

Motion for Summary Adjudication (Judge Patricia Nieto)

Case Number: BC605059
2018 Dept: 24

Hearing Date: November 02,

Plaintiff's Motion for Summary Adjudication of Issues is DENIED. While Inter-Con has established that NAS breached the Note by failing to pay the remaining balance due under the Note in the amount of \$153,343.67, NAS has established its affirmative defense of entitlement to a setoff in the amount of \$344,864.26. Further, Inter-Con has not established that NAS breached the Note regarding the future invoices.

Background:

This action rises out of allegations by Inter-Con Security Systems, Inc. ("Inter-Con") that North American Security, Inc. ("NAS") breached two separate contracts between the parties: (1) an implied contract to provide armed protective security officers throughout the state of Nevada, and (2) a written promissory note. Inter-Con commenced this action on December 22, 2015. Inter-Con filed the operative First Supplemental and Amended Complaint ("FAC") on October 19, 2016, against NAS as well as NAS' two owners, Arthur L. Lopez and Kenneth D. Hillman alleging the following seven causes of action: (1) breach of implied contract; (2) money had and received; (3) breach of written promissory note; (4) breach of written promissory note; (5) conversion; (6) imposition of constructive trust; (7) declaratory relief. Inter-Con seeks to hold Lopez and Hillman liable based on an alter ego theory of liability.

In the FAC, Inter-Con alleges that in December 2012, NAS was awarded a contract with the U.S. Department of Homeland

Security ("DHS") to provide armed protective security officer services throughout the state of Nevada from April 2013 through March 2018 ("DHS Agreement").

Commencing on or about September 1, 2013, and continuing to February 2016, Inter-Con and NAS entered into an agreement under which Inter-Con would provide a portion of the security services of the DHS Agreement ("Sub-Agreement"). In accordance with the Sub-Agreement, Inter-Con prepared invoices for the services that it performed and provided the invoices to NAS who, in turn, would combine Inter-Con's invoices with NAS' invoices for its services and tender both invoices to DHS for payment. Once DHS paid NAS, NAS was to pay Inter-Con. Inter-Con has performed all of its obligations under the Sub-Agreement. Inter-Con alleges that NAS breached the Sub-Agreement by failing to pay Inter-Con's invoices for the work it performed in connection with the DHS Agreement and owes Inter-Con \$980,514.00 for that work. Inter-Con has made repeated demands for payment.

In regards to the promissory note, Inter-Con alleges that on October 1, 2015, NAS signed a written promissory note in favor of Inter-Con wherein NAS agreed to pay Inter-Con \$1,053,359.73, plus interest at a rate of 3 %, in three monthly installments beginning October 15, 2015 and promised to pay net 30 on all future invoices. ("Note"). NAS made the first two monthly payments, but breached the Note by failing to make the third payment of \$353,343.67 that was due on December 15, 2015. Inter-Con alleges that NAS also breached the Note by failing to pay, net 30 days, invoices Inter-Con submitted to NAS. Specifically, through and including September 12, 2016, Inter-Con submitted invoices to NAS in the amount of \$627,170.00, which NAS has failed to pay.

Inter-Con now seeks an order granting summary adjudication of the following issues in its favor and against NAS: There is no triable issues of material fact as to Inter-Con's third and fourth causes of action, each for breach of written promissory

note, as Inter-Con has established that there is no defense to either claim and, therefore, Inter-Con is entitled to a judgment on each claim.

Discussion

Legal Standard

A plaintiff is entitled to summary adjudication if the plaintiff establishes there is no defense to that claim. (CCP § 437c (f)(1).) “A plaintiff . . . has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action.” (CCP § 437c (p)(1); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [the party moving for summary judgment bears an initial burden to demonstrate the absence of any triable issue of material fact on the elements of the claims it asserts or opposes].) “Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact.” (*Id.* at 851 [original italics].) Once the moving party has satisfied the initial burden of proof, the burden “shifts to the opposing party to show, by responsive separate statement and admissible evidence that triable issues of fact exist.” (*Health Net, Inc. v. RLI Ins. Co.* (2012) 206 Cal.App.4th 232, 250; CCP § 437c (p)(1).) Because a summary judgment denies the losing party a trial, the evidence must be liberally construed in support of that party and resolve doubts concerning the evidence in that party’s favor. (*Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1205.)

Objections Inter-Con submitted 32 written objections to portions of the declaration of Author Lopez, which NAS

submitted in support of its opposition to the instant motion. The Court rules as follows: Objection nos. 5 and 9 are OVERRULED. The remainder of the objections are SUSTAINED.

Analysis Inter-Con seeks summary adjudication of the third and fourth cases of action for breach of the Note. The nature of the parties' relationship concerning the DHS Nevada Agreement and the Nevada Sub-Agreement is undisputed. (Defendant's Separate Statement ("DSS") Nos. 1-2.) It is also undisputed that the parties simultaneously had a similar relationship in Indiana, except that NAS was Inter-Con's subcontractor ("Indiana Sub-Contract") under a DHS contract that Inter-Con had been awarded in Indiana ("Indiana DHS Agreement"). (DSS Nos. 29-30.)

Inter-Con admits that because of NAS' indebtedness under the Nevada Sub-Agreement, Inter-Con did not pay NAS' invoices under the Indiana DHS Agreement totaling \$346,864.26 from October 6, 2015 through March 1, 2016.

NAS made the first two payments required under the Note. (PSS No. 5; DSS Nos. 41-43.) However, instead of making the third payment of \$353,343.67 on December 15, 2015, NAS paid \$100,000 on December 9, 2015 and \$100,000 on December 14, 2015 and no other payments thereafter. (PSS No. 5; DSS Nos. 42-43.) Thereafter, NAS failed to pay Inter-Con's invoices dated October 7, 2015 through February 9, 2016, under the Nevada Sub-Agreement totaling \$1,053,380.46. (PSS No. 5.)

The Note also provided a schedule for the three payments: October 15, 2015 (\$352,436.61); November 15, 2015 (\$353,811.83); and December 15, 2015 (\$353,343.67). (PSS No.2.) Thus, inclusive of interest, the Note was for \$1,059,592.11.

(PSS No.2-3.)

"CONTINUING OBLIGATION TO PAY INVOICES IN THE REGULAR COURSE: All parties to this Note understand, acknowledge and confirm

that during and after the term of this Note Payee will continue to invoice Maker for current and continuing services rendered under the Parties' existing relationship. Maker promises to make payment on all such future invoices net 30 days. Nothing contained in this Note or agreed to by the parties relieves Maker of its obligation to make payment on all future invoices net 30 days, and all timely payments due under this Note."

"PAYMENT OF PRINCIPAL. The principal amount of this Promissory Note (the "Note") shall be due and payable in three (3) monthly installments beginning October 15, 2015. Maker agrees to pay interest at a rate three percent (3%). All payments under this Note shall be applied to interest first, and then to outstanding principal.

"FOR VALUE RECEIVED AND SERVICES PERFORMED, North American Security, Inc., (the "Maker"), hereby promises to pay to the order of Inter-Con Security Systems, Inc. ("Payee") the principal sum of One Million, Fifty Three Thousand, Three Hundred Fifty Nine Dollars and 73/100 (\$1,053,359.73) with interest at the rate of three percent (3%) pursuant to the terms and conditions set forth herein.

The Note provides, in relevant part, as follows:

In regards to the Nevada Agreements, the following is either explicitly undisputed or uncontroverted by opposing evidence. In 2015 NAS fell behind in its payments to Inter-Con. NAS' Chief Executive Officer, Lopez, requested a meeting to discuss NAS' delinquency. The parties met on September 30, 2015, during which they agreed that the NAS owed Inter-Con totaled \$1,053,359.73. (DSS No.39.) Lopez proposed that NAS would catch up over three monthly installment payments and Inter-Con accepted. As a result, Inter-Con drafted the Note and Lopez signed it on behalf of NAS. (Plaintiff's Separate Statement ("PSS") No. 1; DSS No. 39.)

1.3rd Cause of Action: Breach of Written Promissory Note

A cause of action for breach of contract requires pleading the following: (1) a contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach and (4) the resulting harm to the plaintiff. (*Reichert v. Gen. Ins. Co. of Am.* (1968) 68 Cal. 2d 822, 830; 4 Witkin, Cal. Proc. 5th (2008) Plead, § 515, p. 648.) In the third causes of action, Inter-Con alleges NAS breached the Note by failing to make the third installment payment due on December 15, 2015 of \$353,343.67. The undisputed evidence establishes the existence of the Note, NAS' breach and Inter-Con's resulting damages. NAS contends that the Note fails for lack of consideration. NAS contends that Inter-Con gave nothing in exchange for the Note since Inter-Con gave no discounts on the invoices or settlement of any kind. According to NAS, the Note was simply an acknowledgement of amounts already due and owing by simply adding up outstanding invoices and nothing more. Inter-Con argues that the Note is supported by adequate consideration in that Inter-Con did not pursue legal action against NAS and instead granted it an extension of time to pay the amount due. NAS' consideration argument fails. Consideration is "[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor[.]" (Civ. Code § 1605.) " 'A promissory note is presumed to have been given for a sufficient consideration . . . and in an action thereon, the introduction of the note in evidence establishes a *prima facie* right to recover according to its terms. The burden of showing a want of consideration . . . is cast upon the party seeking to avoid it, and if he fails to make this showing, the presumption prevails and furnishes sufficient evidence to

support a finding that the note was given for a good and valuable consideration.' [Citation.] At the same time, '[t]he absence of consideration is always a defense to a suit on a promissory note [citation] and since an instrument lacking in consideration is invalid, this fact may be shown by extrinsic evidence.' " (*Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1133 [alterations in original]; see also Civ. Code §§ 1614, 1615).) "Forbearing suit or extending time for performance which suspends a legal right constitutes a sufficient consideration . . . [T]he promise to forbear may be implied as well as express. Further, the mere act of forbearance [is] in itself evidence of an agreement to forbear." (*Levine v. Tobin* (1962) 210 Cal.App.2d 67, 69 [citations and quotation marks omitted].) Here, Inter-Con has submitted a copy of the written Note in support of its motion. The Note contains a recital of consideration: "*For value received and services performed*" Therefore, consideration is presumed. NAS has not met its burden of showing a lack of consideration. NAS admits that as of September 30, 2015, it was in breach of the Nevada Sub-Agreement since it admittedly owed Inter-Con \$1,053,359.73. NAS' breach of the Nevada Sub-Agreement entitled Inter-Con to suspend its performance and sue NAS for the breach. (See *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 12 ["It is well settle that the breach of an important condition may excuse the other party from performance."]; *B. L. Metcalf General Contractor, Inc. v. Earl Erne Inc.* (1963) 212 Cal.App.2d 689, 693-694 [defining "termination" of contract as "the right of one contracting party to terminate further performance because of the breach of the other . . . [and the non-breaching party] may proceed to present his claim for damages by reason of the breach up to that date."] .) Instead of suing NAS, Inter-Con continued to perform under the Nevada Sub-Agreement and granted the extension to pay that NAS requested. The fact that Inter-Con did not sue NAS during this time period is evidence of Inter-Con's agreement to forbear. These facts show that the Note was an implied contract to

forbear for the period of time stated.

Since, NAS admits that it did not pay the third payment of \$353,343.67 in full on the due date, but only paid \$200,000, Inter-Con has established that NAS breached the Note as alleged in third cause of action.

Therefore, the Note is supported by ample consideration and Inter-Con performed its obligations by forbearing its right to sue.

2. 4th Cause of Action – Breach of Written Promissory Note

In the fourth cause of action, Inter-Con alleges that NAS breached the Note by failing to pay Inter-Con's invoices on a net 30 days basis in that through and including September 12, 2016, Inter-Con submitted invoices to NAS in the amount of \$627,170.00, which NAS has failed to pay. NAS disputes that failing to pay the future invoices was a valid part of the Note and, as a result, no breach occurred as to the future invoices. Specifically, NAS argues that the Note is not negotiable as to the future invoices because it fails to meet the requirements of a negotiable instrument. Therefore, according to NAS, the Note is unenforceable or, at a minimum, the future invoices obligation of the Note is unenforceable. Inter-Con argues that whether the Note is negotiable or not is immaterial. A promissory note is a written promise to pay a specified sum of money to a certain person. (*Yellow Jacket Gold & Silver Mining Co. v. Holbrook* (1914) 24 Cal.App. 687, 691; *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1132; Cal. U. Com. Code, §§ 3104 [negotiable instruments], 9102 (a)(65) [secured transactions]; Black's Law Dictionary (10th ed. 2014), NOTE.) A promissory note is *prima facie* evidence of a party's right to recover according to its terms. (*Saks*, supra, 90 Cal.App.4th at 1132.) A promissory note may be either negotiable or nonnegotiable. (*Kendall v. Parker* (1894) 103 Cal. 319.) Negotiability merely relates to an instrument that is "capable of being transferred by

delivery or indorsement when the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses.” (Black’s Law Dictionary (10th ed. 2014) NEGOTIABLE.) The Commercial Code does not contain any provision that provides that a nonnegotiable instrument is unenforceable. The Note was not transferred to a third-party who is trying to enforce it. Therefore, whether the Note is negotiable or not is immaterial to its enforceability. However, the Court finds that the future invoices obligation is unenforceable under the Note. The specified sum that NAS promised to pay Inter-Con under the Note was \$1,053,359.73, which represents a debt that NAS had already incurred as of the date of the Note, October 1, 2015. NAS’ promise to “make payment on future invoices net 30 days” is not a promise to pay a specified sum. Instead, it is a promise that relates to future debts in unspecified amounts. As evidenced by the language of the Note, the promise to pay future invoices net 30 days is governed by the parties’ existing relationship. More specifically, the Note states that the parties “understand, acknowledge and confirm” that Inter-Con will continue to invoice NAS “for current and continuing services rendered *under the Parties’ existing relationship.*” The parties’ then existing relationship was governed by the Nevada Sub-Agreement and the Nevada DHS Agreement. The very next sentence relates back to the Parties’ existing relationship by stating that NAS “promises to make payment on all *such future invoices* net 30 days.” Thus, any breach of NAS’ promise to pay future invoices on any basis is governed by the Nevada Sub-Agreement and the Nevada DHS Agreement, not the Note. Inter-Con therefore must pursue its damages for NAS’ failure to pay the invoices that became due after the date of the Note in its first cause of action for breach of implied contract. Accordingly, Inter-Con has not established that NAS breached the Note as alleged in its fourth cause of action.

3. Setoffs

Setoff is an equitable affirmative defense. (*Jess v. Herrmann* (1979) 26 Cal.3d 131, 142; *Space Properties, Inc. v. Tool Research Co.* (1962) 203 Cal.App.2d 819, 827.) NAS argues that it is entitled to setoffs. There is no dispute that NAS is entitled to setoffs of \$344,864.26 because Inter-Con did not pay NAS' invoices concerning the Indiana Sub-Agreement from October 6, 2015 through March 1, 2016. However, NAS has failed to submit admissible evidence of supporting its claim to any other setoffs. In sum, Inter-Con has not established that NAS breached the Note regarding the future invoices. Further, while Inter-Con has established that NAS breached the Note by failing to pay the remaining balance due under the Note in the amount of \$153,343.67, NAS has established its affirmative defense of entitlement to a setoff in the amount of \$344,864.26. Therefore, Inter-Con's motion for summary adjudication is DENIED. Moving party is ordered to give notice.

The two claims do not have to arise out of the same operative facts. (*Terry Trading Corp. v. Barsky* (1930) 210 Cal. 428, 435-36.) But they must result from the same parties in the same capacities. (*Prudential Reinsurance Co. v. Superior Court* (1992) 3 Cal.4th 1118 ["debts owed in a fiduciary, agency, trustee, or partnership capacity are not subject to setoff"].)

Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to

the other party.

CCP Section 431.70 provides, in pertinent part:

Where cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations. If the cross-demand would otherwise be barred by the statute of limitations, the relief accorded under this section shall not exceed the value of the relief granted to the other party.

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NAS argues that it is entitled to setoffs. There is no dispute that NAS is entitled to setoffs of \$344,864.26 because Inter-Con did not pay NAS' invoices concerning the Indiana Sub-Agreement from October 6, 2015 through March 1, 2016. However, NAS has failed to submit admissible evidence of supporting its claim to any other setoffs.

In sum, Inter-Con has not established that NAS breached the Note regarding the future invoices. Further, while Inter-Con has established that NAS breached the Note by failing to pay the remaining balance due under the Note in the amount of \$153,343.67, NAS has established its affirmative defense of

entitlement to a setoff in the amount of \$344,864.26. Therefore, Inter-Con's motion for summary adjudication is DENIED.

Moving party is ordered to give notice.