Filed 4/18/12 California Bank & Trust v. Tate-Mann CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CALIFORNIA BANK & TRUST, INC., Plaintiff and Respondent, v. ZEPHYR TATE-MANN, Defendant and Appellant.	B234477 (Los Angeles County Super. Ct. No. KC059470)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter Joseph Meeka, Judge. Affirmed.

Zephyr Tate-Mann, in pro. per., for Defendant and Appellant.

Foell & Elder and William N. Elder Jr. for Plaintiff and Respondent.

A lender, plaintiff and respondent California Bank & Trust (California Bank or Bank), sued a borrower, defendant ABM Construction and Investment, Inc. (ABM), and a guarantor, defendant and appellant Zephyr Tate-Mann, for the balance due on written loan and guaranty agreements. California Bank obtained summary judgment against both defendants, but only Tate-Mann appealed from the judgment. Finding no triable issues of material fact, we conclude that summary judgment was properly granted.

BACKGROUND

On September 23, 2005, California Bank and ABM entered into a loan agreement providing for a $50,000 line of credit that was personally guaranteed by Tate-Mann, the owner and chief executive officer of ABM. On July 8, 2007, the parties amended the loan agreement to provide for a $50,000 term loan with monthly payments of approximately $834.16.

After ABM defaulted on the loan in the latter half of 2009, the Bank requested a payment of $1,654.95 from Tate-Mann. When Tate-Mann did not cure the delinquency, the Bank issued a January 27, 2010 notice of default and acceleration[1] of loan that required the immediate payment of the then outstanding balance of $40,280.27.

On February 1, 2010, however, the Bank agreed to accept a monthly payment of $350 per month for three months beginning on March 1, 2010. The Bank's February 1, 2010 letter concerning this agreement (the February 1 letter agreement) stated in relevant part: "This confirms our agreement for payments of $350.00 beginning 3-1-10 for 3 months only to assist with your current financial situation. [¶] Subsequently, the terms

---

[1] The loan agreement stated in relevant part: "LENDER'S RIGHTS. Upon default, Lender may declare the entire unpaid principal balance of this Credit Facility and all accrued unpaid interest immediately due, without notice, and then Borrower will pay that amount to Lender." It further stated: "Borrower shall be responsible for all costs incurred by Lender to collect the amounts due hereunder if Borrower does not pay. This includes, subject to any limits under applicable law, . . . Lender's attorneys' fees and legal expenses, . . . appeals, and any anticipated post-judgment collection services. Borrower also will pay any court costs, in addition to all other sums provided by law."

will be renegotiated to resolve this matter in a timely manner relative to the balance due. [¶] *After the initial 90 day period, current personal and business financial statements are required to properly evaluate your ability to service the loan.* [¶] The bank will consider waiving past due interest and late charges so long as payments are received on or before the due date." (Italics added.)

Defendants did not comply with the February 1 letter agreement's requirement to provide "current personal and business financial statements" at the end of the 90-day period. According to the declaration of the Bank's loan administrator, Ernest Gentile, the Bank viewed defendants' failure to comply with this requirement as a breach of the February 1 letter agreement.

In addition to their failure to produce the required financial statements, defendants were late with the July 1, 2010 loan payment. As a result, the Bank issued a July 28, 2010 notice of acceleration that required the immediate payment of the entire balance due on the loan. Neither ABM nor Tate-Mann complied with the notice of acceleration.

On August 25, 2010, the Bank filed a complaint alleging a first cause of action against ABM for the balance due on the loan and a second cause of action against Tate-Mann for the balance due on the written continuing guaranty. The Bank filed a summary judgment motion, which was supported by the loan and guaranty documents, the loan payment records, and Gentile's declaration regarding the history of the loan. The Bank requested a judgment for the principal balance of $38,109.14 plus interest at the contract rate ("Wall Street Journal Published Prime Rate" plus 4.75 percent), contractual attorney fees, and costs.

In opposition, defendants raised the Bank's alleged breach of the February 1 letter agreement as an affirmative defense. In their view, the original loan documents were supplanted by the February 1 letter agreement, which the Bank allegedly breached by failing "to renegotiate the terms of the loan per the agreement of February 1, 2010." Defendants contended that because they had not breached the February 1 letter agreement, the Bank was not entitled to accelerate the loan to collect the full principal balance plus interest and attorney fees. Based on their position that the February 1 letter

agreement created a "discrepancy as to the terms of the loan repayment," defendants argued that summary judgment was improper.

In reply, the Bank submitted Gentile's second declaration, which stated that defendants had breached the February 1 letter agreement "by failing to provide the Plaintiff and myself with any current Personal and Business Financial Statements after the initial ninety (90) day period. [¶] . . . Additionally, the Defendants failed to pay Plaintiff $350.00 on July 1, 2010. Indeed, [they] only paid Plaintiff $100.00 for July 2010, as of July 28, 2010. On July 28, 2010, I accelerated the balance due and owing involving the subject Loan Amended Agreement. [Internal record citations omitted.]"

Gentile further attested that, at the time of the summary judgment hearing, the Bank was owed $38,226.60 (consisting of $37,731.24 in principal and $495.36 in late charges) plus interest of $1,447.22 (for the period of September 20, 2010 through March 14, 2011).

The trial court found that the facts were largely undisputed. In the court's view, the sole issue was whether the February 1 letter agreement could reasonably be construed to require the Bank to renegotiate the payment terms. The court rejected defendants' interpretation that a renegotiation was required at the end of the three-month period, stating: "Reading the February 1, 2010 letter in its entirety, and attempting to give meaning to all its terms, and to the parties[']intent, the Court finds that the letter is not ambiguous and does not require [the Bank] to renegotiate or initiate renegotiation of the loan. The letter expressly provides for reduced payments of the $350.00 per month for '3 months only,' with the possibility of further renegotiating payment terms thereafter, contingent upon Defendant[s'] submission of financial statements. Moreover, even if the letter is ambiguous, it is still not reasonably susceptible to Defendant[s'] interpretation. Given that the letter expressly states that the $350/month payment amount . . . was for '3 months only,' the letter cannot be reasonably interpreted to allow [Defendants] to continue making payments in the amount of $350.00 per month beyond the specified three-month period as [they] did. Further, even if the February 1, 2010 letter was reasonably susceptible to Defendant[s'] interpretation, Defendants themselves breached a

condition precedent to any duty to renegotiate payment terms by failing to provide their personal and business financial statements to Plaintiff. Finally, Defendants have not demonstrated that Plaintiff's acceptance of Defendants' partial payments constituted a waiver of the contractual payment requirements. [¶] Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED."

On April 28, 2011, the trial court denied defendants' motion for reconsideration and entered a judgment for the Bank for $39,673.82 (comprised of $37,731.24 in principal and $495.36 in late charges, for a total of $38,226.60, plus interest of $1,447.22), contractual attorney fees, and costs. Tate-Mann timely appealed from the judgment.

DISCUSSION

The standard of review for summary judgment is well established. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

In determining whether there are triable issues of material fact, we consider all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc*.

(2000) 24 Cal.4th 317, 334.) "We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. (*Kelleher v. Empresa Hondurena de Vapores, S.A.* (1976) 57 Cal.App.3d 52, 56.) In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true. (See *Zeilman v. County of Kern* (1985) 168 Cal.App.3d 1174, 1179, fn. 3.)" (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.)

The evidence was undisputed that defendants had defaulted on their original loan and guaranty agreements, which entitled the Bank to accelerate the loan. The sole issue, as the trial court correctly found, was whether the February 1 letter agreement could reasonably be construed as a novation that required the Bank to renegotiate the payment terms at the end of the three-month period.

"A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. (Civ. Code, §§ 1530, 1532.) A novation is subject to the general rules governing contracts (Civ. Code, § 1532) and requires an intent to discharge the old contract, a mutual assent, and a consideration. [Citation.] The question whether these elements are present is one of fact for determination by the trial judge. (*Alexander v. Angel* [(1951)] 37 Cal.2d 856, 860-861.)" (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463.)

Tate-Mann contends that she created a triable issue of material fact through her declaration, in which she construed the February 1 letter agreement as a subsequent agreement or novation that *required* the Bank to "open renegotiations" at the end of the three-month reduced payment period. She asserts that by paying the reduced sum of $350 per month during the three-month period, defendants satisfied the conditions of the February 1 letter agreement, which obligated the Bank to "open renegotiations" at the end of the three-month period. She argues that the Bank's failure to "open renegotiations" eliminated any obligation defendants may have had to provide personal and business financial statements.

The trial court found, however, that the evidence did not reasonably support Tate-Mann's theory that the parties intended through the February 1 letter agreement to create a subsequent agreement or novation that would extinguish the original loan documents and preclude the Bank from accelerating the loan.[2] The record contains no evidence to contradict the trial court's finding. Significantly, we find nothing in the February 1 letter agreement that reasonably suggests the parties intended to substitute the three-month reduced payment plan for the original loan obligations, or to require the Bank to renegotiate the loan at the end of the three-month period. The Bank argues that if the parties intended such a result, it would have been mentioned in the February 1 letter agreement. The Bank states that because the February 1 letter agreement contains "absolutely no mention that the February 1, 2010, ninety (90) day modification would extinguish the previous SBA [Small Business Administration] Loan," the record does not reasonably support a finding that the parties intended to extinguish the original loan agreements. We agree.

We also agree with the trial court's determination that "even if the February 1, 2010 letter was reasonably susceptible to Defendant[s'] interpretation, Defendants themselves breached a condition precedent to any duty to renegotiate payment terms by failing to provide their personal and business financial statements to Plaintiff." The record is devoid of any evidence that defendants submitted the required business and personal financial statements at the end of the three-month period.

Tate-Mann's remaining arguments concerning the Bank's conduct (that by failing to renegotiate the loan, it breached the implied covenant of good faith and fair dealing, abused its power and process, and engaged in opportunistic behavior) do not require a different result. These arguments fail to negate the lack of evidence to support a finding that the Bank was required to renegotiate the loan at the end of the three-month period.

Finally, the record does not support Tate-Mann's allegation of judicial bias. The lack of a reporter's transcript of the summary judgment hearing precludes us from

---

[2] Tate-Mann does not dispute that the original loan documents entitled the Bank to accelerate the loan upon default.

determining whether Tate-Mann's description of events is complete and accurate. For example, Tate-Mann states for the first time in her reply brief that she was denied the opportunity to speak at the summary judgment hearing and that this constituted a violation of her constitutional rights. Given the lack of a reporter's transcript, we cannot confirm whether this occurred, and, in any event, we need not decide issues that are raised for the first time in a reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

In summary, we conclude that the moving party's evidence—the loan and guaranty documents, the loan payment records, and Gentile's declaration regarding the history of the loan—established that the Bank was authorized to accelerate the loan, thereby entitling it to summary judgment, and that the opposing parties' evidence was insufficient to create a triable issue of material fact. For these reasons, summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. The Bank is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.