

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D21876  
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Argued - December 18, 2008

A. GAIL PRUDENTI, P.J.  
ROBERT A. SPOLZINO  
WILLIAM E. McCARTHY  
JOHN M. LEVENTHAL, JJ.

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2008-07549

DECISION & ORDER

Premium Assignment Corporation, appellant, v  
Utopia Home Care, Inc., respondent.

(Index No. 32229/07)

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Steven G. Legum, Mineola, N.Y., for appellant.

Ahern & Ahern, Kings Park, N.Y. (Dennis P. Ahern of counsel), for respondent.

In an action to recover on an instrument for the payment of money, brought by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Spinner, J.), dated July 3, 2008, which denied its motion.

ORDERED that the order is reversed, on the law, with costs, the motion is granted, and the matter is remitted to the Supreme Court, Suffolk County, for a hearing on the amount of the attorney's fee to be awarded to the plaintiff, and thereafter for entry of an appropriate judgment.

The plaintiff made a prima facie showing of its entitlement to summary judgment pursuant to CPLR 3213 by establishing the existence of an instrument for the payment of a sum certain and the defendant's failure to make the payments called for by its terms (*see Juste v Niewdach*, 26 AD3d 416). In opposition, the defendant failed to raise a triable issue of fact or a meritorious defense (*see Black Rock Inc. v Z Best Car Wash, Inc.*, 27 AD3d 409). Contrary to the defendant's contention, the instrument at issue did not require any additional performance on the part of the

plaintiff as a condition precedent to repayment, nor did it require the plaintiff to pursue its claim against the defendant's insurer (*see Afco Credit Corp. v Boropark Twelfth Ave. Realty Corp.*, 187 AD2d 634).

Since, the instrument did not provide for a sum certain with respect to the recovery of an attorney's fee in the event of a default in payment on the instrument, a hearing must be held to determine the amount of such award (*see Borg v Belair Ridge Dev. Corp.*, 270 AD2d 377, 378).

PRUDENTI, P.J., SPOLZINO, McCARTHY and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer  
Clerk of the Court