

Kleinfeld v Rand

2018 NY Slip Op 31363(U)

June 27, 2018

Supreme Court, New York County

Docket Number: 158629/2014

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK
 Part 57

-----x
 EVE KLEINFELD

Plaintiff(s)

Index no. 158629/2014

-against-

DECISION/ORDER

MARVIN RAND

Defendant(s)
 -----x

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of the motion of the defendant for summary judgment and the motion of the plaintiff for summary judgment

PAPERS

NUMBERED

Notice of Motion and Affidavits and Exhibits Annexed	1
Answering Affidavits with Exhibits Annexed	2
Replying Affidavits with Exhibits Annexed	3
Memorandum of Law	4, 5 & 6
Notice of Motion and Affidavits And Exhibits Annexed	7
Replying Affidavit	8
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Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

Marvin Rand (the **Defendant**)'s motion for summary judgment (i.e., motion sequence number 4) and Eve Kleinfeld (the **Plaintiff**)'s motion for summary judgment (i.e., motion sequence number 5) are both denied in their entirety.

Pursuant to (x) a certain Promissory Note (the **Note**), dated February 8, 2007, by 128 22nd Street Associates, LLC (**128 LLC**), Mag Builders, LLC (**Mag LLC**) and 259 Garside Associates, LLC (**259 LLC**; 128 LLC, Mag LLC, and 259 LLC, collectively, the **Borrower**), as borrower and in favor of the Plaintiff, as lender, the Borrower borrowed \$300,000 and (y) a Guaranty, dated of even date therewith, the Defendant guaranteed Borrower's obligation to repay the Note.

I. Defendant's motion for Summary Judgment

Summary Judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact.

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). Failure to make such a prima facie showing requires denial of the motion. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) citing *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985). Once the showing has been made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, at 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980).

The Defendant argues that the summary judgment is appropriate because (x) there is no personal jurisdiction in this action over the Defendant and (y) the Guaranty is not enforceable under the statute of limitations because there is no written evidence that the Guaranty was extended or affirmed under the Statute of Frauds.

(x) Personal Jurisdiction

Notwithstanding the October 13, 2016 decision of the First Department reversing Judge Kern's April 30, 2015 decision to dismiss based on lack of personal jurisdiction and finding that the 2 conversations conceded by Defendant that occurred in New York regarding the loan transaction were sufficient to warrant personal jurisdiction in New York, the Defendant again argues that the action should be dismissed for lack of personal jurisdiction. Inasmuch as the First Department already concluded that personal jurisdiction over the Defendant exists, this branch of the Defendant's motion is denied.

(y) Statute of Limitations / Statute of Frauds

It is well settled that an agreement to extend the payment period of a debt without the consent of the surety results in a discharge of the surety. *National Park Bank of New York v. Koehler*, 204 N.Y.174, 97 N.E.468 (1912); *Becker v. Faber*, 280 N.Y. 146, 19 N.E.2d 997, 121 A.L.R. 1010 (1939); *Midlland Steel Warehouse Corp. v. Godinger Silver Art Ltd.*, 276 A.D.2d 341, 714 N.Y.S.2d 466, 2000 N.Y. Slip Op. 08782 (1st Dept. 2000). In addition, an agreement that requires a writing pursuant to the statute of frauds can only be changed or altered by a writing and that includes the consent of the guarantor to a change or alteration of the underlying obligation. *M. H. Metal Product Corporation v. April*, 251 N.Y. 146 (1929). However, a guarantor may be estopped from asserting the statute of frauds by his agreement and conduct. *Id.*

In this case, the Note was signed by the Borrower and guaranteed by the Defendant. The Note was payable one year from the date of execution (i.e. February 8, 2008) unless extended for 6 months upon the written request of the Borrower. The Borrower requested and obtained two six months extensions. The Borrower's written extension requests were signed by Alon Rand, the brother and partner (i.e., other member of the Borrower) of the Defendant on behalf of the Borrower. Although the Plaintiff has not submitted anything showing that the Defendant consented in writing to an extension of the Note, the affidavit of Samuel Boussi dated April 8, 2015, (Exhibit F to the Affidavit of Maurice F. Heller in Opposition to Defendant's Motion) contains sworn allegations that the Defendant personally requested the extensions of the loan. This raises a triable issue of fact as to whether the Defendant did consent to the extensions of the loan and the Guaranty. If this is the case, the statute of frauds would be satisfied. *See M.H. Metal supra.*

With respect to the Defendant's argument that the statute of limitations bars enforcement of the Guaranty, the statute of limitations on a cause of action for breach of contract is six year CPLR § 213(2). If the Guaranty is enforceable under the statute of frauds because the Defendant requested or consented to the extensions of the loan that the Defendant's brother made, then the cause of action did not accrue until the expiration of the second extension (i.e., February 8, 2009). Inasmuch as the action was commenced on September 4, 2014, the action would be timely.

Accordingly, the Defendant's motion for summary judgment is denied.

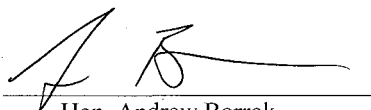
II. Plaintiff's Motion for Summary Judgment

In order to recover for a claim of breach of contract a plaintiff must establish the existence of a contract, the plaintiff's performance under the contract, the defendant's breach, and resulting damages. See, for example: *Harris v. Seward Park Housing Corporation*, 79 A.D.3d 425, 913 N.Y.S.2d 161, 2010 N.Y. Slip Op. 08861 (1st Dept. 2010).

The affidavit of Samuel Boussi is sufficient to make out all of the elements of the Plaintiff's claim. However, as discussed above, there is a material issue of fact as to whether the Defendant requested or consented to an extension of the loan (i.e., whether the action is barred based on the statute of frauds and the statute of limitations).

Accordingly, the Plaintiff's motion for summary judgment is denied.

Dated: June 27, 2018

A handwritten signature in black ink, appearing to read 'A. Borrok', is written over a horizontal line.

Hon. Andrew Borrok
J.S.C.