

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

3 WEST 137TH STREET PHARMACY & MEDICAL
SUPPLY INC.,

Plaintiff

INDEX NO. 652277 /13

MOTION DATE 06-04-2014

-Against-

137 PHARMACY CORP., PAUL WISEBERG,
"JOHN DOE #1" through "JOHN DOE# 100",
being fictitious names of entities and/or
individuals, who are subtenants and in possession
of the premises known as 3 West 137th Street
New York, N.Y. 10037,

Defendant.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion for summary judgment and to dismiss counterclaims.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment and to dismiss defendants' counterclaims is granted, the clerk of court is to enter judgment in favor of plaintiff and against the defendants accordingly.

Plaintiff brings this action to collect on a promissory note signed by defendants on December 31, 2012 wherein defendants acknowledge being indebted to plaintiff in the amount of \$183,203.00 dollars. Payment on the note was to be made in Forty Eight (48) installments commencing on the first day of February 2013 and on the first day of the month thereafter until the first day of January 2017 when the unpaid principal balance and interest would be payable. On default of the payment of any installment plaintiff is authorized to accelerate payment on the note, collect interest on the outstanding balance at the rate of 5% and collect reasonable costs of collection plus attorneys fees.

This note was given in connection with an "Asset Sale Agreement" (hereinafter "agreement") dated September 28, 2012, entered into between plaintiff and defendant for the sale by plaintiff to defendant of a pharmacy located at 3 West 137th Street. The agreement required purchaser to give a down payment of \$75,000.00 and the balance of the purchase price was secured by a promissory note in the amount of \$183,203.00 dollars, which is the note in question. The transaction closed on December 31, 2012 at which time plaintiff delivered to defendants a bill of sale and defendants delivered to

plaintiff the promissory note which was signed by Todd Wiseberg as president of the corporation and by Paul Wiseberg individually as guarantor.

Defendants made the first and second payments when due; however they defaulted in making the third payment. Plaintiff served defendant with a notice of default and after the default not being cured within the 10 day cure period contemplated in the Note, commenced this action for the balance due on the note which is \$176,277.22 dollars.

In support of the motion plaintiff provides a copy of the Note signed by defendants, the Asset Sale Agreement, the Bill of Sale, the Payment schedule, the Notice of default and the pleadings. (see moving papers Exhibits 1 through 8).

Defendants oppose the motion and submit the affidavit of Todd Wiseberg, who states that he was induced into purchasing the pharmacy by the fraudulent oral representations of the plaintiffs; that the agreement was terminated effective April 3, 2013 for plaintiff's failure to comply with a condition precedent -as contemplated in paragraph 4(e) of the agreement- in that defendant was unable to obtain a medicaid provider number for the pharmacy within 150 days of the execution of the agreement. In accordance with the cancellation of the agreement defendant has requested the return of its deposit and all payments on the Note and has commenced an action in New York State Supreme Court. Defendant argues that these are issues of fact that preclude the granting of summary judgment.

The agreement states at paragraph 4 Condition Precedent:

"The obligations of both parties to consummate the transaction contemplated herein is hereby subject to the satisfaction at or prior to closing of the following conditions:

(b) Medicaid- The conditional approval of the New York State Department of Health of Purchaser's application for a Medicaid provider number has been obtained. Purchaser agrees to make application therefor within approximately (20) days of the date of this Agreement to comply with and carry out any and all requirements, demands, requests, rules and regulations of the New York State Department of Health as to expedite the approval of such application and issuance of said license to purchaser.

(e) Failure of Condition Precedent- In the event that any of the conditions contained in this paragraph"4" have not been complied with within 150 days of the execution of this agreement, either party may terminate this agreement at any time by providing written notice to the other, at which time all amounts paid under this contract at the time of termination to Seller on account of the purchase price shall be returned to the Purchaser within 3 days of the termination thereof and neither party shall have any liability to the other...."

At paragraph 8 Closing of Title:

(a) " Title shall close at the offices of Robert E. Semensohn, Esq., within two (2) weeks of the date of receipt of notice that the purchaser has received conditional approval to be a Medicaid provider...."

At paragraph 18 Modification of Agreement:

“All prior understandings, agreements, representations and warranties, oral or written between Seller and Purchaser are merged in this contract. This Agreement and the Management Agreement being executed simultaneously herewith constitute the complete agreement and understanding among the parties hereto and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract. This Agreement, and the rights and obligations of the parties hereunder, may not and cannot be modified, varied, terminated, abrogated, or in any manner changed by parol or by any other means, other than by another contract in writing entered into and executed in the same manner as the instant agreement.....”

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note’s terms (New York Commercial Bank, v. J.Realty F Rockaway, Ltd, 108 A.D.3d 756, 969 N.Y.S.2d 796 [2nd. Dept. 2013]). Proof that defendant executed the note and defaulted thereon is sufficient for the granting of summary judgment (Craven v. Rigas, 71 A.D. 3d 1220, 896 N.Y.S. 2d 504 [3rd. Dept. 2010]). Promissory notes, as instruments for the payment of money only are entitled to the expedited procedure of summary judgment. Once a prima facie case is established, defendant may defeat summary judgment only by demonstrating the existence of an issue of fact with respect to a bona fide defense (Friends Lumber Inc., v. Cornell Development Corp., 243 A.D. 2d 886, 663 N.Y.S. 2d 327 [3rd. Dept. 1997]).

Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law, eliminating all material issues of fact. It is now incumbent upon the defendant to raise a factual issue, this defendant has failed to do.

Defendants claim that they cancelled the Agreement due to a breach by Plaintiff of a condition precedent. “ A condition precedent may be waived by subsequent acts and agreements which operate as a waiver of contract terms”(CJS Sales § 245;CBS Inc., v. Ziff-Davis Pub. Co., 75 N.Y.2d 496, 553 N.E.2d 997, 554 N.Y.S.2d 449 [1990]; Hadcock Motors, Inc., v. Metzger, 92 A.D.2d 1, 459 N.Y.S.2d 634 [4th Dept.1983] finding defendant waived written approval of transaction when it closed after receipt of oral approval; Coizza II v. 164-50 Crossbay Realty Corp., 73 A.D.3d 678, 900 N.Y.S.2d 416 [2nd. Dept. 2010]finding plaintiff waived certificate of occupancy condition precedent to closing).

The condition precedent required conditional Medicaid approval, not the actual receipt of a medicaid provider number. To the extent defendant received conditional approval the condition has been satisfied, and to the extent defendant proceeded to closing without obtaining conditional approval, the condition precedent contemplated in paragraph 4 of the agreement - which states that the condition must be satisfied at or prior to closing- has been waived.

“A general, vague merger clause is ineffective to bar parol evidence from being introduced to prove fraud in inducing a contract. However, where the person alleging fraud specifically disclaims reliance upon oral representations, parol evidence is inadmissible.” (Mahn Real Estate Corporation v. Shapolsky, 178 A.D.2d 383, 577 N.Y.S.2d 824 [1st. Dept. 1991]). Since the plaintiff stipulated in the contract at paragraph 18 that “All prior understandings, agreements, representations and warranties, oral or written between Seller and Purchaser are merged in this contract, and that neither party is relying upon any statement made by anyone else that is not set forth in this contract, this specific disclaimer destroys the allegations in defendants’ counterclaim that the agreement was executed and closed in reliance upon plaintiff’s and a third-party’s oral representations.

Accordingly , it is ORDERED that plaintiff’s motion for summary judgment on the Second cause of action is granted and the clerk of court is DIRECTED to enter judgment in favor of plaintiff and against the defendants jointly and severally in the amount of \$176, 277.22 dollars together with interest at the rate of 5% from April 1, 2013 to the date of entry of judgment and thereafter at the statutory rate as computed by the clerk, together with a bill of costs and disbursements as taxed by the clerk and it is further

ORDERED, that the portion of the plaintiff’s motion that seeks the recovery of attorneys fees is severed and an assessment thereof is directed at the time of the trial of this action, and it is further


ORDERED, that defendants’ counterclaim is dismissed, and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 13 located at 71 Thomas Street, Room 210, on August 20, 2014 at 9:30 A.M.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: July 3, 2014



Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE