Melrose Credit Union v Wilk
2017 NY Slip Op 32200(U)
September 15, 2017
Supreme Court, Queens County
Docket Number: 715395/2016
Judge: Leslie J. Purificacion

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

MELROSE CREDIT UNION, x

Plaintiff,

-against-

LIDKA WILK and WIILK CAB CORP.,

Defendants.

x

Index Number 715395 2016

Motion Dates June 5, 2017

Motion Seq. Nos. 1

The following papers numbered E15 to E48 read on this motion by plaintiff seeking summary judgment, pursuant to CPLR 3212.

	Papers Numbered
Notices of Motion - Affirmation - Affidavit - Exhibits - Proposed Order and Judgment	E15-E28
Answering Affidavit - Exhibits	E32-E37
Reply Affirmation - Exhibits	E38-E43

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment, pursuant to CPLR 3212, is determined as follows:

Plaintiff moves for summary judgment against defendants, based upon defendants' default in the payment of a promissory note and consumer credit disclosure, dated November 26, 2012, in the principal amount of $693,600.00.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]).

In an action based on a promissory note, "a plaintiff makes a prima facie showing of entitlement to judgment as a matter of law ... by showing that the defendant executed the subject instrument, the instrument contains an unconditional promise to repay the plaintiff upon demand or at a definite time, and the defendant failed to pay in accordance with the instrument's terms" (*Von Fricken v Schaefer*, 118 AD3d 869, 870 [2014]; *see Weissman v Sinorm Deli*, 88 NY2d 437 [1996]; *Oak Rock Fin., LLC v Rodriguez*, 148 AD3d 1036 [2017]; *Hansraj v Sukhu.* 145 AD3d 755 [2016]).

Plaintiff has established its prima facie entitlement to summary judgment on the promissory note herein. In support of its motion, plaintiff submitted its attorney's affirmation, a copy of the promissory note signed by defendants as "makers," and an affidavit of Anthony G. Hood, an Authorized Signatory of plaintiff, sworn to on March 6, 2017, which states that his review of plaintiff's records revealed that defendants defaulted on the outstanding note, held by plaintiff, "on November 26, 2015, and each month thereafter," and that plaintiff elected to accelerate the notes and declare the entire balance due, in the total amount of $625,133.32 (comprising $606,441.18 in principal and $18,692.14 in accrued interest as of March 6, 2017). Thus, the burden shifts to defendants to submit admissible

evidence to present the existence of a triable issue of fact with regard to a bona fide defense to the motion (*see Ahmad v Luce*, 147 AD3d 888 [2017]; *Sun Convenient, Inc. v Sarasamir Corp.*, 123 AD3d 906 [2014]).

Defendant's opposition failed to raise a triable issue of fact in this regard *(see Weindorf v Wightman*, 133 AD3d 822 [2015]; *Castle Restoration & Constr., Inc. v Castle Restoration, LLC*, 122 AD3d 789 [2014]). Defendants did not deny the existence of the note, the execution thereof, the default in payment, or proper service of the pleadings upon them. Defendants oppose this motion solely on the basis that the promissory note should be discharged due to a "supervening impracticability " of performance (Restatement [Second] of Contracts, § 261 [1981]). Impossibility of performing a contract may be raised as an affirmative defense in a breach of contract action, but was not so raised in the action at bar. Even had it been properly raised, financial difficulty or economic hardship of the promisor, even to the extent of insolvency or bankruptcy, would not establish impossibility sufficient to excuse performance of the contractual obligation (*see 407 E. 61st Garage, Inc. v Savoy Fifth Ave. Corp.*, 23 NY2d 275 [1968]). "Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*Kei Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902 [1987]; *see RW Holdings, LLC v Mayer*, 131 AD3d 1128 [2015]). Defendants have failed to demonstrate either that Lidka Wilk was an unsophisticated commercial party, or that she could not have anticipated the possibility that future events might result in a financial disadvantage to one of the parties hereto at the time the promissory note was executed (see *Kei Kim Corp. v Central Markets, Inc.*, 70 NY2d 900, 902; *RW Holdings, LLC v Mayer*, 131 AD3d 1128). Thus, under the circumstances of this matter, the impossibility of performance doctrine does not apply to relieve defendants of their obligations under the note.

Defendants also contends that the motion is premature, as plaintiff has not responded to defendants' request for discovery herein. The party who claims the summary judgment motion is premature has the burden of demonstrating that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the ken and control of the movant (*see Marrone v Miloscio*, 145 AD3d 996 [2016]; *Buto v Town of Smithtown*, 121 AD3d 829 [2014]). Defendants have failed to show that any of the requested discovery was salient to their opposition, or that such items were in the exclusive knowledge and control of plaintiff (*see Fisher v City of New York*, 128 AD3d 763 [2015]; *Colon v Manhattan and Bronx Surface Trans. Operating Auth.*, 35 AD3d 515 [2006]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Gilbert Frank Corp. v Federal Ins. Co*, 70 NY2d 966 [1988]).

However, although the complaint includes a request for attorneys' fees, plaintiff's motion fails to seek an award of same. While recovery of attorney's fees is authorized by the promissory note, such recovery is limited to "reasonable attorney's fees," which determination is within the province of the court. Plaintiff has failed to submit an affirmation of services, which would enable the court to make such a determination in a proper case, and the retainer agreement between the plaintiff and its counsel is not binding on the defendants or the court. As such, no award for attorneys' fees is granted hereby.

Accordingly, plaintiff's motion for summary judgment is granted to the extent that plaintiff may enter judgment with the judgment clerk in the amount of $625,133.32, along with interest from March 6, 2017 at the note rate of 4.5%, plus costs and disbursements in an amount to be calculated by the clerk of the court.

Dated: SEP 15 2017

Hon. Leslie J. Purificacion, J.S.C.

FILED
SEP 25 2017
COUNTY CLERK
QUEENS COUNTY