

Fisher v. Lovaro LLC

Supreme Court of New York, New York County

February 18, 2022, Decided; February 18, 2022, Filed

INDEX NO. 656488/2021

Reporter

2022 N.Y. Misc. LEXIS 848 *; 2022 NY Slip Op 30565(U) **

[**1] STEPHEN M. FISHER and ROBERT T. FOOTE, JR. as TRUSTEES OF THE BARBARA B. BUZARD DESCENDANTS' TRUST, Plaintiffs, - v - LOVARO LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

Appearance, summary judgment, payment of money, line of credit, plus interest, plaintiffs', collateral, monetary, repay, last will and testament, unconditional promise, amount of principal, appointing power, requested relief, plenary action, thirty days, law firm, instruments, e-filing, qualify, loaned, vague

Judges: [*1] PRESENT: HON. BARRY R. OSTRAGER, Justice.

Opinion by: BARRY R. OSTRAGER

Opinion

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Before the Court is the motion by plaintiffs Stephen M. Fisher and Robert T. Foote, Jr., as trustees of the Barbara Brumder Buzard Descendants' Trust, for an order pursuant to *CPLR* § 3213 granting plaintiffs summary judgment in lieu of complaint against defendant Lovaro LLC based on a Promissory Note and Credit Agreement in the total amount of \$1,344,368.35, plus interest. Plaintiffs seek significant other relief in addition to the monetary payment of the two instruments, including the seizure of collateral securing the Credit Agreement pursuant to *CPLR* § 7102. In a letter to the Court, plaintiffs indicated that they do not intend to pursue attorney's fees in relation to the present motion, but they are unwilling to limit the requested relief to a money judgment for the outstanding loans plus interest. NYSCEF Doc. No. 25. Service was properly made upon defendant through the Secretary of State, as well as personally upon defendant's managers. NYSCEF Doc. Nos. 17-19. Defendant has not appeared in this proceeding and the motion is unopposed. For the reasons that follow, the motion is granted in part.

[**2] To [*2] qualify for summary judgment in lieu of complaint, plaintiffs must prove a *prima facie* case by showing an instrument for the payment of money only, and that defendant has failed to make the payments called for by the instrument's terms. *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136, 137, 295

[*N.Y.S.2d 752 \(1st Dept. 1968\)*](#).

Plaintiffs' claim is based on two separate instruments: a Promissory Note executed by defendant Lovaro LLC, through its managers Allen Zadeh and Robert T. Foote III (the son of plaintiff Robert T. Foote, Jr., and grandson of Barbara B. Buzard) (NYSCEF Doc. No. 9); and a Credit Agreement (NYSCEF Doc. No. 6).

The Promissory Note contains an unconditional promise to repay a loan of \$51,041.10. The Promissory Note is an instrument for the payment of money only as it requires defendant to make certain payments, and nothing else. *Id.* Summary judgment in lieu of complaint relating to the Note is therefore granted.

The Credit Agreement was executed on September 1, 2016, between defendant Lovaro LLC (through its managers) and lender H.P. Brumder Trust. Before her death, Barbara B. Buzard was the primary beneficiary of the Brumder Trust. She was granted a limited power of appointment over all the assets of the Brumder Trust, which could be exercised upon her death [*3] through her last will and testament. NYSCEF Doc. No. 5, ¶7(b). This power of appointment was exercised through the Second Codicil to Ms. Buzard's Last Will and Testament, where she appointed, upon her death, the remainder of the Brumder Trust's assets to plaintiffs, the trustees of the Descendants' Trust. NYSCEF Doc. No. 7, ¶A(4).

The Credit Agreement "covers a revolving line of credit for a total principal amount" of \$998,396.41. NYSCEF Doc. No. 6, ¶8. This is not an instrument for the payment of money only [**3] because it requires, among other things, proof of the amounts drawn on the credit line and proof that the defendant received such sums. [*Weissman v. Sinorm Deli*, 88 N.Y.2d 437, 669 N.E.2d 242, 646 N.Y.S.2d 308 \(1996\)](#).

The language in the Credit Agreement is vague; it

allowed defendant to indebt itself to plaintiffs for the total principal amount listed but does not indicate whether defendant has actually done so. The line of credit does not contain an unconditional promise to repay \$998,396.41. The promise to repay that amount is conditioned upon defendant actually drawing that amount. In support of the motion, plaintiff Stephen Miller submitted an affidavit, but like the Credit Agreement, the affidavit is vague and fails to establish proof that plaintiff had [*4] drawn the amount plaintiff seeks to recover.

Further, plaintiffs seek relief under the Credit Agreement beyond the recovery of the monetary amount allegedly loaned to defendant. Plaintiffs also seek delivery of the collateral used to secure the loan, an injunction, and an inquest hearing to determine the full extent of the collateral assets, among other things. All of the requests for relief relating to the Credit Agreement do not qualify for *CPLR* § 3213 relief. The motion is therefore denied insofar as it seeks monetary and other relief under the Credit Agreement, and that portion of the proceeding is converted to a plenary action.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is granted to the extent provided herein. The Clerk is directed to enter judgment in favor of plaintiffs Stephen M. Fisher and Robert T. Foote, Jr., as trustees of the Barbara B. Buzard Descendants' Trust, against defendant Lovaro LLC in the principal sum of \$51,041.10 plus interest at the contractual rate of 4% per annum from the November 30, 2019 Maturity Date, in an amount [**4] calculated by the Clerk of the Court, upon plaintiffs' e-filing of a Proposed Judgment directed [*5] to the County Clerk, and it is further

ORDERED to the extent plaintiffs seek recovery under the Fourth Amended and Restated Credit Agreement and Disclosure, plaintiff must pursue that relief in a

plenary action. Plaintiffs must serve on defendant a complaint within thirty days pursuant to the CPLR. Plaintiffs must also serve on defendant a copy of this decision. Defendant shall file an Answer within thirty days thereafter. A conference is scheduled for May 16, 2022, at 12:00 p.m. If defendant defaults, the Court will direct such other and further relief as appropriate.

The May 16, 2022 appearance will be conducted with a court reporter via Microsoft Teams. On or before May 2, 2022, the movant shall efile a letter with a Joint Appearance Sheet. The Joint Appearance Sheet shall contain the full caption and index number of the case, the name of each attorney or party who will be participating in the Teams appearance, that attorney's law firm, law firm address, telephone number, email address for each individual appearing attorney, and the client represented.

Dated: February 18, 2022

/s/ Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

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