SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

LUIS RAMIREZ AND RAMON GONZALEZ,

Plaintiffs,

-against-

R&G FOOD SUPERMARKET INC. AND MANUEL A. LARA

Defendants.

DECISION AND ORDER
Index No.: 24527/2020E

Present:
HON. EDDIE J. MCSHAN

The following e-filed documents, listed on NYSCEF as document numbers 25 – 40 (Motion Seq. #002) were read on this motion seeking summary judgment.

Upon the foregoing cited papers, the Decision and Order of this Court is as follows:

Plaintiffs move pursuant to CPLR 3212 for an order granting summary judgment and entering a judgment against the defendants, R&G Food Supermarket Inc. ("R&G") and Manuel Lara ("Lara"), in the amount of $433,375.32 with 15% interest in accordance with the promissory note. Defendants opposed Plaintiffs' application to the extent that it seeks entry of a judgment against Lara. The Court grants Plaintiffs' applications as follows.

Initially, the Court notes that plaintiffs commenced the instant action by filing a Summons for Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213 on May 26, 2020. The Honorable Ruben Franco denied plaintiffs' application without prejudice by Order dated July 21, 2020. Plaintiffs thereafter served a Supplemental Summons (NYSCEF # 20) and Verified Complaint (NYSCEF # 22) on or about June 1, 2021. Defendants served a Verified Answer (NYSCEF # 24) containing a general denial on or about on August 12, 2021.

Summary Judgment

Plaintiffs insist that they are entitled to judgment as a matter of law. Plaintiffs state that the parties entered into a stock purchase agreement on February 6, 2019 (NYSCEF # 33) wherein plaintiffs agreed to sell a certain supermarket business to Lara. Plaintiffs contend that Lara executed a promissory note and security agreement as consideration for the purchase of the business (NYSCEF # 32). Plaintiffs assert that Lara executed the promissory note both as the President of R&G and also individually. Plaintiffs insist that R&G and Lara have failed to tender payment as required by the

promissory note and are in breach of the promissory note and security agreement. In support, plaintiffs annex the affidavit of plaintiff Luis Ramirez ("Ramirez") (NYSCEF # 27).

Lara "emphatically" denies personally guaranteeing the payment of the note (NYSCEF # 37). Lara insists that only R&G is responsible for the outstanding debt arguing that the value of the business is "far greater than the amount of the debt, thus sellers' interest was more than sufficiently protected." Defendants note that paragraph 4(h) of the stock purchase agreement provides that plaintiffs may repossess the business in the event of a default on the promissory note. Lara asserts that R&G is the maker of the note and is responsible for the debt. He insists that he is not the maker of the note and that there is nothing in the promissory note to indicate that he expressly guaranteed the debt. Lara suggests that he signed the note "twice because of lack of consideration received by the corporation. . . . so I signed it for that purpose, to recognize the consideration (the shares of stock) received by me, individually." Lara argues that the ambiguity and omission expressly listing him as a guarantor is fatal and must be strictly construed against the plaintiffs as drafters of the document.

A party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]). The moving party's evidence, most importantly, must be in admissible form (*Friends of Animals, Inc. v Assoc. Fur Mfr., Inc.,* 46 NY2d 1065 [1979]). Once the moving party establishes his *prima facie* showing, the burden shifts to the nonmoving party to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Zuckerman v City of New York,* 49 NY2d 492 [1980]). The nonmoving party cannot provide conclusory allegations of fact or law to defeat a summary judgment motion, a "drastic remedy" in this State, this court looks to find issues rather than to determine them, and to evaluate whether the alleged factual issues are genuine or lack substance (*Sillman v Twentieth Century Fox Film Corp.,* 3 NY2d 394, 404-5 [1957]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock,* 23 AD2d 943 [3d Dept 1965]).

The Court finds that plaintiffs established a *prima facie* showing of entitlement to judgment as a matter of law on their cause of action for breach of a promissory note. To prevail on a breach of

promissory note, plaintiff must establish that defendant executed a promissory note, the note contained an unequivocal and unconditional obligation to repay, and the defendant failed to pay according to the terms of the instrument (*see for example Constructamax, Inc. v CBA Associates, Inc.*, 294 AD2d 460 [2d Dept 2002]). Plaintiffs established that Lara signed the promissory note in his capacity as President of R&G, as well as individually, that the note required the defendant to pay the note "on or before May 13, 2019, and that defendants failed to tender the payment as required by the promissory note. Based upon the Court's findings, the burden shifts to the defendants to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*Zuckerman,* 49 NY2d 492).

The Court finds that defendants failed to establish, by admissible evidence, the existence of a triable issue of fact. Defendants acknowledge that R&G is the maker of the promissory note and that the corporation is responsible for the debt. Defendants do not dispute plaintiffs' allegations that they did not make the payments as required by the note. Plaintiff is therefore entitled to a judgment as a matter of law against R&G (*Constructamax, Inc.,* 294 AD2d 460).

Defendants' self-serving allegations that Lara is not personally liable on the note is not supported by the record. It is well settled "that an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal'" (*see for example Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1 [1964]). Moreover, an agent will be liable on a note by signing it twice, once in his representative capacity followed by a signature in his individual capacity (*see Hackensack Cars, Inc. v Beverly*, 140 AD2d 254 [1st Dept 1988]). The promissory note (NYSCEF # 32) unequivocally shows that Lara signed the note in both his representative capacity and individual capacity. Defendants suggestion that Lara is not the maker of the note because it was R&G that made the promise to pay does not relieve him of his personal liability based upon the clear and explicit evidence of his intention to be personally bound based upon him signing the note in both his representative and individual capacities (*Hackensack Cars, Inc.*, 140 AD2d 254).

In addition, defendants' argument that paragraph 4(h) of the stock purchase agreement allows plaintiffs to repossess the business in the event of a default on the promissory note is unavailing. It is

well-settled that a plaintiff's repossession of collateral "does not constitute an election of remedies that preclude[s] the plaintiffs from proceeding on the note and guaranty" (see UCC 9-601; 9-609) (*see Lupo v Annas Lullaby Café LLC,* 189 AD3d 1205 [2d Dept 2020], relying on *Marine Midland Bank v Hakim,* 247 AD2d 345 [1st Dept 1998]). "Plaintiff's decision to sue on the note while retaining the collateral was within its rights under UCC 9-501(1) and was commercially reasonable" (*Marine Midland Bank,* 247 AD2d 345). Furthermore, plaintiffs' claim is based solely upon the express terms of the promissory note and does not resort to any of the provisions of the Security Agreement. Based upon the foregoing, plaintiffs are entitled to summary judgment on their cause of action for breach of a promissory note.

Counsel Fees

Plaintiffs' request for an award of reasonable counsel fees is denied based upon the record presented. Plaintiffs briefly make a request for an award of reasonable counsel fees in the conclusion of their attorney's affirmations without any arguments or evidence in support. The Court is unable to determine the amount of counsel fees that would be reasonable on this record.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that plaintiffs' application for summary judgment pursuant to CPLR 3212 on their cause of action for breach of promissory note is granted in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that plaintiffs' application for counsel fees is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment in favor of plaintiffs, Luis Ramirez and Ramon Gonzalez, and against defendants, R&G Food Supermarket Inc. and Manuel A. Lara, in the amount of $433,375.32, together with interest at the rate of 15% from May 13, 2019 until entry of this Decision and Order and then statutory interest thereafter, as well as costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of cost.

The foregoing shall constitute the decision and order of this Court.

Dated: December 14, 2021

J.S.C.