Stark v Keane Stud LLC
2021 NY Slip Op 30173(U)
January 21, 2021
Supreme Court, New York County
Docket Number: 156423/2018
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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JEFFREY STARK

Plaintiff,

- v -

KEANE STUD LLC,

Defendant.

INDEX NO. 156423/2018

MOTION DATE 11/10/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 163, 164, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202, 203, 204

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

Upon the foregoing documents, it is

On this motion for partial summary judgment, the plaintiff, Jeffrey G. Stark (herein "Stark"), is seeking to collect $345,578, plus interest, either on the personal note ("Note") given to him by the defendant, Keane Stud LLC ("Keane Stud") (Second and Third Causes of Action of Amended Complaint) or, alternatively, on the ground of money had and received - unjust enrichment (Fourth Cause of Action). He also seeks a hearing as to costs and reasonable attorney's fees as provided in the Note (Fifth Cause of Action).

Background

Plaintiff Stark is the single member of Depot Hill Road LLC (herein "Depot Hill"). Depot Hill is a 50% member of defendant Keane Stud. The other 50% member of Keane Stud is

Tarragon Corporation (herein "Tarragon"), of which William Friedman (herein "Friedman") is the principal.

In the fall of 2007, Keane Stud sought additional funding for its development project and Stark alleges that he reached an agreement with Friedman to make an interim personal loan of $600,000 to Keane Stud, rather than a member loan from Depot Hill. The $600,000 loan was made pursuant to a Mortgage Note (herein "the Note"), dated August 30, 2007, by and between Keane Stud, as borrower, in favor of Stark. The Note explicitly states it covers loans up to $600,000 and further, that it "may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change, modification, termination, waiver, or discharge is sought."[1]

The first of three amendments were made to the operating agreement on June 1, 2007 (herein "First Amendment"). Under its terms, Depot Hill was given permission to obtain financing of up to $1,500,000. On July 30, 2008, the parties agreed to enter into the Second Amendment of the Operating Agreement (herein "Second Amendment") which allowed Depot Hill to borrow $1,200,000 from Salisbury Bank and Trust Company, to be secured by a mortgage on the Property. Finally, the Third Amendment of the Operating Agreement (herein "Third Agreement") was entered into on September 15, 2011 and defined explicitly how funds received from any sale of the property would be divided between Tarragon and Depot Hill.

Stark alleges that he loaned $820,000 to Keane Stud, consisting of (1) five loans totaling $600,000 made between September 5, 2007 and April 7, 2008, and (2) three additional loans totaling $220,000 made between May 5, 2008 and August 6, 2008. Stark asserts that he was repaid $530,000 of principal on the Loan but alleges that Keane Stud continues to owe him

[1] Plaintiff submits the mortgage document and defendant submits the mortgage note document, both dated August 30, 2007.

$290,000. Stark also alleges that he lent an additional $55,578 to Keane Stud between September 8, 2014 and September 28, 2014. In sum, Stark claims that he is owed $345,578 by Keane Stud. Defendant contends that any loans in the excess of $600,000 were not personal loans and were not covered by the terms of the August 30, 2007 Note.

Analysis

Plaintiff contends that his contributions in excess of $600,000 were personal loans and further that Keane Stud is estopped from contending that these loans were member contributions by its 2008-2015 tax returns prepared and executed by Tarragon. As evidence of this position, plaintiff points to the fact that all the loan payments were made from his personal brokerage account, that there is no document that explicitly states that loan amounts greater than $600,000 were member contributions, and that the Third Amendment did not roll over all plaintiff's post-2011 loan amounts into capital contributions.

Specifically, plaintiff points to the tax returns of Keane Stud prepared by Tarragon and executed by Friedman for the years 2009-2015 which reported on Schedule L line 19 "mortgage notes" and included Stark's outstanding loans to Keane Stud of $290,000. Keane Stud's 2016 tax return also refers to the sum of $55,578 as "Mortgage notes, bonds payable in less than 1 year". Although Keane Stud filed amended tax returns for the years 2013 and 2016, plaintiff alleges that the amended returns purported to reclassify his personal loan of $290,000 as a capital contribution by Depot Hill. However, defendant argues that certain tax returns had been filed in error and that the amended returns fixed those errors.

In opposition, defendant argues that the Note, which was executed 15 days after the First Amendment, clearly reflects that it was to pertain to personal loans made by plaintiff and was limited to $600,000. Further, defendant contends that the documentary evidence submitted

demonstrates that, by September 30, 2008, plaintiff had received $780,000 in payments in satisfaction of the $600,000 personal loan. In defendant's view, this repayment satisfied the Note and no further loans could be made under its terms.

Summary judgment may not be granted unless the movant demonstrates its entitlement to judgment, as a matter of law, by tendering "evidentiary proof in admissible form," which may include documentary evidence attached to the attorneys affirmation (*see Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Am. Exp. Centurion Bank v Badalamenti*, 30 Misc 3d 1201(A), 958 NYS2d 644 [2010]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associate Fur Manufacturers, Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). It is only thereafter incumbent upon the party opposing summary judgment to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The movant's failure to make such a showing, regardless of the sufficiency of opposing papers, mandates the denial of a summary judgment motion (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Rushmore Recoveries X, LLC v Skolnick*, 15 Misc 3d 1139(A), 841 NYS2d 823 [2007]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the *prima facie* showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 N Y2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see*

Rotuba Extruders, v Ceppos, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]. *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Plaintiff has not asserted a *prima facie* case on summary judgment. Despite plaintiff's contentions, there are several issues that are unclear regarding the understanding of the parties as they entered into the contractual agreements. Further, plaintiff submits several copies of emails from individuals who have not submitted affidavits which would relate to the reliability of the emails' contents. Accordingly, plaintiff's motion for summary judgment is denied.

Moreover, if plaintiff had met his burden, defendant has nonetheless raised questions of material fact that defeat summary judgment. Defendant takes issue with plaintiff's interpretation of the documentary evidence and both parties allege an understanding of the other's intent when entering into both the Note and the Operating Agreement Amendments. For example, plaintiff alleges that under the June 1, 2007 First Amendment, he was given permission to make personal loans above $600,000 to Keane Stud. However, defendant takes great issue with this assertion and contends that the First Amendment was designed to facilitate Depot Hill obtaining financing of up to $1,500,000, not accept personal loans. The court cannot resolve these discrepancies on a motion for summary judgment. Issues of credibility are not to be resolved on summary judgment (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept. 2002]).

Accordingly, plaintiff's motion for summary judgment is denied.

It is hereby,

ORDERED that Plaintiff Jeffrey G. Stark's motion for summary judgment is denied.

1/21/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE