SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CAPITAL ONE EQUIPMENT

Plaintiffs,

-against-

AUGUSTIN V. DEUS., *et al.*,

Defendants.

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DECISION AND ORDER
Index No.: 656088/2017

Mot. Seq. No.: 001

O. PETER SHERWOOD, J.:

Plaintiff Capital One Taxi Medallion Finance seeks summary judgment in lieu of complaint in accordance with CPLR § 3213. For the following reasons, the motion is granted.

I. BACKGROUND

On February 6, 2013, non-party N.A.A. Funding Inc. ("NAA") made a loan to defendants Augustin V. Deus and Adeline Deus, deceased, ("Borrowers") for the amount of $422,000.00 (Hussain Aff. ¶ 3). To evidence the loan, Borrowers executed a promissory note ("Note") in favor of NAA; the Borrowers also executed a loan agreement and a security agreement (Hussain Aff. ¶ 3 - 4, Exs. A, B, C). Upon closing the loan, NAA assigned a 100% participation interest in the Note to Capital One Taxi Medallion Finance ("COTMF") (Hussain Aff. ¶ 5). COTMF became the "Lender" and gained all rights and remedies in respect to the loan. The loan's maturity date was March 1, 2016; all outstanding amounts were then due in full (Hussain Aff. ¶ 9, Ex. A at 3).

According to the Note, interest accrues at a 3.50% per annum rate (Hussain Aff. ¶ 6, Ex. A at 1). In the event of default, interest in the outstanding sum accrues at a 24.00% per annum rate (Hussain Aff. ¶ 7, Ex. at 2). Borrowers agreed to also pay reasonable attorney fees, costs, and expenses incurred by the Lender to enforce the terms of the note (Hussain Aff. ¶ 8, Ex. A at 4).

Borrowers defaulted on the maturity date, March 1, 2016. COTMF notified the defendants on July 7, 2017 that all sums outstanding were fully and immediately due (Hussain Aff. ¶ 10, 11). The remaining principal constituted $388,612.18 and the accrued default interest $144,045.58 (Hussain Aff. ¶ 14). As of September 15, 2017, the Borrowers had made partial post-maturity

payments in the amount totaling $130,314.62 (Hussain Aff. ¶ 13). Accordingly, plaintiff claims the defendants owe COTMF $402,343.14 as of September 15, 2017 (Hussain Aff. ¶ 14). Plaintiff also seeks attorney fees. No further payment information was provided.

II. OPPOSITION

In opposition, defendants argue lack of proper standing, impossibility, and breach of good faith and fair dealing. Defendants argue plaintiff lacks standing to enforce the Note (Deus Aff. ¶ 6-7). Defendants argue that, without a proper showing that the allonge in favor of the plaintiff was properly executed, the motion should be denied (Deus Aff. ¶ 6).

Defendants also claim impracticability or impossibility of performance (Deus Aff. ¶ 8). The change in the taxi industry due to companies like Uber and Lyft has made the defendants unable to pay back the Note (Deus Aff. ¶ 9-12). Defendants also argue the methods and nature of the transaction which resulted in the Loan was unfairly tipped against them as they are unsophisticated immigrants and English is their second language, and the very terms of the agreement breaches the covenant of good faith and fair dealing (Deus Aff. ¶ 14, 19). The only option the defendants claim to be viable at present would be refinance the original loan (Deus Aff. ¶ 16).

Defendants ask the court to dismiss the motion for summary judgment in lieu of complaint and compels the renegotiation of the Note (Deus Aff. ¶ 20). If the court finds in favor of the plaintiff, then the defendants wish to be awarded a setoff against the plaintiff's valuation to the result of a net monetary judgment of zero and the plaintiff should only be granted replevin relief; essentially, plaintiff should be granted possession of the medallion in place of monetary damages (Feinsilver Aff. ¶ 32).

III. REPLY

Plaintiff asserts it has standing because the Note was properly endorsed by the originator of the Note, NAA, and even if it were not, COTMF possessed the original Note at the time of the action, and therefore, had standing to pursue the action. Plaintiff claims the impossibility defense is improper, as it only excuses a party's contractual performance where there was been destruction or obstruction by God, a superior force, or by law. It does not extend to situations where performance has become more difficult or expensive due to economic conditions. Since

the defendants rely upon only the assertion of economic impracticability, it should fail as a matter of law. Finally, there has been no breach of good faith and fair dealing since the alleged "predatory lending tactics" claimed by defendants have not been proven through evidence. Further, allegations about the plaintiff forcing defendants to waive or limit certain rights is irrelevant because NAA, not COTMF, originated the Loan and COTMF is not enforcing the affidavit for judgment by confession.

Borrower does not dispute that the Note is an instrument for the payment of money only and any other facts presented by the plaintiff. Unless the defendants can raise a triable issue of fact, COTMF is entitled to summary judgment.

IV. DISCUSSION

A. Standard for Summary Judgment in Lieu of Complaint

The plaintiff's move for summary judgment in lieu of complaint against the defendants for breach of contract in repaying the Note. CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar *de minimis* deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri*, 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a *prima facie* case for summary judgment (*Weissman*, 88 NY2d at 444; *Matas v Alpargatas S.A.I.C., 21A* AD2d 327 [1st Dept 2000]).

The Note is a promise from the defendants to the plaintiff that they will pay back the amount owed from the loan plus interest and be made payable on March 3, 2016. This dispute is properly brought by motion for summary judgment in lieu of complaint. To succeed on its motion, plaintiff must make a prima facie case. Based on the Note, loan agreement, security agreement, and affidavit presented by the plaintiff without substantial rebuke by the defendants, a prima facie claim has been made.

B. Defendants Fail to Prove that Plaintiff Lacks Standing

Plaintiff has standing to bring this action. To have standing, a plaintiff must have an interest in the cause of the action (*Bank of N.Y. v. Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

The lack of standing argument made by the defendants relies upon the allonge being improperly executed by NAA in its transfer of the 100% participation interest to COTMF. However, defendants do not present any evidence to support this defense. As produced by the plaintiffs, the allonge is signed by one of the Acting Secretaries. On its face, the allonge seems to be properly executed. Further, COTMF, at the time of the action's commencement, held the original Note, giving COTMF the proper standing to bring the action against the defendants. As far as defendants contend, "there is an issue whether the party who executed the allonge…had proper authority" (Feinsilver Aff. 9). This argument is vague, conclusory, and only made upon information and belief, and is insufficient to create an issue of fact. Without further evidence, the lack of standing claim fails.

C. Reliance on Economic Impossibility Fails to Meet the Standard Within New York

Defendants rely on Restatement (First) of Contracts § 454 to argue that performance is impossible when there is extreme and unreasonable difficulty, expense, injury, or loss (Affirmation in Opp'n ¶ 20, citing Restatement [First] of Contracts § 454). According to the Restatement, impossibility is synonymous with impracticability. Defendants claim the change in economic circumstances has made the defendants' repayment of the loan impossible. However, New York courts have held differently. In *Sassower v. Blumenfeld*, performance of a contract is not excused where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy (24 Misc3d 843, 846-847 [Nassau County 2009]). Impossibility cannot rely upon the amounts lost, the nature of lost investments, or the actual state of current finances and assets. Financial loss as a whole cannot be the sole reason to claim in possibility. Economic hardship alone cannot excuse performance (*Maple Farms Inc. v City School Dist.*, 76 Misc2d 1080, 1083 [1974]); the impossibility must be produced by an unanticipated event that could not have been foreseen or

guarded against in the contract (*407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 23 NY2d 275, 282 [1968]).

Defendants base the defense of impossibility upon the idea that, due to the economic change on the medallion and taxi industry of New York by ride sharing applications like Uber and Lyft, there is an impossible hurdle for the defendants to overcome, making the repayment of the loan impossible. Since the defendants rely upon an argument of economic impracticability of repaying the loan, the standard for impossibility is not met.

D. There was No Breach of Good Faith and Fair Dealing by Either NAA or COTMF in Regards to the Formation of the Note and Other Documents

It is well settled that within every contract is an implied covenant of good faith and fair dealings (see *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). An implied covenant of good faith and fair dealing includes any promises which a reasonable promisee would be justified in understanding were included in the agreement (*1357 Tarrytown Road Auto, LLC v. Granite Properties, LLC,* 142 AD3d 976, 977 [2d Dept 2016]). The implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement (*id.*). An implied duty of good faith and fair dealing serves to safeguard a party's interest in the contractual agreement since it is impossible to anticipate every possible action or undertaking a party may take on (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). However, the obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties' agreement (see *Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights (see *Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs.*, Inc., 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the Plaintiff must allege facts that tend to show that the Defendants sought to prevent performance of the contract or to withhold its

benefits from the Plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]).

The argument being made by the defendants is that the Confession of Judgment and the circumstances surrounding the execution of the loan were unfair to the defendants, resulting in a breach of the obligations of good faith and fair dealing inherent in all contracts. CPLR § 3218 says that a confession of judgment signed by the guarantor and borrower is valid when the sum due, the due date, and the reasons for the sum are made clear as they are here (McKinney's CPLR § 3218). The contract, as produced by the plaintiff, appears on its face to be sufficiently executed by the proper parties and the claim that the closing attorney signed improperly in the place of the Acting Secretary is unsupported by any evidence suggesting it should be fatal. Further, the allegedly improper Judgment of Confession that defendants claim they were forced to sign is not being enforced here, making any argument surrounding it moot.

Defendants claim a recent decision in the commercial division supports their position that the existence of a breach of the covenant of good faith and fair dealing is a question of fact, precluding the issuance of summary judgment. In that case, the borrower sued lender COTMF seeking a declaratory judgment that COTMF breached the agreement by declaring it would not make any additional loans, when the agreement stated COTMF would consider issuing additional loans.. (*Transit Funding Associates LLC v Capital One Equipment*, 2016 WL 8467982 [N.Y.Sup.], 2016 N.Y. Slip Op. 32688[U] [2016], *revd in part* 149 A.D.3d 23 [1st Dept 2017]). The appellate court reversed in part, stating that the language of the contract shows the lender was not required to consider each new loan in good faith because, while other clauses in the contract explicitly stated actions would be made in good faith, COTMF's obligation to consider future loans did not included such language. (*Transit Funding Associates, LLC v. Capital One Equipment Finance Corp.*, 149 A.D.3d 23, 29-30 [1st Dept 2017]). Here, there is no agreement between the plaintiff and defendants to provide or consider future loans as there was in *Transit Funding Associates*; the plaintiff has no obligation to renegotiate the Loan with the defendants. For these reasons, the defense of good faith and fair dealing should fail.

V. CONCLUSION

For the reasons discussed above, the motion for summary judgment in lieu of complaint is granted. As far as defendants ask for a setoff and for plaintiff's recovery to be limited to the

medallion, the loan agreement gives plaintiff the option to choose its remedy in case of non-payment. Defendants' request is denied. The matter is hereby referred to a special referee for a hearing on damages. Accordingly, it is hereby

ORDERED that this matter is referred to a Special Referee to hear and report for a hearing on damages; and it is further

ORDERED that counsel for the plaintiff shall, within thirty (30) days from the date of this order, serve a copy of this order with notice of entry, together with the completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This shall constitute the decision and order of the Court.

DATED: July 30, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.