SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROBERT K. FUTTERMAN, Index No.: 655599/2018

Plaintiff, **DECISION & ORDER**

-against-

JONATHAN KRIEGER,

Defendant.

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JENNIFER G. SCHECTER, J.:

Plaintiff Robert K. Futterman moves for summary judgment in lieu of complaint against defendant Jonathan Krieger. Defendant opposes the motion and urges that this action should be arbitrated. Plaintiff's motion is granted.

"Pursuant to CPLR 3213, a party may commence an action by motion for summary judgment in lieu of complaint when the action is 'based upon an instrument for the payment of money only'" (*Lawrence v Kennedy*, 95 AD3d 955, 957 [2d Dept 2012]). A motion under CPLR 3213 is an appropriate means to collect on a promissory note (*Poah One Acquisition Holdings V Ltd. v Armenta*, 96 AD3d 560 [1st Dept 2012], citing *Bank of Am., N.A. v Solow*, 59 AD3d 304 [1st Dept 2009]). "To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms" (*Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 [1st Dept 2012]). "Once the plaintiff submits evidence establishing these elements, the

burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" (*id.*).

The material facts are undisputed. Plaintiff is the founder of non-party Robert K. Futterman & Associates, LLC (RKF), a real estate firm. Pursuant to an Amended and Restated New York Independent Agent Agreement dated December 28, 2015, defendant worked as a contractor for RKF (Dkt. 5 [the 2015 Agreement]).[1] In section 4(D) of the 2015 Agreement, RKF agreed to make up to a $1 million loan to defendant that would carry 4.5% annual interest (*id.* at 7). The loan was to be repaid within 30 days "after the expiration of the Time Period" (*see id.*), which is defined as the earlier of December 31, 2018 or the date of the 2015 Agreement's termination (*see id.* at 1-2). Defendant was personally obligated to repay the loan but repayment could be made from commissions he generated (*see id.* at 7).

The loan itself is governed by a Promissory Note dated December 28, 2015 (*see id.* at 14 [the Note]). The Note provides that defendant "authorizes RKF, ***at its sole discretion***, to automatically apply" defendant's commissions against the loan balance (*see id.* [emphasis added]). The Note provides that in the event of default, 12% interest

[1] Defendant had worked for RKF for a number of years. The 2015 Agreement superseded his prior contract with RKF that was executed in 2012.

shall accrue;[2] that Krieger consents to this court's jurisdiction in an action to enforce the Note; and that he will pay RKF's attorneys' fees in such an action (*see id.*).[3]

In a Termination of Exclusive Representation Agreement that was fully executed on February 26, 2018, RKF and defendant agreed to terminate the 2015 Agreement (Dkt. 8 [the Termination Agreement]).[4] The Termination Agreement recognizes that the Note is outstanding and provides that "[t]he right to receive the remaining balance of the [Note] will be assigned by RKF to Robert Futterman personally as a distribution pursuant to RKF's operating agreement" (*id.* at 2). By letter dated June 8, 2018, RKF acknowledged that, in 2017, it had assigned the Note to plaintiff (Dkt. 7 [the June 2018 Letter]). On November 9, 2018, plaintiff commenced this action and moved for summary judgment in lieu of complaint, arguing that defendant became obligated to repay the Note on March 28, 2018--30 days after the 2015 Agreement terminated.

Defendant does not dispute that RKF loaned him $1 million pursuant to the 2015 Agreement and the Note. He also does not dispute that he never repaid the loan in cash.

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[2] Plaintiff seeks default interest from March 28, 2018 but does not seek 4.5% interest from the date of the loan (*see* Dkt. 4 at 1).

[3] Plaintiff does not request attorneys' fees so none are awarded.

[4] The Termination Agreement also terminated a December 31, 2015 agreement between RKF and non-party Retail Worx LLC (Retail Worx), a company that employed defendant as its CEO (*see* Dkt. 19 at 1). Attached to the Termination Agreement is a new agreement between RKF and Retail Worx (*see id.* at 4). The relationship between the parties and Retail Worx is a red herring raised by defendant in a transparent effort to confuse the court. The Termination Agreement states, in no uncertain terms in its sixth whereas clause, that, in addition to terminating the contract between RKF and Retail Worx, the parties agreed to terminate the 2015 Agreement (*see id.* at 1). This is repeated three paragraphs later (*see id.*). That is why defendant signed the Termination Agreement *twice* – on behalf of himself and separately on behalf of Retail Worx (*see id.* at 3). Thus, defendant's contention that the 2015 Agreement "is not expressly mentioned in" the Termination Agreement is frivolous (*see* Dkt. 15 at 6).

He claims that he generated commissions that should offset his liability under the Note. He does not, however, identify the transactions on which he worked that gave rise to those commissions (facts that he would know without discovery)[5] or the actual commission amounts. Defendant also claims that the arbitration clause in section 7(J) of the 2015 Agreement, which applies to disputes arising under the 2015 Agreement, applies to actions to collect on the Note (*see* Dkt. 5 at 12), even though the Note itself expressly provides that a collection action may be brought in this court and the Termination Agreement does not contain an arbitration clause (*see id.* at 14). Defendant further claims that the June 2018 Letter does not prove that RKF assigned the Note to plaintiff. Finally, he argues that the 2015 Agreement did not really terminate until the end of 2018; thus, he was not obligated to repay the loan until January 30, 2019 (an argument that would only affect the running of default interest since this date has passed). None of these arguments have merit.

Even according to defendant, the $1 million must be repaid, in full, plus interest, only subject to set-off from his Net Commissions. Net Commissions are calculated based on defendant's Annual Bookings (Dkt. 5 at 4). Annual Bookings include only those deals in which defendant was involved (*see id.* at 5). Hence, if there was a deal in which defendant was involved that generated Net Commissions, defendant would know of that deal. He does not identify any such deal. In any event, the loan is *not* repayable on a

[5] This is not disputed by defendant in light of paragraph 5 of the 2015 Agreement (*see* Dkt. 18 at 8 ["Upon termination of [defendant] Contractor services, a list (the 'Pending List') ***shall be prepared by the Contractor*** within three (3) days of Contractor's sending or receiving notice of termination, which Pending List shall identify ***all pending transactions*** procured by Contractor or in which Contractor is materially involved"] [emphasis added]).

non-recourse basis only as against Net Commissions (*see* Dkt. 5 at 7 ["Neither (defendant's) failure to earn any Net Commissions nor the termination of this Agreement or (defendant's) relationship with or engagement by the Company, shall in any way affect the obligation of (defendant) to repay the Loan"]). Rather, the Net Commissions owed to defendant could, at RKF's discretion, be used to reduce the amount owed on the Note.[6] Indeed, if there were Net Commissions owed to defendant that were not allocated toward the loan balance, presumably, defendant would be asserting a claim for those amounts. Defendant, however, does not claim that there is a current dispute between him and RKF over unpaid commissions, nor does he claim that at the time he signed the Termination Agreement, he was owed any money from RKF. Execution of the Termination Agreement, moreover, triggered his obligation to repay the Note; thus, Krieger would have raised the issue of unpaid commissions and any offset at that time.

Most significantly, the Termination Agreement defeats any factual questions that Krieger attempts to raise even if there was a requirement that commissions due to him offset his debt (and there was none). In that contract, defendant agreed that he was "not entitled to any payments pursuant to the [2015 Agreement] following [that] date for any transactions" except for those listed on Exhibit B, which were the "Pending List" for

[6] While the 2015 Agreement suggests that the parties had a sort of waterfall agreement where commissions would be used to repay the loan, no such waterfall arrangement was agreed to in the Note, which simply gave RKF the *discretion* to set of liability on the Note with defendant's commissions. Since the 2015 Agreement was terminated, it has no bearing on the parties' rights under the Note. Repayment of the loan is governed only by the Note, while any commissions owed to defendant (which, again, he has not identified) is a matter between him and RKF, are governed by the 2015 and Termination Agreements, and would have to be the subject of another action should a dispute arise (though, as discussed herein, the general release in the Termination Agreement renders this academic).

which commissions could potentially be payable (Dkt. 8 at 1). Krieger has not alleged that as of the date payment was due (in March 2018) when he defaulted, he was owed any commission from those five specific deals. To the extent that he asserts entitlement to any other commission, such a claim would be barred by the general release in the second-to-last paragraph of the Termination Agreement (*see* Dkt. 19 at 3).

In addition, the Note did not require any formal demand or declaration of default. To the contrary, defendant expressly waived his right to "demand, presentment, and notice of dishonor" and agreed that the Note was payable 30 days "following the expiration of the Time Period for any reason, or such earlier date that this Agreement is effectively terminated by Maker or RKF" (Dkt. 6).

In sum, the Termination Agreement unambiguously terminated the 2015 Agreement; thus, the Note became payable on March 28, 2018. The Note does not, in contrast to the 2015 Agreement, provide for arbitration, and explicitly permits a collection action to be brought in this court (*see 8430985 Canada Inc. v United Realty Advisors LP*, 2015 WL 4885337, at *6 [Sup Ct, NY County Aug. 17, 2015] ["The parties clearly knew how to differentiate between [forum selection and arbitration] clauses. If the parties did not intend to litigate a default under the Guarantees in this court, they would not have included a mandatory litigation forum section clause in the Guarantees"], *affd* 148 AD3d 428 [1st Dept 2017]). The June 2018 Letter clearly evidences that plaintiff was assigned RKF's rights under the Note, which was specifically contemplated in the Termination Agreement. Defendant does not proffer any evidence, aside from sheer

speculation, to raise a question of fact as to its validity. Finally, defendant has not submitted any evidence or proffered any testimony suggesting he is owed commissions on any particular deal that could be used to set-off his liability.

Accordingly, it is ORDERED that the motion for summary judgment in lieu of complaint by plaintiff Robert K. Futterman against defendant Jonathan Krieger is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $1 million, plus 12% annual interest from March 28, 2018 to the date judgment is entered.

Dated: April 29, 2019

ENTER:

Jennifer G. Schecter, J.S.C.