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, February 15, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Sequence #3

The defendants have moved pursuant to CPLR §2221 seeking to reargue a decision and order dated August 25, 2022 which denied a motion to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior order 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, the defendant Schneur Minsky executed a personal guaranty 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 defendants moved seeking to dismiss the lawsuit on the grounds the guaranty pre-dated the promissory note and thus could not have been intended to guaranty a loan that had not yet taken place. The court rejected that

argument noting that the incorrect date contained on the guaranty was a mere clerical error and there was no other note to which the guaranty could have referred. Moreover, the court rejected the argument the nature of the notary acknowledgment page required dismissal of the lawsuit. Upon reargument the defendants argue the court misapprehended the arguments presented about the notary acknowledgment page and reformation of the contract and the court should correct facts asserted that are indeed disputed by the parties.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

Concerning the notary acknowledgment page, the prior decision curiously noted that such page is listed as the third page of a five page document, the first four pages comprising the guaranty itself. However, the court concluded that without any evidence of any impropriety on the part of the notary that mere curiosity was not a basis to dismiss the lawsuit. The defendants argue that the nature of the acknowledgment page as page 3 of a five page document means the acknowledgment page was not part of

the guaranty at all. The defendants assert that "on its face, the acknowledgement page is NOT part of the alleged personal guaranty. To the contrary, the acknowledgement page seems as though it came from an entirely different document – a document with only two pages preceding the acknowledgement page" (see, Affirmation in Support, ¶26 [NYSCEF Doc. No. 31]). Of course, there is no conclusive proof as to the nature of this acknowledgment page and whether it was acknowledging the guaranty or some other two page document. Surely there are questions in this regard and these questions require further discovery. The lawsuit cannot be dismissed merely because an acknowledgment page may have been misnumbered.

Next, concerning the argument any reformation of the contract cannot take place since the statute of limitations for such reformation has passed, the prior motion did not utilize reformation at all. Indeed, there are questions of fact whether reformation is even necessary. In U.S. v. Schoenhard, 819 F. Supp 751 [Northern Division of Illinois 1993] the court held that where a guaranty pre-dated the date of the note, in clear error, then "such a minor oversight, under these circumstances, should not provide the basis for defendant to escape his obligations under the guaranty" (id). No mention of reformation was contemplated. The defendants argue that U.S. v. Lowy, 703 F.Supp 1040 [Eastern District of New York 1989] upon which the court

based its prior determination is not "established precedent" (see, Affirmation in Support, ¶35 [NYSCEF Doc. No. 31]) precisely because that case failed to contemplate any reformation of the guaranty. However, there are numerous cases that hold a guaranty which predates or is contemporaneous with a note sufficiently guarantees such note notwithstanding the date of the guaranty and without resorting to reformation of the contract (see, Branch Banking and Trust Company v. king, Cotton & Sanders P.C., 20111 WL 13228765 [Northern District of Alabama 2011]), Bank of Idaho v. Colley, 647 P2d 776 [Court of Appeals of Idaho 1982], Fewox v. Tallahassee Bank & Trust Company, 249 So2d 55 [District Court of Appeal of Florida First District 1971]). Thus, reformation of the guaranty is not required. Whether the guaranty was executed on July 3 as indicated or July 10 and the guaranty merely contains the wrong date there is certainly substantial evidence the guaranty referred to the note. As the above cases make clear, the mere incorrect date contained within a guaranty is not a basis upon which to absolve the requirements pursuant to that guaranty. Thus, a court may "as a matter of interpretation, carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract clearer and that any such "interpretation" is not considered to be a reformation of the contract" (see, NCCMI Inc., v. Bersin Properties LLC, 74 Misc3d 1221(A), 162 NYS3d 921 [Supreme Court

New York County 2022, citing Castellano v. State, 43 NY2d 909, 403 NYS2d 724 [1978]). Therefore, there are questions concerning the nature of applying the pre-dated guaranty to the promissory note in this case. These questions must be explored through discovery and at the conclusion of all discovery any party may make any appropriate substantive motion in this regard.

Consequently, the motion seeking reargument is denied.

The defendant's motion seeking the court correct certain factual assumptions is granted. The court stated in the prior decision that "it must be noted that there is really is no dispute the defendant has not repaid the money owed" (see, Prior Decision, page 3 [NYSCEF Doc. No. 21]). In fact, the defendants dispute that any funds are owed. The court, therefore, retracts any such finding of fact purporting to establish there is no dispute about the repayment of any funds. Further, the court stated that "it is clear the guaranty specifically refers to the note and a mere clerical mistake was the cause of inserting the wrong date" (id at page 5). While the amount of the guaranty matches the amount of the note there is no specific evidence the guaranty refers to the note, although as noted there are questions of fact in this regard. Again, the court retracts that characterization of facts that are in dispute. There can be no law of the case conclusions drawn from those earlier statements of the court, both regarding to the repayment of any debt and whether the guaranty conclusively referred to the note.

Thus, that portion of the defendant's motion is granted.

So ordered.

ENTER:

DATED: February 15, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC