Suntrust Bank v Wasserman

2013 NY Slip Op 31920(U)

August 12, 2013

Sup Ct, New York County

Docket Number: 151094/2013

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. Justice

PART 35

Index Number : 151094/2013
SUNTRUST BANK
vs
WASSERMAN, JEFFREY S.
Sequence Number : 001
DISMISS ACTION

INDEX NO. 151094/13
MOTION DATE 6/25/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Jeffrey S. Wasserman a/k/a Jeffrey Wasserman pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of the plaintiff is denied, except that the second cause of action for unjust enrichment is severed and dismissed pursuant to CPLR 3211(a)(1); and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that defendant shall serve his Answer within 20 days of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on November 12, 2013, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: 8/12/13

[signature], J.S.C.
CAROL EDMEAD J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

SUNTRUST BANK,

Plaintiff,

-against-

JEFFREY S. WASSERMAN a/k/a
JEFFREY WASSERMAN,

Defendant.

---x

Index No. 151094/2013

DECISION/ORDER
Motion Seq. 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this consumer credit action to recover a post-repossession deficiency judgment, defendant Jeffrey S. Wasserman a/k/a Jeffrey Wasserman ("defendant") moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of the plaintiff Suntrust Bank ("plaintiff") on the ground that his defense is based on documentary evidence and for failure to state a cause of action.

Factual Background

Plaintiff alleges that on May 19, 2008, defendant, as borrower, and plaintiff, as lender, entered into a SunTrust Marine Installment Note (the "Note") in connection with financing a used 2000 Leopard 75 MY and a 2000 diesel twin Starboard Man Engine (collectively, the "yacht"). The Note provided that in the event of default, all payments were accelerated and become due and payable on demand. As additional security, plaintiff entered into a first Preferred Ship mortgage (the "Mortgage").[1]

---

[1] After defendant filed his opposition papers, plaintiff amended the complaint to correct, *inter alia*, that the loan was a refinance of an existing loan on the yacht.

In its first cause of action, plaintiff alleges that it is the owner and holder of the Note and Mortgage, and that defendant failed to make payments as they became due, with the last payment being made on April 29, 2009. At that time, there were 230 payments outstanding, and the balance due was $2,259,307.67. The Note was presented for payment and payment was refused. The yacht was later repossessed and sold on March 30, 2010 in a commercially reasonable manner for $830,000 (the proceeds after the sale were $724,174.09). As such, plaintiff seeks $1,535,133.58, with interest at the contract rate of 6.37% per annum from March 31, 2010.

In its second cause of action, plaintiff seeks the above amount under the theory of unjust enrichment, and in the third cause of action, plaintiff seeks attorneys' fees pursuant to the Note.

In support of dismissal, defendant argues that plaintiff failed to allege compliance with UCC §9-611 which requires plaintiff to send defendant notice pursuant to UCC §9-613 that defendant is entitled to an accounting or disclosure of the place of the disposition.[2] The June 17, 2009 "Notice of Our Plan to Sell Property at Private Sale" (the "Notice") is defective under UCC §9-614 in that it fails to disclose the correct date, time, and place of disposition as required under UCC §9-613, and falsely states that the yacht was stored in Indiana as opposed to Florida. Plaintiff also failed to allege the details of the private sale, including where it took place, where the yacht was stored since the repossession until the sale, the name of the purchaser and whether plaintiff was affiliated with the purchaser. Further, no notice was sent to defendant confirming that he had a right to demand delivery of an accounting. Plaintiff also failed to allege that it conducted an appraisal before the private sale, and what the appraisal amount was. Plaintiff's complaint lacks the required specificity under CPLR 3013.

---

[2] Defendant's memorandum of law argues that notice was not given pursuant to UCC §9-621.

Nor is there any allegation that plaintiff satisfied UCC §9-610 by giving a meaningful opportunity for competitive bidding. Defendant purchased the yacht on January 15, 2007 for $1,324,000 and defendant took out a loan for $1,060,000. Plaintiff refinanced that loan with plaintiff in May 2008 for $2,300,000 to perform a gut renovation and construction of the yacht (the "Survey Report") shows that the yacht appraised at $3,800,000 with an approximate replacement value of $6,500,000). Additionally, plaintiff actively concealed the location of the yacht despite email inquiries seeking the location of the yacht to permit a luxury boat broker to inspect the boat with a prospective client interested in purchasing it for at least the sum of the outstanding loan. And, plaintiff failed to advertise, notice and conduct a public sale, at which interested buyers could have inspected the board and bid up the price. The private buyer, perhaps a friend or family member of plaintiff's bank executive, was given an unfair advantage, and insider price in disregard to the rights of defendant to a surplus. The buyer then advertised the yacht for sale for $1,695,000. Under UCC §9-615(f), the sale to someone related to the secured party for a price significantly below what could have been realized at a sale to someone without relation to the secured party is calculated not based on the actual proceeds, but based on the amount that would have been received.

The above circumstances and sale price of the yacht show that plaintiff's disposition was suspect and commercially unreasonable. And, as plaintiff failed to strictly comply with the UCC, plaintiff cannot pursue any deficiency against defendant. Consequently, the legal fees' claim must also be dismissed.

Further, the unjust enrichment claim cannot stand in light of a written agreement governing the parties' dispute.

[* 5]

In opposition, plaintiff argues that it properly pleaded a breach of contract claim that thre was an agreement, plaintiff loaned defendant money in exchange for a security interest in the yacht and defendant's promise to repay the loan, defendant's failure to pay pursuant to such agreement, and damages. Defendant's motion incorrectly applies a summary judgment standard to the complaint. And, the commercial reasonableness of the sale can be proven at a later stage, and need not be alleged.

Plaintiff argues that defendant defaulted at the height of the economic crisis when the market for luxury goods, such as the luxury yacht herein, was depressed, and when the yacht was stripped of parts before its repossession. The stale documents of the value of the yacht two years before the sale fail to account for the market conditions and condition of the yacht at the time of the sale. At the time of the sale, the yacht appraised at $995,000, and plaintiff listed the yacht at a boat show in Florida for $1.1 million and engaged a broker, Grande Yachts International, Inc. The broker received offers of $700,000 and $750,000, and negotiated the sale to a private individual through an arms-length transaction for $830,000. Defendant's recent investigation revealed that the yacht has since been resold twice for amounts less than the price plaintiff sold the yacht for in March 2008, was listed for sale in April 2013 for $1,095,000, and is currently listed for sale for $999,000.[3]

Plaintiff was under no UCC obligation to hire defendant's broker, or to provide defendant with access to the yacht absent defendant's redemption and payment of past due amounts. And there is no caselaw to support defendant's claim that plaintiff's failure to respond to defendant's

---

[3] Plaintiff asserts that in 2011, closing documents show that the yacht resold for approximately $750,000 ($495,000 cash, plus $250,000 in trade-in values of a 2005 37 Formula PC and 2007 Lamborghini). A 2012 purchase agreement shows that the yacht was resold for $700,000.

broker renders the sale commercially unreasonable. Defendant was not obligated to deviate from its standard practices. Further, UCC §9-627(a) states that the fact that a higher price could have been obtained in a different manner is insufficient to preclude plaintiff from showing that the sale was conducted in a commercially reasonable manner. As indicated in UCC §9-613(e), plaintiff was not required to provide the location of the collateral in the Notice, as the disposition was by private sale. And, the Notice properly advised defendant of his right to an accounting. There is no documentary evidence indicating that the sale was made to an insider.

Further, since claims may be asserted alternatively, the unjust enrichment, as pleaded, is proper. And, it is undisputed that the Agreement provided for attorneys' fees.

In reply, defendant argues that allegations in the complaint are not to be accepted as true where there is a document that refutes the truth of the allegation. The hearsay statements and defendant's counsel's personal experiences in an effort to value the yacht after this suit was filed are insufficient. The actions undertaken before the yacht was sold, *i.e.*, the failure to consider defendant's broker's options, show favoritism and disregard of the opportunity to have sold the yacht at a much higher price to at least cover the balance due. Plaintiff does not explain the discrepancy regarding the location of the yacht as stated in the Notice, or the identity of the buyer at the private sale and whether the buyer had any relationship with anyone at plaintiff bank.

Discussion

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether

deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Thus, to clarify, contrary to defendant's references to plaintiff's burden of "proof," on a pre-answer motion to dismiss, plaintiff need not prove or demonstrate its claims at this juncture.

To state its first cause of action for breach of contract, plaintiff must allege (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]; *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 850 NYS2d 6 [1st Dept. 2007]; *Renaissance Equity Holding, LLC v Al-An Elevator Maintenance Corp.*, 36 Misc 3d 1209(A), 954 NYS2d 761 (Table) [Supreme Court, New York County 2012]).

Clearly, plaintiff's complaint sufficiently alleges the underlying agreement (the Note) between the parties, plaintiff's performance in providing the funds agreed to thereunder, defendant's failure to make payments due thereunder, and the resulting damages.[4]

Notably, defendant does not argue that the complaint does not allege these elements. Instead, defendant argues that plaintiff has not alleged facts demonstrating compliance with the UCC sections under which plaintiff's deficiency judgment is sought. In this regard, and in connection with the damages allegedly sustained, plaintiff pleaded that its disposition of the yacht was commercially reasonable, but was insufficient to offset the amount defendant allegedly owed the plaintiff. However, defendant cited no New York caselaw requiring dismissal of the complaint for failing to allege underlying facts that if true, would establish compliance with the subject UCC sections. Plaintiff presented no caselaw requiring the complaint for a deficiency judgement to state where the sale took place, where the collateral was stored, and whether plaintiff was affiliated with the purchaser. Instead, defendant's caselaw established entitlement to dismissal upon motions for summary judgment where plaintiff failed to prove compliance with the UCC, a standard inapplicable herein (*see Mack Financial Corp. v Knoud*, 98 AD2d 713, 469 NYS2d 116 [2d Dept 1983] (holding that "summary judgment [in favor of the secured party plaintiff] was improvidently granted" where plaintiff's moving papers failed to set forth the facts surrounding the sale of the collateral); *see also*, *DaimlerChrysler Servs. N. Am., LLC v Levine*, 12 Misc 3d 140(A), 824 NYS2d 761(Supreme Court, Appellate Term 9th and 10th Judicial Districts 2006] (affirming the denial of plaintiff's motion for summary judgment, where

[4] Although defendant's motion was initially aimed at the complaint, the amended complaint did not change the material allegations of the complaint, and thus, the defendant's motion is equally applied to the amended complaint.

"plaintiffs submissions fail to set forth sufficient facts and circumstances surrounding the disposition and sale of the repossessed vehicle so as to establish that the sale was conducted in a commercially reasonable manner); *see also Coxall v Clover Commercial Corp.*, 4 Misc 3d 654, 781 NYS2d 567 [Civil Court of the City of New York, Kings County 2004] (rendering a judgment dismissing the complaint after trial)).

Therefore, defendant's request for dismissal of the first cause of action pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and the third cause of action for attorneys' fees flowing therefrom, lacks merit and is denied.

Likewise, dismissal of the second cause of action for unjust enrichment is unwarranted pursuant to CPLR 3211(a)(7) for failure to state a cause of action, as CPLR 3014[5] permits the pleading of alternative theories (*Segal v Cooper,* 49 AD3d 467, 856 NYS2d 12 [1st Dept 2008] (adequately alleged unjust enrichment claim need not be dismissed "merely because it 'contradicts the underlying theory' of the breach of contract cause of action"); *cf. PKO Television, Ltd. v Time Life Films, Inc.*, 169 AD2d 582, 564 NYS2d 434 [1st Dept 1991] (dismissing quasi contract claim, "the existence of which is undisputed")). In order to state a claim of unjust enrichment, a plaintiff must allege that he or she "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (*Nakamura v Fuji*, 253 AD2d 387, 390 [1st Dept 1998]).

Here, plaintiff alleges that defendant received the benefit of a loan from plaintiff, which plaintiff advanced, and that defendant would be unjustly enriched if permitted to retain the

---

[5] CPLR 3014 provides, in relevant part, that "[c]auses of action or defenses may be stated alternatively or hypothetically."

benefit of the loan without repaying the plaintiff. Defendant does not contest that the unjust enrichment claim is adequately stated. Therefore, defendant's request to dismiss the unjust enrichment claim pursuant to CPLR 3211(a)(7) is denied.

Turning to defendant's request for dismissal pursuant to CPLR 3211(a)(1), pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Such a motion may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")). While CPLR 3211(a)(1) does not explicitly define

"documentary evidence," this term "as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 [N.Y.Ct.Cl. 2003]; *Fontanetta v Doe, supra, citing* 2 N.Y. Prac., Com. Litig. in New York State Courts § 7:60, 2d. ed.)), deeds (*Igarashi v Higashi*, 289 AD2d 128, 735 NYS2d 33 [1st Dept 2001]), and informal judicial admissions (*Morgenthow & Latham v Bank of New York Co.*, 305 AD2d 74, 760 NYS2d 438 [1st Dept 2003] (informal judicial admissions by plaintiffs' "attorney-in-fact" in another action, and prior statements of parties in the course of litigation that refute an essential element of a plaintiff's present claim)).

Conversely, affidavits, deposition transcripts, and emails do not qualify as "documentary evidence" for purposes of this rule (*see Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983]; *Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004] (finding that the deposition, trial testimony, and an e-mail narrative "are of a type that 'do not meet the CPLR 3211(a)(1) requirement of conclusively establishing [the] defense as a matter of law'")).

And, while affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, such affidavits "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [petitioner] has no [claim or] cause of action'" (*Lawrence v Miller*, 11 NY3d

588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Here, defendant's reliance on, *inter alia*, his affidavit, the underlying purchase, financing, and refinancing documents, the Survey Report, plaintiff's security agreement, the Notice, notice of deficiency, emails, and advertisements fail to establish, as a matter of law, his defense that the sale was commercially unreasonable.

UCC § 9-610, entitled "Disposition of Collateral After Default" provides:

> (a) [Disposition after default.] After default, a secured party may sell . . . or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
>
> (b) [Commercially reasonable disposition.] Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

UCC § 9-611(b) and (c) require that "a reasonable authenticated notification of disposition" be given to the debtor defendant before the disposition of collateral.

As to the contents of the Notice, UCC § 9-613, entitled "Contents and Form of Notification Before Disposition of Collateral: General" provides, in relevant part:

> (a) The contents of a notification of disposition are sufficient if the notification:
>
> * * * * *
>
> (4) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and[6]

---

[6] UCC § 9-613(e) states that the "following form of notification and the form appearing in Section 9-614(c),when completed, each *provides sufficient information*:

NOTIFICATION OF DISPOSITION OF COLLATERAL
To: (Name of debtor, obligor, or other person to which the notification is sent)
From: (Name, address, and telephone number of secured party)
Name of Debtor(s): (Include only if debtor(s) are not an addressee)

(5) states the time and place of a public disposition or the time after which any other disposition is to be made.

Section 9-614(c), pertaining to the disposition of collateral in a consumer goods transaction, provides:

> (Name and address of any obligor who is also a debtor)
>
> Subject: (Identification of Transaction)
>
> We have your (describe collateral), because you broke promises in our agreement.
>
> * * * * *
>
> (For a private disposition:)]
>
> We will sell (describe collateral) at private sale sometime after (date). A sale could include a lease or license.
>
> * * * * *
>
> If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at (telephone number) (or write us at (secured party's address)) and request a written explanation. (We will charge you $ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.)
>
> If you need more information about the sale call us at (telephone number) (or write us at (secured party's address)). . . .

Here, the Notice mirrored the above language found in UCC § 9-614(c).

Further, the Notice advised defendant "to call or write" the plaintiff at the telephone number and address provided therein if defendant wanted plaintiff "to provide you with a written

---

* * * * *

(For a private disposition:)

We will sell (or lease or license, as applicable) the (describe collateral) privately sometime after (day and date).
You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell (or lease or license, as applicable) (for a charge of $). You may request an accounting by calling us at (telephone number).

[* 14]

explanation of how we figured the amount that you owe us. . . ." Although the word "accounting" was not utilized in the Notice, under UCC 9-613(d) and 9-614(b) (pertaining to consumer goods), a "particular phrasing of the notification is not required." Defendant failed to show, by caselaw or otherwise, that the invitation for an explanation of the amount due and owing renders the Notice void as a matter of law.

Also, contrary to defendant's contention, there is no express requirement that the Notice provide the location of the *collateral*. UCC § 9-613 requires notice of the time and place of a public *disposition*, and the "time" of any other, *i.e.*, "private" *disposition*. And, plaintiff's Notice provided the date of the "private" sale (*i.e.*, "15 days from the date of this letter"). Further, the Notice invited defendant to contact plaintiff if he "need[ed] more information about the sale." Thus, the alleged improper location of the *collateral,* or failure to provide requested information about the *collateral's* location is insufficient to defeat plaintiff's claims as a matter law, at this juncture.

No do the remaining documents utterly refute plaintiff's claim that its sale was commercially reasonable.

UCC § 9-627. Determination of Whether Conduct Was Commercially Reasonable

> (a) . . . . The fact that a greater amount could have been obtained by a . . . disposition, or acceptance at a different time *or in a different method from that selected by the secured party* is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. (Emphasis added).
>
> (b) . . . . A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
>
> (1) in the usual manner on any recognized market;
>
> (2) at the price current in any recognized market at the time of the disposition; or

> (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

The UCC does not expressly require that plaintiff cooperate with defendant's attempt to sell the collateral. This section states that the fact that plaintiff could have obtained a greater amount "in a different method" is insufficient to preclude plaintiff from showing that sale was made in a commercially reasonable manner. Plaintiff submitted documents indicating other, lower offers it received for the yacht, and the condition of the yacht at or about the time of the sale to merit the price it accepted at the private sale. Therefore, even if plaintiff's email request and other correspondence constituted documentary evidence under CPLR 3211(a)(1) to show that plaintiff ignored plaintiff's attempt to assist with the disposition of the yacht, (which this Court finds they do not), they fail to establish that the circumstances of plaintiff's sale was commercially unreasonable as a matter of law, at this juncture.

Further, that plaintiff sold the yacht for an amount significantly less than defendant's purchase price (as shown on the bill of sale), or the appraised value (as shown in the Survey Report) does not render the sale commercially unreasonable. Such documents, dated years before the sale, do not establish the value of the yacht at the time of the sale.

And, the unsubstantiated claim that the sale of the yacht was not an arms-length transaction is sufficiently countered with plaintiff's opposition papers in any event.

While the low sales price on the yacht may warrant scrutiny and a careful consideration of the circumstances of the disposition to determine whether each aspect of the sale was commercially reasonable, such task is for the trier-of-fact at trial or the Court on a motion for summary judgment, and is inappropriate at this pre-answer stage of the litigation.

Thus, dismissal of the breach of contract claim and attorneys' fees claim arising therefrom based on documentary evidence pursuant to CPLR 3211(a)(1) is unwarranted and denied.

However, as to the unjust enrichment claim (second cause of action), dismissal is warranted pursuant to CPLR 3211(a)(1). The undisputed existence of a valid and enforceable written agreement governing a particular subject matter precludes recovery in quasi-contract for events arising out of the same subject matter *(Clark–Fitzpatrick, Inc., v Long Island Railroad Co.*, 70 NY2d 382, 521 NYS2d 653).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Jeffrey S. Wasserman a/k/a Jeffrey Wasserman pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of the plaintiff is denied, except that the second cause of action for unjust enrichment is severed and dismissed pursuant to CPLR 3211(a)(1); and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that defendant shall serve his Answer within 20 days of entry of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on November 12, 2013, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: August 12, 2013

Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.