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

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MARTIN GREENBERG, as Trustee of the MARTIN GREENBERG REVOCABLE TRUST DATED MAY 2, 2011,

Plaintiff,

-against-

GARY DEROSA,

Defendant.

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DECISION AND ORDER
Index No.: 652424/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. BACKGROUND

This is the first-filed action between these two parties. Plaintiff Martin Greenberg, suing as Trustee of the Martin Greenberg Revocable Trust dated May 2, 2011 (Greenberg), loaned Gary DeRosa $2.35 million in several transactions entered into between May 2012 and August 2017. Greenberg personally also made a $100,000 interest-free loan to DeRosa in August 2017. The loans, copies of which are attached to the affidavit of Greenberg (NYSCEF Doc. No. 3), are as follows:

Loan	Principal (in $000's)	Exhibit
First May 2012 Note	500	1
Second May 2012 Note	500	2
November 2014 Note	300	7
May 2015 Note	700	8
October 2015 Note	250	9
February 2016 Note	100	10
Personal Loan	100	none

DeRosa defaulted on the notes. Plaintiff claims DeRosa owes $2,269,456.36, including interest as of filing of this motion for summary judgment in lieu of complaint. About three months later, Greenberg filed a Verified Complaint, commencing a new action based on the two

May 2012 notes identified above. In the later action, Greenberg seeks a declaratory judgment of DeRosa's default on these notes, and that Greenberg is the rightful owner of certain notes which were the collateral for the May 2012 notes. Greenberg also claims breach of the implied covenant of good faith and fair dealing. Greenberg also seeks an accounting and an order requiring the escrow agent to turn the collateral notes over to Greenberg.

The loans, the notes, and the plaintiff's default are undisputed.

II. ARGUMENTS

A. Defendant's Opposition to Summary Judgment in Lieu of Complaint

DeRosa does not dispute the facts about the loans, the notes, or his own default. He claims to have defenses based on Greenberg's bad faith in bringing this action solely to injure him, and because he and Greenberg had an implied agreement that Greenberg would forebear on enforcing the notes (Opp at 4). DeRosa claims that, as a result, Greenberg has breached the implied covenant of good faith and fair dealing, and that the motion should fail (*id.*). According to DeRosa, the parties discussed a resolution of this dispute and a payment plan. DeRosa paid $250,000, with that amount going to pay off the personal note, the February 2015 (presumably meaning 2016) note, and some of the interest accrued (*id.* at 5). DeRosa explains he believed that was a good faith payment on the debt, which would induce Greenberg to forbear as to any action on the notes. Greenberg did not forbear for as long as DeRosa thought they had agreed he would (*id.* at 5-6). Additionally, Greenberg stated he chose this course of action to punish DeRosa and to teach him a lesson (*id.* at 6). DeRosa also claims Greenberg changed counsel before bringing this action, choosing Herrick in order to run up costs, which DeRosa would eventually have to pay.

B. Plaintiff's Arguments in Support

Plaintiff argues the agreements are governed by the statute of frauds and require a signed writing in order to be modified (Reply at 1, *see* Promissory Notes, attached as exhibits 1-2, 7-9 to Greenberg aff, NYSCEF Docs. No. 4-5, 10-12). As no writing exists, and as defendant has not even alleged any explicit discussion of forbearance, the Motion for Summary Judgment should be granted (*id.*).

Each promissory note contains a "no oral modification" clause, making a verbal forbearance agreement unenforceable (*id.* at 3-4, Promissory Notes ["This Note may not be changed, modified or discharged, nor any provision waived, orally, but only in writing, signed by the party against whom enforcement of any such change, modification, discharge or waiver is

sought."]; *see also N. Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977, 978 [2d Dept 2009] ["any forbearance discussed by the parties is not enforceable absent a writing signed by North Bright, as required by the mortgage and by the statute of frauds"][referring to General Obligations Law § 15-301(1)]). DeRosa does not claim there was any written forbearance agreement, or even an explicit oral agreement. He asserts only that forbearance was implied (Reply at 4).

While there are exceptions to the writing requirement of the statute of frauds, including unconscionability, admission to the terms and existence of an oral agreement, waiver, or estoppel, plaintiff has not alleged facts to support any of those exceptions (*id.* at 5). It is not unconscionable to seek payment of an admittedly owed debt. Defendant has not alleged he provided any consideration to induce forbearance, as the payment DeRosa made was all provided in payment of pre-existing debts (*id.* at 6).

The e-mail chain provided by DeRosa (NYSCEF Doc. No. 30) includes a statement by plaintiff's prior counsel that plaintiff would stay execution of default until March 19 and a discussion of how an imminent planned payment would be allocated. It also included a statement by defendant's counsel that DeRosa might need more time to raise the rest of the funds (*id.* and Reply at 8). There was no agreement to forbear in perpetuity (Reply at 9). As far as DeRosa claims to have had a "reasonable belief" that making the payment would induce longer forbearance, nothing in the documents could give rise to such a belief (*id.* citing *Chem. Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308, 309 [1st Dept 1995] [defendants' contention that there were issues of fact regarding the existence of an oral modification was insufficient, as the documents provided only showed that the parties were considering changing the maturity date of the relevant contract, so summary judgment was properly granted]).

As far as defendant claims Greenberg failed to act in good faith, DeRosa's allegations are conclusory and unsubstantiated, and such allegations cannot stand (Reply at 11-12). Nor is plaintiff's decision not to negotiate a further forbearance illustrative of bad faith (*id.* at 12). As to plaintiff's decision to hire Herrick, his original attorney was not a litigator and Greenberg is entitled to hire the counsel he sees fit (*id.* at 13). Finally, as far as DeRosa claims Greenberg made statements that he would bring this claim to punish DeRosa and cause him pain, no affidavits evidencing those statements have been supplied. Further, such claims cannot be a functional defense, since it would be invoked in every litigation (*id.*).

III. DISCUSSION

A. Standard for Summary Judgment in Lieu of Complaint

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 (*see, 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.,* 274 AD2d 327 [1st Dept 2000]).

The debt and the defendant's default are undisputed. It is undisputed the notes are an instrument for the payment of money only, and the proper subject for a motion for summary judgment in lieu of complaint.

According to General Obligations Law § 15-301, "[a] written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." The Notes at issue contain such a provision. There is no writing signed by Greenberg changing the maturity date of the notes or promising to forbear. Nor is there an admission by Greenberg of such a representation, other than the promise to forbear until March 19, 2018. As far as DeRosa claims they had an oral agreement to forbear, "[a]s the parties dispute the very terms and conditions of the alleged oral forbearance, their discussions do not qualify as a substitute for the required writing" (*N. Bright Capital, LLC,* 66 AD3d at 978).

As far as DeRosa claims Greenberg breached the implied covenant of good faith and fair dealing, the implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see*

Boscoral Operating, LLC v Nautica Apparel, Inc., 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). 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]).

Greenberg's forbearance to enforce the notes is not a term of the notes, nor does it have the effect of destroying or injuring DeRosa's right to receive the fruits of the contract or the benefits of the underlying agreement. In fact, as 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*, 51 AD3d at 550), the court cannot construe the failure to forbear to be a breach of the covenant, as that would effectively nullify the express terms of the contract.

As the elements of the claim are undisputed, and DeRosa has failed to allege facts which could constitute a defense, let alone provide admissible evidence, the motion shall be granted. Promptly after the filing of this Decision and Order, counsel shall meet and confer to seek agreement on the amount of the judgment to be entered, including principal, interest, default

interest and costs and expenses. A thirty (30) day settle order deadline is provided so that the parties have adequate time to meet and confer.

It is hereby

ORDERED that the motion for summary judgment in lieu of complaint is GRANTED in favor of plaintiff Martin Greenberg as Trustee of the Martin Greenberg Revocable Trust Dated May 2, 2011 and against defendant Gary DeRosa; and it is further

ORDERED that plaintiff shall settle order on notice within thirty (30) days of service of this Decision and Order with Notice of Entry with said order to include the principal balance due under the notes, accrued interest through the dates of default, interest through the date the proposed judgment is filed, provision for the daily amount of additional interest through entry of judgment and, if the parties are unable to reach agreement as to the amount of costs and expenses, including reasonable attorneys fees, a provision severing the claim for costs and expenses and referring the issue to a special referee to hear and recommend.

This constitutes the decision and order of the court.

DATED: January 2, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.