FIRST COMMERCIAL BANK OF MANATEE COUNTY, Plaintiff, v DONALD ZUCKER and CYNTHIA ZUCKER, Defendants.

77 Civ. 4366

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1979 U.S. Dist. LEXIS 15124

Jan. 12, 1979

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff bank, brought an action to recover the balance due on a loan made to a corporation. Defendants were the president of the corporation and his wife who both resided in New York. Defendant The bank filed an motion under *Fed. R. Civ. P. 12(c)* for an order striking the nine affirmative defenses asserted in the answer as being legally insufficient and pursuant to *Fed. R. Civ. P. 56* for summary judgment.

OVERVIEW: The bank asserted that pursuant *Fla. Stat. Ann. § 672.3-414*, defendants, as accommodation parties, were personally and individually liable for the full amount of the outstanding balance. Defendants admitted to signing the note but claimed that they were fraudulently induced to do so by representations of the bank through its officers. They claimed the bank's officers told them the bank would exhaust all legal remedies for collection against the corporation and against collateral before proceedings against defendants. The bank denied making any such representations. The bank alleged that it materially altered its position by granted an extension based upon the president's acts in making payments upon the note, and the doctrine of equitable estoppel should be applied. The court found that material questions of fact existed. The wife asserted that she was not a party of the extension agreement, she was discharged from all liability on the note. The wife signed the note that contained a waiver of the notice of extenuation. Thus, she would not be discharged. The court refused to grant an order of protection to keep defendants from taking a deposition of the bank's employee.

OUTCOME: The court denied the bank's motion to dismiss the affirmative defenses based upon the fraudulent inducement and its motion for summary judgment. The court granted the bank's motion to dismiss the wife's answer that she was not liable, the answer based on the bank's failure to make presentment, and the answer based upon jurisdiction was granted. The bank's motion for a protective order was denied.

LexisNexis(R) Headnotes

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview
[HN1] In an action based upon diversity, the court will follow the conflict of law rules of the state in which it sits. In contract actions, New York applies the law of the jurisdiction having the most significant interest in the resolution of the issue.

Commercial Law (UCC) > General Provisions (Article 1) > Policies & Purposes > Supplemental Laws
Contracts Law > Defenses > Duress & Undue Influence > General Overview
[HN2] See *Fla. Stat. Ann. § 671.1-103*.

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Evidence > Documentary Evidence > Parol Evidence
Evidence > Relevance > Parol Evidence
[HN3] In a contract action, a defendant can use parol evidence to show that a promise has been obtained by fraud.

Contracts Law > Consideration > Detrimental Reliance
[HN4] The doctrine of estoppel applies to a situation where one party makes a representation to another who justifiably relies upon that representation and acts upon it. If it is determined later that the relying party was justified in his reliance, the party who made the representation may be estopped from denying his statement.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > General Overview
Contracts Law > Negotiable Instruments > Enforcement > Joint & Several Instruments
Contracts Law > Negotiable Instruments > Negotiation > Indorsement > Accommodation Indorsements
[HN5] Pursuant to *Fla. Stat. Ann. § 673.3-415(1)* an accommodation party may be liable for the full balance on a note. *Fla. Stat. Ann. § 673.3-118* further provides that a consent to an extension, expressed in the instrument is binding on secondary parties and accommodation parties.

Contracts Law > Negotiable Instruments > Enforcement > Duties & Liabilities of Parties > Types of Parties > Accommodated & Accommodation Parties
Contracts Law > Negotiable Instruments > Negotiation > Indorsement > Accommodation Indorsements
Contracts Law > Types of Contracts > Guaranty Contracts
[HN6] Courts have consistently held that where an accommodation party signs a note containing a waiver of notice of extension, the party will not be discharged by the granting of an extension without notice.

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment
[HN7] See *Fla. Stat. Ann. § 673.3-511(2)*.

COUNSEL: [*1] GERARD A. DUPUIS, ESQ., ALAN M. EPSTEIN, ESQ., BLEAKLEY, PLATT, SCHMIDT & FRITZ, 80 Pine Street, New York, New York 10005 For Plaintiff

SAMUEL KIRSCHENBAUM, ESQ., DREYER & TAUB, 90 Park Avenue, New York, New York 10016 For Defendants

OPINION BY: PIERCE

OPINION

LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

Plaintiff, a Florida bank, brings this action to recover the balance due on a loan of $30,000 made to the Conquistador Bay Corporation (not a party to this action) on October 14, 1975.Defendant Donald Zucker, a New York resident, is president of Conquistador. Defendant Cynthia Zucker is his wife and also resides in New York.

Plaintiff alleges that defendant Donald Zucker signed the promissory note ("note") evidencing the loan in his capacity as president of the corporation and that both defendants Donald and Cynthia Zucker personally and individually endorsed the note as accommodation parties. The note was initially due and payable on January 12, 1976. It is alleged that prior to that date, the corporation and Donald Zucker requested an extension of the time for payment. After a series of negotiations, an extension agreement was executed on February 6, 1976. Payments due on the [*2] note were received by the bank until April 14, 1977. The outstanding balance due on the note is apparently $16,261.52 plus interest.

Plaintiff has moved pursuant to *Fed.R.Civ.P. 12(c)* for an order striking the nine affirmative defenses asserted in the answer as being legally insufficient and pursuant to *Fed.R.Civ.P. 56* for summary judgment. Plaintiff asserts that pursuant to *U.C.C. § 3-414*, as codified by the State of Florida in *Fla. Stat. Ann. § 672.3-414*, defendants, as accommodation parties, are personally and individually liable for the full amount of the outstanding balance.

The jurisdiction of this Court is based upon the diversity of citizenship of the parties. [HN1] In an action based upon diversity, the Court will follow the conflict of law rules of the state in which it sits. *Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941)*. In contract actions, New York applies the law of the jurisdiction having the most significant interest in the resolution of the issue. See *Auten v. Auten, 308 N.Y. 155 (1954)*. In the present case, the Court determines, and the parties apparently agree, that the jurisdiction having the most interest is Florida, and accordingly, [*3] Florida law should be applied in this case.

Defendants admit signing the note, but in defense they assert that they were fraudulently induced to so do by representations made to them by plaintiff through its officers. (First, second, third, fourth, sixth and seventh defenses).Defendants contend that prior to their signing the note, they were told that plaintiff would exhaust all legal remedies for collection against the corporate maker and against the collateral before proceeding against the defendants. Defendants further claim that they signed the note in reliance upon this representation, that the representation was false and untrue at the time that it was made and that plaintiff intended to deceive defendants.

Plaintiff replies that no such representation was made but that even if it were made the defendants should be equitably estopped from asserting it. Plaintiff alleges that it materially altered its position to its detriment upon the representations made to it by defendant Donald Zucker and on the basis of his performance with regard to the note. Plaintiff Bank further argues that by personally making payments on the note Zucker waived any right he may have had to [*4] raise the alleged defense of fraudulent inducement.

U.C.C. Article 3, which deals with commercial paper, does not specifically address the problem of either fraudulent inducement or equitable estoppel. However, *U.C.C. § 1-103*, as codified in *Fla. Stat. Ann. § 671.1-103* states that:

[HN2] "Unless displaced by the particular provisions of this code, the principles of law and equity including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause supplement its provisions."

Thus, in determining the question of fraudulent inducement and equitable estoppel, the Court here looks to the law of contracts.

[HN3] In a contract action a defendant can use parol evidence to show that a promise has been obtained by fraud. *Union Mutual Insurance Co. v. Wilkinson, 80 U.S. (13 Wall.) 222 (1872)*; *Arnold v. National Aniline & Chemical Co., 20 F.2d 364 (2d Cir. 1927)*; 3 A. Corbin, Contracts § 580 (1960); 9 Wigmore, Evidence § 2439 (3d ed. 1940). The Court finds that defendants' claim that they were fraudulently induced to sign the note raises factual issues [*5] of credibility which should be resolved at trial rather than upon a motion for summary judgment.

Similarly, the matter of equitable estoppel raises issues of fact and credibility. [HN4] The doctrine of estoppel applies to a situation where one party makes a representation to another who justifiably relies upon that representation and acts upon it. If it is determined later that the relying party was justified in his reliance, the party who made the representation may be estopped from denying his statement. 1 Williston, Contracts § 139 (3d ed. 1957). Here, plaintiff asserts that it relied upon Donald Zucker's representations, as evidenced by his payments on the note, that he would be liable on the note. The bank alleges that it materially altered its position by granting an extension based upon defendant Zucker's actions and that the doctrine of equitable estoppel should be applied. The Court concludes that this situation clearly presents questions of fact and, as with the issue of fraudulent inducement, is a question which should be decided at trial rather than upon a motion for summary judgment.

Accordingly, plaintiff's motion to dismiss the first, second, third, fourth, sixth [*6] and seventh defenses and the motion for summary judgment are denied.

Plaintiff has also moved to strike the fifth, eighth and ninth affirmative defenses. In the fifth defense, defendant Cynthia Zucker asserts that she was not a party to the extension agreement and that since she did not receive notice of the extension, she is discharged from all liability on the note.

Pursuant to *Fla. Stat. Ann. § 673.3-415(1)*, [HN5] an accommodation party may be liable for the full balance on a note. See *Gehrig v. Ray, 332 So. 2d 703 (1st Dist. Ct. App. 1976)*; *Ebeling v. Lowry, 203 So. 2d 506 (4th Dist. Ct. App. 1967)*. *Section 673.3-118 of Fla. Stat. Ann.* further provides that "A consent to an extension, expressed in the instrument is binding on secondary parties and accommodation parties." The note which is the subject of this action and which it is not disputed was signed by Cynthia Zucker contains the following language:

"Presentment, demand, protest, notice of dishonor, and extension of time without notice are hereby waived by each and every obligor."

In addition, the extension agreement stated that plaintiff intended to reserve its rights against each of the parties to the original note.

[*7] [HN6] Courts have consistently held that where an accommodation party signs a note containing a waiver of notice of extension, the party will not be discharged by the granting of an extension without notice. See *Bay National Bank & Trust Co. v. Mason, 349 So. 2d 810 (1st Dist. Ct. App. 1977)*; *Vanguard Construction Co. v. Lewis State Bank, 348 So. 2d 72 (1st Dist. Ct. App. 1977)*; *Beakley v. Sarasota Bank & Trust Co., 194 So. 2d 918 (2d Dist. Ct. App. 1967)*. Accordingly, plaintiff's motion to strike the fifth affirmative defense is granted.

The eighth defense asserts that defendants are not liable because plaintiff failed to make presentment, demand or protest or to give notice of dishonor. U.C.C. § 3-511(2), *Fla. Stat. Ann. § 673.3-511(2)* provides:

[HN7] "Presentment or notice or protest as the case may be is entirely excused when (a) the party to be charged has waived it expressly or by implication either before or after it is due...."

The Court observes that the notes to this section indicate a broad reading of any waiver.The promissory note in question expressly waived the right to presentment, demand, protest or notice of dishonor. Furthermore, plaintiff's answers to Interrogatory [*8] No. 1 of the first set of interrogatories states that demand was made on the Conquistador Bay Corporation and all the individual endorsers of the note. Although lack of demand was included as a defense in the answer, defendants have not addressed the motion to dismiss this defense and apparently do not contest its insufficiency. Accordingly, plaintiff's motion to strike the eighth affirmative defense is granted.

The ninth affirmative defense asserts that "the Court lacks jurisdiction over the persons of the defendants because the summons fails to comply with *F.R.Civ.P. Rule 4(b)* in that it fails to state the time within which the defendants are required to appear and defend." Again, defendants have not addressed this issue. Plaintiff argues that any error was harmless and notes that defendants' counsel telephoned plaintiff's counsel on April 28, 1978 and requested an adjournment of their time to answer which was granted. The Court agrees with the position that "Defendant's appearance in the action should be enough to prevent any technical error in form from providing a basis for invalidating the process. Similarly, a summons specifying an incorrect time for the submission of [*9] an answer normally should be deemed cured by defendant's responding to it and filing an answer." 4 Wright & Miller, Federal Practice & Procedure § 1088 (1969). Accordingly, plaintiff's motion to strike the ninth affirmative defense is granted.

Plaintiff also moves for an order of protection, pursuant to *Fed.R.Civ.P. 26(c)* striking defendants' notice to take the deposition of plaintiff's employee, Douglas A. Mark. Throughout thepapers submitted in support of its motion, plaintiff has asserted that the defenses here are sham and that the defendants seek to impose unnecessary expense and burden on plaintiff by noticing Mark's deposition. While the Court is sympathetic to plaintiff's desire for an expeditious and summary resolution of its claim, the affidavits submitted in this motion clearly raise issues of fact, especially of credibility. Accordingly, the Court is compelled to deny plaintiff's motion for summary judgment and for a protective order.However, the Court does note that should plaintiff eventually prevail, the note expressly provides that "The obligors, jointly and severally, promise and agree to pay all costs of collection and reasonable attorneys' fees incurred or [*10] paid by Bank in enforcing this note upon the occurrence of any default."

Conclusion

1. Plaintiff's motion to dismiss the first, second, third, fourth, sixth and seventh affirmative defenses and for summary judgment is hereby denied.

2. Plaintiff's motion to dismiss the fifth, eighth and ninth affirmative defenses is hereby granted.

3. Plaintiff's motion for a protective order is hereby denied.

4. No further motions are to be made herein without prior conference with the Court.

5. Attorneys for the parties are directed to appear before the undersigned for a pretrial conference at 9:30 a.m. on February 6, 1978 in Courtroom 906.

SO ORDERED.

LAWRENCE W. PIERCE U.S.D.J.

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