Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Ando, Ltd., Savino Viscoso, and Rita Viscoso;

Plaintiff,

-against-

Cool Restaurant Corp., and Donna Scotto,

Defendants

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Index No.: 4686/06
Motion Date: 8/10/11
Motion Cal. No.: 1
Motion Seq. No.: 3

The following papers numbered 1 to 20 read on this motion for an order pursuant to CPLR 3212, awarding plaintiff summary judgment on the ground that there are no disputed issues of material fact and no meritorious defenses.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion- Affidavits. Exhibits.....	5 - 9
Affirmation in Opposition - Affidavits-Exhibits.....	10 - 12
Reply.....	13 - 15
Reply in Support of Cross-Motion.....	16 - 18
Memorandum of Law.....	19 - 20

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiffs ANDO, LTD (herein ANDO), SAVINO VISCOSO, and RITA VISCOSO (herein "Plaintiffs" collectively) move for summary judgment pursuant to CPLR § 3212 for nonpayment on a promissory note by the principle debtor and the guarantor. Defendants COOL RESTAURANT CORP., and DONNA SCOTTO (herein "Defendants")[1] cross-move for

[1]The original action was commenced solely by Ando, however, leave to amend was granted by adding Savino Viscoso and Rita Viscoso as owners of the premises and principals of Ando, a corporation dissolved as of May 30, 2003, against Cool Restaurant Corp., Vincent Scotto, Donna Scotto and Vincent J. Scotto as defendants. By the same order, the matter was discontinued as against Vincent and Vincent J. , both deceased.

summary judgment pursuant to CPLR §3212 dismissing the complaint arguing that Ando has no standing because it is a dissolved corporation, and a dissolved corporation may not prosecute new actions. As more fully set forth below, the Plaintiffs' motion is granted and Defendants cross motion denied.

Background

On or about July 1, 2002, plaintiffs leased to defendants the ground floor and basement of the premises for use as a restaurant, and at all relevant times thereafter, defendants have operated the premises as an Italian restaurant. (*Plaintiffs' Exhibit 5.*)

On or about July 1, 2002, plaintiff Ando also sold to defendants numerous assets, including without limitation, its bar and restaurant equipment, inventory, furniture, fixtures, and chattel. The contract of sale designated said assets as security for the Note that defendants proffered in payment for the business.

Under the terms of the Note, the defendants promised to pay to Plaintiff ANDO the sum of three hundred thousand ($300,000.00) dollars, together with interest at the rate of seven (7%) percent per annum, in equal monthly payments of $5,940.36, commencing on October 1, 2002 and continuing on the first day of each month until either the loan was fully paid with all accrued interest or until September 1, 2007, on which date the entire remaining principal balance and all accrued interest would become due and payable. (*Plaintiffs' Exhibit 3.*)

The last payment made by defendants was applied to the payment due on July 1, 2005. (*Plaintiffs' Exhibit 8.*) Defendants have allegedly defaulted on the loan and have not made

a payment since. (*Plaintiffs' Exhibit 8.*) According to the plaintiffs', the total amount presently due and owing by defendants to plaintiff under the loan is $296,694.38. (*Plaintiffs' Exhibit 8.*)

Plaintiff seeks enforcement of the promissory note and payment of the balance due, plus accrued interest.

Contentions

Defendants claim misrepresentation of material fact by Plaintiffs as a complete defense to the enforcement of the promissory note. Defendant DONNA SCOTTO refused to pay off the loan, contending that Plaintiff ANDO made a false representation in the related contract of sale, which materially induced defendants to give the Note.

Specifically, defendants contend that the plaintiffs fraudulently misrepresented to defendants that plaintiffs' restaurant, at the time of contract, was operating in compliance with all applicable laws, rules and regulations. Specifically, defendants contend that the restaurant was not in compliance with all applicable laws, by virtue of serving alcohol to patrons for consumption in outdoor areas of the premises without the required licensure.

Defendants further claim that they "incurred damages during a prolonged period of reduced profitability in that defendants were precluded from serving alcohol to patrons in the outdoor areas of said premises during defendants' acquisition of the appropriate license to engage in said activity."

Plaintiffs contend that they made no such representation and the defendants cannot argue in good faith that they believed they would be able to serve alcohol outdoors when

defendants had completed their own liquor license application immediately after the sale and represented that the restaurant would not sell alcohol outdoors.

Plaintiffs also rely on the Rider to contract, which explicitly states that the transaction is specifically conditioned upon the approval by the State Liquor Authority (herein "SLA') of a temporary application to be made by the defendants for a liquor license.

Plaintiffs contend that the defendants cannot now claim that in 2005, which was three years after entering into the contract of sale, that the SLA told defendants that the license does not cover serving liquor outside, and then use that claim to avoid payment under the note and guaranty under the guise of a false representation defense.

Analysis

It is undisputed that on or about July 1, 2005, defendants defaulted on the loan and have not made a payment since.

The plaintiffs established its prima facie entitlement to judgment as a matter of law by submitting proof of the promissory note and guaranty, and of the defendants' failure to make the payments provided for by their terms (see *Northport Car Wash, Inc. v Northport Car Care, LLC*, 52 AD3d 794, 794-795 [2nd Dept. 2008]).

Once a prima facie entitlement to summary judgment has been established it is "incumbent upon the defendant to come forward with proof of evidentiary facts showing the existence of a triable issue with respect to a bona fide defense." *(Spodek v. Park Property Development Associates*, 263 A.D.2d 478 [2nd Dept 1999].) Defendants must "avoid mere

conclusory allegations and lay bare his or her proof." (*S & H Bldg. Material Corp. v. Riven,* 176 A.D.2d 715 [2nd Dept 1991].)

A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (*Zuckerman v. City of New York,* 49 NY2d 557 [1980].)

The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages. (*Introna v Huntington Learning Ctrs.*, Inc., 78 A.D.3d 896 [2nd Dept. 2010] citing *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) When a party to a contract conceals a material fact, which he is in good faith bound to reveal, such nondisclosure may be treated as the equivalent of a false representation that such a fact does not exist. *(Tahini Invest., Ltd. v. Bobrowsky,* 99 A.D.2d 489, 490 [2d Dep't 1984] citing *Rosenschein v. McNally,* 17 A.D.2d 834 [2d Dep't 1962].)

In *Rudnick v Glendale Systems*, 222 AD2d 572 (2d Dept 1995), the plaintiff buyers gave defendant sellers a promissory note towards the purchase price of a bakery upon entering into a contract. After making a few payments under the note, plaintiffs defaulted and brought an action to rescind the agreement of sale claiming that they were fraudulently induced into entering the contract as a result of the seller's alleged false misrepresentations about the gross receipts of the bakery and the physical condition of the premises. The Second Department affirmed the granting of summary judgment because the contract in *Rudnick* contained a provision which disclaimed seller's representations about "the property's physical condition or the

bakery's income, expenses, and operation." The Court held that "such clauses are sufficiently specific to bar the buyers from claiming that they were fraudulently induced into entering into the contract because of oral representations to the contrary." (Id at 573.) The Court also rejected "the buyers' contentions that the facts allegedly misrepresented or not disclosed were peculiarly within the sellers' knowledge" because the buyers had the means available to discover the facts underlying any alleged misrepresentations. (Id.)

As in *Rudnick*, defendants' reliance herein on the alleged misrepresentations regarding the outdoor status of a liquor license cannot support a claim of fraudulent misrepresentation because in the application defendants submitted to the SLA, defendants specifically answered "no" to the question of whether any outside area or sidewalk café would be used for the sale or consumption of alcoholic beverages. Moreover, according to the Rider, defendants were required to obtain their own liquor license after the sale and it was under the license—in which the defendants specifically represented to the SLA that they would not serve alcohol outdoors—that defendants were, in fact, unable to serve alcohol outdoors.

Specifically, the Fourteenth Paragraph of the Rider to the Contract states:

"This transaction is specifically conditioned upon the approval by the State Liquor Authority of a temporary application to be made by the Buyer for a restaurant liquor license. In the event that such temporary license is disapproved through no fault of the Buyer, all payments made hereunder shall be returned to the Buyer. The Buyer agrees, within (5) days from the date of this agreement to make such temporary application and to promptly comply with and carry out the requirements, demands, requests, and rules and regulations of the Local A.B.C. Board and the

New York State Liquor Authority so as to expedite the approval of such temporary application and issuance of said license to the Purchaser." (*Plaintiffs' Exhibit 6.*)

Additionally, the defendants represented that they would not sell alcohol outside when asked the following question on their application for a liquor license:

"e. Any outside area or sidewalk café used for the sale or Consumption of alcoholic beverages?"The defendants checked the box marked "No." (*Plaintiffs' Exhibit 10.*)

Accordingly, as shown above, the defendants failed to raise a triable issue of fact. The conclusory and unsubstantiated allegations of fraud and misrepresentation submitted by the defendants are insufficient to meet this burden (see *Colonial Commercial Corp. v Breskel Assocs.*, 238 A.D.2d 539 [2nd Dept. 1997]; *Great Neck Car Care Ctr. v Artpat Auto Repair Corp.*, 107 AD2d 658, 659 [2nd Dept.1985]; *Nissan Motor Acceptance Corp. v Scialpi*, 83 A.D.3d 1020 [2nd Dept. 2011]).

Additionally, in its cross-motion, defendants state that plaintiff Ando was issued a dissolution in 2003, which obligates them to wind up its affairs as required by BCL Section 1005. Moreover, defendants contend that while it is acknowledged that BCL Section 1006(a)(4) authorizes a dissolved corporation to sue or be sued for the purposes of winding up pursuant to BCL Section 1005, the dissolved corporation may only do so as part of the "winding up" process and may not conduct new business.

Specifically, defendants' contend that a dissolved corporation cannot prosecute an action on the basis of new business. Moreover, defendants rely on *Metered Appliances Inc. v. Owners Corp.*, 225 AD2d 338 [1st Dept. 1996], arguing that the default on that note, which took place on

or about July 1, 2005 can be understood to constitute new business within the meaning set forth under the case, even though the promissory note itself predates dissolution.

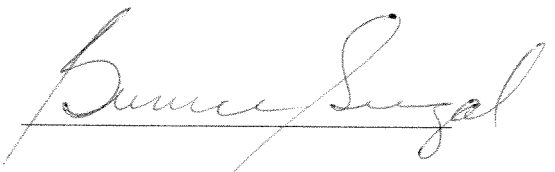
However, in that case, the court found that because the lease had been performed for the first five years of its ten-year term, defendant could not nullify the contract to the detriment of the delinquent plaintiff corporation after receiving the benefits of performance. Therefore, the court held that the trial court properly denied defendant and third-party plaintiff's motion to declare the lease null and void. Accordingly, in this case, defendants' reliance and use of *Metered Appliances Inc.* is inappropriate. Moreover, a dissolved corporation may, as a part of winding up its affairs, bring an action arising post dissolution even if the claim was not ripe prior to the dissolution.(*Tedesco v A.P. Green Industries*, 8 NY3d 243 [2007]). Accordingly, the court specifically finds that the default by defendant is not new business and therefore not prohibited.

IV.

Conclusion

Accordingly, Plaintiffs motion for summary judgment pursuant to CPLR § 3212 is granted. Defendants cross motion pursuant to CPLR §2214(b) is denied. This constitutes the decision and order of the court.

Dated: December 29 , 2011



Bernice D. Siegal, J. S. C.