

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

D33315
C/ct

_____AD3d_____

Argued - November 21, 2011

DANIEL D. ANGIOLILLO, J.P.
THOMAS A. DICKERSON
PLUMMER E. LOTT
ROBERT J. MILLER, JJ.

2010-09062

DECISION & ORDER

American Realty Corp. of NY, et al., appellants,
v Ragobar D. Sukhu, respondent.

(Index No. 30579/09)

Paskoff & Tamber, LLP, New York, N.Y. (Adam Paskoff of counsel), for appellants.

Lowell B. Davis, Carle Place, N.Y. (Harvey A. Schweiger of counsel), for respondent.

In an action to recover on a promissory note, commenced by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Lebowitz, J.), entered July 19, 2010, as, upon reargument, adhered to an original determination in an order of the same court entered April 8, 2010, denying the plaintiffs' motion for summary judgment in lieu of complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

“To establish prima facie entitlement to judgment as a matter of law with respect to a promissory note, a plaintiff must show the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms” (*Lugli v Johnston*, 78 AD3d 1133, 1135; *see Gullery v Imburgio*, 74 AD3d 1022, 1022). Once the plaintiff submits evidence establishing these elements, the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (*see Jin Sheng He v Sing Huei Chang*, 83 AD3d 788, 789).

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Here, the Supreme Court denied the plaintiffs' motion for summary judgment in lieu of complaint. In the order appealed from, the Supreme Court then granted the plaintiffs' subsequent motion for leave to reargue, and, upon reargument, adhered to its original determination. We affirm the order made upon reargument insofar as appealed from.

The plaintiffs established their prima facie entitlement to judgment as a matter of law by submitting the subject promissory note, which was signed by the defendant and which contained an unequivocal and unconditional obligation to repay, and by showing that the defendant failed to pay in accordance with the note's terms. However, in opposition to the plaintiffs' prima facie showing, the defendant raised a triable issue of fact with respect to the bona fide defense of lack of consideration for the note (*see Samet v Binson*, 79 AD3d 1005, 1005-1006; *Mastro v Carroll*, 296 AD2d 802, 802-803; *Cafaro v Squitieri*, 290 AD2d 472; *Manufacturers Hanover Trust Co. v L.N. Props.*, 174 AD2d 383, 383).

Accordingly, upon reargument, the Supreme Court properly adhered to its original determination denying the plaintiffs' motion for summary judgment in lieu of complaint.

ANGIOLILLO, J.P., DICKERSON, LOTT and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court