, that the plaintiff consents to the use of the defendant's shares of stock as collateral for the subject loans, that its liens, if any, shall be subordinate to Bay Ridge's liens, and that it will not charge certain fees to Bay Ridge or the defendant in the event of the foreclosure and sale of the subject collateral. In paragraph 4, entitled "Withholding Calls and Payments," the subject LOU's provides in pertinent part:

> Upon written notice from [Bay Ridge] that the loan is in default [the plaintiff] will not permit use of [the plaintiff's] network dispatch and billing system by anyone using the Collateral (take off the air), and will not permit payment of accounts due [the defendant] pending execution of [Bay Ridge's] rights under the Security Interest in the Stock and security interest in the accounts."

The plaintiff has failed to establish its prima facie entitlement to summary judgment on its first cause of action herein. In addition to its failure to eliminate all issues of fact regarding the defendant's affirmative defenses, the plaintiff has failed to submit admissible evidence that it had any obligation to pay the outstanding debt allegedly owed to Bay Ridge on behalf of the defendant, the amount that it paid to Bay Ridge, and the actions taken by Bay Ridge, if any, to recover the outstanding loan amounts from the defendant or the plaintiff. A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, as such party must affirmatively demonstrate the merit of his or her claim or defense as a matter of law (***Velasquez v Gomez***, 44 Ad3d 649, 843 NYS2d 368 [2d Dept 2007]).

Further, to succeed on a claim for unjust enrichment, a plaintiff must establish that the defendant was enriched at the plaintiff's expense, and that "it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (***Paramount Film Distrib. Corp. v State of New York***, 30 NY2d 415, 421, 334 NYS2d 388 [1972], *cert. denied* 414 US 829, 94 S Ct 57 [1973]; *see* ***Whitman Realty Group v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]; ***Cruz v McAneney***, 31 AD3d 54, 816 NYS2d 486 [2d Dept 2006]).

Here, the plaintiff has failed, among other things, to submit any evidence regarding the foreclosure and sale of the subject collateral, whether the collateral was purchased in foreclosure or otherwise by the plaintiff or a third-party, and what rights it obtained in the collateral by the alleged

payment of the outstanding loan balances to Bay Ridge. In addition, the plaintiff has failed to submit any evidence that it assisted the defendant in the purchase of the shares of stock which were used as collateral herein, or how it would be inequitable to allow the defendant to retain the income he earned from the dispatch system prior to his alleged default in repaying the subject loans.

Moreover, it has been held that recovery for unjust enrichment is barred if there is a valid and enforceable contract between the parties (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]; ***Whitman Realty Group v Galano***, *supra*; ***Stark v City of New York***, 31 AD3d 530, 818 NYS2d 281 [2d Dept 2006]). As a triable issues exist regarding the enforceability of the subject documents, summary judgment on the ground of unjust enrichment is denied (*see* ***Sterlacci v Gurfein***, 18 AD3d 229, 794 NYS2d 362 [1st Dept 2005]; ***Carriafielio-Diehl & Assocs. v D & M Elec. Contr.***, 12 AD3d 478, 784 NYS2d 617 [2d Dept 2004]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *reargd denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Martinez v 123-16 Liberty Avenue. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, the plaintiff's motion for summary judgment on the second cause of action for unjust enrichment is denied, and the motion is denied in its entirety.[2]

Dated: 6/1/2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

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[2] The plaintiff's submission, the defendant's opposition papers, and the plaintiff's reply papers contain un-tabbed exhibits. In the future, it is requested that counsel properly tab exhibits or, at a minimum, separate exhibits with differently colored papers, as the lack of tabbing or the use of white papers to separate exhibits renders it difficult for the Court to match arguments to documents and to sort through the exhibits (*see* ***Zambrano v Mendez***, 2013 NY Slip Op 32450[U][Sup Ct, Suffolk County 2013]; ***DelVecchio v Sciacca***, 2012 NY Slip Op 33088[U][Sup Ct, Suffolk County 2012]; ***Youngewirth v Town of Ramapo Town Bd.***, 29 Misc 3d 1221[A], 918 NYS2d 401 [Sup Ct, Rockland County 2010]).