

Rackman v Ingber

2020 NY Slip Op 31805(U)

June 9, 2020

Supreme Court, New York County

Docket Number: 654120/2019

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

JESSICA RACKMAN

Plaintiff,

- v -

LINDA INGBER,

Defendant.

-----X

INDEX NO. 654120/2019
MOTION DATE N/A
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied.

Background

Plaintiff is defendant’s sister-in-law and loaned defendant \$300,000 in July 2011. That agreement provided that defendant would pay plaintiff \$1,500 per month from September 1, 2011 through July 31, 2012 (NYSCEF Doc. No. 10). Defendant agreed to pay all amounts due (if any remained) by July 31, 2012; however, the agreement permitted the parties to agree by mutual assent that if the principal was not paid on July 31, 2012, then defendant could continue to pay \$1,500 per month until plaintiff was paid in full (*id.*).

Plaintiff claims that the date by which defendant was supposed to repay the loan expired and plaintiff then demanded the full amount. She asserts that the default occurred on July 31, 2012 and the loan was accelerated in May 2019.

Defendant claims that she has not defaulted on the note and continues to pay \$1,500 per month in compliance with the terms of the agreement. Defendant asserts that the statute of

limitations has expired although she has not cross-moved to dismiss on that basis nor did she assert it as an affirmative defense in her answer.

Discussion

“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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

The Court denies the motion. There are simply too many questions about what took place in this case for the Court to grant plaintiff summary judgment. Here, defendant claims she has not defaulted and continues to make payments. That is an issue of fact.¹

In reply, plaintiff submits an “affirmation” from plaintiff although this document does not state that plaintiff is an attorney or other individual authorized to submit an affirmation and it is not notarized (NYSCEF Doc. No. 21). Moreover, this affirmation admits that plaintiff agreed to extend the loan but does not state how long the extension was, the terms of the extension or attach evidence of the extension. Plaintiff then states that in June 2018 she told defendant she wanted the principal amount repaid; again, no supporting documentation is attached and no explanation is provided for what happened from July 2012 through June 2018.

¹ Although plaintiff did not attach the summons and complaint to its moving papers, the Court will overlook that omission because this is an e-filed case.

Moreover, plaintiff's "affirmation" admits that the parties mutually agreed to extend the terms of the loan and that defendant continued to make the \$1,500 payments through September 1, 2019 (NYSCEF Doc. No. 2, ¶¶ 6, 21). This case was brought in July 2019. This illustrates the problem: how can the Court determine whether defendant breached the terms of the agreement when plaintiff admits defendant was making payments, plaintiff was accepting those payments when the case began and without the terms of the extension? Did the extension permit plaintiff to declare all amounts due at any time regardless of defendant's continued monthly payments?

Put another way, the evidence submitted on this motion demonstrates that the parties agreed to extend the loan payment past the original maturity date in July 2012 and that defendant never paid off the loan in full. But what is not clear is on what basis plaintiff suddenly decided to demand the whole amount due because there is no document that sets forth a second maturity date.

Discovery is needed to explore what happened concerning the extension of the loan, defendant's purported payments and plaintiff's alleged acceleration. Plaintiff cannot successfully move for summary judgment by submitting only a warning letter that tells defendant to pay the \$300,000 but does not reference when it became due or that the loan was accelerated (NYSCEF Doc. No. 12).

The Court also denies defendant's request to dismiss based on the applicable statute of limitations. Defendant did not make a cross-motion for that relief nor did she move to dismiss or assert this defense in her answer. Therefore, even if defendant has actually made a cross-motion, this defense was never asserted.

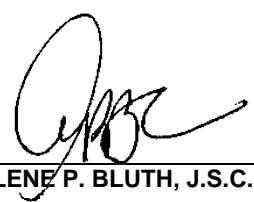
Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied.

Conference: September 8, 2020 at 10 a.m. The parties are directed to check the docket and this part's rules concerning whether the conference will take place virtually. The parties are free to submit a preliminary conference order signed by both sides for the Court's approval via e-filing.

06/09/2020

DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE