



Warning
As of: Dec 05, 2012

[1] MORSE, ZELNICK, ROSE & LANDER, LLP, Plaintiff, -against-
RONNYBROOK FARM DAIRY, INC., Defendant. Index No. 106421/09**

106421/09

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2011 N.Y. Misc. LEXIS 1815; 2011 NY Slip Op 31006U

**April 14, 2011, Decided
April 19, 2011, Filed**

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Reversed by, Vacated by *Morse, Zelnick, Rose & Lander, LLP v. Ronnybrook Farm Dairy, Inc., 2012 N.Y. App. Div. LEXIS 1321 (N.Y. App. Div. 1st Dep't, Feb. 23, 2012)*

CORE TERMS: promissory note, preferred stock, redeemable, summary judgment, repayment, farm, subordinated, offerings, stock, default, dairy, repay, liquidation, financing, converted, holder, satisfaction, principal amount, preferred shares, precondition, public offering, convertible, long-term, legal representation, affirmative defense, unconditional, subordination, self-serving, presentment, outstanding

JUDGES: [*1] Present: Hon. Judith J. Gische, JSC.

OPINION BY: Judith J. Gische

OPINION

[**2] Decision and Order

Upon the foregoing papers, the decision and order of the court is as follows:

JUDITH GISCHE, J.:

In this action to recover unpaid principal and accrued interest due under a promissory note, plaintiff Morse, Zelnick, Rose & Lander, LLP (Morse, Zelnick) moves, pursuant to *CPLR 3212*, for an order granting summary judgment against defendant Ronnybrook Farm Dairy, Inc. (Ronnybrook) in the amount of \$101,001.37 plus additional interest from April 1, 2009. Issue has been joined and this motion is brought pre-note of issue. Since summary judgment relief is available, the motion will be decided on its merits (*CPLR § 3212[a]*; *Myung Chun v. North American Mortgage Co., 285 A.D.2d 42, 729 N.Y.S.2d 716 [1st Dept 2001]*).

Arguments

Ronnybrook is a manufacturer of dairy products which produces its line of products from [**3] raw milk obtained from its dairy farm located in upstate New York. It is undisputed that, in or about the mid 1990's, efforts were made by plaintiff and the owners of the dairy farm, the Osofsky family, to undertake a public offering of their farm. This was not a simple or inexpensive proposition, and according to Ronnybrook, the only [*2] party that benefitted financially from the failed undertaking was the Morse, Zelnick law firm.

The instant action concerns two separate documents executed on May 25, 2000, each of which involves a series of financing arrangements for the benefit of Ronnybrook. One was a subordinated unsecured promissory note in the principal amount of \$75,000 in favor of Morse, Zelnick (the Note). Pursuant to the terms of the Note, copies of which are annexed to the pleadings and to the notice of motion, Ronnybrook, as the maker, or payor, on the Note, was required to repay Morse, Zelnick on the earlier of May 25, 2005, or "not later than the day following the date on which [Ronnybrook] or any of its subsidiaries receives the proceeds from a Qualified Liquidity Event" (Note, subsection [2] [a]). The preamble to the Note stipulates that the Note evidences money due Morse, Zelnick for services rendered to Ronnybrook, and that Ronnybrook "waives presentment, demand, protest or notice of any kind" and agrees to pay Morse, Zelnick "on demand, all costs and expenses (including reasonable legal fees) incurred in connection with the enforcement and collection of this Note." The preamble also stipulates that [*3] the Note is subordinated to Senior Debt, as it is defined in subsection three. Subsection 3 provides:

[t]he payment of principal of, and interest on, this Note is hereby expressly subordinated, in right of payment to the prior payment in full of the principal of, premium (if any) and interest on, all Senior Debt of [Ronnybrook] and its subsidiaries whether outstanding on the date hereof or hereafter incurred or created. "Senior Debt" means, collectively, (a) all Indebtedness for Borrowed [**4] Money ... and (b) all payment obligations of [Ronnybrook] pursuant to any capitalized lease entered into by [Ronnybrook] after the date of this Note

* * *

Nothing contained herein (i) shall impair ... the obligations of [Ronnybrook] which are absolute and unconditional, to pay to the holder hereof all amounts payable in respect of this Note as and when the same shall become due and payable in accordance with the terms hereof of (ii) is intended to or shall affect the relative rights of the holder of this Note and the creditors (other than the holders of the Senior Debt) of [Ronnybrook], or (iii) shall prevent the holder of this Note from exercising all rights, powers and remedies otherwise permitted [*4] by applicable law up upon a default for Event of Default under this Note, all subject to the rights of the holders of the Senior Debt as set forth in these subordination provisions.

The second document consists of a two-page letter agreement (the Letter) between Morse, Zelnick, Richard Osofsky (R. Osofsky), as president of Ronnybrook, and Sofisco Nominees Limited. The Letter, which is printed on Morse, Zelnick stationery, references more extensive financing arrangements for the benefit of Ronnybrook, and sets forth the relative priorities of repayment in the event Ronnybrook has insufficient funds when repayment is due. The Letter states, in relevant part:

In connection with a US \$1,000,000.00 financing provided by Sofisco Nominees Limited ("Sofisco"), Ronnybrook Farm ... has issued convertible subordinated unsecured promissory notes to Sofisco and Richard A. Osofsky ... in the original principal amounts of \$1,000,000 and \$134,000, respectively. These notes are convertible into Series A Preferred Shares of Ronnybrook. In addition, Ronnybrook is issuing a subordinated unsecured note, in the original principal amount of \$75,000, to [Morse, Zelnick] to evidence a payable to [Morse, Zelnick] [*5] for legal services rendered. This letter will confirm the understanding among Sofisco, Osofsky and [Morse, Zelnick] concerning the

relative priority of Sofisco, Osofsky and [Morse, Zelnick] in the event Ronnybrook has insufficient funds to repay the notes when they come due. . .

[f]he repayment of the note held by [Morse, Zelnick] shall be subordinate and subject to the repayment of the notes held by Sofisco and Osofsky or the payment of any Liquidation Preference on the Series A Preferred [**5] Shares held by Sofisco and Osofsky. After the notes held by Sofisco and Osofsky have been repaid in full or after Sofisco and Osofsky have received the entire Liquidation Preference with respect to the Series A Preferred Shares that they hold, Ronnybrook shall repay the note held by [Morse, Zelnick].

For reasons left unstated, the action was not commenced, by plaintiff's filing of the summons and complaint, until May 6, 2009, and issue was not joined by service of defendant's answer until on or about October 28, 2009. The gravamen of the complaint is that Morse, Zelnick is entitled to repayment of the Note, plus interest, because: (1) the conversion of the R. Osofsky and Sofisco promissory notes into [*6] stock satisfied the Senior Debt precondition; (2) there has been no Qualifying Liquidation Event entitling Ronnybrook to a liquidation preference (*see* Note, subsection 2); (3) there is no evidence that Ronnybrook lacked sufficient funds when the Note came due; and (4) Ronnybrook's failure to pay the principal amount due on the maturity date constituted an Event of Default (*see* Note, subsection 4).

According to movant, this is a simple action on a promissory note and defendant's acknowledged failure to repay the Note entitles it to summary judgment. In support of its motion, plaintiff submits a copy of the Note together with the sworn affidavit of Howard L. Morse, a partner at Morse, Zelnick, confirming that the Note, which contains a waiver of presentment or a demand, was executed and delivered by defendant on May 25, 2000, and defendant defaulted and failed to repay the Note as of the May 25, 2005-maturity date¹. Given that plaintiff has established its entitlement to summary judgment (*Seaman-Andwall Corp. v Wright Mack Corp.*, 31 AD2d 136, 137, 295 N.Y.S.2d 752 [1st Dept 1968], *aff'd* 29 NY2d 617, 273 N.E.2d 138, 324 N.Y.S.2d 410 [1971]),

the burden [**6] shifts to defendant to come forward with evidentiary proof sufficient to raise an issue [*7] as to an affirmative defense to the payment on the Note (*see Gateway State Bank v Shangri-La Private Club for Women*, 113 AD2d 791, 792, 493 N.Y.S.2d 226 [2nd Dept 1985], *aff'd* 67 NY2d 627, 490 N.E.2d 546, 499 N.Y.S.2d 679 [1986]).

1 Howard L. Morse further attests to the fact that no payment had been made on the Note as of the date of the affidavit (November 10, 2010).

Defendant does not deny executing and delivering the Note, nor does it dispute plaintiff's assertion that it has not repaid the Note. Rather, it is defendant's contention that summary judgment should be denied because plaintiff has failed to prove that the preconditions (the Senior Debt) to payment on the Note have been satisfied, and because this is really a dispute over legal fees involving the poor quality and self-serving nature of Morse, Zelnick's representation of Ronnybrook, necessitating a period of discovery. Specifically, Ronnybrook contends that it would be wrong for Morse, Zelnick to benefit further from the bad advice it gave with respect to loans, guarantees, mortgages, notes, stock offerings and marketing strategies pertaining to the failed public offering.

To this end, defendant submits the sworn affidavit of R. Osofsky who states, among other things, that:

I [*8] have never gotten satisfaction of the \$134,000 Pre-condition Note that Plaintiff still holds in their files and I know nothing of their allegation that they converted either the Sofisco note or my note into some preferred shares which were liquidated. The Plaintiff has provided me no paperwork to support this allegation.

I believe the plaintiff is engaging in unethical acts by culling old legal files to sue their own clients in actions where their performance was woeful, conflicted and to the detriment of their client. Further, I attest that the \$134,000 [sic] Osofsky Note they claim was satisfied as a precondition to the Promissory Note repayment has not been satisfied or otherwise converted as they claim

(R. Osofsky Aff., ¶¶ 12 and 17, respectively).

In its reply affirmation, Morse, Zelnick submits a copy of the Ronnybrook Farm Dairy, [**7] Inc. "Offering Circular," dated October 10, 2001, including its annexed "Index to Financial Statements," as documentary proof that the preconditions to repayment (the two promissory notes constituting the Senior Debt), were, in fact, satisfied.

Under the section of the Offering Circular entitled "Certain Transactions," Ronnybrook notes that:

[o]n May 25, [*9] 2000 Sofisco Nominees Limited, a company owned by Paul H. Brown, one of our directors, paid us \$1,000,000 for a convertible subordinated secured note which was converted into 1,000 shares of Preferred Stock, 750 shares of Common Stock and a warrant to purchase an additional 160,000 shares of Common Stock at an exercise price of \$1.50 per share.

Under the section of the "Index to Financial

Statements," entitled "Long-Term Debt," Ronnybrook lists plaintiff's \$75,000 Note but does not list either Sofisco's \$1,000,000 promissory note or R. Osofsky's \$134,000 promissory note (see Reply Aff, Exhibit A, at F-4). Additionally, under section 5 of the Index to Financial Statement, Ronnybrook states:

[i]n connection with the Company's receipt of \$1,000,000 financing on May 25, 2000, the Company issued 750,000 of Common Stock and 1,000 share of Series A, Redeemable Preferred Stock. The redeemable preferred stock portion of this financing was valued at \$459,927 and is being accreted up to its fair value of \$1,000,000 over its redemption period.

In addition, the Company also converted \$134,000 of long-term debt to 134 shares of Series A, Redeemable Preferred Stock on May 25, 2000.

The following table [*10] summarizes [the] Company's redeemable preferred stock activity for the year ended December 31, 2000 and the six months ended June 30, 2001:

	Preferred Stock
Conversion of long-term debt to redeemable preferred stock	\$134,000
Issuance of redeemable preferred stock	459,927
Accretion of redeemable preferred stock	43,622
Balance: December 31, 2000	637,549
Accretion of redeemable preferred stock	40,669
Balance: June 30, 2001	\$678,218

Through the Offering Circular and Index to Financial Statements, which indicates that the [**8] Sofisco and R. Osofsky promissory notes were converted into shares of stock, Morse, Zelnick has demonstrated satisfaction of the Senior Debt.²

2 Additionally, the fact that there is no evidence

of a voluntary or involuntary dissolution or winding up of the corporation, precludes any possibility of a liquidation preference to which Sofisco and R. Osofsky would, under those circumstances, be entitled.

Court's Decision

To the extent that R. Osofsky, on behalf of himself and Ronnybrook, claims to be a victim of plaintiffs

actions with respect to the failed public offering, asserting in his affidavit that he lacked the personal legal representation needed to better counter the advice he and/or [*11] Ronnybrook was receiving from Morse, Zelnick (Aff, at 11), the assertions are unavailing. Not only is this not an affirmative defense to collection on a promissory note, but the Offering Circular reveals that R. Osofsky is both a sophisticated businessman and a practicing attorney (see Offering Circular, at 35)

Moreover, even if the Senior Debt was outstanding, Morse, Zelnick would not be barred from commencing an action to collect on the Note upon Ronnybrook's default.

Contrary to the claim by [defendant], the fact that the note[] contained [a] subordination clause[] does not in any respect affect either the unconditional nature of the obligation or the right to institute an appropriate proceeding upon default, in accordance with the terms of the note[]. Any question in terms of priority as to the rights of the plaintiffs as against other creditors has no bearing upon the plaintiffs' right to judgment as against the individual and corporate defendants [internal citation omitted]

(Kornfeld v NRX Tech., 93 AD2d 772, 772 - 773, 461 N.Y.S.2d 342 [1st Dept 1983], affd 62 NY2d 686, 465 N.E.2d 30, 476 N.Y.S.2d 523 [1984]; see Dorf v Knitmedia Inc., 2007 WL 2376813 (NY Sup), 16 Misc 3d 1126[A], 847 N.Y.S.2d 901, 2007 NY Slip Op 51583[U] [Sup Ct, NY Co 2007]).

[**9] Conclusion

Morse, Zelnick [*12] has demonstrated both the existence of an unpaid promissory note, and satisfaction of Senior Debt. Accordingly, defendant's imprecise denials as to satisfaction of the Sofisco and/or R. Osofsky promissory notes, and its disappointment with what defendant alleges to have been inadequate and self-serving legal representation, do not meet the showing necessary to forestall summary judgment (*Steinberg v Schnapp, 73 AD3d 171, 177, 899 N.Y.S.2d 167 [1st Dept 2010]*).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted to the extent that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$75,000.00, together with interest at the rate of 9% per annum from the date of May 26, 2005 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: New York, New York

April 14, 2011

ENTER:

/s/ Judith J. Gische

Hon. Judith J. Gische, J.S.C.