

Morelli Ratner, P.C. v City Natl. Bank
2018 NY Slip Op 30296(U)
February 14, 2018
Supreme Court, New York County
Docket Number: 652604/2014
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MORELLI RATNER, P.C., BENEDICT P. MORELLI,
and ARLENE MORELLI,

Plaintiffs,

Index No. 652604/2014
Mot. Seq. No. 003

-against-

Decision and Order

CITY NATIONAL BANK,

Defendant.
-----X

Masley, J.:

In motion sequence number 003, the defendant City National Bank (the Bank) moves for summary judgment dismissing the complaint of Morelli Ratner, P.C. (Morelli Ratner), Benedict P. Morelli, and Arlene Morelli (collectively, the Morelli Parties). The Bank also seeks costs and expenses incurred, including reasonable attorneys' fees, and requests that the calculation of the costs, expenses, and attorneys' fees be referred to a special referee.

Background

Briefly, the Morelli Parties entered into a "credit agreement" (the Credit Agreement) with the Bank by which the Bank provided a \$10 million revolving term loan (the Loan); simultaneously, Morelli Ratner executed a restated promissory note, and Mr. and Mrs. Morelli executed a written guaranty (the Guaranty). The Credit Agreement was secured by a mortgage on the Morelli's residence in Quogue, New York. The Loan's maturity date was August 1, 2012. On January 18, 2013, the parties entered into a "Forbearance and First Amendment to the Credit Agreement" extending the maturity date of the Loan to April 1, 2013; on June 13, 2013, the parties entered into a "Forbearance and Second Amendment to Credit Agreement," extending the maturity date of the Loan to September 1, 2013. No third written amendment was executed,

though the parties engaged in negotiation discussions into 2014. For a detailed statement of the facts, please see this court's decision in *City National Bank v Morelli Ratner, P.C., et al.*, Index No. 158388/2014, motion sequence number 005 (Action No. 1).

In this action, filed on September 22, 2014, the Morelli Parties assert causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent inducement, promissory estoppel, violation of General Business Law (GBL) § 349, and a declaratory judgment. On August 17, 2016, this court (Oing, J.) dismissed the Morelli Parties' GBL § 349 claim. The Bank now moves for summary judgment dismissing the remaining claims.

Discussion

Summary judgment is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see generally CPLR 3212). Initially, "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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 562).

In Action No. 1, this court held that the parties never reached an oral agreement

in 2014 as to the forbearance and payment of the Loan, which matured in September 2013. Thus, in this action, the Morelli Parties' claim for breach of an oral agreement is dismissed. Likewise, the Morelli Parties' claim for breach of the implied covenant of good faith and fair dealing, which is predicated on allegations of an oral agreement, is also dismissed.

In support of their fraudulent inducement cause of action, the Morelli Parties allege that the Bank induced them into making the \$250,000 payment to the Bank in April 2014 by making false statements that: (1) the Bank did not intend to sue the Morelli Parties; (2) the parties had reached an agreement; (3) the Bank intended to formalize the agreement in writing once Mr. Morelli signed the "pre-negotiation agreement" (the PNA); and (4) the PNA was a mere formality. The record does not support this claim.

In support of this motion, with regard to the alleged false statement that the Bank was not going to file a lawsuit against the Morelli Parties, the Bank presents a demand letter, dated February 7, 2014, in which the Bank clearly stated that it would take actions, including legal action, if the Loan in default was not paid. In response, the Morelli Parties argue that the Bank made repeated assurances that it was not going to sue, which induced them to make the \$250,000 Loan payment in June 2014. Specifically, the Morelli Parties refer the court to Mr. Morelli's affidavit (Weigel Aff., Ex. 7, ¶¶ 17, 29). Mr. Morelli affirms that, in November 2013, the Morelli Parties' contact person at the Bank, Mr. Forgette, assured him that the Bank was not going to sue (*id.* ¶ 17). Mr. Morelli also affirms that, on May 27, 2014, the Morelli Parties' accountant, Mr. Zukowsky, told him by email that Mr. Zukowsky was told by Mr. Forgette that the Bank

was not going to sue (*id.* ¶ 29). Further, Mr. Morelli states that Mr. Forgette made the same assurances during Mr. Morelli's subsequent telephone conversations with Mr. Forgette (*id.*). This affidavit fails to raise an issue of fact.

The first time Mr. Morelli was allegedly assured the Bank was not going to sue was in November 2013, long before the Bank sent the default letter stating that the Bank will take action, including a lawsuit. Thus, that alleged assurance does not support their fraudulent inducement claim. Further, the assurances allegedly made in May 2014 were subsequent to Morelli Parties' payment to the Bank of \$250,000 in April 2014; thus, those alleged statements could not have fraudulently induced Mr. Morelli to make the payment.

In regard to the other alleged fraudulent statements, again, the evidence shows that the parties clearly understood that they were still in negotiations during the period of March 2014 to June 2014, and that there was no oral agreement; thus, the argument that the \$250,000 check was sent in reliance on the Bank's purported statements that an agreement had been reached and was being reduced to writing, and that the PNA was merely a formality, is not supported by the evidence. This claim is dismissed.

The Morelli Parties' cause of action for promissory estoppel is also dismissed. That claim is based on the Morelli Parties' allegations that the Bank promised to formalize the purported oral agreement in writing. As discussed above and in this court's decision in Action No. 1, there was no meeting of the minds, and no oral agreement; therefore, this claim cannot withstand summary judgment. For the same reason, the Morelli Parties' claim for a declaration that the oral agreement superseded and amended the Credit Agreement, Guaranty, and related prior agreements must also

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be dismissed.

In light of the forgoing, the complaint against the Bank is dismissed in its entirety.

The portion of the Bank's motion seeking costs, expenses, and attorneys' fees incurred in defending this action pursuant to Section 11.2 of the Credit Agreement is also granted. The Morelli Parties do not dispute that the Bank is entitled to costs, expenses, and attorneys' fees under Section 11.2 of the Credit Agreement.

Accordingly, it is

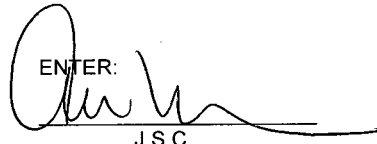
ORDERED that plaintiff City National Bank's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the issue of the amount of reasonable costs, expenses, and attorneys' fees that plaintiff may recover against the defendants Morelli Ratner, P.C., Benedict B. Morelli, and Arlene P. Morelli is referred to a special referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated: February 14, 2018

ENTER:



J.S.C.

HON. ANDREA MASLEY

¹ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/suptctmanh under the "References" section of the "Courthouse Procedures" link).