



COLONIE BLOCK AND SUPPLY CO. v. D. H. OVERMYER CO.

315 N.Y.S.2d 713 (1970) | Cited 0 times | New York Supreme Court | November 30, 1970

Appellants executed a promissory note payable to respondent on March 29, 1967 in the face amount of \$7,128.48 payable in installments of \$198.01 plus interest on the unpaid balance at the rate of six per cent per annum. Payments were to be made on the first day of each month commencing August 1, 1967. An acceleration clause in the note provided: "Upon failure to make payment of any installment, above mentioned, or any part thereof, and after failure of Maker to cure such default within sixty (60) days after written notice thereof to Maker, the remaining amount of the principal of this note with all interest then accrued shall, at the option of the holder of this note, at once become due and payable." Appellants made payments apparently as scheduled until January, 1968 when the payments began to be late. The additional interest due by reason of the lateness of the payment was not included in the amounts paid. On December 16, 1968 respondent sent a letter to appellants stating that past-due interest on the note by reason of late payments amounted to \$326.23 and advising appellants that the option to accelerate would be exercised unless the delinquency was cured within 60 days. Appellants continued to make late payments through the month of June, 1969 without adding additional interest accrued, and did not cure the delinquent interest as required by the notice. The February, March, April and May payments were made in the month of May and the June payment was made on June 16, 1969. On September 15, 1969 respondent commenced this action to recover the balance of the principal due on the note plus the accumulated interest thereon. On October 28, 1969 appellants mailed the payments for the months of July, August, September and October without adding the additional interest accrued. These checks were returned uncashed on November 4, 1969. Appellants thereafter answered the complaint alleging that, by reason of respondent's acceptance of the payments subsequent to the letter of December 16, 1969, respondent had waived its option to declare the entire principal due and payable. Appellants contend that the default claimed in the letter of December 16, 1968 was cured, and that the acceptance of the payments in the month of May after the acceleration of the note constituted a waiver of the acceleration. Respondent argues that the payments accepted in May, 1969 constituted merely a reduction of the total accelerated balance. Appellants, having been given notice to cure their default within 60 days, and having failed to cure the default within that period, the unpaid balance of the note, together with interest, became due and payable on February 19, 1969. The payments made by appellants in December, 1968 and January, 1969 which did not include the arrears in interest did not cure the default. The payments made in the months of May and June, 1969 prior to commencement of the suit also did not include arrears in interest, and were made at a time when the interest in arrears had increased by reason of delays in payment. Thus, the said payments made by appellants did not cure their default. The election by the respondent to accelerate the maturity of the note was clear and unequivocal and, since payment of the arrearages which gave rise to the right to accelerate was not made in full prior to the commencement of the action, the right of the respondent to exercise its



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option was not waived. Proper notice of default was given and never cured according to the very terms of the note.

Disposition

Order and judgment affirmed, with costs.

