SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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770 FIFTH AVENUE COMPANY,

Plaintiff, Decision and order

- against - Index No. 508376/2022

770 FRAME LLC and SCHNEUR MINSKY,

Defendants, August 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has cross-moved seeking to amend the complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint on July 10, 2013 the defendant executed a promissory note in favor of the plaintiff in the amount of $330,000. The note required monthly payments of $3,000 for five years and a final payment of $150,000 due July 2018. Further, on July 3, 2013 the defendant Schneur Minsky executed a personal guarantee which guaranteed the payments pursuant to the note. The complaint alleges the defendants failed to make the final payment and that as of the filing of the complaint the defendants owe $211,402.99 comprising principal and interest. The plaintiff commenced this action seeking recovery of the sums owed based upon the note and the guarantee. Indeed, the complaint contains two causes of action, the first based upon the

note and the second based upon the guaranty. The defendants have now moved seeking to dismiss the lawsuit on the grounds the plaintiff 770 Fifth Avenue Company has no standing to pursue the claims. Further, the defendants assert the guarantee pre-dates the promissory note and thus could not possibly have been intended to guarantee a loan that had not yet taken place. The plaintiff argues the complaint alleges prima facie claims and seeks to amend the complaint to address the issues raised.

Conclusions of Law

It is well settled that a request to amend a pleading shall be freely given unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit (Adduci v. 1829 Park Place LLC, 176 AD3d 658, 107 NYS3d 690 [2d Dept., 2019]). The decision whether to grant such leave is within the court's sound discretion and such determination will not lightly be set aside (Ravnikar v. Skyline Credit-Ride Inc., 79 AD3d 1118, 913 NYS2d 339 [2d Dept., 2010]). Therefore, when exercising that discretion the court should consider whether the party seeking the amendment was aware of the facts upon which the request is based and whether a reasonable excuse for any delay has been presented and whether any prejudice will result (Cohen v. Ho, 38 AD3d 705, 833 NYS2d 542 [2d Dept., 2007]).

First, it must be noted that there is really is no dispute the defendant has not repaid the money owed. The only grounds for dismissal are technical, namely an incorrectly dated guaranty and the wrong description of the entity plaintiff. It is true the guaranty contains the date of July 3, 2013 while the note itself contains the date of July 10, 2013. However, the guaranty can only be referring to the note of July 10, 2013. This is true for two distinct reasons. First, there is no other transaction between the parties to which the guaranty could possibly refer (see, Cohen v. Sandy Springs Crossing Associates L.P., 238 Ga App 711, 520 SE2d 17 [1999]). Second, the guaranty is verified by a notary which lists the date as July 10, 2013 the same date as the note. The defendants point out that the guaranty is four pages while the notary acknowledgment page is listed as page 3 raising questions as to its veracity. That is a curious observation, however, without any evidence impugning the integrity of the notary there is no basis to question its authenticity. Further, a review of the signature of the notary annexed to the note and the signature of the same notary annexed to the guaranty clearly demonstrates they are different, confirming the notary signed separately for each document. Thus, this is a simple mistake wherein the wrong date had been included within the guaranty. A mere clerical mistake cannot affect the validity of the entire guaranty at this stage of the proceedings. The case of U.S. v.

Lowy, 703 F.Supp 1040 [Eastern District of New York 1989] is instructive. In that case the defendant borrowed money and signed a note and a guaranty. The note was dated June 29, 1976 while the guaranty was dated May 6, 1976. The court rejected the argument, also presented here, that the guaranty did not refer to the note since the date of the guaranty pre-dated the note. The court stated that "defendants' sole basis for asserting that they never guaranteed the 1976 Note is the fact that the 1976 Guaranty signed by them mistakenly refers to the Note as having been made on May 6, 1976 (the date the Guaranty was made), rather than on June 29, 1976, the true date of the making of the Note. Defendants have no explanation as to what it was they were guaranteeing when they signed the Guaranty on May 6, 1976, nor can they explain why the lender, amount and interest of the Note referred to in that Guaranty are exactly equal to the lender, amount and interest of the June 29 Note. Defendants do not dispute that a $270,000 loan was made to Adria on June 26, 1976. They simply want this court to hold that they need not honor their guaranty of that loan because the guaranty mistakenly refers to the loan as having been made on May 6. The court will not permit defendants to escape their obligations on the basis of a trivial clerical error" (id). Further, in a footnote the court rejected the assertion that "important contractual rights can turn on tiny mistakes in drafting an agreement" (id).

Likewise, in this case, it is clear the guaranty specifically refers to the note and a mere clerical mistake was the cause of inserting the wrong date. Thus, the arguments presented about reformation of contracts is inapplicable in this specific scenario. Therefore, the motion seeking to dismiss the complaint on the grounds the guaranty pre-dates the note is denied.

The plaintiff seeks to amend the complaint to reflect that the correct composition of the plaintiff is one of a partnership and not a corporation and that an executor has been appointed on behalf of one of the partners. While it is true that perhaps careless drafting of the complaint led to its incorrect designation, there really is no basis to deny the amendment. Moreover, the fact counsel could have been aware of true nature of plaintiff's partnership status does not undermine the request to amend the complaint.

Therefore, based on the foregoing the motion seeking to amend the complaint is granted. The motion seeking to dismiss the complaint is consequently denied. Lastly, the motion seeking attorney's fees is denied.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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